



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Office of General Counsel  
P.O. Box - 21109  
Juneau, Alaska 99802-1109  
Telephone (907) 586-7414

September 5, 1989

MEMORANDUM FOR: Fishery Planning Committee

FROM: GCAK - *Jonathan Poltard*

SUBJECT: General Guidance on Inshore-Offshore Allocations

At its June, 1989, meeting, the North Pacific Fishery Management Council requested that this committee address the issue identified above. A number of proposals have been submitted by interested parties for the committee's consideration. This memorandum is intended to provide the committee with preliminary legal guidance in evaluating these proposals. Because the proposals are preliminary and vague in many important respects, it is not possible to provide a detailed legal analysis. However, this memorandum generally discusses many of the relevant legal issues.

*yes* At the outset, it is important to recognize that the Magnuson Fishery Conservation and Management Act does not establish an "automatic" preference to groundfish quotas for shore-based processors, or for fishing vessels that deliver to shore-based processors. Any contrary expressions of legislative intent could not overcome the plain language of the Act. Congress' definition of "United States fish processors" clearly includes both shore-based and floating processors, and nothing in the other provisions requires preference to one or the other of these components. However, neither does the Act flatly prohibit conservation and management measures that might allocate fishing privileges among various United States fishermen processing at sea or delivering to shore-based processors, if such measures satisfy the other provisions of the Act.

Although the Act requires no single approach to the issue under consideration, it does establish national standards against which all conservation and management measures must be compared. Two of the national standards seem particularly relevant - national standard 4, respecting allocations, and national standard 5, relating to efficiency. Also, several of the proposal raise interesting questions concerning U.S. free trade obligations under the General Agreement on Tariffs and Trade (GATT). By emphasizing

<sup>1</sup> Magnuson Act section 3(25), 16 U.S.C. § 1802(25), defines "United States fish processors" as "facilities located within the United States for, and vessels of the United States used or equipped for, the processing of fish for commercial use or consumption."



2

these legal requirements I do not mean to imply that other legal standards - such as the requirement to achieve the OY on a continuing basis - may be ignored.

National Standard 4 - Allocations:

Magnuson Act national standard 4 provides as follows:

Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be

(A) fair and reasonable to all such fishermen;

(B) reasonably calculated to promote conservation; and

carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.<sup>2</sup>

National standard 4 prohibits discrimination between residents of different States. Because the persons likely to benefit most directly under any of the proposals are likely to be Alaska residents, it might be argued that all of the proposals would run afoul of this requirement. However, NOAA has in practice also considered the incidence of the burden imposed by regulations as well as the benefit in determining compliance with national standard 4. For example, in evaluating king and Tanner crab FMPs that provided for exclusive registration areas benefitting Alaskan communities adjacent to certain fishing areas, NOAA determined that such provisions do not "discriminate between residents of different States" as long as the adverse effect falls equally on similarly situated Alaskans and non-Alaskans. In that situation, the burdens imposed by exclusive registration areas fell equally upon resident and non-resident owners of large, mobile crab fishing vessels. A NOAA General Counsel opinion discussing the identical requirement of Northern Pacific Halibut Act section 5(c) reaches the same conclusion concerning certain proposals designed to protect

---

<sup>2</sup> Magnuson Act section 301(a)(4), 16 U.S.C. § 1851(a)(4).



SEP - 6 - 89 WED 12 00

P. 05

4

**GATT:**

Generally speaking, requirements that fish be landed in a particular location for processing may run afoul of international free trade obligations under GATT. For example, a Canadian law requiring fish caught off Canada to be landed in Canada for processing was successfully challenged by the United States as an unfair trade restriction. Obviously, a similar restriction imposed by the United States would be subject to a similar challenge, particularly if it had the effect of prohibiting U.S. fishermen from delivering groundfish harvests directly to Canada for processing. Once again, some of the proposals seem more problematic than others in this regard. In particular, establishment of a quota that only may be landed for processing at a particular place in Alaska may be most suspect. However, other proposals that simply establish an at-sea processing quota without requiring landing at a particular place may be more defensible under our GATT obligations.

Finally, several of the proposals suggest limiting access and prohibiting roe stripping as desired measures. Perhaps these proposals should be considered by the other committees and plan development teams that are currently exploring these issues.

cc: Jay Johnson, Margaret Frailey, Craig O'Connor  
Steve Pennoyer, Jim Brooks, Dale Evans

N-79

ASSISTANT GENERAL COUNSEL FOR FISHERIES

Craig R. O'Connor  
Alaska Regional Attorney

**SUBJECT:** Limitations on Roe Stripping

#### BACKGROUND

Practices that could be labeled "wasteful" occur in many, perhaps in most, marine fisheries. Some of these practices are dictated by the economics of the fishery, such as the discard of unmarketable fish in trawl fisheries. Others are mandated by regulators for management and enforcement reasons, such as the discard of undersized fish or "prohibited species."

Recent events in the groundfish trawl fisheries in the Gulf of Alaska and Bering Sea stimulated discussion by the North Pacific Council of measures that would ban or restrict one "wasteful" practice, that of roe stripping in the pollock fisheries. These fisheries are currently managed through annual quotas with no seasonal breakdowns; trawling proceeds until the quotas are reached. The Fishery Management Plans for Groundfish of the Gulf of Alaska and for Groundfish of the Bering Sea and Aleutian Islands (FMPs) identify no biological problem with allowing all or most of the harvest to occur in the first few months of the year, during the spawning season.

Because pollock roe has a commercial value many times that of any product produced from the flesh of the fish, some at-sea processors have opted to increase the amount of roe they can handle and store by "stripping" roe from female fish while discarding male pollock and female carcasses. The North Pacific Council at its September meeting postponed action on a roe-stripping amendment, but stated clearly its intent to prohibit the practice and to promote fuller utilization of the pollock resource. The Executive Director of the Council requested an opinion on the legal parameters of the issue before the December 5 Council meeting.



## SUMMARY

(1) There is authority under the Magnuson Fishery Conservation and Management Act to limit wasteful practices. Controlling wasteful practices is as legitimate a purpose as conserving a stock of fish or allocating fishing privileges. Requiring fuller utilization of a fishery resource should be justified as a means of achieving optimum yield.

(2) There are a multitude of conservation and management measures, directed at harvesting activities, available to eliminate or restrict practices such as roe stripping. These include seasons, quotas, gear requirements, discard restrictions, and catch limits.

(3) There is also authority under the Act to limit wasteful practices by requiring at-sea processors to retain harvested fish rather than discarding them. At-sea processing is "fishing" subject to regulation under the Act.

(4) There is authority -- though not as clear-cut -- to limit wasteful practices by requiring at-sea processors to utilize fish flesh for food products and fish meal. There have been no instances thus far of directly mandating what a processor does with legally possessed fish for purposes of full utilization.

(5) There is no authority to limit wasteful practices by regulating on-shore processors, because on-shore processors can be regulated only indirectly as an incidence of managing "fishing."

## CAVEAT

This memorandum does not address the adequacy of any record developed by any Council to support any of the management measures discussed. The analysis is completely theoretical; Secretarial approval and legal defense of any measure affecting roe stripping or other fish processing practices would depend on the existence of a record justifying the measure and demonstrating the net benefits to be derived from its implementation.

## DISCUSSION

We will first explore the purposes cognizable under the Magnuson Act for restricting roe stripping and other wasteful practices, and then examine the means authorized by the Act to accomplish such restrictions.

## 1. Acceptable Purposes

### A. Biology

It goes without saying that biological reasons for limiting or banning roe stripping would be valid; they would implement the paramount purpose of the Magnuson Act, to conserve a stock of fish. The first and fourth purposes of the Act, 16 U.S.C. 1801(b)(1) and (4), are to conserve and manage the fishery resources of the United States and to achieve and maintain, on a continuing basis, the optimum yield from each fishery. National standard 1, 16 U.S.C. 1851(a)(1), reiterates the requirement of achieving optimum yield. Fishery management plans (FMPs) must contain measures necessary and appropriate for the conservation and management of the fishery, 16 U.S.C. 1853(a); the definition of "conservation and management", 16 U.S.C. 1802(2), emphasizes the rebuilding, restoration, and maintenance of fishery resources.

If it can be established that harvesting before or during spawning season adversely affects recruitment by breaking up schools of fish before spawning occurs, or by concentrating harvest of the quota on pre-spawning fish, a Council would have adequate rationale to adopt restrictions on the practice.

### B. Economic and Ecological

Likewise, allocation of fishing privileges is a traditional purpose of management measures under the Act. Some of the concern over roe stripping stems from fishermen and shore-based processors whose opportunity to participate in the pollock fishery was curtailed by the rapid harvest of the quota by factory-trawlers early in the year. The need to deal with increasing demand for a shrinking public resource was recognized in the Act as one of the Councils' tasks. This is recognized in national standard 4, 16 U.S.C. 1851(a)(4), which addresses the allocation of fishing privileges, and in the section listing discretionary provisions of FMPs, 16 U.S.C. 1853(b), which includes limits on types of fishing vessels and gear, quotas and catch limits, and systems of limiting access to a fishery.

If it can be established that the net benefits to the Nation would be increased by allocating the opportunity to harvest pollock among the various participants, or by distributing the effort on the annual quota more evenly, a Council would have adequate rationale to adopt measures that would affect roe stripping. A particularly analogous FMP is the Mid-Atlantic Council's surf clam plan, which uses quarterly quotas, controlled hours of fishing, and a moratorium on entry to provide a steady stream of clams to processors throughout the year. Socioeconomic factors such as dependence on employment in

processing plants could also enter into the equation.<sup>1</sup> Of course, any allocation would have to meet the criteria of national standards 4 and 5, 16 U.S.C. 1851(a)(4) and (5), for fairness and equity and promotion of conservation.

Another economic/ecological reason for banning discards is that decaying fish might "sour" a particular fishing ground. In 1982 the National Marine Fisheries Service added a condition to the permits of foreign vessels in the Pacific whiting fishery, prohibiting discards of fish and offal (except prohibited species) within 12 miles of shore. Domestic fishermen in Humboldt Bay were complaining not only about the ecological consequences of dumping, but about the time consumed in the nasty job of cleaning refuse from their trawls. The permit condition is still in place.

### C. Full Utilization

Because the record developed by NMFS and Council staff before the September meeting of the North Pacific Council apparently did not adequately establish biological, ecological, or economic reasons for roe stripping restrictions,<sup>2</sup> the debate turned to limiting the practice for reasons of "full[er] utilization" or prevention of "wastage."<sup>3</sup> The transcript shows some unease among Council members with this purpose. As mentioned above, wasteful practices are tolerated or mandated in many fisheries under Magnuson Act regulation. Avoidance of waste has not been a commonly expressed purpose for FMP measures. Defining what is

<sup>1</sup> Pot gear was phased out of the Gulf of Alaska sablefish fishery beginning in 1986 by Amendment 14 to the Groundfish FMP. One justification was the dependence on the fishery of hook and line fishermen and the shore-based processors to whom they delivered. 50 FR 43193, 43196 (Oct. 24, 1985).

<sup>2</sup> Statement of Steve Pennoyer, NMFS Alaska Regional Director, at page 3 of transcript of North Pacific Council discussion of Agenda D-3(a), September 28, 1989.

<sup>3</sup> One proponent argued, "...I think there's probably a third issue here and that would be a moral issue. Last year during the time this took place the whole industry was in headlines day after day about the thousands of pounds of usable fish that were discarded and thus removed from access to the rest of the public. Fish that any other time of year would have been usable, marketable, and desirable fish but because of seeking only the high valued roe, they were removed from accessibility and there must be some consideration for this and the wisest use of a product." Statement of Council member Ron Hegge at page 17 of transcript of North Pacific Council discussion of Agenda D-3(a), September 29, 1989.

"waste" and what is the unavoidable incidence of rational economic decisions by the fishing industry is a gnarly question.

The Magnuson Act, however, does suggest that prevention of waste is a legitimate goal for fishery management measures. The role of our fishery resources in contributing to the world's food supply is specifically mentioned twice in the "findings" section, 16 U.S.C. 1801(a)(1) and (7), once in general terms and later in terms of developing a fishery for underutilized species. The interests of consumer groups in participating in the Council process are recognized in the "purposes" section, 16 U.S.C. 1801(b)(5). The policy expressed in 16 U.S.C. 1801(c)(3) of promoting efficiency has been interpreted to encompass measures that discourage waste.<sup>4</sup>

The central concept of fishery management under the Act, "optimum yield" (OY), emphasizes food production in considering what amount of fish will provide the greatest overall benefit to the Nation, 16 U.S.C. 1802(13). The national standard guidelines say food production encompasses "the goals of providing seafood to consumers, maintaining an economically viable fishery, and utilizing the capacity of U.S. fishery resources to meet nutritional needs." 50 C.F.R. 602.11(f)(2)(i). Social factors that may be considered in setting OY include "world-wide nutritional needs." 50 C.F.R. 602.11(f)(3)(ii).

The required provisions of FMPs include specification of OY and the conservation and management measures "necessary and appropriate" for achieving OY, 16 U.S.C. 1853(a)(1) and (3). This is the case because all conservation and management measures must be consistent with the national standards, which include the requirement to achieve optimum yield on a continuing basis, 16 U.S.C. 1851(a)(1).

The only textual argument against measures with waste avoidance as their purpose is that FMPs are to contain measures necessary and appropriate for the "conservation and management" of the fishery, but the term "conservation and management" is defined very narrowly in 16 U.S.C. 1802(2):

The term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that--  
(i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;

---

<sup>4</sup> General Counsel Opinion No. 80 (1979).

- (ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and
- (iii) there will be a multiplicity of options available with respect to future uses of these resources.

Even if one follows the definitional chain from "fishery resources" to "fishery" to "fishing" to broaden the object affected by the described measures, the verbs "rebuild, restore, or maintain" indicate that the first meaning of "fishery" ("(A) one or more stocks of fish...") is the one intended. The purposes for which these measures are to be designed under (B) of the definition all speak to preservation of fishery resources. Therefore the definition of "conservation and management" seems -- at first reading -- limited to measures with biological purposes, those directed at protecting the natural resource.

The definition of "conservation and management" has a peculiar legislative history. It began, almost word for word, as a definition of "conservation" in section 3 of S.961. (The Commerce Committee Report described "conservation" as "interchangeable with the term 'management.' This definition serves to outline several of the goals of the national fishery management program.") There was no direct connection between the term "conservation" and the contents of fishery management plans under section 203(a) of that bill, which directed each Council to submit "recommended management regulations," except for the basket clause in the discretionary provisions section (203(b)(7) of the bill). A Legislative History of the Fishery Conservation and Management Act of 1976 at 674, 701, 711-12 (1976). The final legislation required FMPs to contain "conservation and management measures" and revised the definition of "conservation and management" in an apparent

---

<sup>5</sup> This is one of the provisions that was narrowly interpreted in General Counsel Opinion No. 61 (1978), which concluded that the Act did not authorize the Secretary to deny applications for joint-venture permits on the basis that U.S. processors could process the fish. This ruling resulted in the processor-preference amendment, P.L. 95-354. The implication of Opinion No. 61, that "conservation and management" does not encompass consideration of the economic interests of on-shore processors, is inconsistent with Opinion No. 80 and subsequent practice of the agency (see discussion on page 7).

attempt at conformity.<sup>6</sup>

Not since 1978 has the definition of "conservation and management" stood in the way of Secretarial action under the Magnuson Act (see footnote 5). In fact, the definition was broadly construed in General Counsel Opinion No. 80 (1979), which addressed public health and safety measures, to allow any purpose that can be inferred from the Act as the basis for an FMP provision. Strict application of a narrow interpretation of the term would eliminate probably half the FMP measures currently in place. Regulations allocating fishing privileges, setting minimum size limits for the convenience of processors, spreading effort over an entire season, separating mobile from fixed gear, allowing experimental fishing contrary to conservation regimes, permitting the harvest of "prohibited species," forbidding one fisherman from pulling another's traps -- all these and other measures would be suspect as conservation-neutral or even as counter to conservation purposes.

We believe a strict reading of the definition of "conservation and management" is inconsistent with the Act's many expressions of permissible economic and social goals. Optimum yield cannot be achieved if FMPs can address only the restoration or maintenance of stocks of fish. Many purposes of the Act cannot be fulfilled if the Councils and the Secretary are so limited.

---

<sup>6</sup> Another peculiarity about the definition is that it includes measures to "restore...the marine environment," while section 303 restricts conservation and management measures to those "applicable to foreign fishing and fishing by vessels of the United States." The legislative history is clear that threats to the marine environment such as oil spills and navigation could not be regulated under the Act. Councils wishing to control activities harmful to the marine environment and citing the definition of "conservation and management" as authority have been told that Congress gave them no tools to affect activities other than "fishing." Memorandum by Joel MacDonald, August 7, 1979, "Council Authority to Prescribe Conservation and Management Measures Respecting the Marine Environment and Fishery Habitats." Even an activity that literally comes within the definition of "fishing" (anchoring on coral, by which a fishery resource might be "taken") has been excluded from coverage by the Act. Memorandum by Gaylin Sponis (1982?), "Fishery Management Plan for Coral and Coral Reefs of the Gulf of Mexico and South Atlantic." A prohibition in the FMP against anchoring by vessels over a certain length in "habitat areas of particular concern" was disapproved because it would have regulated navigation of vessels not even remotely connected with the fishing industry.

Several examples can be cited of management measures that have waste avoidance as at least one of their purposes:

- o The purpose of the Texas closure in the Gulf of Mexico Shrimp FMP was described by a federal district court as "to protect shrimp until they reach a more valuable size and thereby eliminate the wasteful practice of discarding undersized brown shrimp." Louisiana v. Baldrige (sic), 538 F.Supp. 625, 627 (E.D.La. 1982). The court upheld this management measure.
- o The Red Drum FMP identified wastage as a problem, citing instances where purse seines overloaded with red drum were held until transfer vessels arrived. If the fish were held too long, they were released intentionally. In at least one case the fish were lost during the transfer due to a torn net. The regulations banned at-sea transfers and added an admonishment (now at 50 C.F.R. 653.22(b)): "A person or vessel must conduct fishing operations in a way that minimizes wastage of red drum."
- o The New England Groundfish FMP, for a few months, contained a no-discard rule to prevent the waste of valuable protein. 44 FR 885, 889 (January 3, 1979).<sup>7</sup>

---

<sup>7</sup> The provision was rescinded by Amendment 5, with the following explanation:

The early stages of groundfish management under the FCMA brought the imposition of low trip limit levels for all the regulated species. Fishing under this restrictive system led to the practice of vessels discarding groundfish in order that they might bring in the largest and most highly valued permitted catch possible. For example, if a vessel had caught all of its trip allocation of codfish but not haddock, any additional codfish caught on subsequent tows might be discarded until the haddock limit was filled out.

The Council attempted to regulate a solution to this problem prohibiting discarding at sea, and establishing weekly trip limits in mid-1978. The intent at this time was to create the incentive to conduct as clean and species specific a fishing operation as possible, and thereby eliminate needless wastage of groundfish. It was envisioned that if wastage could be minimized, the OYs could be increased accordingly. However, experience has shown that generally this is not possible. The common habitat preferences of codfish, haddock, and

12. 01 1989 7.
- o The Tanner crab FMP, no longer in effect, tailored seasons to avoid harvest of molting crabs, which suffered high mortality rates during transport to on-shore processors. The season could be shortened if molting began sooner than anticipated. 44 FR 30688.
  - o The Secretarial Shark FMP, now being developed, would require landing of the entire shark to eliminate the wasteful practice of "finning."

We conclude that the Act most certainly allows the Councils to adopt, and the Secretary to approve, management measures aimed at avoidance of waste or promotion of fuller utilization of fish. The most defensible approach would be amending the definition of optimum yield, to add an overlay of full utilization to the numbers set for biological and economic reasons.

## 2. Acceptable Management Measures

### A. Quotas

Establishing waste avoidance as a legitimate purpose for an FMP measure is only the beginning. What means may a Council employ to accomplish such a purpose? The North Pacific Council discussed a number of traditional measures, of the sort enumerated in 16 U.S.C. 1853(b), that are undoubtedly available.<sup>8</sup> One approach would set semi-annual or quarterly quotas to limit the amount of pollock that could be taken during the spawning season.<sup>9</sup> Cf. 1853(b)(3). While such quotas would distribute fishing opportunity over the year, they would probably not eliminate roe stripping entirely; the rush to harvest the

---

yellowtail, the restrictive management system imposed under the FCMA, and undoubtedly, the escalating vessel operating costs all have defeated the "no-discard" concept. Therefore, in recognition of this disparity between the intent of the no-discard regulation and the factors that determine the way in which the fishery operates, FMP refinement is necessary.

<sup>8</sup> For each of these suggestions, the Regional Attorney verified their acceptability under the Act. Pages 15-17, 21 of transcript of North Pacific Council discussion of Agenda D-3(a), September 28-29, 1989.

<sup>9</sup> The Council in fact recommended that the Regional Director allocate pollock in the Gulf of Alaska on a quarterly basis in 1990.

allowable periodic quota would still operate during the first quarter or half-year.

#### B. Seasons

Another option would simply ban a directed pollock fishery during the spawning season. Cf. 1853(b)(2). While biological or waste-avoidance concerns might argue for a ban, the economic loss of the profitable roe fishery might be difficult to justify. Indeed, timing the fishery to avoid the roe season might itself be considered wasteful, since the value of each female fish harvested is appreciably less without the roe.

#### C. Catch limits, etc.

One measure the Council did not discuss, but certainly could consider, would be a per-vessel limit on pollock harvest. Cf. 1853(b)(3). A daily or weekly limit would slow down the harvest, even during spawning season, so that a catcher/processor would have no economic incentive to discard usable flesh. Other undiscussed possibilities include limiting the number of vessels in the fishery (cf. 1853(b)(6)); requiring operable fish-meal equipment to be installed on processing vessels, or prohibiting the use of mechanical roe extractors (cf. 1853(b)(4)); and forbidding processing vessels from operating in the fishery (cf. 1853(b)(4)).

#### D. Limits on use of fish

One Council member suggested prohibiting the discard of male fish and roe-stripped females. Several amendments to the motion were offered, specifying that in a directed pollock fishery undersized fish, heads, frames, guts, and "unmarketable flesh, based on industry-wide marketability" could be discarded. Applying a no-discard rule to harvesters raises no legal problems of authority under the Act and has precedents in the New England Groundfish FMP<sup>10</sup> and the yet-to-be-adopted Secretarial Shark FMP.<sup>11</sup> (As another Council member noted, such

---

<sup>10</sup> The regulations made it unlawful for "any person" to "discard, at sea" any groundfish. The definition of "discard" required the retention of any live fish once on board a vessel, or any dead fish that had been caught. Because there was no at-sea processing in the fishery, the regulations in effect imposed a landing requirement on harvesters, but had no application to processors.

<sup>11</sup> The October 20, 1989, draft of the FMP, besides setting commercial quotas and recreational bag limits, requires the landing of carcasses in proportion to the number of fins retained. The discussion of finning focuses on the waste issue,

a rule might present enforcement problems and raise difficult issues as to what constitutes "unmarketable flesh.")

The Regional Attorney proposed a variation on this motion, a ban on harvesting fish that would be used for roe stripping. An analogy for this approach is found in the Northern Anchovy FMP, which created a "formula OY" dependent on size of the spawning biomass. It gives highest priority to the importance of anchovy as forage for marine birds and other fish, and to the live bait fishery, for which no quota is set. The middle priority is for the nonreduction fishery (for dead bait or human consumption), which has a small quota no matter what the biomass size. Lowest priority is the reduction fishery ("fishing for northern anchovies for the purposes of conversion to fish flour, fish meal, fish scrap, fertilizer, fish oil, or other fishery products or byproducts for purposes other than direct human consumption"). Only if the biomass is above a certain level is the reduction fishery allowed. See 50 C.F.R. 662.20.

Back in 1978, when the Northern Anchovy FMP was approved, there was no discussion of the authority to regulate the purposes for which fishing was allowed. (Attention was focused on the novelty of a "formula OY.") The regulations authorize a type of purse seine for use only in the reduction fishery, but contain no direct prohibition on fishing for reduction purposes during a closure of the reduction fishery. Perhaps the practical explanation for this omission is that no one fishing with other gear would harvest amounts useful in a reduction operation. It would nonetheless be a violation of the Magnuson Act for someone to buy or possess for "purposes of conversion" anchovies harvested without a reduction quota in effect. 16 U.S.C. 1857(1)(G)).

Some North Pacific Council members were apparently uncomfortable with restricting fishing "for the purpose of" roe stripping, because the fisherman delivering pollock to a processor would be responsible for a practice over which he had no control. (This would not be a problem, of course, with a catcher/processor.) The Council seemed more interested in the question whether a no-discard rule or a flesh-utilization requirement could be applied

---

although there might be some unstated conservation benefits from the ban (by slowing the harvest by requiring landing or by identifying the species killed from the carcass). The impacts analysis discusses possible economic loss to the fishermen, but projects social benefits from elimination of waste. Again, there is no at-sea processing in the shark fishery. The draft FMP does not specify what may be done with landed carcasses; presumably, they may be discarded.

directly to processors.<sup>12</sup>

FMPs may contain only conservation and management measures "applicable to foreign fishing and fishing by vessels of the United States." 16 U.S.C. 1853(a)(1). "Fishing" is defined at 1802(10)(D) as "any operations at sea in support of, or in preparation for" the harvesting of fish. While the definition of "fishing vessel" at 1801(11)(B) specifically includes "processing" as "any activity relating to fishing," a narrow focus on the "fishing" definition raises an issue of whether at-sea processing is "in support of" the harvesting of fish. If it is not, arguably the Magnuson Act does not authorize the direct regulation of at-sea processing activities.<sup>13</sup>

One answer is that at-sea processing does support harvesting, particularly in the roe-stripping circumstance where discarding carcasses frees the processing crew and equipment to handle more pollock than "full utilization" practices would allow.

Another answer is that the definition of "fishing" should not be read so narrowly. During development of the processor-preference amendment, both the House and Senate bills revised definitions to include at-sea processing as "fishing." As one sponsor explained, "In the end, we decided to leave the FCMA definitions unchanged on this point while, at the same time, making clear the act was intended to benefit the entire fishing industry. I want to emphasize that, even though the final bill does not include the House clarification, it is the understanding of the House that 'fishing' in section 3 of the FCMA

---

<sup>12</sup> It should be noted that this approach would not resolve the allocation issue between factory trawlers and vessels that deliver to on-shore processors. Factory trawlers operating on an undivided annual quota, even though slowed by full-utilization requirements or a no-discard rule, could still harvest the lion's share of the quota early in the season.

<sup>13</sup> Indirect regulation of both at-sea and on-shore processors has long been accepted under the Magnuson Act as a necessary concomitant of the regulation of harvesting activities. Examples are reporting requirements such as those challenged in National Food Processors v. Klutznick, No. 81-1239 (D.C.Cir. June 30, 1981), and access to loading docks for inspection purposes, enforced in Lovgren v. Byrne, 787 F.2d 857 (3rd Cir. 1986). Another indirect regulation currently under litigation is the prohibition against sale in the Atlantic Billfish FMP (National Fisheries Institute v. Mosbacher, No. 88-3103 (D.D.C., filed October 26, 1988)). The purpose of the prohibition is to implement the plan's allocation of billfish to the recreational fishery and to prevent creation of a market for billfish incidentally caught in a commercial fishery.

does include "processing" and that, for that reason, the proposed clarification is unnecessary." 124 Cong. Rec. H8265-66 (August 10, 1978) (statement of Rep. Murphy).

The legislative history of the Act and its amendments manifests no clear intent by Congress whether FMPs may address what processors do with legally harvested fish. We acknowledge there is no exact precedent for the full-utilization proposal.<sup>14</sup> Examples cited in this memorandum--no at-sea transfer of red drum, no discard of New England groundfish or sharks, no sale of Atlantic billfish, no quota for an anchovy reduction fishery-- may be characterized as directed at harvesters.<sup>15</sup> Nevertheless, we find no persuasive analytical distinction between measures aimed at harvesting activities and those aimed at processing activities occurring at sea. Instructing a "fishing vessel" to retain or land fish is--practically or conceptually--no different from requiring it to use the fish for some nutritional or other economic purpose.

The risk in mandating particular uses of harvested fish is that a court, in reviewing the statute, its history, and the agency practice in implementing it, may conclude that direct regulation of processors is a new venture, outside the original intent of Congress. A court might discern a limited authority over anyone beyond the harvester, since the Magnuson Act is so elaborately focused on harvesting activities. Even the processor-preference amendment stopped short of requiring harvesters to deliver fish to U.S. processors or interfering in the business arrangements between processors and harvesters.

One statutory objection to the direct regulation of at-sea processors might be the unfairness involved in requiring full utilization of pollock by floating processors, but not by on-shore processors. National standard 4 addresses the fair and equitable allocation of fishing privileges among fishermen, but does not cover treatment of other participants in the fishing industry. This may be an indication that Congress did not intend direct regulation of processors. On the other hand, many management measures affect different users in different ways without running afoul of the Act (see 50 C.F.R. 602.14).

---

<sup>14</sup> This lack of precedent was the source of the Regional Attorney's doubts expressed at the September Council meeting on the validity of direct regulation of processors.

<sup>15</sup> The permit condition on the Pacific whiting fishery, however, tells processors as well as harvesters they may not discard fish within 12 miles of shore. This restriction is not aimed at the method of harvest or any allocation of fishing privileges. Rather, it is directed at an aspect of usage of legally possessed fish.

Persons beyond the fisheries jurisdiction of the United States (foreigners who fish only on the high seas or U.S. citizens who fish only in State waters) may enjoy advantages vis-a-vis those subject to Magnuson Act jurisdiction but fishing on the same stock of fish. The fact the Secretary cannot regulate the former does not mean he should not regulate the latter.

Another objection might be that national standard 5 requires measures "where practicable, [to] promote efficiency in the utilization of fishery resources." From one viewpoint, roe stripping is the most efficient practice imaginable: given the time constraints in a quota-driven fishery, the discard of low-value fish maximizes the vessel's economic return by allowing available labor, equipment, and storage capacity to be devoted to production of the high-value roe. The guidelines for standard 5, however, take a broader view of "efficiency." The Appendix to the guidelines states:

NOAA believes that, for purposes of standard 5, efficiency can be defined as the ability to produce a desired effect or product [or achieve an objective] with a minimum of effort, costs, or misuse of valuable biological resources. In other words, Councils should choose management measures that achieve the FMP's objectives with minimum cost and burdens on society....NOAA believes that an FMP should not restrict the use of productive and cost-effective techniques of harvesting, processing or marketing, unless such restriction is necessary to achieve the conservation or social objectives of the FMP (emphasis added).

A measure directed at achieving fuller utilization of pollock flesh could be justified either as a restriction on cost-effective processing techniques that is nonetheless required to achieve a conservation or social objective, or as a means of achieving efficient utilization of fishery resources without wasting protein.

Yet another objection is that national standard 7 requires management measures to minimize costs, including costs to the industry of complying with the measures. The guidelines for national standard 7, 50 C.F.R. 602.17(d)(1), state that management measures "should be designed to give fishermen the greatest possible freedom of action in conducting business... that [is] consistent with ensuring wise use of the resources...." Again, this balancing of economic burdens (loss of roe harvest) against social objectives (fuller utilization of protein) is the sort of policy decision the Act mandates the Council to make.

### 3. Conclusion

As long as a measure applies to fishing (including at-sea processing), has a purpose cognizable under the Act, furthers the achievement of optimum yield, and is consistent with the national standards, one can argue it is authorized by 16 U.S.C. 1853. We conclude that we could defend direct regulation of harvesting and at-sea processing (but not on-shore processing) to prevent roe stripping as coming within the purview of the Act. The safer approach, however, is to control roe stripping by traditional harvesting restrictions or by banning discards by vessels at sea. Telling processors how much fish meal and how many fillets they must produce risks a judicial challenge to our statutory authority.

We reiterate the need for a record justifying any limitation on roe stripping.<sup>16</sup> We also note the existence of policy arguments against embarking on the "slippery slope" of regulating the economic decisions of processors.<sup>17</sup> Since the legal and policy questions are not free from doubt, and since the national standard guidelines do not address equity among fishery participants other than fishermen, amendment to the Act to clarify the extent to which processors should be regulated would be welcome.

---

<sup>16</sup> Another caveat: Requirements for utilization of fish must avoid creation of export restrictions that would present problems under the General Agreement on Tariffs and Trade.

<sup>17</sup> Councils concerned about "wastage" or nutritional needs might propose that a certain amount of fish be sold to underdeveloped countries, that salmon be canned instead of marketed fresh, or that recreational fishermen be forced to eat their trophies.

**JOSEPH THOMAS PLESHA**

5010 N.E. 180th Street  
Seattle, Washington 98155

**WORK EXPERIENCE**

September 1987 to Present: General Counsel for Trident Seafoods Corporation.

December 1986 to September 1987: Associate with Reed McClure Mocerri Thonn & Moriarity.

April 1985 to November 1986: Counsel for the United States Senate Committee on Commerce, Science and Transportation.

September 1983 to April 1985: Legislative Assistant for Senator Frank H. Murkowski from Alaska.

1983: Staff Attorney in the misdemeanor division of the Seattle-King County Public Defender Association.

1974-1982, summer employment: Worked as deckhand, engineer, and captain on cannery tender vessels in Ketchikan, Alaska for Wards Cove Packing Company.

**BAR MEMBERSHIPS**

Alaska Bar Association  
Washington State Bar Association

**LEGAL EDUCATION**

University of Puget Sound School of Law: 1978-1981 J.D.

**UNDERGRADUATE EDUCATION**

University of Washington: 1974-1978 B.A.

D-95