

**A  
CONFERENCE  
ON  
EAST COAST  
FISHERIES  
LAW**

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Fisheries Management and Enforcement

Serving Foreign Fishing Clients

Initiating Joint Ventures

Financing Fisheries Development

Cooperatives and Anti-trust

**June 24-25, 1983**

**University of Maine  
School of Law  
Portland, Maine**

**SPONSORED BY:**

**MARINE LAW INSTITUTE  
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## PURPOSE

Recent developments in fisheries law affect lawyers with clients in the harvesting, processing, and marketing sectors of the fishing industry throughout the eastern seaboard.

In the seven years since the Magnuson Fishery Conservation and Management Act established a framework for comprehensive fisheries management, the legal needs of the fishing industry have become increasingly complex. Individuals and associations are challenging state and federal management decisions. Fishery cooperatives have expanded their roles to encompass marketing, management, and vessel services.

In an era of fiscal restraint, financing new vessels or on-shore facilities presents new challenges. At the same time, the development of new markets, here and abroad, creates new opportunities. Trade missions to other nations are opening doors for U.S. processors. At-sea joint ventures between U.S. fishermen and foreign processors have expanded the markets for harvesters. In all these undertakings, lawyers are playing an increasingly important role.

The conference will update participants on current management and enforcement policies for East Coast fisheries as well as Coast Guard vessel safety and documentation requirements. The program will also explore several areas where fisheries law is evolving rapidly, in joint ventures, opportunities and competition with foreign markets, the growth of cooperatives and associations, and financing fisheries development. In addition, traditional business law issues such as incorporation and antitrust questions will be discussed from a fisheries perspective.

The MARINE LAW INSTITUTE is a component of the University of Maine School of Law and the University of Southern Maine's Center for Research and Advanced Study. The Institute carries out research and educational projects on legal issues affecting ocean and coastal resources. One of its primary areas of investigation is the interjurisdictional problems associated with the management of marine resources on the state, federal, and international levels. The Institute is on the Portland campus of the University of Southern Maine, one-half mile from the business district of Portland.

## PORTLAND

Portland is a city in touch with the sea. The working waterfront of Portland is home to Maine's largest fishing fleet, ferry services to the harbor islands and to Nova Scotia, and pilot boats that guide large oil tankers into port. The pride of Portland is its reconstructed Old Port District which boasts specialty shops, craft cooperatives, and many fine restaurants and cafes.

A newly-opened wing of the Portland Art Museum features marine artists, many of whom, like Winslow Homer, used the Maine coast for their inspiration. A few minutes' drive from downtown Portland are the sandy beaches, rocky cliffs and lighthouses which typify Maine.

## FRIDAY, JUNE 24

### 8:30 REGISTRATION

### 9:00 INTRODUCTION AND WELCOME

### 9:15 FISHERIES MANAGEMENT REGULATION

- The federal fishery management process: plans and procedures of the New England, Mid-Atlantic, and South Atlantic Management Councils; Considerations for litigation under the Magnuson Fishery Conservation and Management Act; State fishery regulations: procedures in the eastern states and relationship to Council plans; Representing foreign fishing interests.

Alison Rieger, Director, Marine Law Institute, University of Southern Maine, Portland, ME

John Dunnigan, Marine Resources Consultant, Georgetown, MA (Formerly NOAA Northeast Regional Counsel & Deputy Director, New England Fishery Management Council)

David C. Hoover, Chief Counsel for Fisheries, Commonwealth of Massachusetts, Boston, MA

Jay Hastings, Attorney-at-law, Seattle, WA

### 10:45 BREAK

### 11:00 ENFORCEMENT

- How National Marine Fisheries Service prosecutes violations of federal regulations; Representing your fisheries client; Special enforcement issues: vessel seizures and libelling and warrantless vessel searches.

Craig O'Connor, Southeast Regional Counsel, NOAA General Counsel, St. Petersburg, FL

Robert M. Rhodes, Esq., Messer, Rhodes & Vickers, Tallahassee, FL (General Counsel to Southeastern Fisheries Association, Inc.)

Roberto Moreno, Esq., Jimenez and Fuste, Hato Rey Puerto Rico

### 12:00 LUNCH

#### Speaker:

Robert Hayes, Director, National Marine Fisheries Service, Office of Industry Services

"The Next Billion (in U.S. Fish Exports): Expanding Foreign Markets and the Special Problems of Counter-Trade"

### 1:15 FEDERAL LICENSING REQUIREMENTS

- Vessel documentation; Coastwise trade and foreign vessel requirements; Safety requirements.

Timothy McHugh, Esq., Hoch, Flanagan & Snyder, Boston, MA

Terry Leitzell, Esq., Bogle and Gates, Washington, D.C. (Formerly Assistant Administrator for Fisheries, NOAA)

Richard Hiscock, Vessel Safety Consultant, N. Chatham, MA

### 2:45 BREAK

### 3:00 FISHERIES DEVELOPMENT

- Private sector financing for vessels and shoreside facilities; Federal financial assistance programs; Saltwater-Kennedy Act Program and the Fisheries Develop-

## TRANSPORTATION

The Law School is located on the University of Southern Maine Portland campus, ¼ mile from Exit 6B, Forest Avenue, off Interstate 295, approximately 2½ hours driving time north of Boston. Portland is served by the Portland Jetport, about five miles from campus. Connections between the Jetport and downtown Portland can be made by taxi, rental cars and Metro bus.

More detailed transportation information will be sent to registrants.

ment Foundations; U.S.— Canadian competition or cooperation: response to the Kirby Task Force Report.

Timothy R. McHugh, Hoch, Flanagan & Snyder

Robert Hayes, National Marine Fisheries Service

Terry Leitzell, Bogle & Gates

Ken Coons, Executive Director, New England Fisheries Development Foundation, Boston, MA

Ralph Gillis, General Counsel, New England Fisheries Development Foundation, Boston, MA

Dr. Guy Marchesseault, Deputy Director, New England Fishery Management Council, Saugus, MA

5:30 RECEPTION

6:30 DINNER

Speaker:

Congressman John B. Breaux, Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment (INVITED)

"The Government's Role in Assisting the U.S. Fishing Industry"

**SATURDAY, JUNE 25**

8:30 ASSOCIATIONS, COOPERATIVES, AND ANTI-TRUST

— The role of associations; Forming cooperatives; Anti-trust problems

Roy Tate, Deputy Director, Massachusetts Lobstermen's Association, Marshfield, MA

Donald E. Graham, Esq., McDermott, Will & Emery, Washington, D.C. (Formerly General Counsel, National Farmers Co-op)

9:30 JOINT VENTURES

— Operational considerations

Walter Pereyra, Marine Resources Co., Seattle, WA

10:00 BREAK

10:15 JOINT VENTURES (Continued)

— Financial and contractual considerations; Government regulatory aspects: assessments of joint ventures "capacity" and permitting; Internal waters joint ventures: state procedures; Doing business with the Japanese; Prospects for east coast joint ventures.

Myron Nordquist, Esq., Duncan, Allen & Mitchell, Washington, D.C.

John Dunnigan, Marine Resources Consultant

David Hoover, Massachusetts Division of Marine Fisheries

Paul MacGregor, Esq., Mundt, MacGregor, Happel, Falconer, Zulauf & Hall, Seattle, WA

Jay Hastings, Attorney-at-Law

Walter Pereyra, Marine Resources Co.

Al Guimond, President, Stonington Foods, Inc., Stonington, CT

12:00 AUDIENCE COMMENTS

**COURSE MATERIALS**

Detailed outlines and materials compiled by the speakers will be provided to each participant.

Call the Marine Law Institute at (207) 780-4474 if you have any questions.

**REGISTRATION INFORMATION**

The registration fee is \$100.00 if received before June 15, 1983 and \$125.00 thereafter. The fee includes attendance at all sessions, course materials, refreshment breaks, Friday lunch, and dinner at the Eastland Hotel on Friday evening.

If you plan to bring a guest to the Friday evening dinner, please add \$18.00 to the registration fee.

Return the attached registration form as soon as possible, or you may register by telephone (207) 780-4474. Receipt of registration fee confirms your reservation.

**ACCOMMODATIONS**

Please make your own reservations for overnight accommodations as soon as possible. Blocks of rooms have been reserved for conference participants at the Downtown Holiday Inn and the Eastland Hotel in Portland, as well as at the Gorham campus of the University of Southern Maine, a 25-minute drive from the Law School. In order to qualify for special room rates, you should make reservations by June 9, 1983, and mention the East Coast Fisheries Law Conference in your correspondence.

One night's deposit or a credit card number will guarantee your room reservations.

Downtown Holiday Inn 88 Spring Street Portland, ME 04111 (207) 775-2311 or 1-800-238-8000 Single: 45.00 and up Double: 55.00 and up	Eastland Hotel 157 High Street Portland, ME 04101 (207) 775-5411 or 1-800-341-0414 Single: 55.00 Double: 65.00	Gorham Campus Dept. of Conferences Woodward Hall Gorham, ME 04038 (207) 780-5264 or (207) 780-4074 Double: 8.50/person Single: 11.00/person (Towels & linens incl.)
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**REGISTRATION FORM**

**East Coast Fisheries Law**

Name \_\_\_\_\_ Phone \_\_\_\_\_

Affiliation \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Registration Fee: \_\_\_\_\_ \$100 before June 15, 1983

\_\_\_\_\_ \$125 after June 15, 1983

\_\_\_\_\_ \$ \_\_\_\_\_ for \_\_\_\_\_ guest(s) for  
Friday dinner at Eastland Hotel  
(\$18.00 per guest)

\_\_\_\_\_ Total

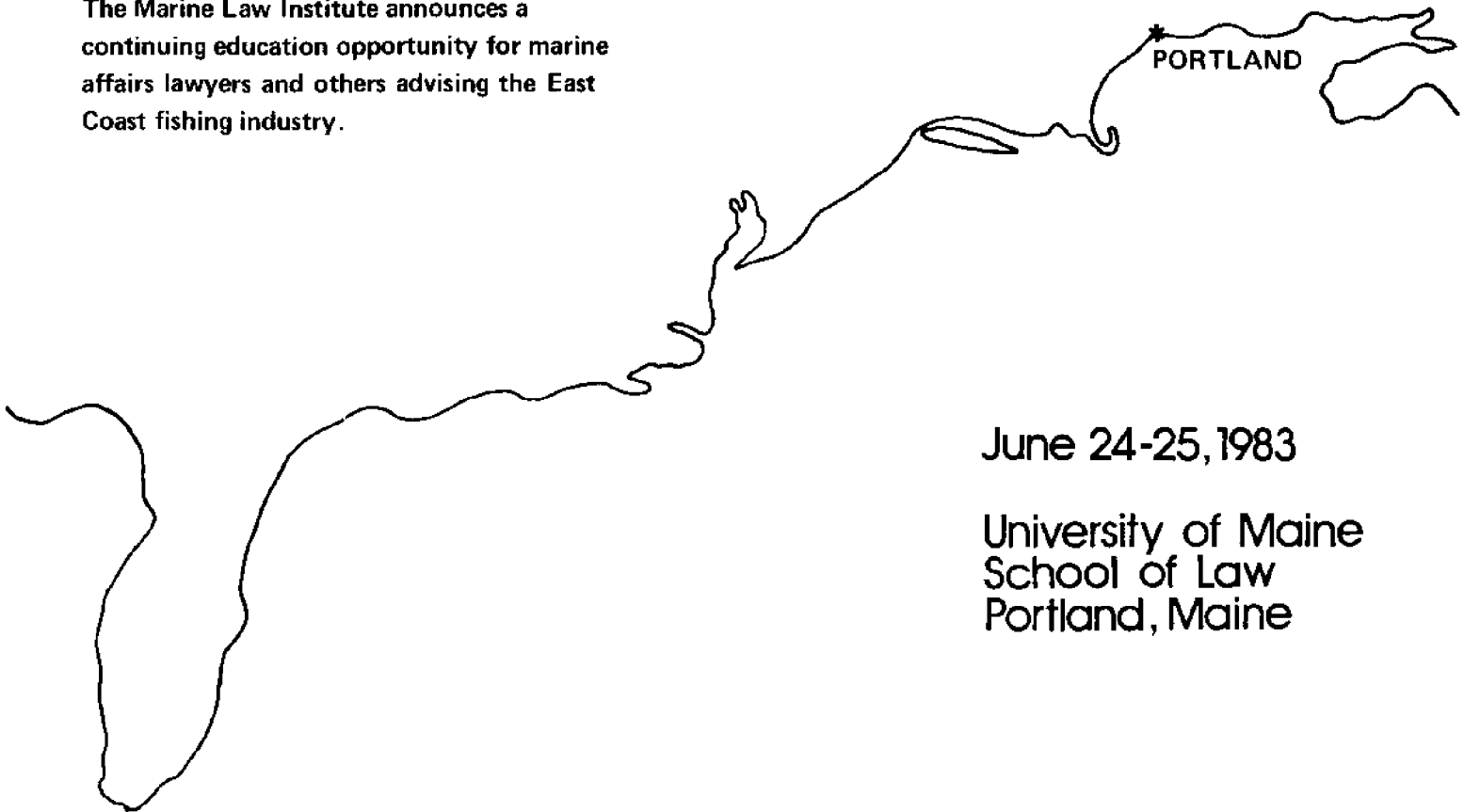
Check appropriate box  Registration fee enclosed  
 Bill my organization

Make check payable to: University of Southern Maine

Return this form to: Marine Law Institute  
246 Deering Avenue  
Portland, Maine 04102

MARINE LAW INSTITUTE  
University of Southern Maine  
246 Deering Avenue  
Portland, Maine 04102

The Marine Law Institute announces a continuing education opportunity for marine affairs lawyers and others advising the East Coast fishing industry.



June 24-25, 1983

University of Maine  
School of Law  
Portland, Maine



THE FEDERAL FISHERY MANAGEMENT PROCESS: PLANS AND PROCEDURES  
OF THE REGIONAL FISHERY MANAGEMENT COUNCILS

Alison Rieser  
Marine Law Institute

- I. The Magnuson Fishery Conservation and Management Act of 1976 (MFCMA)
  - A. Purpose and Effect of the Original Act
    1. Established 197-mile zone contiguous to the territorial sea subject to exclusive management authority of U.S.
    2. Made all foreign fishing within waters adjacent to U.S. subject to the Act, except for tuna
    3. Placed domestic fishing industry under federal management for the first time
    4. Left existing state authority over fisheries within territorial waters intact, subject to possible preemption by the Secretary of Commerce
  - B. The Management Process under the MFCMA
    1. The eight regional fishery management councils : their authority, membership, and role
    2. Role of the Secretary of Commerce
    3. Role of the Department of State
    4. Contents of Fishery Management Plans
      - a. description of the fishery and specification of the management unit
      - b. specification of optimum yield, total allowable level of foreign fishing, domestic annual harvesting and processing, and joint venture processing
      - c. management measures and data reporting requirements
    5. National Standards for fishery management
    6. Council procedures

7. Problems in implementation

- a. relationship between the Councils and NOAA/NMFS; length of time required to obtain plan approval and implementation
- b. enforceability of management measures, including problems with state regulation in territorial waters
- c. credibility of management measures and their scientific basis

II. Major Amendments to the MFCMA

- A. Joint Venture Amendment of 1977 (P.L. 95-354)--to provide for the regulation of foreign fish processing vessels in the Fishery Conservation Zone (FCZ)
- B. American Fisheries Promotion Act of 1980 (P.L. 96-561)--changing the foreign fishing allocation criteria to encourage foreign countries to open up markets for U.S. fish products
- C. Internal Waters Joint Ventures Amendment of 1982 (P.L. 97-191) to provide for state regulation of foreign fish processing vessels in internal waters of the state (inside the baseline)
- D. 1982 Amendments (P.L. 97-453)--changes in the FMP process:
  - a. automatic approval of plans after 75 days if not disapproved or returned to the Council
  - b. emergency power of Secretary to promulgate regulations even if no plan is in place (allowing up to 90 days of Secretarial regulation without Council approval and another 90 days with it); mandatory emergency regulations to be promulgated if Council votes unanimously to request such action)
  - c. requirement that Councils submitted draft proposed regulations with FMPs to the Secretary

III. Overview of East Coast Fishery Management Plans

A. New England

- 1. groundfish (cod, haddock, yellowtail flounder)
- 2. Atlantic scallops
- 3. American lobster (proposed)
- 4. Atlantic sea herring (withdrawn)

B. Mid-Atlantic

1. surf clam and ocean quahog
2. squid, mackerel, and butterfish
3. bluefish (under development)

C. South Atlantic and Gulf of Mexico

1. stone crab
2. spiny lobster
3. snapper-grouper (proposed)
4. coastal migratory pelagic species

APPENDICES

Guidelines for Fishery Management Plans, 50 CFR Part 602

Summaries of Major East Coast Fishery Management Plans:

Squid, Mackerel and Butterfish  
Spiny Lobster  
Coastal Migratory Pelagic Species  
Snapper-Grouper  
American Lobster  
Atlantic Groundfish  
Stone Crab  
Atlantic Sea Scallop

**Amendment #3 to the Atlantic Mackerel, Squid and Butterfish Fisheries, 50 CFR 655; 48 Fed.Reg. 14554, April 1983**

Amendment #3 to the Fishery Management Plans for the Atlantic Mackerel, Squid and Butterfish Fisheries merged the management plans for the three fisheries into a single management regime, and extended the regulations through March 31, 1986. The amendment was initially approved on April 4, 1982 (48 Fed.Reg. 14554), and an interim emergency rule, effective from April 1, 1983 through June 29, 1983, was issued simultaneously. The Plan applies to all Atlantic Mackerel, Squid and Butterfish under U.S. jurisdiction, excluding the Gulf of Mexico and the Caribbean Sea.

Under the regulations implementing the amendment, the Secretary of Commerce must make an annual determination of optimum yield (OY), domestic annual harvest (DAH), domestic annual processing (DAP), total allowable level of foreign fishing (TALFF), and reserve (if any) for each of the fisheries.

The optimum yield for Loligo squid may not exceed 44,000 metric tons (mt); OY for Illex squid may not exceed 30,000 mt. The regulations provide for a Reserve equal to half of the difference between OY and DAH; the other half is the initial TALFF. In order to limit foreign fishing and give domestic harvesters an additional incentive to increase their catches, the regulations state that the OY determined annually may be less than the maximum possible value by the amount DAH is less than 7,000 mt for Loligo or 5,000 mt for Illex.

The annual OY, DAH, DAP, and TALFF determinations for Atlantic mackerel are based upon the predicted mackerel spawning stock size. OY is currently set at 30,000 mt. The amendment prohibits a directed foreign fishery unless the spawning stock size exceeds 600,000 mt after the entire predicted U.S. and Canadian harvests are taken. If the spawning stock size is determined to be less than or equal to 600,000 mt, the OY equals the sum of the DAH and TALFF, not to exceed 30,000 mt. The TALFF for mackerel is incidental catch only, with the actual amount being two percent of the allocations of silver hake, plus one percent of the allocations of Loligo, Illex, and red hake. If the spawning stock size is predicted to be greater than 600,000 mt after the predicted U.S. and Canadian harvests are taken, the OY is the amount which would result in a spawning stock size of 600,000 mt the following year (after the predicted Canadian harvest is taken). The OY may be adjusted downward, however, to prevent the total mackerel catch from exceeding the best estimate of the optimum fishing mortality rate. A minimum

U.S. allocation of 30,000 mt is established by the regulations, however, the allocation cannot exceed OY.

The annual OY for butterfish under the regulations is the amount of fish U.S. fishermen harvest under the amendment, plus TALFF, the total not to exceed 16,000 mt, the level calculated to be the maximum sustainable yield (MSY) for the stock. The TALFF is six percent of the allocated portion of the Loligo TALFF plus one percent of the allocated portions of Illex, silver hake and red hake TALFF's, plus one percent of the mackerel TALFF if a directed foreign fishery is allowed.

The regulations also provide for closure of any fishery if the U.S. fishermen have harvested 80% of the allowable domestic harvest, if such closure is necessary to prevent the allowable domestic harvest from being exceeded.

**Proposed American Lobster Regulations, 50 CFR 649; 48 Fed.Reg. 22760, May 20, 1983.**

A Fishery Management Plan (FMP) for the American lobster, developed by the New England Fishery Management Council in consultation with the Mid-Atlantic Fishery Management Council, is currently undergoing review by NOAA. Notice of availability was published on April 21, 1983 (48 Fed.Reg. 17120) and proposed implementing regulations were issued on May 20, 1983 (48 Fed.Reg. 22760). The regulations govern fishing for the American lobster within that portion of the Atlantic Ocean over which the United States exercises fishery management authority.

Under the proposed regulations, the possession or landing of lobster with a carapace length of less than 3 3/16 inches is prohibited, and only two claws per tail may be landed. After January 1, 1986, the landing or possession of any lobster parts will be prohibited altogether. The harvesting or females with eggs attached, or the removal of such eggs, is illegal under the proposed regulations, and lobster traps must be marked and equipped with vents to allow the release of sublegal lobsters. In addition, lobster fishermen must obtain a permit to legally engage in the fishery; the regulations provide for permitting directly by the National Marine Fisheries Service (NMFS), or through states having co-operative agreements with NMFS.

The OY of the fishery is that amount of lobster which can be harvested under the management regulations specified. The regulations anticipate full utilization of the resource by domestic harvesters, therefore, the TALFF equals zero.

Stone Crab Fishery, 50 CFR 654, 44 Fed.Reg. 53519, September 14, 1979

The Fishery Management Plan for the Stone Crab Fishery of the Gulf of Mexico, prepared by the Gulf of Mexico Fishery Management Council, was approved by NOAA on March 19, 1979. Implementing regulations were issued on September 13, 1979 (44 Fed.Reg. 53519). The regulations govern fishing for stone crabs within that portion of the Gulf of Mexico along the west coast of Florida, including the Florida Keys.

The regulations impose a 2 3/4 inch limit on claw size (crab claws are generally removed at sea; the stone crab bodies must then be returned to the water before the fishing vessel leaves the fishery conservation zone (FCZ)). Additional management measures require that the traps used have a biodegradable panel, impose area restrictions on fishing, and establish a closed season for the fishery between May 16 and October 14.

As a result of gear conflicts between stone crab and shrimp fishermen in the Gulf of Mexico, and consequent rising tensions, emergency regulations were issued on April 6, 1983, closing certain areas of the FCZ to stone crab fishing. (48 Fed.Reg. 14903).

The OY is defined as all harvestable adult stone crabs in the management area between October 5 and May 5 that have a claw size of 7.0 cm or greater. There are no foreign participants in the stone crab fishery.

Coastal Migratory Pelagic Resources, 50 CFR 642; 48 Fed.Reg. 5270, February 4, 1983

The Fishery Management Plan for the Coastal Migratory Pelagic Resources (mackerel) was developed jointly by the Gulf of Mexico and South Atlantic Fishery Management Councils. The plan was approved by NOAA on April 1, 1982, and final implementing regulations were issued on February 4, 1983. (48 Fed.Reg. 5270) The regulations govern fishing for coastal migratory pelagic fish by vessels of the U.S. with the FCZ off the Atlantic coastal states south of the Virginia-North Carolina border and in the Gulf of Mexico.

Management measures contained in the regulations include season and quota restrictions, size restrictions, and vessel, gear and equipment limitations. The regulations establish general quotas for each of the species managed by the Plan. The king mackerel quotas are initially broken down by user group (commercial and recreational). Both the king mackerel and Spanish mackerel quotas are suballocated by gear type used. In

addition, the regulations provide for closure of the fisheries upon harvesting of the specific quotas. In the case of conflict between hook-and-line and gill net fishermen, the Secretary is authorized to prohibit use of gillnet gear within certain areas.

The OY for king mackerel is equal to the best available estimate of MSY for the species. The OY for Spanish mackerel is also MSY and for cobia is the available amount of cobia which meets the size restriction established by the regulations.

Since the regulations anticipate that domestic fishermen will harvest the OY of the fishery, the TALFF is set at zero.

Spiny Lobster Fishery of the Gulf of Mexico and the South Atlantic, 50 CFR 640; 47 Fed.Reg. 29202, July 2, 1982

The Fishery Management Plan for the Spiny Lobster Fishery was prepared jointly by the Gulf of Mexico and South Atlantic Fishery Management Councils, and was approved by NOAA on February 2, 1982. A notice of proposed rulemaking was published on March 12, 1982 (47 Fed.Reg. 10878), and an emergency interim rule implementing the closed season portion of the FMP was published on March 30, 1982 (47 Fed.Reg. 13353). The rule was effective for 45 days and was extended for an additional 45 days on May 16, 1982 (47 Fed.Reg. 21256). Final implementing regulations were published on July 2, 1982 (47 Fed.Reg. 29202). The regulations govern fishing for the spiny lobster within the FCZ in the Atlantic Ocean along the coast of the South Atlantic states from the Virginia-North Carolina border south and through the Gulf of Mexico.

The regulations establish seasons for the harvesting of spiny lobster. The harvest of egg-bearing females is prohibited, as is the removal of eggs from such lobsters. Lobsters with a carapace length of less than 3 inches, or with a total length of less than 5 1/2 inches must be returned immediately to the water unharmed. The regulations also require that traps have a degradable panel, and prohibit the use of certain gear and harvesting methods.

The OY for the fishery is specified to be all lobsters meeting size restrictions established by the regulations that can be harvested by commercial and recreational fishermen given existing technology and prevailing economic conditions. This definition of the OY would equal the DAH, therefore the TALFF is calculated to be zero.

**Snapper-Grouper Fishery of the South Atlantic, 50 CFR 646; 48 Fed.Reg. 26843, June 10, 1983**

A Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic is currently undergoing review by NOAA; notice of availability of the FMP was published on May 13, 1983 (48 Fed.Reg. 21607). Proposed implementing regulations were published on June 10, 1983 (48 Fed.Reg. 26843).

The proposed FMP manages the snapper-grouper fishery throughout the FCZ off the southern Atlantic coastal states from the Virginia-North Carolina border south to the boundary line between the Gulf of Mexico and South Atlantic Fishery Management Fishery Management Councils. The FMP covers 69 species of fish, including snappers, groupers, porgies, grunts, tilefishes, sea bass, and other related demersal species.

The regulations establish minimum sizes for several of the species in order to prevent harvesting of fish before they reach their optimum harvest size. In addition, the regulations prohibit the use of certain types of gear including poisons, explosives, fish traps, and trawls for the taking of fish in the snapper-grouper fishery.

The OY for each fishery is the yield that results from the harvest of fish that have reached the minimum size set by the regulations. Since the expected DAH is equal to the OY, the TALFF established by the FMP is zero.

**Surf Clam and Ocean Quahog, 50 CFR 652; 47 Fed.Reg. 4268, January 29, 1982**

The original Fishery Management Plan for the Atlantic Surf Clam and Ocean Quahog Fisheries, prepared by the Mid-Atlantic Fishery Management Council, was approved by NOAA on November 13, 1977 for the period through September 1979. Amendment #1 extended it through December 31, 1979, and revised reporting requirements to bring them into compliance with the amended MFCMA. Amendment #2 extended the plan through 1981. Amendment #3 extends the plan indefinitely, and revises it. Final regulations implementing the Amendment were issued on January 29, 1982 (47 Fed.Reg. 4268, effective January 26, 1982). The regulations govern fishing for surf clams and ocean quahogs in the FCZ of the Atlantic Ocean.

Under the regulations for the FMP as amended, separate catch quotas for each fishery within the Mid-Atlantic and New England areas must be set annually by the Regional Director of NMFS. These quotas may be adjusted if the actual catch for any one quarter falls more than 5,000 bushels short of the specified quota. In such a case, the



shortfall may be added to succeeding quarterly quotas. Quotas for all of the fisheries may be reduced if it appears that the total catch will exceed the specified annual quota, and the Regional Director may close any fishery if it appears that the quota for any time period will be exceeded. In addition, fishing for surf clams in the Mid-Atlantic region is restricted to specified days and hours.

The implementing regulations also provide for closure in the event of environmental degradation, and prohibit fishing in certain polluted areas. The regulations impose a size restriction of 5/14 inches for surf clams (although a percentage of undersized clams may be legally taken), and provide for closure of an area to both ocean quahog and surf clam fishing if a significant percentage of clams harvested from the area is undersized.

A moratorium on entry of vessels into the surf clam fishery has been in effect since 1977. NOAA is currently considering establishment of a permanent limited entry program for the fishery; the moratorium has been extended until review of that proposal is complete.

The regulations prohibit foreign fishing for surf clams and ocean quahogs.

Atlantic Sea Scallop, 50 CFR 650; 47 Fed.Reg. 35992,  
August 18, 1982

The Atlantic Sea Scallop regulations implement the Atlantic Sea Scallop Fishery Management Plan, developed by the New England Fishery Management Council in consultation with the Mid-Atlantic and South Atlantic Fishery Management Councils. The Plan was approved on April 26, 1982; final regulations implementing the Plan were issued April 18, 1982 (47 Fed.Reg. 35992). The regulations govern fishing for the Atlantic sea scallop within that portion of the Atlantic Ocean over which the U.S. exercises fishery management authority.

Management measures established by the regulations set minimum sizes for Atlantic scallops harvested from U.S. waters in terms of maximum number of meats per pound (for scallops shucked at sea) or shell height (for scallops landed in the shell). Compliance is determined through random sampling. In addition, the Regional Director of NMFS must report, at least annually, concerning the status of the fishery and possible changes in the resource or industry which might require adjustment of the management program. Standards may be adjusted within a range of 25 to 40 meats per pound by any one adjustment.

The regulations established, for the period of May 15, 1982 through May 15, 1983, a maximum meat count of 40 meats per pound with a corresponding minimum shell height of 3 1/4 inches. Under the original regulations, the meat count was to be reduced thereafter to a maximum of 30 meats per pound, with a corresponding shell height of 3 1/2 inches. However, because implementation of this reduction would result in inconsistencies between standards imposed on Canadian and U.S. fishermen, and would adversely affect the domestic scallop industry, an inseason adjustment was proposed (48 Fed.Reg. 19046, April 27, 1983) and approved (48 Fed.Reg. 23434, May 25, 1983).

The adjustment established a meat count of 35 meats per pound and a shell height of 3 3/8 inches to apply during the period from May 25, 1983 through December 31, 1983. On January 1, 1984, the standard will revert to the 30 meats per pound, 3 1/2 inch shell height level.

The OY is defined as that amount of sea scallop catch that results from implementation of the management measures. Since the expected DAH is thus estimated to be equal to the OY, the TALFF is set at zero.

**Atlantic Groundfish (Cod, Haddock and Yellowtail  
Flounder), 50 CFR 651; 47 Fed.Reg. 43709, October 4, 1982**

The Atlantic Groundfish regulations implement the Interim Fishery Management Plan for Atlantic Groundfish developed by the New England Fishery Management Council in consultation with the Mid-Atlantic Fishery Management Council. The Plan was approved on January 11, 1982, and proposed regulations were published on March 11, 1982 (47 Fed.Reg. 10605). An emergency interim rule implemented the Interim Plan on March 31, 1982, (47 Fed.Reg. 13357) for 45 days. That rule was extended for an additional 45 days on May 15, 1982 (47 Fed.Reg. 20781). The final rule implementing the Interim Plan was published on October 4, 1982 (47 Fed.Reg. 43709), and became effective on September 29, 1982. The regulations govern fishing for groundfish within that portion of the Atlantic Ocean over which the U.S. exercises fisheries management authority.

The regulations establish minimum mesh sizes for trawl and fill nets operating within a specified area, and prohibit the use of certain types of gear which would effectively diminish the mesh size. The "large-mesh area" encompasses the area where historic data indicate that about 90% of the commercial catch of cod, haddock and yellowtail flounder takes place. In addition, management measures provide for seasonal closure of spawning areas, and establish a minimum fish size for both commercial and recreational fishing. The regulations include an Optional Settlement Program which allows fishing vessels, if certified by the Regional Director to engage in small mesh fisheries within the large mesh areas.

LITIGATION UNDER THE MAGNUSON ACT

Conference on East Coast Fisheries Law

Portland, Maine

June 24, 1983

Outline of Presentation

Prepared By: John H. Dunnigan

1. WHO ARE THE DEFENDANTS?

-Government counsel: NOAA GC -- regional attorneys and GCF; plus Justice Department in Washington

-Parties:

-USA; DOC; NOAA

-Responsible officials: Assistant Administrator for Fisheries, NOAA; Regional Director, NMFS

-Regional Fishery Management Councils: recommend against suit -- no adequate remedy, and politically unwise.

2. WHEN do you sue?

-Plans vs. Regulations: at what point is there reviewable agency action?

-Council prepares Plan and draft regulations

- NMFS receives Plan and publishes Council's draft regulations
- NMFS reviews Plan
- NMFS may 1.) disapprove Plan; 2.) partially disapprove Plan; 3.) approve Plan but publish different regulations
- Administrative remedies
- Magnuson Act, §305(d):

(d) JUDICIAL REVIEW -- Regulations promulgated by the Secretary under this Act shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, United States Code, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated; except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside any such regulation on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

3. WHAT is the basis for the lawsuit?

-Procedural Grounds

- Administrative Procedure Act
- National Environmental Policy Act
- Regulatory Flexibility Act
- Paperwork Reduction Act
- Executive Order 12291
- Coastal Zone Management Act, §307(c)

-Substantive Grounds

- DOES THE PLAN: contain the required elements?
- IS THE PLAN: consistent with the National Standards?
- IS THE PLAN: consistent with other provisions of the Magnuson Act?
- IS THE PLAN: consistent with other applicable law?
- DO THE REGULATIONS: accurately implement the Plan?  
Are they consistent with the Magnuson Act and other applicable law?

EXCERPTS FROM THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

Relating To

WHAT THE CONGRESS INTENDED THE COUNCILS TO DO THROUGH FMP'S

\* \* \* \* \*

SEC. 2. FINDINGS, PURPOSES AND POLICY

(a) FINDINGS. The Congress finds and declares the following:

- (1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.
- (2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.
- (3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of the United States fishermen.
- (4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified and implemented.
- (5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

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\*\*\*Asterisks indicate where portions of the Magnuson Act which do not relate to the issue of basic fishery management policies have been left out.

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- (6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.
- (7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) PURPOSES. It is therefore declared to be the purposes of the Congress in this Act

- (1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;
- (2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;
- (3) to promote domestic commercial and recreational fishing under sound conservation and management principles;
- (4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;
- (5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and
- (6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development.

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(c) POLICY. It is further declared to be the policy of the Congress in this Act

- (1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act;
- (2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act;
- (3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;
- (4) to permit foreign fishing consistent with the provisions of this Act; and
- (5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

SECTION 3. DEFINITIONS. As used in this Act, unless the context otherwise requires

\* \* \* \* \*

- (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;

(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.

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\* \* \* \* \*

- (7) The term "fishery" means
  - (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
  - (B) any fishing for such stocks.

\* \* \* \* \*

- (18) The term "optimum", with respect to the yield of a fishery, means the amount of fish
  - (A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and
  - (B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor.

\* \* \* \* \*

- (22) The term "stock of fish" means a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

\* \* \* \* \*

TITLE III. NATIONAL FISHERY MANAGEMENT PROGRAM

SEC. 301. NATIONAL STANDARDS FOR FISHERY CONSERVATION AND MANAGEMENT.

- (a) IN GENERAL. Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:
  - (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery;
  - (2) Conservation and management measures shall be based upon the best scientific information available.
  - (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

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- (4) 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 equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.
- (5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.
- (6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.
- (7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

\* \* \* \* \*

SEC. 303. CONTENTS OF FISHERY MANAGEMENT PLANS.

- (a) REQUIRED PROVISIONS. Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall
  - (1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are
    - (A) necessary and appropriate for the conservation and management of the fishery;
    - (B) described in this subsection or subsection (b), or both; and
    - (C) consistent with the national standards, the other provisions of this Act, and any other applicable law;
  - (2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interest in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;
  - (3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

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- (4) assess and specify
    - (A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),
    - (B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing;
    - (C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States; and
  - (5) specify the pertinent data which shall be submitted to the Secretary with respect to the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, and the estimated processing capacity of, and the actual processing capacity utilized by United States fish processors.
- (b) DISCRETIONARY PROVISIONS. Any fishery management plan which is prepared by any Council; or by the Secretary, with respect to any fishery, may
- (1) require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone;
  - (2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;
  - (3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;
  - (4) prohibit, limit, condition, or require the use of specified types and quantities of fish gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this Act;
  - (5) incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery;

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- (6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account
  - (A) present participation in the fishery,
  - (B) historical fishing practices in, and dependence on, the fishery,
  - (C) the economics of the fishery,
  - (D) the capability of fishing vessels used in the fishery to engage in other fisheries,
  - (E) the cultural and social framework relevant to the fishery, and
  - (F) any other relevant considerations; and
- (7) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

\* \* \* \* \*

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## II.d.1

### The Administrative Procedure Act (APA) (1974)

The Administrative Procedure Act (APA) establishes procedural requirements (publication, hearings, etc.) applicable to rulemaking by Federal agencies. Since the Councils are not rulemaking bodies (i.e., issuing regulations as opposed to developing management plans) the APA does not directly affect their activities.

The FCMA does specifically impose upon the Councils certain APA-type requirements, however, such as the requirement that the Councils conduct such hearings as necessary in their regions while developing plans, and the requirement that they publish a statement of their own organization and procedures.

The APA does apply to the Secretary of Commerce regarding the issuance of regulations to implement management plans.

### Coastal Zone Management Act (CZMA) (1972, amended annually)

The principal objective of this Act is to encourage and assist States in developing coastal zone management programs, to coordinate State activities and to safeguard the regional and national interests in the coastal zone. In the preparation of fishery management plans, Councils should be particularly cognizant of section 307(c) of the CZMA, which requires that any Federal activity directly affecting the coastal zone of a State be consistent with that State's approved coastal zone management program, since activities taking place beyond the territorial sea may impact in the coastal zone. Council FMP development may also be indirectly aided by the initiation of a Coastal Fisheries Element (CFE) as part of the CZMA program development and implementation grants. The purpose of CFE is to provide the States with financial and technical assistance to develop information required for more effective management of fisheries within the territorial sea.

### Endangered Species Act (ESA) (1969, revised 1973)

This Act provides for the conservation of endangered and threatened species of fish, wildlife and plants. The program is administered jointly by the Secretaries of Interior and Commerce. Councils should be mindful of the threatened and endangered species list; when preparing FMP's, they should consult NMFS and the Fish and Wildlife Service, as a routine procedure, as to whether the fishing under a plan is likely to jeopardize the continued existence of a listed species or results in the destruction or adverse modification of its critical habitat.

9/9/82

Executive Order 12291 (1981)

Under E.O. 12291, an analysis of rules and alternatives has to be performed within a cost-benefit framework. The general requirements of the Order specify conditions for developing and reviewing rulemaking actions.

- Regulatory action shall not be undertaken unless the potential benefits to society outweigh the potential costs to society;
- Regulatory objectives shall be chosen to maximize the net benefits to society;
- Alternatives shall be chosen involving the least net cost to society; and
- Agencies shall set regulatory objectives with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Although the Order emphasizes the importance of cost-benefit information, other factors such as biological effects, social values, institutional structures, and political consequences provide necessary information for our decisions to approve or disapprove rules. Benefit-cost estimates are one form of important data. Because of the unquantifiable nature of some fishery regulatory costs and benefits, we also will use other information to evaluate tradeoffs among rulemaking alternatives.

Criteria to Determine Whether Regulatory Actions are Major or Non-Major Under E.O. 12291.

1. Executive Order 12291 provides broad criteria for determining whether a proposed regulation is major. Any regulation is considered a "major" rule if it is likely to 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
3. A 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.

2. These criteria do not define the terms "major", "significant", or "adverse." NMFS developed interim criteria scaled to the size of the fishing industry to obtain more accurate determinations of major regulations. The criteria, consistent with expected guidelines from DOC, are as follows:

### II.d.3

Any FMP or amendment to a plan is a "major" rule if it is likely to result in:

1. An increase in total cost or price of goods or services to the national economy of \$5 million or more in any one year.
2. An increase in cost or price of goods or services of 10 percent or more, in any one year, in any industry or market, level of government, or geographic region; provided that the incremental cost of production exceeds \$1 million annually or incremental revenues paid for goods or services so affected exceeds \$1 million annually.
3. An adverse impact on competition. This is defined as a regulation that restricts entry into a fishery or imposes a limited entry system, or in any way directly limits the number of U.S. fishing vessels that may participate in a fishery.
4. An adverse impact on employment. This is defined as a regulation that reduces employment in a fishery, either at the harvesting or processing level, by 10 percent in any one year, measured from a base year representative of historical employment levels in the fishery.
5. An adverse impact on investment. This is defined as a regulation that reduces the incentive to invest in innovation gear and equipment or increases the risk of investment.
6. An adverse impact on productivity. This is defined as a regulation that reduces gross revenues to the participants in a fishery by 10 percent or more in any one year, provided that the reduction in gross revenues is at least \$1 million (evaluated at the most recent prices).
7. Adverse impacts on exports. This is defined as any regulation that constrains the ability of U.S. fishermen or processors to export fishery products; provided that the overall impact of such a constraint is a reduction in the annual level of exports of a given product of at least 20 percent over the reported export level of the previous year.

Source: T. Leitzel Memo of June 17, 1981.

#### The Federal Advisory Committee Act (FACA) (1972)

The provisions of FACA apply to the Councils, their Scientific and Statistical Committees and advisory panels. Application of FACA is designed to ensure open meetings and public access to information gathered by the Councils.

The FACA requires that Council meetings be open to the public and that notice be published in advance in the Federal Register so that interested members of the public can attend the meetings. The agenda, records, reports, working papers, and minutes which are made available to or prepared by the Council must also be made available for public inspection except when prohibited by law.



#### II.d.4

Strict application of FACA has, at times, hindered the timely operations of the Councils. Most all Councils have requested that MFCMA be revised to exclude the Councils from FACA provisions.

#### Marine Mammal Protection Act (MMPA) (1972, amended in 1981)

Although mammals are not covered by the MFCMA since "fish" is defined in section 3(6) to exclude marine mammals, section 404 of the MFCMA amends the MMPA to include waters out to 200 miles. The moratorium on taking marine mammals thus became effective in the FCZ on March 1, 1977. Under section 101(a)(2) of the MMPA, permits for the taking of marine mammals incidental to the course of commercial fishing may be issued by NMFS subject to regulation. With passage of the FCMA, this section of the MMPA applies to foreign as well as to domestic fishing in the FCZ.

#### Marine Protection Research and Sanctuaries Act (MPRSA) (1972, amended in 1974 and 1979)

The MPRSA authorizes the Secretary of Commerce, after consultation with appropriate Federal agencies and with Presidential approval, to designate ocean waters as far seaward as the outer edge of the Continental Shelf as marine sanctuaries, to preserve or restore distinctive conservation, recreational, ecological, or esthetic values. Since passage of the FCMA, NOAA has established certain policies and procedures regarding sanctuary designation (embodied in proposed regulations) which ensure Council participation and coordination with fishery management plans. There are no sanctuaries in the Northeast region although some have been proposed in the past.

#### The National Environmental Policy Act (NEPA) (1969)

The National Environmental Policy Act expressed the intent of Congress to assess the effect of Federal activities on the environment. NEPA's basic purpose is to insure that Federal officials weigh and give appropriate consideration to environmental values in policy formulation, decision-making and administrative actions, and that the public is provided adequate opportunity to review and comment on the major Federal actions. NEPA requires preparation of an Environmental Impact Statement (EIS) for major Federal actions that significantly affect the quality of the human environment. Criteria to determine whether regulatory actions are major or non-major are contained in E.O. 12291.

The Federal action in FMP development has been determined to be the implementation of final regulations. Environmental Impact Statements are prepared for all fishery management plans as well as significant amendments to existing plans. A determination of environmental significance of amendments

must be made through the preparation of an environmental assessment. Specific NEPA regulations on procedures and format were issued by the Council on Environmental Quality on November 29, 1978.

The Revised NOAA Directive Implementing NEPA and Executive Order No. 12114 (Environmental Effects Abroad of Major Federal Actions) was published in Federal Register July 24, 1980.

The purpose of the revision is to comply with regulations issued by the Council on Environmental Quality (CEQ) on November 29, 1978, which require that each agency adopt procedures for its internal use to supplement the CEQ regulations and implement NEPA.

The revision states the circumstances requiring an environmental impact statement (EIS) and/or an environmental assessment (EA) on a federal action. EISs are required for all FMPs. EAs are required for all major FMP amendments. EISs and EAs are not required for the following actions:

1. Extension of the time frame of a FMP when there would not be a change in the environmental consequences of its implementation;
2. funding for proposals which already has EISs;
3. programmatic functions with no potential for significant environmental impacts; and
4. promulgation of regulations regarding criteria for adoption of the plans, programs, or policies and related implementing regulations.

The revision also states the procedures for environmental review and the importance of an earliest possible review of environmental impacts in the planning process. The scoping process, defined as "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action" should include public participation and integrated consultation, notice of intent on the federal action published in the Federal Register, and consideration of all impacts from the action. Following the scoping process, if it is found that significant environmental impacts will result from a proposed NOAA action (i.e., an FMP), a Discussion Paper is prepared in the format of an EIS and modified as necessary in response to comments received. This paper then becomes the Draft EIS (DEIS). The final EIS (FEIS) reflects the comments received in the DEIS and represents NOAA's proposed action.

The provisions set out in this revision also apply to NOAA activities, or impacts thereof, which occur outside the territory of the U.S., or which may affect resources not subject to the management authority of the U.S.

P.L. 96-511 Paperwork Reduction Act (PRA) (1980)

The purpose of the PRA is:

1. "to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;
2. to minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information;
3. to maximize the usefulness of information collected by the Federal Government;
4. to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices;
5. to ensure that automatic data processing and telecommunications technologies are acquired and used by the Federal Government in a manner which improves service delivery and program management, increases productivity, reduces waste and fraud, and, wherever practicable and appropriate, reduces the information processing burden for the Federal Government and for persons who provide information to the Federal Government; and
6. to ensure that the collection, maintenance, use and dissemination of information by the Federal Government is consistent with applicable laws relating to confidentiality, including section 552a of the Privacy Act."

The Director of the Office of Management and Budget (OMB) develops and implements the Federal information policies, principles, standards, and guidelines and provides direction and oversees the review and approval of information requests, the reductions of the paperwork burden, Federal statistical activities, record management activities, privacy records, interagency sharing of information, and acquisition and use of automatic data processing telecommunications, and other technology for managing information resources.

The Director of OMB set a goal to reduce the then existing burden of federal collection of information by 15% by 10/1/82 and for the following year set a goal to reduce the burden by another 10%.

Although the New England Fishery Management Council is not considered a government agency, the Council develops fishery management plans that are implemented by NMFS, a federal government agency. Before a management plan is approved, the impacts of any data requirements contained in a management plan must be assessed under the criteria stated in the PRA.

9/9/82

The Regulatory Flexibility Act (RFA) (1980)

The RFA requires regulations to reflect compliance capabilities of both small and large entities under the RFA regulatory agencies are required to determine whether the regulations will have a "significant economic impact on a substantial number of small entities." If the regulations are expected to have a significant economic impact -- either positive or negative -- a "regulatory flexibility analysis" (RFA) must be prepared. This analysis is sent to the Chief Counsel for Advocacy of the Small Business Administration for review. A regulatory flexibility analysis is not required if the agency head (Secretary of Commerce) certifies the rule will not have a significant economic impact.

The Assistant Administrator for Fisheries makes an initial certification on the basis of an analysis supporting the management regime proposed in an FMP or amendment. This analysis has to address questions concerning the impacts of management action on small entities or small businesses at regional and local economic levels. The definition of "significant economic impacts," however, will vary by fishery because of their relative sizes and complexities.

The RFA defines small businesses, small organizations, and small governmental jurisdictions as follows:

1. Small Business: This is a small business concern which is independently owned and operated and which is not dominant in its field of operation.
2. Small Organization: This is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.
3. Small Governmental Jurisdiction: This is a governmental jurisdiction with a population of less than fifty thousand.

STATE FISHERY MANAGEMENT AUTHORITY

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I. Historical Basis.

- A. New England: Massachusetts Bay Colony Charter - Charles I of England confirmed the earlier grant of title by James I as contained in the letters of patent to the Massachusetts Bay Colony. The General Court, the governing body of the Colony, developed and approved the first Colonial Ordinance of 1641 which contained the right of free fishing.
- B. Generally: The 10th amendment to the United States Constitution authorizes state power and authority within the boundaries of the respective states. Submerged Lands Act clarified state three mile territorial sea boundaries (twelve mile territorial sea for Louisiana, Florida and Puerto Rico).
- C. Subject Matter: States generally legislated within their boundaries the fishing activity involved (e.g. nets) and the resource itself (e.g. species, size and quantity) regardless of the citizenship of the individual. It was the conduct itself that was first being proscribed.
- D. Scope: As resource management became the broader subject of state legislative action, the territorial application of state regulations extended beyond the boundaries of the state out of necessity. Generally, it extended to citizens of the state, vessels landing their catch in the state and vessels with a home port in the state regardless of the origin of the catch. Later, this extraterritorial application of the legislative action covered the fishing

activities of non-citizens if the state had an established and legitimate interest in the resource.

## II. Federal Basis.

- A. Magnuson Act: Section 306(a) clarifies the historical basis of state fishery management authority within the boundaries of the states. This section also provides for the federal preemption of state fishery management authority in the event the state is frustrating the federal regulation of a fishery resource within the fishery conservation zone which extends from the limit of the state's territorial sea out to two hundred miles (appendix A).
- B. Extraterritorial: The Magnuson Act clarifies state fishery management authority beyond its territorial boundaries by authorizing state regulation of fishing vessels "registered under the laws of the state."
1. Generally, there must be some nexus between the state and the fishing vessel being regulated. Note that the state is directly regulating the fishing vessel, and indirectly regulating the fishery beyond its boundaries. A nexus may exist if any one of the following factors is present:
    - a. minimum contacts with the state sufficient to constitute doing business in the state;
    - b. use of port facilities in the state for the landing of catch, or the taking on of fuel, bait or provisions;
    - c. state citizenship of the fishing vessel owner or master; or
    - d. state licensing of the fishing vessel, its owner or master (appendix B).

- C. Federal Regulations: 47 Fed. Reg. 12181 (March 22, 1982) establishes the interim procedures and substance for federal preemption of state fishery management authority (appendix C). Generally, the Secretary of Commerce is required to conduct an Adjudicatory Proceeding, with notice and opportunity for argument for the affected state. The Secretary must find that the state action or inaction substantially and adversely affects the carrying out of a fishery management plan.
- D. State Management Authority: States no longer legislate the management of a fishery resource subsequent to the advent of state regulatory agencies. Generally, the state administrative structures are composed of a marine fisheries agency with rulemaking authority. Enabling statutes of the various New England states are suspiciously similar (appendix D). Some state administrative structures are composed of a marine fisheries commission with members appointed by the Governor and having rulemaking authority. Most states have marine fishery advisory committees composed of industry representatives (appendix E).
- E. Case Law: The cases suggest that states have broad authority to regulate fishery resources within its boundaries, and in the absence of federal regulations in the fishery conservation zone, without its boundaries (appendix F). However, fertile areas for litigating state fishery management regulations include:
1. the public trust doctrine in the state (local government) regulation of shellfish resources. Questions remain concerning the legitimacy of restricting commercial access

- to shellfish resources to local residents;
2. commerce clause violations in state fishery management measures that unduly burden interstate commerce such as state residency restrictions;
  3. privileges and immunities clause violations in state fishery management measures that impermissibly discriminate against citizens from one state doing business in another state when protecting a local industry;
  4. equal protection clause violations in state fishery management measures that are based entirely on the citizenship of the individual; and
  5. supremacy of federal law when fishing vessels which are documented under the laws of the United States are denied access to state waters based solely on the residency of the owner or the home port of the fishing vessel.



## SEC. 306. STATE JURISDICTION

16 USC 1856.

(a) IN GENERAL--Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. For purposes of this Act, except as provided in subsection (b), the jurisdiction and authority of a State shall extend (1) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party and (2) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

Amended by 97-453.

(b) EXCEPTION.--(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that--

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over

such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

(c) EXCEPTION REGARDING FOREIGN FISH PROCESSING IN INTERNAL WATERS.--(1) A foreign fishing vessel may engage in fish processing within the internal waters of a State if, and only if--

Amended by 97-191.

(A) the vessel is qualified for purposes of this paragraph pursuant to paragraph (4)(C); and

(B) the owner or operator of the vessel applies to the Governor of the State for, and (subject to paragraph (2)) is granted, permission for the vessel to engage in such processing.

(2) The Governor of a State may not grant permission for a foreign fishing vessel to engage in fish processing under paragraph (1)(B) if he determines that fish processors within the State have adequate capacity, and will utilize such capacity, to process all of the United States harvested fish from the fishery concerned that are landed in the State.

(3) Nothing in this subsection may be construed as relieving a foreign fishing vessel from the duty to comply with all applicable Federal and State laws while operating within the internal waters of a State incident to permission obtained under paragraph (1)(B).

(4) For purposes of this subsection--

(A) The term "fish processing" includes, in addition to processing, the performance of any other activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, or transportation.

(B) The phrase "internal waters of a State" means all waters within the boundaries of a State except those seaward of the baseline from which the territorial sea is measured.

(C) A foreign fishing vessel shall be treated as qualified for purposes of paragraph (1) if the foreign nation under which it is flagged will be a party to (i) a governing international fishery agreement or (ii) a treaty described in section 201(b) of this Act (16 U.S.C. 1821(b)) during the time the vessel will engage in the fish processing for which permission is sought under paragraph (1)(B).

Chap. 336. AN ACT RELATIVE TO STATE FISHERY MANAGEMENT AUTHORITY.

Be it enacted, etc., as follows:

SECTION 1. Section 1 of chapter 130 of the General Laws, as most recently amended by section 6 of chapter 119 of the acts of 1978, is hereby further amended by inserting after the definition of "Quahog" the following definition:-

"Registered under the laws of the state", any vessel from a Massachusetts port which is licensed to operate for commercial fishing purposes under the authority of this chapter, or any vessel from a Massachusetts port which is operated for commercial fishing purposes by any person licensed under the authority of this chapter.

SECTION 2. Said section 1 of said chapter 130 is hereby further amended by striking out the last paragraph, as amended by section 2 of chapter 98 of the acts of 1945, and inserting in place thereof the following paragraph:-

This chapter and regulations made under the authority thereof shall apply to all marine fisheries and fish within the jurisdiction of the commonwealth and to all vessels registered under the laws of the commonwealth. This provision shall not be construed to limit the authority of the director to protect anadromous fish by providing for their passage from the coastal waters to spawning grounds in streams and ponds in inland waters and to regulate fisheries contained therein for the taking of such anadromous fish.

Approved July 10, 1981.

Massachusetts

**26. Marine organism.** "Marine organism" means any animal, plant or other life that usually inhabits salt water.

**27. Marine resources.** "Marine resources" means all renewable marine organisms and the entire ecology and habitat supporting those organisms.

**28. Marine resources' laws.** "Marine resources' laws" means chapter 419 and Part 9 or any other statute authorizing the commissioner or department to undertake any activity, and any regulation authorized by these statutes.

**29. Marine species.** "Marine species" means all marine animals except lobster, shellfish and marine worms.

**30. Marine worms.** "Marine worms" means sand, blood and clam worms.

**31. Parlor section.** "Parlor section" means that part of a lobster trap designed or intended to hold or detain lobsters until they are removed by the fisherman.

**32. Permit.** "Permit" means license.

**33. Person.** "Person" means any individual, firm, corporation or agency or political subdivision of government.

**34. Personal use.** "Personal use" means for consumption or use by oneself, by members of the immediate family or by invited guests.

**35. Process, the verb.** The verb "process" means handling, storing, cooking, preparing, producing, manufacturing, preserving, packing or other activity which could change the condition or form.

**35-A. Quahog.** "Quahog" means a marine mollusk, *Mercenaria mercenaria*, commonly called hard shelled clams, and *Artica icelandica*, commonly called mahogany quahogs.

**36. Registered vessel.** "Registered vessel" means a vessel which is owned or operated by a person licensed under this Part, a vessel which is used to bring a marine organism into the State or its coastal waters, or a vessel which is licensed under chapter 308 et seq.<sup>1</sup> or 46 U.S.Code, chapters 2<sup>2</sup> and 12<sup>3</sup> and section 808<sup>4</sup> and has declared at Maine home port.

**37. Retail.** "Retail" means sale, trade or service directly to the consumer for his personal use.

**37-A. Rigged.** "Rigged" means to have on board the equipment necessary to undertake the activity.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric  
Administration**

**50 CFR Part 619**

**Preemption of State Authority Under  
Section 306(b) of the Magnuson  
Fishery Conservation and  
Management Act**

**AGENCY:** National Oceanic and  
Atmospheric Administration (NOAA),  
Commerce.

**ACTION:** Interim final regulations.

---

**SUMMARY:** NOAA promulgates rules  
which interpret section 306(b) of the  
Magnuson Fishery Conservation and  
Management Act and specify the  
procedures governing the formal  
adjudicatory hearings specified in  
section 306(b). These rules apprise  
interested parties of NOAA's  
interpretations and procedures in the  
event that it becomes necessary to  
preempt State fishery management  
authority if State action or inaction

adversely affects Federal implementation of Fishery Management Plans. NOAA also solicits comments on the rules.

**DATE:** These rules are effective as interim rules. Comments must be submitted on or before April 21, 1982.

**ADDRESS:** Comments should be sent to the NOAA Office of General Counsel (GCF), Room 404, 3300 Whitehaven Street NW., Washington, D.C. 20235.

**FOR FURTHER INFORMATION CONTACT:** Frederick D. Kyle, 202-634-7486.

**SUPPLEMENTARY INFORMATION:** Section 306(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1856(b)) authorizes the Secretary of Commerce to apply Federal regulations to State waters (other than internal waters) if he finds certain facts in a formal adjudicatory hearing. This statutory provision supplements, but does not substitute for, the Constitutional doctrine of Federal Supremacy—that State laws which conflict with Federal regulations, or which proscribe activities permitted by Federal regulations, are superseded by those Federal regulations.

NOAA promulgates these rules to govern preemption hearings under section 306(b) when required. The rules accomplish two purposes. First, they interpret key statutory phrases (such as "predominately" and "substantially affects") regarding the factual findings for Federal preemption of State authority. Second, the rules set forth the procedures by which the process is governed, from commencement of the hearing through reinstatement of State authority. Certain of these procedures (e.g., commencement of the proceeding, personal decision by the Secretary, and reinstatement of State authority) are unique to preemption hearings. Procedures governing the actual conduct of formal adjudicatory hearings, however, are not unique to preemption hearings. With respect to the latter procedures, NOAA utilizes its previously published Hearing and Appeal Procedures, 15 CFR Part 904, Subpart C (48 FR 61653), with certain exceptions, (regarding sections not applicable to preemption hearings) to ensure uniformity of procedures in all its formal adjudicatory hearings.

#### Classification

NOAA promulgates these rules as interim final rules on the authority of 5 U.S.C. 553(b), which exempts interpretative and agency practice rules from notice-and-comment procedures. Nonetheless, NOAA solicits comments on these rules from interested parties

and will review them in light of the comments.

NOAA has determined that these rules, which interpret statutory provisions and prescribe procedures, are not "major" rules as defined in Executive Order 12291. These rules are not subject to requirements of the Regulatory Flexibility Act, and contain no collection of information requirements for purposes of the Paperwork Reduction Act of 1980. These regulations prescribe agency procedures and thus constitute a "categorical exclusion" from the requirements of the National Environmental Policy Act of 1969.

Dated: March 16, 1982.

Robert K. Crowell,  
Deputy Executive Director, National Marine Fisheries Service.

For the reasons set forth in the preamble, a new Part 619 is added to 50 CFR, Chapter VI, to read as follows:

#### PART 619—PREEMPTION OF STATE AUTHORITY UNDER SECTION 306(b)

##### Sec.

- 619.1 Purpose and scope.
- 619.2 General policy.
- 619.3 Definitions.
- 619.4 Factual predicates for Federal preemption.
- 619.5 Commencement of proceedings.
- 619.6 Rules pertaining to the hearing.
- 619.7 Administrative appeal.
- 619.8 Secretary's decision.
- 619.9 Application for Reinstatement of State Authority.

Authority. 16 U.S.C. 1856(b)

##### § 619.1 Purpose and scope.

The rules in this part, together with the requirements of 5 U.S.C. 554-557, prescribe procedures for the conduct of preemption hearings under section 306(b) of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1856(b). These rules are issued by the Secretary of Commerce pursuant to the authority of section 305(g) of the Act and the requirement of 5 U.S.C. 552(a)(1)(C).

##### § 619.2 General policy.

It is the policy of the Secretary of Commerce that preemption proceedings will be conducted expeditiously. The administrative law judge and counsel or other representative for each party are encouraged to make every effort at each stage of the proceedings to avoid delay.

##### § 619.3 Definitions.

As used in this part, unless the context clearly requires otherwise:  
*Act* means the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*

*Administrator* means the Administrator, National Oceanic and Atmospheric Administration (NOAA) or any person to whom the Administrator's authority has been delegated.

*Assistant Administrator* means the Assistant Administrator for Fisheries, NOAA, or any person to whom the Assistant Administrator's authority has been delegated.

*Council* means any appropriate Regional Fishery Management Council established under Title III of the Act.

*Party to the proceeding* means the Assistant Administrator and each State served with a notice of proposed preemption (as represented by such State's Attorney General or other official representative).

*Secretary* means the Secretary of Commerce.

*State* means any State or States, as defined in Section 3(21) of the Act, with respect to which action is taken under this part.

##### § 619.4 Factual findings for Federal preemption.

(a) The two factual findings for Federal preemption of State management authority over a fishery are:

(1) The fishing in a fishery, which is covered by a fishery management plan implemented under the Act, is engaged in predominately within the fishery conservation zone (FCZ) and beyond such zone; and

(2) A State has taken an action, or omitted to take an action, the results of which will substantially and adversely affect the carrying out of such fishery management plans.

(b) *Definitions.* In addition to definitions contained in section 3 of the Act, terms used in this section have the following meanings:

*Predominately* means, with respect to fishing in a fishery, that more fishing on the stock or stocks of fish covered by the fishery management plan occurs, or would occur in the absence of regulation, within or beyond the FCZ than within the boundaries of all States off the coasts of which the fishery is conducted. Whether fishing is engaged in "predominately" within or beyond the FCZ shall be determined after consideration of relevant factors, including but not limited to:

(1) The catch (based on numbers, value or weight of fish caught, or other relevant factors) or fishing effort during the appropriate period.

(2) In light of historical patterns of the distribution of catch or fishing effort for such stock or stocks of fish.

*State action or omission that affects a fishery covered by a fishery management plan includes a State's statutes, conservation and management regulations, judicial decisions, policies, and enforcement practices, or the lack thereof.*

*Substantially (affects).* Whether or not a State's action or omission will substantially affect the carrying out of a fishery management plan (FMP) for a fishery is determined after consideration of relevant factors, including but not limited to:

(1) The similarity or dissimilarity between:

(i) The goals, objectives, or policies of the State's action or omission and the management goals or objectives specified in the FMP for the fishery, or

(ii) The State and Federal conservation and management measures for the fishery;

(2) The effect of the State's action or omission upon:

(i) The achievement of the FMP's goals or objectives for the fishery;

(ii) The achievement of optimum yield from the fishery on a continuing basis;

(iii) The attainment of the national standards for fishery conservation and management (as set forth in section 301(a) of the Act) and compliance with other applicable law; and

(iv) The enforcement of regulations implementing the FMP;

(3) The proportion of the total fishery (stock or stocks of fish and fishing for such stocks) that occurs or has occurred within the boundaries of such State, or that is subject to the effects of a particular State's action or omission; and

(4) The characteristics and status (including migratory patterns and biological condition) of the stock or stocks of fish in the fishery.

#### § 619.5 Commencement of proceedings.

(a) *Notice of proposed preemption.* The Assistant Administrator may, if deemed necessary, initiate a proceeding under this part by issuing a notice of proposed preemption to the Governor and Attorney General of the State concerned. The notice shall contain:

(1) A recital of the legal authority and jurisdiction for instituting the proceeding;

(2) A concise statement of the § 619.4 factual findings for Federal preemption upon which the notice is based;

(3) The time, place, and date of the hearing; and

(4) Any regulations which the Assistant Administrator proposes to apply or promulgate with respect to fishing within the boundaries of the State.

(b) *Response.* The State shall have the opportunity to respond in writing to the notice of proposed preemption.

(c) *Amendment.* The Assistant Administrator may, at any time prior to the hearing, amend or withdraw the notice of proposed preemption. At the discretion of the administrative law judge, the Assistant Administrator may, after the hearing has begun but before the record is closed, amend or withdraw the notice of proposed preemption.

(d) *Proposed regulations—(1) In general.* If additional regulations are required to govern fishing within the boundaries of a State, the Assistant Administrator shall publish proposed regulations in the Federal Register concurrently with issuing the notice indicated in paragraph (a) of this section.

(2) *Emergency actions.* Nothing in this section shall prevent the Secretary from taking emergency action under section 305(e) of the Act.

#### § 619.6 Rules pertaining to the hearing.

The civil procedure rules of the National Oceanic and Atmospheric Administration currently set forth in 15 CFR Part 904, Subpart C, (or as subsequently amended), apply to the course of the hearing subsequent to commencement of the proceeding (pursuant to § 619.5) and prior to administrative appeal (§ 619.7), except that the following sections shall not apply:

15 CFR 904.201 (Definitions);

15 CFR 904.206(a)(1) (Duties and powers of judge); and

15 CFR 904.272 (Administrative review of decision).

#### § 619.7 Administrative appeal.

(a) *Right of appeal.* Within twenty (20) days after receiving the recommended decision, either party may appeal the decision to the Administrator. Any such appeal shall be made in writing and shall include a concise explanation of any factual or legal errors the party believes were made by the administrative law judge, and any alternative findings the party proposes that the Administrator make. A copy of the appeal shall be sent to the opposing party.

(b) *Response.* The opposing party shall have ten (10) days from receipt of a copy of the appeal in which to respond in writing. There shall be no further right of reply.

(c) *Administrator's authority.* Upon consideration of any such appeal, and response thereto, the Administrator may, on the basis of the hearing record and any materials submitted with respect to the appeal:

(1) Remand the case to the administrative law judge for such further proceedings as may be appropriate, along with a statement of reasons for the remand;

(2) Reserve decision on the merits or withdraw the notice of proposed preemption; or

(3) Accept or reject any of the findings or conclusions of the administrative law judge and submit a recommendation to the Secretary.

(d) *Recommendation to the Secretary.* If no appeal is filed, the Administrator shall promptly certify the hearing record and a recommendation to the Secretary. If an appeal is filed and the Administrator acts pursuant to paragraph (c)(3) of this section, the Administrator shall promptly certify the hearing record, any appeal record and his recommendation to the Secretary.

#### § 619.8 Secretary's decision.

(a) *Secretary's authority.* Based upon the hearing record, any appeal record, and the Administrator's recommendation, the Secretary shall decide whether the factual findings exist for Federal preemption of a State's authority within its boundaries (other than in internal waters) with respect to the fishery in question, or whether to remand the case to the Administrator for further proceedings as may be appropriate.

(b) *Notification.* (1) If the Secretary determines that the factual findings for Federal preemption exist, he shall notify in writing the Governor of that State and the appropriate Council of his preemption of that State's authority. The Secretary shall also direct the Administrator to promulgate appropriate regulations proposed pursuant to § 619.5(d), and otherwise to begin regulating the fishery within the State's boundaries.

(2) If the Secretary determines that the factual findings for Federal preemption do not exist, he shall notify in writing the Governor of that State and the appropriate Council of his determination. The Secretary shall also direct the Administrator to issue a notice withdrawing the regulations proposed pursuant to § 619.5(d).

#### § 619.9 Application for Reinstatement of State authority.

(a) *Application or Notice.* At any time after the promulgation of regulations under § 619.8(b)(1) to regulate a fishery within a State's boundaries, the affected State may apply to the Secretary for reinstatement of State authority, or the Secretary may of his own initiative serve upon such State a notice of intent

to terminate such Federal regulation. A State's application shall include a clear and concise statement of (1) the action taken by the State to correct the action or omission found to have substantially and adversely affected the carrying out of the fishery management plan, or (2) any changed circumstances which affect the relationship of the State's action or omission to take action to the carrying out of the fishery management plan; and (3) any laws, regulations or other materials which the State believes support the application.

(b) *Informal response.* If the Secretary determines that the application does not raise substantial and material issues of fact, he may accept or reject the application in his discretion. If the Secretary accepts the application and finds that the reasons for which he assumed regulation of the fishery within the boundaries of the State no longer prevail, he shall promptly terminate such regulation and publish any regulatory amendments necessary to accomplish that end.

(c) *Hearing.* Whenever the Secretary determines that the application raises substantial and material issues of fact, he may direct the Administrator to schedule hearings for the receipt of evidence by an administrative law judge. Hearings before the administrative law judge to receive such evidence shall be conducted in accordance with § 619.6. Upon conclusion of such hearings, the administrative law judge shall certify the record and his recommended decision to the Administrator. Upon consideration of the State's application, the hearing record, and any other relevant material, the Administrator shall recommend to the Secretary his determination. If the Secretary finds that the reasons for which he assumed regulation of the fishery within the boundaries of the State no longer prevail, he shall promptly terminate such regulation and shall publish any regulatory amendments necessary to accomplish that end.



**DIRECTORS, ET AL.—POWERS AND DUTIES 130 § 17A****Historical Note**

St.1968, c. 438, § 1, approved June 22, 1968, added subsections (8) and (9).  
 St.1971, c. 1104, an emergency act, approved Nov. 16, 1971, added subsection (10).

**Cross References**

Duties of division under supervision of director, see c. 21, § 5.  
 Similarity of provisions as to director of division of fisheries and game, see c. 131, § 4.

**Library References**

Fish ⇔ 11.

C.J.S. Fish § 37.

**§ 17A. Management of marine fisheries**

Upon petition signed by any interested party or upon his own motion, the director shall submit to the marine fisheries advisory commission proposals relating to the management of the marine fisheries. After public hearing, notice of which shall be published in a newspaper of general distribution in the areas affected, the commission shall in writing approve or disapprove such proposals. If any proposal is so approved, the director shall in accordance with such approval adopt, amend or repeal rules and regulations, subject to the approval of the commissioner, which shall govern the following activities only:

- (1) The manner of taking fish;
- (2) The legal size limits of fish to be taken;
- (3) The seasons and hours during which fish may be taken;
- (4) The numbers or quantities of fish which may be taken;

(5) The opening and closing of areas within the coastal waters to the taking of any and all types of fish; provided that no area shall be so opened or closed without the consent of the selectmen of the town or the mayor and council of the city affected thereby. Upon the request of the commission, the selectmen or mayor and council shall hold a public hearing upon the question and shall thereafter notify the commission in writing within forty-five days after such request has been received or consent will be deemed to have been granted.

No such rule or regulation shall require a license for the taking of finned fish from coastal waters for non-commercial purposes.

Added by St.1962, c. 715, § 8.

**20-3-2. Powers and duties.** — The marine fisheries council shall have regulatory jurisdiction over all marine animal species within the jurisdictional territory of the state. The council is authorized, after the holding of a public hearing to promulgate and adopt rules and regulations governing the following activities only, within the areas of its jurisdiction:

(a) The manner of taking fish, lobsters and shellfish.

(b) The legal size limits of fish, lobsters and shellfish to be taken or possessed.

(c) The seasons and hours during which fish, lobsters and shellfish may be taken or possessed.

(d) The numbers or quantities of fish, lobsters and shellfish which may be taken or possessed.

(e) The opening and closing of areas within the coastal waters to the taking of any and all types of fish, lobsters and shellfish.

**History of Section.**

As enacted by P.L. 1981, ch. 197, § 3.

**Compiler's Notes.** For repeal of former

section, see compiler's note to § 20-3-1.

Rhode Island

Appendix E

PART 1: FISHERIES LEGISLATION OF ASMFC MEMBER STATES

The chart spanning the next eleven pages is a compilation of information on the administrative structure and statutory provisions of the member states of ASMFC. It should be examined in its own right and used as a reference for all future reports issued in connection with this contract. With it, readers can assess the appropriateness of a given proposed law or course of action for a state, and they can make an estimate of the effort needed to effect a change in the regulatory process - or indeed of whether change is possible.

MAINE  
DEPARTMENT OF MARINE RESOURCES

Agency structure or position

n.i.s.\*

Authority

Title 12, sec. 6171      Department can make regulations with consent of  
(legislative) advisory council.

Administrative procedures

Title 12, sec. 6171      Must give prior notice and hold public hearing.

Title 12, sec. 6191      Must follow state Administrative Procedures Act,  
Title 5, sec. 8001 et seq.

ASMFC legislation

Title 12, sec. 46001      State may participate in ASMFC.

Other interstate provisions

n.i.s.

Remarks

Maine has interpreted its present ASMFC authorizing legislation as giving ASMFC authority to make regulations on behalf of the state.

\*n.i.s. = not in statute.

NEW HAMPSHIRE  
DEPARTMENT OF FISH AND GAME

Agency structure or position

r n.i.s.

Authority

Chap. 206:10 Department has power to promulgate rules and regulations.

Chap. 206:19 Department has power to enforce rules and regulations and impose penalties.

Administrative procedures

Chap. 206:11 Every odd-numbered year on the first Monday in June, the Department must hold a public hearing to consider public views on regulations.

ASMFC legislation

Chap. 213:1 State may participate in ASMFC.

Other interstate provisions

Chap. 206:27 "Reciprocal Agreement with Maine and Massachusetts in Regard to Enforcement"

Chap. 213-a:1 Connecticut River Atlantic Salmon Compact (with Massachusetts and Connecticut) is given power to promulgate certain regulations dealing with salmon fisheries. Can issue licenses. Police agencies are authorized to enforce.

Remarks

Chap. 213-a:1 offers clear precedent for New Hampshire's conferring regulatory powers on a compact.

MASSACHUSETTS  
DIVISION OF MARINE FISHERIES

Agency structure or position

A division of the Department of Fisheries, Wildlife, and Recreational Vehicles.

Authority

Chap. 130, sec. 17            Division has power to adopt rules and regulations with governor's approval.

No statute dealing with enforcement.

Administrative procedures

Chap. 130, sec. 17a        Governor appoints the Marine Fisheries Advisory Commission, which holds public hearings and publishes notice. It can approve regulations. (In 384 N.E. 2d 233 the Supreme Judicial Court found this process constitutional.)

ASMFC legislation

Chap. 489, sec. 1.1-1.5    Authorizes participation in ASMFC.  
(Acts of 1941); also  
Appendix to Chap. 130

Other interstate provisions

322 Code Mass. Regs 5.01 Northern Shrimp Fishery regulations

322 Code Mass. Regs 9.01 Management of Massachusetts Herring Fishery

RHODE ISLAND  
DEPARTMENT OF NATURAL RESOURCES

Agency structure or position

Department has advisory council of 7 persons appointed by the governor.

Authority

Chap. 20-1-4              Director of department has authority to promulgate and enforce rules and regulations.

Administrative procedures

n.i.s.

ASMFC legislation

Chap. 20-8-1              State may participate in ASMFC.

Other interstate provisions

n.i.s.

CONNECTICUT  
DEPARTMENT OF ENVIRONMENTAL AFFAIRS

Agency structure or position

n.i.s.

Authority

- Title 26, sec. 3            Department is authorized to promulgate rules and regulations.
- Title 26, sec. 111        Authorizes regulations on sports fisheries.
- Title 26, sec. 159a      Authorizes regulations on commercial fisheries.

Administrative procedures

- Title 26, sec. 112      Enumerates types of regulations and gives requirements for notice and hearings (sports).
- Title 26, sec. 159c      Gives requirements for notice and hearings (commercial).

ASMFC legislation

- Title 26, sec. 295      Authorizes participation in ASMFC.

Other interstate provisions

- Title 26, sec. 26        Provides for reciprocal enforcement of fish and game laws in New York, Rhode Island, and Massachusetts.
- Title 26, sec. 302      Authorizes participation in the Atlantic Salmon Compact.

Remarks

Reciprocal enforcement statute is a step toward interstate regulatory agreement.

NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Agency structure or position

n.i.s.

Authority

Title 3, sec. 0301(2m) Authorizes state to adopt and enforce rules and regulations.

Title 13, sec. 0301 et seq. Presents specific legislation on marine fisheries having the form of regulations

Administrative procedures

n.i.s.

ASMFC legislation

Title 13, sec. 0371 Authorizes participation in ASMFC.

Other interstate provisions

Title 11, sec. 0303 Confers power to enter reciprocal and cooperative agreements.

Remarks

Legislature makes "regulations" as statute. It may be reluctant to cede this authority to ASMFC.

NEW JERSEY  
DIVISION OF FISH, GAME, AND WILDLIFE

Agency structure or position

In Department of Environmental Protection. Marine Fisheries Commission is an 11-member body (with 9 members appointed by the governor) having power to disapprove regulations; see below for exception.

Authority

23:2b-4 Commissioner of Division may propose rules and regulations to the Marine Fisheries Commission

Administrative procedures

23:2b-6 Commissioner can prepare fish management plans and propose and promulgate rules and regulations in accordance with the Administrative Procedures Act. Regulations coming under purview of that Act do not have to be put before the Marine Fisheries Commission.

ASMFC legislation

n.i.s.

Other interstate provisions

- 23:2b-8 Commissioner can enter into reciprocal agreements with other jurisdictions on rules and regulations
- 23:9-56-58 Commission can make agreements with Delaware regarding fishing rights on Delaware River and Bay.

Remarks

A structure appears to exist (23:2b-8) for conferring regulatory power on an interstate compact.

PENNSYLVANIA  
PENNSYLVANIA FISH COMMISSION

Agency structure or position

- Title 30, sec. 301 Nine members are appointed by the governor with senate approval.

Authority

- Title 30, sec. 322 Commission can promulgate rules and regulations concerning fisheries management.
- Title 30, sec. 2102 Commission can promulgate rules and regulations concerning fish and fishing.

Administrative procedures

n.i.s.

ASMFC legislation

- Title 30, sec. 7101 Authorizes participation in ASMFC.

Other interstate provisions

- Title 30, sec. 905 Authorizes reciprocal enforcement with New York and New Jersey of all rules governing fisheries on the Delaware River.
- Title 30, sec. 7301 Designates New York, New Jersey, Pennsylvania, and Delaware as the "Mid-Atlantic Section of ASMFC" and authorizes mutual agreements on rules govern-



ing shad fishing, together with enforcement provisions.

Remarks

Although Pennsylvania has not formally adopted Amendment One, it appears to have gone farther than most states toward authorizing regulation by the compact (Title 30, sec. 7301) in connection with the shad fishery.

DELAWARE  
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

Agency structure or position

n.i.s.

Authority

Title 7, sec. 102            The Department Secretary may promulgate rules and regulations.

Administrative procedures

Title 7, sec. 103            Secretary must publish proposed rules and regulations in two newspapers and hold public hearings.

Title 7, sec. 104            Secretary may delegate duties if such delegation is consistent with Title 29, sec. 80.

ASMFC legislation

Title 7, sec. 1501            Authorizes participation in ASMFC.

Other interstate provisions

Title 7, sec. 902            Grants fishing rights on Delaware River and Bay to Delaware and New Jersey residents.

Remarks

It is possible that Title 7, sec. 104 could be a vehicle by which the Department could convey regulatory authority to ASMFC.

MARYLAND  
FISHERIES ADMINISTRATION

Agency structure or position

Within the Department of Natural Resources

Authority

Title 4                      Legislation in the form of regulations governing fisheries.

No statutory authorization for rule making by the Fisheries Administration or the Department of Natural Resources.

Administrative procedures

n.i.s.

ASMFC legislation

Title 4, sec. 301            Authorizes participation in ASMFC.

Other interstate provisions

Title 4, sec. 306           Potomac River Compact: article 3 gives the compact power to make regulations; article 4 prescribes procedures for regulation; article 5 prescribes procedures for enforcement.

Title 4, sec. 606           Authorizes reciprocal licensing provisions with Virginia, West Virginia, and Pennsylvania.

Remarks

The Potomac River Compact seems a clear indication of precedent for the kind of regulatory authority sought by ASMFC, but it is a two-state compact.

VIRGINIA  
MARINE RESOURCES COMMISSION

Agency structure or position

Consists of a chairman and six members appointed by the governor.

Authority

Sec. 28.1-23                Commission has authority to make regulations.

Administrative procedures

Sec. 28.1-24                Procedure specified for publishing regulations.

Sec. 28.1-26                Hearing procedure specified for regulations.

ASMFC legislation

Sec. 28.1-202 Authorizes participation in ASMFC and adopts Amendment One.

Other interstate provisions

Sec. 28.1-203 Potomac River Compact with Maryland. Article 3, sec. 88 gives Potomac River Fish Commission power to make rules and regulations; article 4 specifies procedures for rule making; article 5 grants enforcement authority.

Remarks

Potomac River Compact provisions establish a precedent for granting rule making authority to a compact, but it is a two-state compact.

NORTH CAROLINA  
MARINE FISH COMMISSION

Agency structure or position

Together with the Wildlife Resources Commission, the Marine Fish Commission is part of the Department of Natural Resources and Community Development.

Authority

Title 113-134 Marine Fish Commission can promulgate rules and regulations.

Title 113-132 Where freshwater fish are found in coastal waters, the two commissions have mutual jurisdiction.

Administrative procedures

Title 113-221 Sets forth procedures for making regulations.

ASMFC legislation

Title 113-251 Authorizes participation in ASMFC.

Title 113-253 Adopts Amendment One.

Other interstate provisions

n.i.s.

SOUTH CAROLINA  
WILDLIFE AND MARINE RESOURCES COMMISSION

Agency structure or position

Within the Department of Wildlife and Marine Resources.

Sec. 50-3-10

Commission consists of 9 members, one from each congressional district and one appointed by the governor.

Authority

50-3-80

Commission has power to recommend legislation and authority to investigate fish and game conditions.

50-17-10 et seq.

Legislation resembling fisheries regulations.

Administrative procedures

n.i.s.

ASMFC legislation

50-7-10

Authorizes participation in ASMFC.

Other interstate provisions

n.i.s.

Remarks

"Regulations" are made by the legislature and enacted as statute.

GEORGIA  
BOARD OF NATURAL RESOURCES

Agency structure or position

Within Department of Natural Resources.

Title 2, sec. 2201

One member from each congressional area; others appointed by the governor and approved by the senate.

Authority

Title 45, sec. 103

Board has authority to promulgate rules and regulations.

Administrative procedures

n.i.s.

ASMFC legislation

Title 45, sec. 721 Authorizes participation in ASMFC.

Other interstate provisions

Title 45, sec. 107 Board can enter reciprocal agreements with bordering states concerning fish licenses.

Title 45, sec. 728-731 Agreements on mutual enforcement of inland waterways with South Carolina, North Carolina, Alabama, and Florida.

FLORIDA  
DIVISION OF MARINE RESOURCES

Agency structure or position

Part of the Department of Natural Resources

Authority

370.021 May promulgate rules and regulations. Power to regulate taking or possession of saltwater fish is reserved to the state.

Administrative procedures

370.021 Director of Division submits them to the Department, which publishes notice.

ASMFC legislation

370.19 Authorizes participation in ASMFC.

Other interstate provisions

370.20 Authorizes participation in Gulf States Marine Fisheries Commission.

370.18 Department may enter reciprocal agreements on shrimp and prawn fisheries.

Remarks

The requirement that regulatory power regarding saltwater fish be reserved to the state appears intended to thwart the operation of an interstate regulatory compact.

Appendix F

- States have very broad constitutional authority to regulate fishing within their territorial waters. Manchester v. Massachusetts, 139 U.S. 240 (1891).
- States may regulate commercial items which are predominantly local in nature, even if there is an incidental impact on interstate commerce. South Carolina State Highway Dep't. v. Barnwell Bros., 303 U.S. 177 (1938).
- The broad constitutional authority of a state applies to citizens and non-citizens within the territorial waters. Glenovich v. Noerenberg, 346 F. Supp. 2186 (D. Alaska 1972).
- States may prohibit the possession of game lawfully caught in another jurisdiction from being possessed unlawfully in that state. Silz v. Hesterberg, 211 U.S. 31 (1980).
- States may require a permit for all fishing vessels operating within state waters regardless of the origin of the catch. Santa Cruz Oil Corp. v. Milnor, 55 Ca. App. 2d 56, 130 P. 2d 256 (1952).
- States may regulate fishing activities beyond their territorial waters if there is a legitimate interest in enforcing state regulations of the same fishery within territorial waters. Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936).
- States may regulate a migratory fishery that occurs both within and without its territorial waters. State v. Bundrant, 546 P.2d 530 (1976).
- States may regulate the fishing activities of its citizens beyond the territorial waters. Skiriotes v. Florida, 313 U.S. 69 (1941).
- States may regulate fishing activity beyond their territorial waters if the fish is landed in the state. Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936).
- States may not protect local interests in violation of the commerce clause of the U.S. Constitution. Tomer v. Witsell, 334 U.S. 385 (1948).
- States may not impermissibly discriminate against non-citizens in violation of the privileges and immunities clause, or the equal protection clause of the U.S. Constitution. Tangier Sound Waterman's Association v. Douglas, 541 F. Supp. 1286 (E.D. Va. 1982).
- States may not deny access to territorial waters fishing to non-resident fishermen whose fishing vessels are documented under the laws of the United States. Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).

**WHITE DOVE, INC.**

v.

**DIRECTOR OF the DIVISION OF  
MARINE FISHERIES<sup>1</sup> et al.<sup>2</sup>**

Supreme Judicial Court of Massachusetts,  
Suffolk.

Argued Feb. 7, 1980.

Decided April 23, 1980.

Commercial fishing corporation brought action attacking validity of Massachusetts regulation governing the taking of Atlantic blue fin tuna. On certification of question of law by the United States District Court for the District of Massachusetts, the Supreme Judicial Court, Kaplan, J., held that Director of Division of Marine Fisheries had statutory authority to promulgate the regulation.

Question answered.

2. Kenneth A. Crossman, Director of the Massachusetts Division of Law Enforcement. See G.L. c. 21, § 6.

1. Fish ⇐ 8

Director of Division of Marine Fisheries had statutory authority to promulgate regulation governing taking of Atlantic blue fin tuna. M.G.L.A. c. 130, §§ 2, 17A, 80, 104.

2. Administrative Law and Procedure ⇐ 390

For an agency's regulations to be valid, no more need be discerned than some rational relation between the regulation and the empowering statute.

3. Constitutional Law ⇐ 72

Respect is owing to an agency's own view that its regulation is within empowering statute.

4. Administrative Law and Procedure ⇐ 749

Presumption exists that an agency regulation does not exceed its empowering statute which is as strong as presumption that a statute squares with the Constitution.

Gene K. Landy, Boston, for plaintiff.

Carl Valvo, Asst. Atty. Gen., for defendants.

Before HENNESSEY, C. J., and QUIRICO, BRAUCHER, KAPLAN and LIACOS, JJ.

KAPLAN, Justice.

In December, 1978, the plaintiff White Dove, Inc., a New Jersey corporation engaged in commercial fishing, commenced an action in the United States District Court for the District of Massachusetts attacking on various Federal and "pendent" State grounds the validity of 322 Code Mass. Regs. § 6.04, a 1976 regulation of the Massachusetts Division of Marine Fisheries governing the taking of Atlantic bluefin tuna. Under the regulation, the plaintiff's vessel *White Dove* could not obtain a "special permit," which would entitle it to take bluefin tuna by purse seine, for the reason that it had not operated in that purse seine fishery in Massachusetts prior to 1974. One of the

claims advanced by the plaintiff in United States District Court was that the regulation was not authorized by statute. The District Judge denied the plaintiff preliminary injunctive relief against the regulation, and at the same time, on the defendants' motion, certified to this court under S.J.C. Rule 3:21 the question: "Did the Director of the Division of Marine Fisheries have statutory authority under G.L. c. 130, §§ 2, 17A, 80, and 104 to promulgate the 1976 tuna purse-seine regulation?" We shall answer the question, "Yea."

[1] Accompanying the certified question is a statement of facts (see S.J.C. Rule 3:21, § 3[2], 359 Mass. 790 [1971]) which we condense, avoiding some detail, as follows. It is the giant bluefin tuna (300 pounds and over) that is of interest here. From December to June these fish are not found in Massachusetts waters, as part of the population moves to the Gulf of Mexico and another into mid-Atlantic waters. The fish are first sighted off the Massachusetts coast in early June and remain in the locality—both within and outside Massachusetts waters—well into the autumn. Cape Cod Bay is an important fishing ground, and it may be—so the plaintiff has contended—that in many, but not all years, the fish appear in "seivable configurations" only within that Bay.

The fish are taken mostly by purse seine or handgear. By the former method, an airplane spots a school and the mother vessel pays out a net around it, closes (purse) the net, and brings the net and contents onto the deck. Handgear fishing is done by individual handline (or rod and reel or harpoon) from relatively small boats.

In recent years the giant bluefin tuna have been destined predominantly for the Japanese market. They are not much fancied in this country, being darker, oilier, and with higher concentrations of mercury than the school-size (smaller) tuna.

In 1974, the Director adopted a regulation of the purse seine and handgear fisheries for the tuna. Purse seine fishing was allowed only in September and October but



not beyond a total seine quota of 225 short tons; it was limited to vessels "having operated in the purse seine fishery for bluefin tuna in Massachusetts since 1964." Hand-gear fishermen each had a catch limit of two a day (or, at the option of any individual or company that had taken the fish in 1973, a seasonal limit equal to 80% of his or its 1973 catch).

A Federal Atlantic Tunas Convention Act, 16 U.S.C. § 971, et seq., was passed in 1975. Regulations thereunder (50 CFR §§ 285.29, 285.30, set forth at 44 Fed.Reg. 36050 [1979]) establish a total quota for all purse seine vessels of 300 tons of the fish; when that weight is reached, this kind of fishing for the giant tuna is closed until the following August 15. Each vessel using hand gear is permitted to take no more than one giant fish a day with a yearly limit for all vessels of 1,128 tons (northern area), or five fish a week with a limit of ninety tons (southern area). There are provisions for giving notice of fish taken.

In view of the Federal regulations, the Director after due procedures adopted the 1976 regulation (reproduced in the margin)<sup>3</sup> repealing the 1974 catch limits. The material provisions prohibited seine fishing before September 1, stated that no vessel should take bluefin tuna by purse seine without a "special permit for a regulated fishery" to be issued by the Director, and limited these permits to "those vessels having operated in the purse seine fishery for bluefin tuna in Massachusetts prior to 1974, as ascertained by official vessel logs or other accredited records."

3. "6.04: Taking of Atlantic Bluefin Tuna *Thunnus thynnus*

"Rules and regulations governing the taking of Atlantic Bluefin Tuna, *Thunnus thynnus*, by Net adopted under provisions of the General Laws of the Commonwealth of Massachusetts, Chapters 30A and 130, Sections 2, 17A 80 and 104.

"(1) The use of nets for taking bluefin tuna other than purse seine or trap as prescribed in the following is prohibited: (a) Bluefin tuna may be taken in approved fish traps. However, the Director shall have the right to inspect any fish trap and modify its operation if he deems the trap is being set specifically to take bluefin tuna. (b) No vessel shall take or attempt to take bluefin tuna with a purse seine

As noted, the plaintiff's vessel *White Dove* could not qualify for a special permit under the 1976 regulation because it had not participated in the purse seine fishery before 1974; it was not equipped for tuna seining until 1976 and did not attempt such seining (which it could do outside Massachusetts coastal waters notwithstanding the regulation) until 1977. Similarly disqualified were two other prospective applicants for special permits. Only two vessels have obtained such permits, *A.A. Ferrante* and *Sea Rover*. The owners of these vessels operate them as a single company, selling the catch to a Japanese company. When the regulation was promulgated in 1976 the Division knew that these two vessels had participated in the seine fishery for the tuna prior to 1974 and knew of no other vessel currently in the fishery which had so participated.

1. The 1976 regulation, in the form of a "proposal," had to be given a public hearing and receive approval by the Marine Fisheries Advisory Commission (established by G.L. c. 21, § 5A), and in the form of a regulation, required approval of the Commissioner of Fisheries, Wildlife and Recreational Vehicles, all before issuance by the Director. (See G.L. c. 130, § 17A, par. 1, and State Administrative Procedure Act, G.L. c. 30A, § 2.) The regulation is now to be measured against the substantive empowering provisions, notably those of G.L. c. 130, § 17A and § 80. The former speaks of proposals "relating to the management

without a Special Permit for a Regulated Fishery issued by the Director of Marine Fisheries. Special Permits for a Regulated Fishery to take bluefin tuna with a purse seine shall be limited to those vessels having operated in the purse seine fishery for bluefin tuna in Massachusetts prior to 1974, as ascertained by official vessel logs or other accredited records.

"(2) Taking or attempting to take bluefin tuna with a purse seine prior to September 1, is prohibited.

"(3) Violation of these rules and regulations will result in immediate revocation of the Special Permit for a Regulated Fishery and shall be subject to a fine of not less than ten dollars nor more than one thousand dollars."

of the marine fisheries," eventuating in "rules and regulations . . . which shall govern the following activities only: (1) The manner of taking fish" (and other listed matters).<sup>4</sup> And § 80 states in part: "No person shall take or sell fish from a fishery regulated by the director without a regulated marine fishery permit, in addition to any other permit that may be required by this chapter."<sup>5</sup>

The plaintiff points out that there is no statutory provision which in terms authorizes a regulation "limiting entry," whence the plaintiff apparently reasons that all comers (presumably the holders of the ordinary commercial fisherman permits, see note 5) must be allowed to enter the purse seining fishery for the tuna, whose lawful catch has been severely controlled by the Federal authorities in the interests of conservation. But "the management of the marine fisheries" in respect to "[t]he manner of taking fish" is a power of considerable dimension. "Manner" is surely not to be read as dealing just with the details of the physical process of reducing fish to possession; it takes in also some regulation of the industrial setup for the taking of fish. And in that connection there is nothing to forbid the Director from applying the device of limiting entry even though that is

not made the subject of a separate conferral of power in the statute. Thus, as the Director suggests, the § 17A(1) power, playing in with the existing tight Federal limitation of the seine fishery catch, could be exerted appropriately to prevent "overcatching."<sup>6</sup> So also the power could be used to prevent "gear" conflicts between the seine and handgear fisheries.<sup>7</sup> Approaching the matter from another angle, we would expect common agreement that it would be a regulation of "manner" to prohibit altogether purse seining for the giant fish (as has been done in the case of salmon, 322 Code Mass.Reg., § 3.06), and to allow only the handgear method. The 1976 regulation, following progressively the 1974 regulation, may be seen as a step to the end of eliminating the seining of the giant fish in waters within our jurisdiction, for the vessels now allowed special permits will drop out of service or be otherwise eliminated or diverted in the course of time. In promoting any of the purposes mentioned, the Director and his advisors could properly decide to give consideration to the reliance interests of those already in the business of seine fishing for the tuna; hence the use of the device of barring entry to newcomers—a point on which the recent case of *New Orleans v. Dukes*, 427 U.S. 297, 96

4. General Laws c. 130, § 17A, provides: "Upon petition signed by any interested party or upon his own motion, the director shall submit to the marine fisheries advisory commission proposals relating to the management of the marine fisheries. After public hearing, notice of which shall be published in a newspaper of general distribution in the areas affected, the commission shall in writing approve or disapprove such proposals. If any proposal is so approved, the director shall in accordance with such approval adopt, amend or repeal rules and regulations, subject to the approval of the commissioner, which shall govern the following activities only: (1) The manner of taking fish; (2) The legal size limits of fish to be taken; (3) The seasons and hours during which fish may be taken; (4) The numbers or quantities of fish which may be taken; (5) The opening and closing of areas within the coastal waters to the taking of any and all types of fish; provided that no area shall be so opened or closed without the consent of the selectmen of the town or the mayor and council of the city affected thereby. Upon the request of the commission, the selectmen or mayor and council shall hold a

public hearing upon the question and shall thereafter notify the commission in writing within forty-five days after such request has been received or consent will be deemed to have been granted.

"No such rule or regulation shall require a license for the taking of finned fish from coastal waters for non-commercial purposes."

5. The "other permit" here involved is the ordinary "commercial fisherman permit." See § 80.

6. It is indicated that three vessels purse seining the giant tuna in a single day have accounted for nearly half the 300 ton quota. The potential for overcatching is thus considerable.

7. Conflict between purse seiners and those taking with less enveloping equipment may be called traditional. See *Corza v. Towers*, 149 F.Supp. 771, 778 (D.Md.) (three-judge court), aff'd, 355 U.S. 37, 78 S.Ct. 116, 2 L.Ed.2d 70 (1957) (per curiam).

S.Ct. 2513, 49 L.Ed.2d 511 (1976), is suggestive.<sup>8</sup>

[2-4] In light of the foregoing, the validity of the 1976 regulation can be upheld with minimal dependence on various supportive canons of interpretation well settled in this jurisdiction, in particular: That no more need be discerned than some rational relation between the regulation and the empowering statute. See *Consolidated Cigar Corp. v. Department of Pub. Health*, 372 Mass. 844, 855, 364 N.E.2d 1202 (1977); *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973). That respect is owing to an agency's own view that its regulation is within the statute. See *Casa Loma, Inc. v. Alcoholic Beverages Control Comm'n.*, — Mass. —, —<sup>a</sup>, 385 N.E.2d 976 (1979); *Board of Educ. v. Assessors of Worcester*, 368 Mass. 511, 515-516, 333 N.E.2d 450 (1975). That, indeed, there is a presumption that the regulation does not exceed the statute which is as strong as the presumption that a statute squares with the Constitution. See *Levy v. Board of Registration & Discipline in Medicine*, — Mass. —, —<sup>b</sup>, 392 N.E.2d 1036 (1979); *Colella v. State Racing Comm'n.*, 360 Mass. 152, 159, 274 N.E.2d 331 (1971).

2. We deal with miscellaneous contentions of the plaintiff which fail, in our view, to overcome the interpretive result indicated. (a) The plaintiff makes a last minute discovery that in 1975 the Department of Natural Resources (which then embraced the Division of Marine Fisheries) sponsored a bill (1975 House Doc. No. 238) to amend § 17A to grant the Director the power to adopt regulations to govern a sixth "activity"—"[t]he amount of fishing effort." The Legislature did not adopt the proposal, but

it is possible to trace the bill into an enactment which limits to 1,300 the number of commercial lobster permits the Director may issue annually. G.L. c. 130, § 38B, inserted by St.1975, c. 484, § 1. The argument is that the Division and the Legislature understood in 1975 that there was a lack of power to issue a regulation on the style of the 1976 regulation and that the bill was designed to supply the power. But it may be that the bill looked simply to a power to limit the number of permits, which the 1976 regulation did not purport to do. In all events, the intimation of a consciousness of lack of power must face the fact that the Division had issued in 1974 a regulation resembling the 1976 regulation. The question, moreover, is what was intended by the original enactment of § 17A, and inaction by a subsequent Legislature carries little weight in defining that intent. See *Massachusetts Comm'n Against Discrimination v. Liberty Mut. Ins. Co.*, 371 Mass. 186, 193-194, 356 N.E.2d 236 (1976). If inaction is given much weight, an agency would be reluctant to seek merely clarifying amendments for fear of the inference that would be drawn from their failure to pass. *Id.* at 194, 356 N.E.2d 236.

(b) Counsel remind us of the common law tradition that the right to fish is "public and common to every person," *Weston v. Sampson*, 8 Cush. 347, 352 (1851), and we are warned against a casual derogation from the common law. It may be enough to say that the current reality is not a common law regime penetrated here and there by statute, but a well statutized law of marine fisheries.

(c) The plaintiff reaches back to *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824), for the argument that the licensing of *White*

<sup>8</sup> Here the Court upheld an ordinance of the city of New Orleans outlawing from the "French Quarter" all pushcart vendors who had been in business less than eight years. The legislative objective was to preserve the area's charm by eliminating all these peddlers but, "rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could [as against a claim of arbitrariness] rationally choose initially to eliminate vendors of more recent vintage. This gradual

approach to the problem is not constitutionally impermissible. . . . The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation . . . ." *Id.* at 305, 96 S.Ct. at 2517-2518.

a. Mass.Adv.Sh. (1979) 291, 296.

b. Mass.Adv.Sh. (1979) 1857, 1864.

Dove to engage "in the coasting trade and the taking of fish of every description" under the Federal Enrollment and Licensing Act of 1793, 46 U.S.C. § 263 (1976), forbids the Commonwealth to bar the plaintiff's vessel from the seine fishing while admitting other vessels to it. We recognize that on this question of preemption we do not have the last word. But as the plaintiff urges us to consider the possibility of preemption as conditioning our interpretation of § 17A(1), we have to say that *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 904 (1977), suggests that that possibility is remote indeed, since neither our statute nor the regulation thereunder affords any preferential treatment to in-State vessels, and prevention of "over-catching" and so on is within the Commonwealth's police power. See *Manchester v. Massachusetts*, 139 U.S. 240, 11 S.Ct. 559, 35 L.Ed. 159 (1891); *Smith v. Maryland*, 18 How. 71, 15 L.Ed. 269 (1855).

The plaintiff complains, finally, of what it terms the "monopolistic" tendency or effect of the 1976 regulation. But this alleged iniquity is not a matter for consideration here.

The question certified is answered "Yes." This opinion will be forwarded to the certifying court and the parties in accordance with S.J.C. Rule 3:21, § 7, 359 Mass. 790 (1971).

rello, J., of first-degree murder and assault and battery with a dangerous weapon, and he appealed. The Supreme Judicial Court, Kaplan, J., held that: (1) grand jury testimony given by witness, who subsequently died, was not admissible under "prior recorded testimony" exception to hearsay rule for purpose of establishing defendant's criminal irresponsibility; (2) such grand jury testimony was not admissible under any "innominate" exception; (3) any error in exclusion of the grand jury testimony would have been harmless; (4) references to defendant's prior incarcerations in the evidence introduced by Commonwealth did not involve any error; (5) even if there had been error in that regard, it was not prejudicial, and (6) prosecutor's opening remarks and testimony in which defendant was pictured as saying at time of his arrest that he would tell everything in exchange for a promise that he would be sentenced to certain facility, rather than another, was not prejudicial.

Judgments affirmed.

## REPRESENTING FOREIGN FISHING INTERESTS

Presentation by

Jay D. Hastings

East Coast Fisheries Law Conference  
June 24-25, 1983  
Portland, Maine

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### FISHERIES MANAGEMENT REGULATION: WHAT WE CAN LEARN FROM THE JAPANESE EXPERIENCE IN THE FISHERY MANAGEMENT PROCESS

The purpose of this presentation is to provide a better understanding for fishery management problems under the Magnuson Fishery Conservation and Management Act from the perspective of Japanese fishing interests. Representing Japanese fishermen offers a unique insight into the fishery management process and its problems under the Magnuson Act. We stand to learn a good deal from the Japanese experience in this process.

Fisheries management under the Magnuson Act is a complex multidisciplinary process which naturally gives rise to a multiplicity of legal and policy issues. For Japanese and other foreign fishermen, most of these issues have been raised in the context of encouraging U.S. fisheries development. Optimum yield (OY) determinations and time and area closures are primary examples of management measures intended to encourage U.S. fisheries development by restricting foreign fishing. The major legal and policy questions raised by these management measures relate to the extent and scope of authority under the Magnuson Act for encouraging the development of U.S. fisheries. Case law has not yet developed on these questions.

Below I have outlined a few of the legal and policy questions raised by OY determinations intended to encourage U.S. fisheries development at the expense of foreign fishing. I have also briefly outlined the procedures we follow for representing foreign fishermen in the fishery management process. The latter outline has been largely developed from a presentation by Mr. Paul

MacGregor given at the First Annual National Fishery Law Symposium on Advising the Fishing Industry, held in Seattle during October of 1982.

I. OPTIMUM YIELD DETERMINATIONS INTENDED TO ENCOURAGE U.S. FISHERIES DEVELOPMENT AT THE EXPENSE OF FOREIGN FISHING

Optimum yields have been specified in at least two fisheries (Tanner crab and butterfish) to eliminate or reduce a foreign fishery as a means to encourage U.S. fisheries development. Japanese fisheries and their markets have been major targets of these actions. The theory underlying these OY determinations is that if the supply of fish entering a foreign market from a foreign allocation is eliminated or reduced, foreign nations will be encouraged to fill the market void through increased purchases from the U.S. industry. Below I have outlined a few of the legal and policy questions raised by these determinations.

A. Has the OY been Properly Assessed and Specified?  
Section 303(a)(3).

1. Does the OY value provide the greatest overall benefit to the Nation? Section 3(18).
  - a. In terms of food production?
  - b. In terms of recreational opportunities?
  - c. In terms of maintaining reciprocal trade benefits with foreign trading partners? Maine v. Kreps, 563 F.2d 1043 at 1049 (1st Cir. 1977).
2. Has the OY been prescribed as such on the basis of the maximum sustainable yield (MSY)?
  - a. What is the MSY or acceptable biological catch (ABC) of the fishery?
  - b. Has the fishery ever produced at the MSY/ABC?
  - c. What are the economic and/or social parameters of the fishery producing at the MSY/ABC or historical levels of fishing?
  - d. What economic and/or social factors or data suggest the resource should not be fished at the MSY/ABC level?

- e. What economic and/or social factors support a specified level of fishing other than the MSY/ABC level?
  - f. Does the reassessed optimal level of fishing "respond to" some unique economic and/or social problem in the fishery or region? Legislative History at 1098-99.
3. Is the economic and/or social factor relevant to the the determination of the OY from the fishery?
- a. Does it have a measureable, quantitative relationship to the fishery producing at the MSY/ABC level?
  - b. Does the OY determination respond to an existing economic and/or social condition or does it attempt to modify or change that condition?
  - c. Is the economic and/or social factor at a given value determinative of the amount of fish which can be utilized by the U.S. industry?
- B. Is the OY Specification Consistent with the National Standards for Fishery Conservation and Management? (No. 5 used as an example.)
- 1. Does the OY specification constitute a management measure?
  - 2. Does the OY specification promote efficiency in the utilization of the fishery resource? Section 301(a)(5).
    - a. Does the OY specification preclude the harvesting of large biological surpluses historically utilized by any current user group?
    - b. Is the purpose of the OY specification to ensure maximum economic return to the U.S. industry in utilizing the biological surplus?
    - c. Is the purpose of the OY specification to maintain stability in the market?
  - 3. Does the OY determination have economic allocation as its sole purpose? Section 301(a)(5).
    - a. Is the intended purpose of the determination to give one user group a distinct economic advantage in the market over another user group?
    - c. Does the value of OY have any meaningful relationship to the MSY/ABC?

C. Does the Determination of the OY Exceed the Scope of Secretarial Authority for the Conservation and Management of the Fishery Resources?

1. What is the intended purpose and/or effect of the OY specification?
  - a. Is the intended purpose to respond to current economic conditions in the fishery and/or market thereby allowing the economics of the fishery to be determined in the normal course of supply and demand?
  - b. Is the intended purpose and/or effect to effect a change in market stability in order to give one user group a competitive advantage over another?
  
2. Is the intended purpose and/or effect of the OY specification consistent with provisions of the Magnuson Act delineating the scope of regulatory authority?
  - a. Purposes of the Act:
    - (1) Conserve and management the fishery resource. Section 2(b)(1).
      - (a) Definition of the term "conservation and management". Section 3(2).
      - (b) National standards for fishery conservation and management. Section 301.
    - (2) To "promote" domestic commercial and recreational fishing. Section 2(b)(3).
    - (3) To "encourage" the development of U.S. fisheries and to ensure that OY determinations "promote" such development. Section 2(b)(6).
      - (a) Definition of the word "encourage" and the scope of authority implied. Webster's Third New International Dictionary, 1981.
      - (b) Is the OY determination intended to "promote" or actually assist in the development?
  - b. Policy of the Act:
    - (1) To maintain without change the existing territorial or other ocean jurisdiction of the U.S. for all purposes other than fishery conservation and management. Section 2(c)(1).



- (a) Narrow v. broad construction of scope and extent of authority under laws with extraterritorial application.
  - (b) Application of common law scope and extent of authority on management of living resources beyond territorial boundaries.
- (2) To permit foreign fishing consistent with the provisions of the Magnuson Act. Section 2(c)(4).
- c. Other provisions of the Act:
- (1) Governing international fishery agreement (GIFA). Section 201(c)
  - (2) Reciprocity. Sections 201(g), 202(a)(4)(A), and 202(e)(3).
3. Is the OY determination consistent with other applicable law and policy?
- (a) Constitutional due process and equal protection.
  - (b) U.S. trade policy. Trade Act of 1974, 19 U.S.C. 2118.

## II. REPRESENTING JAPANESE AND OTHER FOREIGN FISHERMEN IN THE FISHERY MANAGEMENT PROCESS

The fishery management process begins with the Regional Councils and their advisory bodies. Potential problems under proposed management measures affecting the interests of various user groups are best resolved at the regional level. Our system in the United States is unique inasmuch as foreign fishermen have the opportunity to participate in the regional management process.

The openness and fairness of our regional fishery management process is beneficial to both domestic and foreign fishing interests. As fishery management proposal work their way through the development and review process, differences affecting the various user groups are more easily resolved at the regional level. If agreement among the user groups can be reached on particular management measures, the result is a better understanding for the purpose of the measures and the management

process as a whole. Taking care of potential problems at the regional level can also save considerable time and expense later in the review process.

The following outline provides some basic guidelines for keeping track of proposed management measures working their way through the development and review process at the regional and federal levels. These guidelines are patterned after our experience in working with the North Pacific Council and the National Marine Fisheries Service in both Juneau and Washington, D.C.

A. The Council Family.

1. The Executive Director and staff.
2. The Plan Development and Plan Maintenance Teams (PDTs and PMTs).
3. The Scientific and Statistical Committee (SSC).
4. The Advisory Panel (AP).

B. The Council Development Process.

1. Initiation of proposals.
  - a. The Council family.
  - b. Public and private interest groups, both domestic and foreign.
2. Review and development of proposals and alternatives.
  - a. PDTs and PMTs.
  - b. Private contractors.
3. Analysis of the proposed management measure.
  - a. Identification of the scope and purpose of the proposal.
  - b. Analysis of the proposal's effect upon the user group fishing and processing operations.
  - c. Analysis of the proposal's compliance with the national standards for fishery conservation and management, other provisions of the Magnuson Act, and other applicable law.

- d. Assessment of the information and/or data upon which justification for the measure is based (possible use of experts).
  - e. Organization of user group information and/or data to either support or refute the proposed measure.
4. Responding to the proposed management measure.
- a. Communicate with other user groups.
  - b. Communicate with the Council developers.
    - (1) PDT and PMT members.
    - (2) Private contractors.
  - c. Attend and participate in PDT and PMT meetings and special meetings or hearings held by private contractors.
  - d. Communicate with the Council decision makers.
    - (1) Attend and participate in SSC and AP meetings.
    - (2) Prepare and present comments before the AP, SSC, and Council during the public comment periods.

C. The Federal Review Process.

- 1. Obtain a copy of the management proposal from the Regional Director's office once it has been finalized and forwarded to Washington to begin the Secretarial review period.
- 2. Make arrangements to meet with plan reviewers and their general counsel in Washington as soon as possible after the Secretarial review period begins to explain your position in either support of or opposing the management proposal.
- 3. Prepare and submit comments upon proposed management measures well in advance of the final day for submitting comments.
- 4. Meet with as many people in the final decision making process as possible to discuss your group's interests in the proposed management measures.

D. Judicial Review Process.

AGREEMENT BETWEEN  
THE GOVERNMENT OF THE UNITED STATES OF AMERICA  
AND THE GOVERNMENT OF JAPAN  
CONCERNING FISHERIES OFF THE COASTS  
OF THE UNITED STATES OF AMERICA

Agreement signed at Washington September 10, 1982

Entered into force January 1, 1983

Remains in force until December 31, 1987

T.I.A.S. \_\_\_\_\_

\_\_\_\_ U.S.T. \_\_\_\_

The Government of the United States of America and the Government of Japan,

Recognizing that the United States has established a fishery conservation zone within 200 nautical miles of its coasts within which the United States exercises exclusive fishery management authority over all fish and that the United States also exercises such authority over the living resources of the continental shelf appertaining to the United States and over anadromous species of fish of United States origin;

Recalling that they signed the Agreement between the Government of the United States of America and the Government of Japan Concerning Fisheries off the Coasts of the United States of America on March 18, 1977;

Recognizing that Japan has been cooperating in the rational management and conservation of the living resources off the coasts of the United States and that the nationals and fishing vessels of Japan have been cooperating in the development of and engaging in the utilization of these resources off the coasts of the United States;

Desiring to continue and further develop mutual cooperation;

Considering their common concern for the rational management, conservation and achievement of optimum yield of fishery resources off the coasts of the United States;

Taking into account international law relating to oceans and fisheries; and

Desiring to establish reasonable terms and conditions pertaining to fishing for the living resources of mutual concern over which the United States exercises exclusive fishery management authority;

Have agreed as follows:

ARTICLE I

The purpose of this Agreement is to promote rational management, effective conservation and achievement of optimum yield of fishery resources of mutual interest off the coasts of the United States and to estab-

lish a common understanding of the principles and procedures under which fishing may be conducted by nationals and fishing vessels of Japan for the living resources over which the United States exercises exclusive fishery management authority.

## ARTICLE II

As used in this Agreement, the term

1. "living resources over which the United States exercises exclusive fishery management authority" means all fish within the fishery conservation zone, all anadromous species of fish that spawn in the fresh or estuarine waters of the United States and migrate to ocean waters while present in the fishery conservation zone and in areas beyond national fisheries jurisdiction recognized by the United States and all living resources of the continental shelf appertaining to the United States;

2. "fish" means all finfish, mollusks, crustaceans, and other forms of marine animal and plant life, other than marine mammals, birds, and species of tuna which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean;

3. "fishery resources" means one or more stocks of fish that can be treated as a unit for purposes of management and conservation and that are identified on the basis of geographical, scientific, technical, recreational and economic characteristics;

4. "fishery" means any fishing for fishery resources;

5. "fishery conservation zone" means a zone contiguous to the territorial sea of the United States, the seaward boundary of which is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the breadth of the territorial sea of the United States is measured;

6. "fishing" means

- (a) the catching, taking or harvesting of fish;
- (b) the attempted catching, taking or harvesting of fish;
- (c) any other activity that can reasonably be expected to result in the catching, taking or harvesting of fish; or
- (d) any operation at sea, including supply, storage, refrigeration, transportation or processing, directly in support of, or in preparation for, any activity described in subparagraphs (a) through (c) above,

provided that such term does not include other legitimate uses of the high seas, including any scientific research activity;

7. "fishing vessel" means any vessel, boat, ship, or other craft that is used for, equipped to be used for, or of a type that is normally used for

- (a) fishing; or
- (b) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing including preparation, supply, storage, refrigeration, transportation or processing; and

8. "marine mammal" means any mammal that is morphologically adapted to the marine environment, including sea otters and members of the orders Sirenia, Pinnipedia, and Cetacea, or primarily inhabits the marine environment such as polar bears.

### ARTICLE III

The Government of the United States and the Government of Japan shall carry out periodic bilateral consultations regarding the implementation of this Agreement and the development of further cooperation in the field of fisheries of mutual concern, including the establishment of appropriate multilateral organizations for the collection and analysis of scientific data respecting such fisheries.

### ARTICLE IV

1. The Government of the United States is willing to allow access for fishing vessels of Japan to harvest, in accordance with the terms and conditions to be established in permits issued under Article IX, that portion of the total allowable catch for a specific fishery resource that will not be harvested by fishing vessels of the United States and may be made available to fishing vessels of Japan in accordance with paragraph 2 below.

2. The Government of the United States shall determine each year, subject to such adjustments as may be necessitated by unforeseen circumstances affecting the stocks, and in accordance with United States law,

- (a) the total allowable catch for each fishery resource based on optimum yield, taking into account the best available scientific evidence and relevant social, economic and other factors;
- (b) the harvesting capacity of fishing vessels of the United States in respect of each fishery resource;
- (c) the portion of the total allowable catch for a specific fishery resource that may be made available, on a periodic basis each year, to foreign fishing vessels; and

- (d) the allocation of such portion that may be made available to authorized fishing vessels of Japan.

3. The Government of the United States shall determine each year in accordance with United States law the measures necessary to prevent overfishing, while achieving on a continuing basis the optimum yield from each fishery resource. Such measures are described in Annex I which constitutes an integral part of this Agreement.

4. The Government of the United States shall notify the Government of Japan of the determinations provided for in this Article on a timely basis.

#### ARTICLE V

In determining the portion of the surplus of the total allowable catch for fishery resources that may be made available to fishing vessels of foreign nations, including Japan, the Government of the United States will decide on the basis of the factors identified in United States law including:

1. whether, and to what extent, such nations impose tariff barriers or nontariff barriers on the importation, or otherwise restrict the market access, of United States fish or fishery products;

2. whether, and to what extent, such nations are cooperating with the United States in the advancement of existing and new opportunities for fisheries trade, particularly through the purchase of fish or fishery products from United States processors or from United States fishermen;

3. whether, and to what extent, such nations and the fishing vessels of such nations have cooperated with the United States in the enforcement of United States fishing regulations;

4. whether, and to what extent, such nations require the fish harvested from the fishery conservation zone for their domestic consumption;

5. whether, and to what extent, such nations otherwise contribute to, or foster the growth of, a sound and economic United States fishing industry, including minimizing gear conflicts with fishing operations of United States fishermen, and transferring harvesting or processing technology which will benefit the United States fishing industry;

6. whether, and to what extent, the fishing vessels of such nations have traditionally engaged in fishing for such fishery resources;

7. whether, and to what extent, such nations are cooperating with the United States in, and making contributions to, fishery research and the identification of fishery resources; and

8. such other matters as the Government of the United States deems appropriate.

## ARTICLE VI

The Government of Japan shall cooperate with and assist the United States in the development of the United States fishing industry and the increase of United States fishery exports by taking such measures as reducing or removing impediments to the importation and sale of United States fishery products, providing information concerning technical and administrative requirements for access of United States fishery products into Japan, providing economic data, sharing expertise, facilitating the transfer of harvesting or processing technology to the United States fishing industry, facilitating appropriate joint venture and other arrangements, informing Japanese industry of trade and joint venture opportunities with the United States, and taking such other actions as may be appropriate.

## ARTICLE VII

In view of the fact that the anadromous species of fish of United States origin intermingle with such species of fish of other origins in certain waters of their migratory range, the Government of the United States and the Government of Japan shall hold consultations concerning necessary conservation measures for such species of fish in the event that the International Convention for the High Seas Fisheries of the North Pacific Ocean signed at Tokyo on May 9, 1952, as amended by the Protocol signed at Tokyo on April 25, 1978, ceases to be effective.

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## ARTICLE VIII

The Government of Japan shall take all necessary measures to ensure:

1. that nationals and fishing vessels of Japan refrain from fishing for the living resources over which the United States exercises exclusive fishery management authority except as authorized pursuant to this Agreement;
2. that all such fishing vessels so authorized comply with the terms and conditions of permits issued pursuant to this Agreement and applicable laws of the United States; and
3. that the allocation referred to in paragraph 2(d) of Article IV is not exceeded for any fishery.

## ARTICLE IX

The Government of Japan may submit an application to the Government of the United States for a permit for each fishing vessel of Japan that wishes to engage in fishing in the fishery conservation zone pursuant to this Agreement. Such application shall be prepared and processed in ac-



cordance with Annex II which may be amended by agreement through an exchange of notes between the two Governments without modification of the articles of this Agreement. The Government of the United States may require the payment of fees for such permits and for fishing in the fishery conservation zone.

#### ARTICLE X

The Government of Japan shall ensure that nationals and fishing vessels of Japan refrain from harassing, hunting, capturing or killing, or attempting to harass, hunt, capture or kill, any marine mammal within the fishery conservation zone, except as may be otherwise provided by an international agreement respecting marine mammals to which the United States is a party, or in accordance with specific authorization for and controls on incidental taking of marine mammals established by the Government of the United States.

#### ARTICLE XI

The Government of Japan shall take necessary measures, within its competence, to ensure that in the conduct of the fisheries under this Agreement:

1. the authorizing permit for each fishing vessel of Japan is prominently displayed in the wheelhouse of such fishing vessel;
2. appropriate position-fixing and identification equipment, as determined by the Government of the United States, is installed and maintained in working order on each fishing vessel of Japan;
3. designated United States observers are permitted to board, upon request, any fishing vessel of Japan and accorded the courtesies and accommodations provided to ship's officers while aboard such fishing vessel, and owners, operators and crews of such fishing vessel cooperate with the United States observers in the conduct of their official duties, and, further, the Government of the United States be reimbursed for the costs of providing the United States observers aboard such fishing vessel;
4. agents are appointed and maintained within the United States possessing the authority to receive and respond to any legal process issued in the United States with respect to an owner or operator of a fishing vessel of Japan for any cause arising out of the conduct of fishing activities for the living resources over which the United States exercises exclusive fishery management authority; and
5. all necessary measures are taken to minimize fishing gear conflicts and to ensure the prompt and adequate compensation of nationals of the United States for any loss of, or damage to, their fishing vessels, fishing gear or catch, and resultant economic loss, that is caused by any

fishing vessel of Japan, as determined by applicable United States procedures.

#### ARTICLE XII

The Government of Japan shall take all appropriate measures to assist the Government of the United States regarding enforcement activities and to ensure that nationals and fishing vessels of Japan comply with the terms and conditions provided for in this Agreement. It shall take appropriate measures to ensure that each fishing vessel of Japan that engages in fishing for the living resources over which the United States exercises exclusive fishery management authority allow and assist the boarding and inspection of such fishing vessel by any duly authorized enforcement officer of the United States and cooperate in such enforcement action as may be taken pursuant to the laws of the United States.

#### ARTICLE XIII

1. The United States will impose appropriate penalties, in accordance with its laws, on fishing vessels of Japan or their owners or operators, that violate the requirements of this Agreement or the terms and conditions of any permit issued hereunder.

2. In cases of seizure of a fishing vessel of Japan and detention or arrest of its crews by the authorities of the Government of the United States, notification shall be given promptly through diplomatic channels informing the Government of Japan of the action taken and of any penalties subsequently imposed.

3. Seized fishing vessels of Japan and their detained or arrested crews shall be promptly released, subject to such reasonable bond or other security as may be determined by the court of the United States.

#### ARTICLE XIV

1. The Government of the United States and the Government of Japan shall cooperate in the conduct of scientific research required for the purpose of managing and conserving the living resources over which the United States exercises exclusive fishery management authority, including the compilation of the best available scientific information for management and conservation of stocks of mutual interest.

2. The competent agencies of the two Governments shall cooperate in the development of periodic research plans on stocks of mutual interest through correspondence or meetings as appropriate, and may modify them from time to time by mutual consent. The research plans may include, but are not limited to, the exchange of information and scientists, regularly scheduled meetings between scientists to prepare future research plans and review progress, and jointly conducted research projects.

3. The conduct of research during regular commercial fishing operations on board a fishing vessel of Japan in the fishery conservation zone shall not be deemed to change the character of the activities of such fishing vessel from fishing to scientific research. Therefore, it will be necessary to obtain a permit for such fishing vessel in accordance with Article IX.

4. The Government of Japan shall cooperate with the Government of the United States in collecting and reporting biostatistical information and fisheries data, including catch and effort statistics, in accordance with procedures which will be stipulated by the Government of the United States.

#### ARTICLE XV

Should the Government of the United States indicate to the Government of Japan that nationals and fishing vessels of the United States wish to engage in fishing in the fishing zone of Japan, the Government of Japan is willing to allow such fishing on the basis of reciprocity and on terms not more restrictive than those established pursuant to this Agreement.

#### ARTICLE XVI

Nothing contained in this Agreement shall affect or prejudice in any manner the positions of either Government with respect to the extent of internal waters, of the territorial sea, of the high seas, or of coastal state jurisdiction or authority for any purpose other than the management and conservation of fishery resources.

#### ARTICLE XVII

This Agreement shall enter into force on a date to be agreed upon by an exchange of notes between the two Governments, following the completion of their internal procedures necessary for the entry into force of this Agreement, and remain in force until December 31, 1987, unless extended by agreement of the two Governments in a mutually acceptable form. However, either Government may terminate this Agreement at any time by giving twelve months' written notice to the other Government.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Washington, on the tenth day of September, 1982, in duplicate in the English and Japanese languages, both texts being equally authentic.

## ANNEX I

## MANAGEMENT AND CONSERVATION MEASURES

The measures to be determined by the Government of the United States under paragraph 3 of Article IV may include, inter alia:

1. designated areas where, and periods when, fishing shall be permitted, limited, or conducted only by specified types of fishing vessels or with specified types and quantities of fishing gear;
2. limitations on the catch of fish based on area, species of fish, size, number, weight, sex, incidental catch, or other factors;
3. limitations on the number and types of fishing vessels that may engage in fishing and/or on the number of days each fishing vessel of the total fleet may engage in a designated area for a specified fishery;
4. requirements as to the types of fishing gear that may, or may not, be employed; and
5. requirements designed to facilitate enforcement of such conditions and restrictions, including the maintenance of appropriate position-fixing and identification equipment.

## ANNEX II

## APPLICATION AND PERMIT PROCEDURES

The following procedures shall govern the application for and issuance of annual permits authorizing fishing vessels of Japan to engage in fishing for the living resources over which the United States exercises exclusive fishery management authority:

1. The Government of Japan may submit an application to the Government of the United States for each fishing vessel of Japan that wishes to engage in fishing pursuant to this Agreement. Such application shall be made on forms provided by the Government of the United States for that purpose. In submitting applications for permits, the Government of Japan will give due consideration to the need to minimize the number of such applications, in order to aid in the efficient administration of the permit issuance program by the Government of the United States.

2. Any such application shall specify:

- (a) the name and official number or other identification of the fishing vessel for which a permit is sought, together with the name and address of the owner and operator thereof;

- (b) the tonnage, capacity, speed, processing equipment, type and quantity of fishing gear, and such other information relating to the fishing characteristics of the fishing vessel as may be requested;
- (c) a specification of each fishery in which the fishing vessel wishes to engage;
- (d) the amount of fish or tonnage of catch by species of fish contemplated for the fishing vessel during the time such permit is in force;
- (e) the ocean area in which, and the season or period during which, such fishing would be conducted; and
- (f) such other relevant information as may be requested, including desired transshipping areas.

3. The Government of the United States shall review each application, shall determine what conditions and restrictions may be needed, and what fees will be required under Article IX, and shall inform the Government of Japan of such determinations. The Government of the United States reserves the right not to approve applications. The Government of the United States will seek to consult, as appropriate, with the Government of Japan, in making its disapproval of applications.

4. The Government of Japan shall thereupon notify the Government of the United States of its acceptance or rejection of such conditions and restrictions and, in the case of a rejection, of its objections thereto.

5. Upon acceptance of the conditions and restrictions by the Government of Japan and the payment of any applicable fees, the Government of the United States shall approve the application and issue a permit for each fishing vessel of Japan, which shall thereupon be authorized to fish pursuant to this Agreement and the terms and conditions set forth in the permit. Such permits shall be issued for a specific fishing vessel of Japan and shall not be transferred.

6. In the event the Government of Japan notifies the Government of the United States of its objections to specific conditions and restrictions, the two Governments may consult with respect thereto and the Government of Japan may thereupon submit a revised application.

AGREED MINUTES

The representatives of the Government of the United States of America and the Government of Japan have agreed to record the following in connection with the Agreement between the Government of the United States of America and the Government of Japan Concerning Fisheries off the Coasts of the United States of America signed today (hereinafter referred to as the "Agreement"):

1. With respect to paragraph 1 of Article II, the representatives of the Government of the United States and the Government of Japan noted that both Governments recognize the right of coastal states to claim exclusive fishery jurisdiction over maritime areas within a maximum 200 nautical miles from baselines drawn in conformity with international law.

Therefore, it is understood that "areas beyond national fisheries jurisdictions recognized by the United States" referred to in that paragraph means areas of the high seas not belonging to any fishing zone claimed by a coastal state in conformity with the right mentioned above.

2. The representatives of the Government of the United States and the Government of Japan emphasized the importance of the periodic bilateral consultations provided for in Article III. In this connection, the representative of the Government of the United States stated that, with respect to the determinations made under Article IV, his Government will, to the extent permitted by United States law, take into account the views which may be expressed by the Government of Japan.

3. With respect to paragraph 2 of Article IV, the representative of the Government of Japan stated that the need of nationals of Japan concerned to make plans for their annual fishing operations is important to the efficiency of their fishing operations in the fishery conservation zone and to the promotion of cooperation in the development of the United States fishing industry.

In this connection, the representative of the Government of the United States stated that it was his expectation that his Government would notify the Government of Japan as early as possible of the projected allocations for each fishing year to fishing vessels of Japan and the expected dates of periodic releases of such projected allocations in accordance with Articles IV and V.

He also stated that, in order to facilitate planning for fishing operations of nationals of Japan concerned and their cooperation in the development of the United States fishing industry, flexibility concerning the release of allocations could be provided by the Government of the United States to the extent consistent with United States law and the determination made pursuant to Article V.

4. With respect to Article V, the representative of the Government of Japan emphasized the importance of the Japanese fishing industry to the Japanese economy, and urged that the Government of the United States give due consideration to the need for continuation of stable fishing operations by fishing vessels of Japan in the fishery conservation zone.

The representative of the Government of the United States emphasized the importance of rapid and full development of the United States fishing industry to the United States economy and pointed to the importance which his Government attached to Japanese cooperation in that regard.

The representative of the Government of Japan, bearing in mind that the criteria in Article V would be utilized by the Government of the United States with development cooperation referred to in the preceding

sentence principally in mind, requested that the Government of the United States give due consideration to past fishing performance of Japanese fishermen. The representative of the Government of the United States took note of the request of the representative of the Government of Japan and indicated that it would be taken into account in accordance with United States law.

The representatives of the Government of the United States and the Government of Japan acknowledged the advantages to the respective industries of providing stability of cooperation in fishery relations, including fisheries development, fisheries trade, and fishery allocations, over reasonable periods of time.

5. The representative of the Government of the United States stated that Article VI illustrates the kinds of cooperation and assistance that might be sought.

He also noted that, in determining the portion to be allocated to fishing vessels of Japan under paragraph 2 of Article IV, the Government of the United States shall take into account as appropriate the efforts made by the Government of Japan for cooperation and assistance in the area of fisheries under Article VI.

6. With respect to Article VII, the representative of the Government of the United States stated that it was the intention of his Government that it would consult with the Government of Japan concerning any enforcement action by United States authorities with respect to anadromous species of fish of United States origin beyond the fishery conservation zone.

7. In establishing the fees referred to in Article IX, it is understood that, to the extent permitted by United States law, the Government of the United States takes into account, among other factors, the economic conditions of the fisheries for various species of fish.

8. With respect to Article XIII, it is understood that the representatives of the Government of the United States will recommend to the court in any case arising out of fishing activities under the Agreement that the penalty for violation of fishery regulations of the United States not include imprisonment except in the case of enforcement related offenses such as assault on a duly authorized enforcement officer or refusal to permit boarding and inspection.

9. It is understood that the Government of the United States and the Government of Japan will cooperate in the exchange of scientific and technical information relating to species of tuna and other highly migratory species of mutual interest with a view to making regional arrangements, including the establishment of appropriate international organizations, to ensure conservation of the species. Such exchanges shall include the reporting of tuna and associated catches.

It is further understood that at the outset of the Agreement and until such time as appropriate, the two Governments will, in order to establish a base of scientific information to further such arrangements,

provide each other statistics on tuna and associated catches off the coasts of the United States.

10. The Government of the United States undertakes to authorize fishing vessels of Japan engaging in fishing pursuant to the Agreement to enter United States ports in accordance with United States laws for the purpose of purchasing bait, supplies, or outfits, or effecting repairs, or for such other purposes as may be authorized.

11. With respect to the conduct of transshipping operations by fishing vessels of Japan, the representative of the Government of the United States stated that transshipping areas would be provided as appropriate, taking into account all relevant factors, including past practices, and would be set forth in permits or other applicable instruments.



ENFORCEMENT UNDER THE MAGNUSON FISHERY  
CONSERVATION AND MANAGEMENT ACT

An oral presentation by Craig R. O'Connor, Regional  
Attorney, Office of General Counsel, NOAA, DOC

I. Introduction

- A. General description of types of activities regulated by MFCMA (i.e. domestic/foreign; various fisheries)
- B. General overview of structure of GC, GCEL and regional office with emphasis on GCSE structure for handling enforcement

II. Detecting Fishing Violations

- A. Groups involved (NMFS, CG, FMP - cooperative agreement)
- B. Description of some enforcement operations
  - 1. Typical Tortugas shrimp operation
  - 2. Helio/surveillance overflights

III. Civil Administrative Process

- A. Civil vs. criminal prosecution
- B. Case review
- C. Issuance of NOVA
- D. ALJ hearing process
- E. Judicial review

IV. Conclusions

(B) Shrimp Fishery of the Gulf of Mexico 50 C.F.R. Part 658

I. Fishing Violations.

A. Trawling in the Tortugas Shrimp Sanctuary or Texas Closed Area: 50 C.F.R. §§ 658.22 and 658.24.

1. First violation \$12,000 - \$15,000 plus seizure of entire catch on board
2. Second violation \$15,000 - \$25,000 plus seizure of entire catch on board
3. Third violation \$25,000 plus seizure of entire catch on board and seizure of the vessel

B. Trawling in the Stone Crab Area Closure: 50 C.F.R. § 658.23 - see penalty schedule under Gulf of Mexico Stone Crab Fishery.

II. Vessel Identification - failure to affix official number: 50 C.F.R. § 658.6.

- A. First violation \$500 - \$1,000
- B. Second violation \$1,000 - 2,000
- C. Third violation \$2,000 - \$5,000

III. Adjusting Factors (to help determine which end of the range to set penalty).

1. Culpability - wilful/intentional nature of violation.
2. Surrounding circumstances.
  - a. Lack of cooperation with boarding officers.
  - b. Evasion of enforcement vessel/aircraft.
  - c. Interference with enforcement officers.
  - d. Extraordinary cooperation.
3. Time lapse since prior offense.
4. Prior citation.

NEOM CIVIL PENALTY SCHEDULE

(C) Spiny Lobster Fishery of the Gulf of Mexico  
and South Atlantic

50 C.F.R. Part 640

I. Gear and Vessel Restriction

A. Failure to identify vessels, traps, and bouys  
with number and color code as required by  
50 C.F.R. § 640.6.

- |                     |                   |
|---------------------|-------------------|
| 1. First Violation  | \$ 500 - \$1,000  |
| 2. Second Violation | \$1,000 - \$2,000 |
| 3. Third Violation  | \$2,000 - \$5,000 |

B. Using traps without degradable panel as required  
by 50 C.F.R. §640.23(a).

- |                     |                    |
|---------------------|--------------------|
| 1. First Violation  | \$1,000 - \$3,000  |
| 2. Second Violation | \$3,000 - \$5,000  |
| 3. Third Violation  | \$5,000 - \$10,000 |

C. Taking spiny lobster with spears, hooks, poisons,  
explosives or other methods prohibited by 50 C.F.R.  
§ 640.23(b).

- |                     |  |
|---------------------|--|
| 1. First Violation  | \$1,000 - \$2,000 plus seizure<br>of entire catch on board |
| 2. Second Violation | \$2,000 - \$3,000 plus seizure<br>of entire catch on board |
| 3. Third Violation  | \$3,000 - \$5,000 plus seizure<br>of entire catch on board |

D. Leaving traps in the water during the period  
beginning April 6 and ending July 21, 50 C.F.R.  
§ 640.20(a).

1. If traps do not appear to be actively fished

a. Base Penalty

- |                     |                     |
|---------------------|---------------------|
| 1) First Violation  | \$ 2,000 - \$ 5,000 |
| 2) Second Violation | \$ 5,000 - \$10,000 |
| 3) Third Violation  | \$25,000            |

b. Add-ons based on the number of traps

- 1) First Violation - \$500 for each group of 100 traps; if less than 100 traps in group, \$500 for that group of traps (i.e., 105 traps, add-on equals \$1,000)
- 2) Second violation - \$1,000 for each group of 100 traps; if less than 100 traps, \$1,000 for that group of traps

2. Traps that appear to be actively fished:

a. Base penalty

- 1) First violation \$ 5,000 - \$10,000
- 2) Second violation \$10,000 - \$15,000
- 3) Third violation \$25,000

b. Add-ons based on number of traps

- 1) First violation - \$500 for each group of 100 traps; if less than 100 traps in group, \$500 for that group of traps (i.e., 105 traps, add-on equals \$1,000)
- 2) Second violation - \$1,000 for each group of 100 traps; if less than 100 traps, \$1,000 \$1,000 for that grup of traps

3. Traps being worked by boat/fisherman.

- a. First violation - \$12,000 - \$15,000 plus seizure of entire catch on board
- b. Second violation - \$15,000 - \$25,000 plus seizure of entire catch on board
- c. Third violation - \$25,000 plus seizure of entire catch on board and seizure of vessel

II. Harvest Restrictions

- A. Possessing, having custody or control, buying, selling transporting or importing spiny lobster without a proper bill of lading or landing or exporting spiny lobster or spiny lobster traps taken or retained in

violation of the Magnuson Act, 50 C.F.R. § 640 or any regulations promulgated under the Magnuson Act, 50 C.F.R. § 640.7(m).

1. First Violation \$ 5,000 - \$10,000 Plus seizure of entire catch
  2. Second Violation \$10,000 - \$15,000 Plus seizure of entire catch
  3. Third Violation \$25,000 Plus seizure of entire catch
- B. Retain on board or possess on land any berried lobster taken in the FCZ. 50 C.F.R. § 640.21(a).
1. Base penalty
    - a. First Violation \$1,000 - \$2,000
    - b. Second Violation \$2,000 - \$3,000
    - c. Third Violation \$3,000 - \$5,000
  2. Estimated value of the spiny lobster illegally retained or possessed will be added to the base penalty.
- C. Strip or molest any berried lobster. 50 C.F.R. § 640.21(a).
1. First Violation \$ 500 - \$2,000
  2. Second Violation \$2,000 - \$3,000
  3. Third Violation \$3,000 - \$5,000
- D. Pull traps during the period beginning one hour after official sunset and one hour before official sunrise. 50 C.F.R. § 640.21(b)
1. First Violation \$ 500 - \$2,000
  2. Second Violation \$2,000 - \$5,000
  3. Third Violation \$5,000 - \$7,000
- E. Molesting, tending, pulling, or opening another's traps as prohibited in 50 C.F.R § 640.21(b)(2).
1. First Violation \$ 3,000 - \$ 5,000 Plus seizure of entire catch
  2. Second Violation \$ 5,000 - \$10,000 Plus seizure of entire catch
  3. Third Violation \$25,000 Plus seizure of entire catch

F. Exceeding the recreational catch limits as described in 50 C.F.R. § 640.21(c).

1. Base Penalty

- |                     |                   |
|---------------------|-------------------|
| a. First Violation  | \$ 250 - \$1,000  |
| b. Second Violation | \$1,000 - \$2,000 |
| c. Third Violation  | \$2,000 - \$3,000 |

2. Estimated value of the spiny lobster illegally taken will be added to the base penalty.

G. Possession of undersized spiny lobsters in violation of 50 C.F.R. § 640.22(a).

1. First Violation

a. Percentage of undersized catch\*

Under 5%	\$1,000 - \$2,000 plus seizure of shorts for donation/destruction
5% - 10%	\$2,000 - \$4,000 plus seizure of entire catch
11% - 20%	\$4,000 - \$6,000 plus seizure of entire catch
21% - 30%	\$6,000 - \$8,000 plus seizure of entire catch
31% - 40%	\$8,000 - \$10,000 plus seizure of entire catch
41% - 50%	\$10,000 - \$12,000 plus seizure of entire catch
Over 50%	\$12,000 - \$15,000 plus seizure of entire catch

\*Assumes no concealment or dumping of shorts.

- |                           |  |
|---------------------------|--|
| b. Concealment or dumping | \$12,000 - \$15,000 plus seizure of entire catch |
|---------------------------|--|

- |                     |   |
|---------------------|---|
| 2. Second Violation | \$15,000 - \$25,000 plus seizure of entire catch on board |
|---------------------|---|

3. Third Violation

\$25,000 plus seizure  
of entire catch on  
board & seizure of  
vessel

III. Exceeding the number of attractants provided for in  
50 C.F.R. § 640.22(b)

- |                     |                    |
|---------------------|--------------------|
| 1. First Violation  | \$1,000 - \$ 3,000 |
| 2. Second Violation | \$3,000 - \$ 5,000 |
| 3. Third Violation  | \$5,000 - \$10,000 |

IV. Adjusting Factors (to help determine which end of the range  
to set penalty).

1. Culpability - willful/intentional nature of violation.
2. Surrounding circumstances.
  - a. Lack of cooperation with boarding officers.
  - b. Evasion of enforcement vessel/aircraft.
  - c. Extraordinary cooperation.
  - d. Interference with enforcement officers.
3. Time lapse since prior offense.
4. Prior citation.

**DRAFT NEOM CIVIL PENALTY SCHEDULE**

**(A) Gulf of Mexico Stone Crab Fishery 50 C.F.R. Part 654.**

**I. Fishing Violations.**

**A. Possession of stone crabs in FCZ during closed season:  
50 C.F.R. § 654.22.**

- |                     |  |
|---------------------|--|
| 1. First violation  | \$3,000 - \$5,000 plus seizure<br>of entire catch on board   |
| 2. Second violation | \$5,000 - \$10,000 plus seizure<br>of entire catch on board  |
| 3. Third violation  | \$10,000 - \$15,000 plus seizure<br>of entire catch on board |

**B. Trawling inside the stone crab/shrimp line of separation  
as defined in 50 C.F.R. § 654.23(a).**

- |                     |  |
|---------------------|--|
| 1. First violation  | \$12,000 - \$15,000 plus seizure<br>of entire catch on board                     |
| 2. Second violation | \$15,000 - \$25,000 plus seizure<br>of entire catch on board                     |
| 3. Third violation  | \$25,000 - plus seizure of entire<br>catch on board and seizure of<br>the vessel |

**C. Taking of undersized crab claws: 50 C.F.R. § 654.20(a).**

**1. First violation**

**a. Percentage of  
undersized catch\***

- |           |  |
|-----------|--|
| Under 5%  | \$1,000 - \$2,000 plus seizure of<br>shorts for donation/destruction |
| 5% - 10%  | \$2,000 - \$4,000 plus seizure of<br>entire catch                    |
| 11% - 20% | \$4,000 - \$6,000 plus seizure of<br>entire catch                    |
| 21% - 30% | \$6,000 - \$8,000 plus seizure of<br>entire catch                    |



31% - 40%	\$8,000 - \$10,000 plus seizure of entire catch
41% - 50%	\$10,000 - \$12,000 plus seizure of entire catch
Over 50%	\$12,000 - \$15,000 plus seizure of entire catch

\*Assumes no concealment or dumping of shorts.

b. Concealment or dumping \$12,000 - \$15,000 plus seizure of entire catch on board

2. Second violation \$15,000 - \$25,000 plus seizure of entire catch on board

3. Third violation \$25,000 plus seizure of entire catch on board plus seizure of vessel

D. Failure to return stone crab bodies to the water before vessel leaves FCZ: 50 C.F.R. § 654.20(b).

1. First violation \$500 - \$3,000

2. Second violation \$3,000 - \$5,000

3. Third violation \$5,000 - \$10,000

E. Failure to use live boxes if claws are not removed immediately: 50 C.F.R. § 654.20(b).

1. First violation \$500 - \$2,000

2. Second violation \$2,000 - \$5,000

3. Third violation \$5,000 - \$10,000

F. Pulling the trap of another without written permission: 50 C.F.R. § 654.20(c).

1. First violation \$3,000 - \$5,000 plus seizure of entire catch

2. Second violation \$5,000 - \$10,000 plus seizure of entire catch

3. Third violation \$25,000 plus seizure of entire catch on board and seizure of the vessel

G. Fishing traps during the period beginning one hour after sunset to one hour before sunrise: 50 C.F.R. § 654.20(d).

1. First violation \$500 - \$2,000
2. Second violation \$2,000 - \$5,000
3. Third violation \$5,000 - \$7,000

II. Gear and Vessel Violations.

A. Stone crab traps remaining in water during closed season: 50 C.F.R. § 654.22.

1. If traps do not appear to be actively fished:

a. Base penalties

- 1) First violation \$2,000 - \$5,000
- 2) Second violation \$5,000 - \$10,000
- 3) Third violation \$25,000

b. Add-ons based on number of traps

- 1) First violation - \$500 for each group of 100 traps; if less than 100 traps in group, \$500 for that group of traps (i.e., 105 traps, add on equal to \$1,000)
- 2) Second Violation - \$1,000 for each group of 100 traps; if less than 100 traps, \$1,000, for that group of traps

2. Traps that appear to be actively fished:

a. Base penalty

- 1) First violation \$ 5,000 - \$10,000
- 2) Second violation \$10,000 - \$15,000
- 3) Third violation \$25,000

b. Add-ons based on number of traps

- 1) First violation - \$500 for each group of 100 traps; if less than 100 traps in group, \$500 for that group of traps (i.e., 105 traps, add on equal to \$1,000)

2) Second violation - \$1,000 for each group of 100 traps; if less than 100 traps, \$1,000, for that group of traps

3. Traps being worked by boat/fisherman.
  - a. First violation - \$12,000 - \$15,000 plus seizure of entire catch on board
  - b. Second violation - \$15,000 - \$25,000 plus seizure of entire catch on board
  - c. Third violation - \$25,000 plus seizure of entire catch on board and seizure of vessel

B. Lack of degradable panel on traps: 50 C.F.R. § 654.21.

1. First violation \$1,000 - \$3,000
2. Second violation \$3,000 - \$5,000
3. Third violation \$5,000 - \$10,000

C. Failure to mark properly traps, buoys and/or vessel as required by 50 C.F.R. § 654.4.

1. First violation \$500 - \$1,000
2. Second violation \$1,000 - \$2,000
3. Third violation \$2,000 - \$5,000

III. Adjusting Factors (to help determine which end of the range to set penalty).

1. Culpability - wilful/intentional nature of violation.
2. Surrounding circumstances.
  - a. Lack of cooperation with boarding officers.
  - b. Evasion of enforcement vessel/aircraft.
  - c. Interference with enforcement officers.
  - d. Extraordinary cooperation.
3. Time lapse since prior offense.
4. Prior citation.

501-01.3(3)(4)  
(4)

NOAA ENFORCEMENT OPERATIONS MANUAL

(5) Atlantic Tunas Convention of 1975.

(6) Lacey Act

[Reserved]

(7) Marine Protection, Research, and Sanctuaries Act of 1972.

(A) Key Largo Coral Reef Marine Sanctuary.

<u>Offense</u>	<u>Penalty Range*</u>	<u>Compromise Agreement</u>
Removal or destruction of natural features (includes possession) 929.4(a)	A) 150-2,500 B) 2,500-5,000 C) 5,000-50,000	A) 75-1,250 B) 1,250-2,500 C) 2,500-25,000 D) available
Cutting, carving, injuring, mutilating, moving or displacing or breaking off bottom formation of growth 929.4(a)(2)	A) 150-2,500 B) 2,500-5,000 C) 5,000-25,000	A) 75-1,250 B) 1,250-2,500 C) 2,500-12,500 D) available
Attachment of rope, wire anchor, etc. to coral or other formation 929.4(a)(3)	A) 100-150 B) 150-500 C) 500-2,500	A) 50-75 B) 75-250 C) 250-1,250 D) available
Dredging, filling, excavating activities 929.4(b)(1)	A) 2,500-5,000 B) 5,000-25,000 C) 25,000-50,000	A) 1,250-2,500 B) 2,500-12,500 C) 12,500-25,000 D) available
Building or constructing any structure (permanent or temporary) 929.4(b) (2) and (3)	A) 1,000-10,000 B) 5,000-25,000 C) 25,000-50,000	A) 500-5,000 B) 2,500-12,500 C) 12,500-25,000 D) available
Discharge of refuse and polluting substances 929.4(c)	A) 150-1,000 B) 250-50,000 C) 2,500-50,000	A) 75-500 B) 125-25,000 C) 1,250-25,000 D) available

**NOAA ENFORCEMENT OPERATIONS MANUAL**

<u>Offense</u>	<u>Penalty Range*</u>	<u>Compromise Agree</u>
Destroying, molesting etc. archaeological or historical resources 929.4(d)	A) 2,500-10,000 B) 25,000-50,000 C) 25,000-50,000	A) 1,250-5,000 B) 12,500-25,000 C) 12,500-25,000 D) available
Defacing or tampering with markers, etc. 929.4(e)	A) 500-1,000 B) 1,000-2,500 C) 2,500-5,000	A) 250-500 B) 500-1,250 C) 1,250-2,500 D) available
Sport or commercial fishing with other than hook and line gear (excluding traps) 929.4(f)(1).	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Catching of species other than crawfish, spiny lobster, and stonecrab with traps for commercial purposes 929.4(f)(1)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Use of traps which are not marked, color coded or numbered 929.4(f)(1)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Catching or collection of tropical reef fishes (aquarium fishes) 929.4(f)(2)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Use of poisons, electric charges and similar methods for taking of fish	A) 250-1,000 B) 1,000-5,000 C) 5,000-10,000	A) 125-500 B) 500-2,500 C) 2,500-5,000 D) available
Use of area closed to public use by sanctuary manager 929.4(f)(4)	A) 150-2,500 B) 2,500-5,000 C) 5,000-50,000	A) 75-1,250 B) 1,250-2,500 C) 2,500-25,000 D) available
Handling, standing or disturbance of corals by divers 929.4(g)(2)	A) 75-250 B) 250-500 C) 500-1,000	A) 40-125 B) 125-250 C) 250-500 D) available

**NOAA ENFORCEMENT OPERATIONS MANUAL**

<u>Offense</u>	<u>Penalty Range*</u>	<u>Compromise Agreement</u>
Operating a watercraft contrary to regulations 929.4(h)(1) to (8)	A) 100-500 B) 250-2,500 C) 2,500-50,000	A) 50-250 B) 125-1,250 C) 1,250-25,000 D) available
Failure to fly the red and white "divers down" flag 929.4(h)(5)	A) 25-500 B) 150-1,000 C) 1,000-5,000	A) 15-250 B) 75-500 C) 500-2,500 D) available
Photography involving use of special settings or structures 929.4(i)(1)	A) 150-1,000 B) 1,000-5,000 C) 5,000-50,000	A) 75-500 B) 500-2,000 C) 2,500-50,000 D) available
Advertising or Publicity 929.4(j)	A) 150-500 B) 500-1,000 C) 1,000-5,000	A) 75-250 B) 250-500 C) 500-2,500 D) available
Possession of explosives or dangerous weapons 929.4(k)(2)	A) 50-500 B) 150-1,000 C) 500-5,000	A) 25-250 B) 75-500 C) 250-2,500 D) available
Discharge of dangerous weapon or explosive 929.4(k)(3)	A) 50-500 B) 150-5,000 C) 5,000-50,000	A) 25-250 B) 75-2,500 C) 2,500-25,000 D) available
Spearfishing 929.4(k)(2)	A) 100-500 B) 500-2,500 C) 1,000-5,000	A) 50-250 B) 250-1,250 C) 500-2,500 D) available
Conducting an activity authorized by §929.6 without a valid permit or transferring a valid permit.	A) 500-5,000 B) 2,500-10,000 C) 1,000-25,000	A) 250-2,500 B) 1,250-5,000 C) 500-12,500 D) available

- A) First or "casual" violation
- B) Subsequent or "intentional" violations
- C) Severe violations
- D) No compromise

\* Including forfeiture of any seized items

(7) Marine Protection, Research, and Sanctuaries Act of 1972

(C) Looe Key National Marine Sanctuary

<u>Offense</u>	<u>Penalty Range*</u>	<u>Compromise Agreement</u>
Breaking, cutting (or similiarly damaging), or taking any coral or marine vertebrate, except as an incidental result of anchoring outside the Fore Reef § 937.6(a)(1)(A)	A) 150-2,500 B) 2,500-5,000 C) 5,000-50,000	A) 75-1,250 B) 1,250-2,500 C) 2,500-25,000 D) available
Divers handling or standing on coral formations § 937.6(a)(1)(A)	A) 75-250 B) 250-500 C) 500-1,000	A) 40-125 B) 125-250 C) 250-500 D) available
Taking any tropical fish or marine invertebrate, except incidentally to allowed fishing activities § 937.6(a)(1)(B)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Possessing any coral, marine invertebrate, or tropical fish within the sanctuary § 937.6(c)(1)(C)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Operating watercraft in violation of federal rules and regulations § 937.6(a)(2)	A) 100-500 B) 250-2,500 C) 2,500-50,000	A) 50-250 B) 125-1,250 C) 1,250-25,000 D) available
Anchoring or injuring coral with any chain or rope within the Fore Reef § 937.6(a)(2)(A)	A) 100-150 B) 150-500 C) 500-2,500	A) 50-75 B) 75-250 C) 250-1,250 D) available
First diver from dive boat failing to ensure anchor is placed off the coral and will not shift so to damage coral; other diveboat swimmers diving before anchor is properly set § 937.6(a)(2)(A)	A) 100-150 B) 150-500 C) 500-2,500	A) 50-75 B) 75-250 C) 250-1,250 D) available

<u>Offense</u>	<u>Penalty Range*</u>	<u>Compromise Agreement</u>
Watercraft failing to use mooring bouys, stations or anchoring areas when they have been designated and are available § 937.6(a) (2) (B)	A) 100-500 B) 250-2,500 C) 2,500-50,000	A) 50-250 B) 125-1,250 C) 1,250-25,000 D) available
Operating watercraft in such a manner as to strike or otherwise cause damage to the natural features of the sanctuary § 937.6(a) (2) (C)	A) 100-500 B) 250-2,500 C) 2,500-50,000	A) 50-250 B) 125-1,250 C) 1,250-25,000 D) available
Watercraft failing to fly the red and white "divers down" flag during diving operations § 937.6(a) (2) (D)	A) 25-500 B) 150-1,000 C) 1,000-5,000	A) 15-250 B) 75-500 C) 500-2,500 D) available
Using or placing wire fish traps within the sanctuary § 937.6(a) (3) (A)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Placing lobster traps within the Fore Reef area of the sanctuary § 937.6(a) (3) (B)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Spearfishing within the sanctuary § 937.6(a) (3) (C)	A) 100-500 B) 500-2,500 C) 1,000-5,000	A) 50-250 B) 250-1,250 C) 500-2,500 D) available
Using poisons, electric charges, explosives, or similiar fishing methods within the sanctuary § 937.6(a) (3) (D)	A) 50-500 B) 150-5,000 C) 5,000-50,000	A) 25-250 B) 75-2,500 C) 2,500-25,000 D) available
Removing, damaging, or tampering with any historical or cultural resources, including cargo pertaining to submerged wrecks § 937.6(a) (4)	A) 2,500-10,000 B) 25,000-50,000 C) 25,000-50,000	A) 1,250-5,000 B) 12,500-25,000 C) 12,500-25,000 D) available



<u>Offense</u>	<u>Penalty Range*</u>	<u>Compromise Agreement</u>
Depositing or discharging any materials or substances other than fish and chumming materials, cooling water from vessels, or effluents from marine sanitation devices § 937.6(a)(5)	A) 150-1,000 B) 250-50,000 C) 2,500-50,000	A) 75-500 B) 125-25,000 C) 1,250-25,000 D) available
Marking, defacing, damaging, displacing, removing, or tampering with any signs, notices, or placards, whether temporary or permanent, or with any monuments, stakes, posts or other boundary markers installed by the managers or markers placed for the purpose of lobster pot fishing § 937.6(a)(6)	A) 500-1,000 B) 1,000-2,500 C) 2,500-5,000	A) 250-500 B) 500-1,250 C) 1,250-2,500 D) available
Conducting an activity authorized by § 937.8 (related to research, education, or salvage) without a valid permit § 937.8	A) 500-5,000 B) 2,500-10,000 C) 1,000-25,000	A) 250-2,500 B) 1,250-5,000 C) 500-12,500 D) available

- A) First or "casual" violation
- B) Subsequent or "intentional" violation
- C) Severe violation
- D) No compromise

\*Including forfeiture of any seized items

(7) Marine Protection, Research and Sanctuaries Act of 1972

(B) Gray's Reef National Marine Sanctuary

<u>Offense</u>	<u>Penalty Range*</u>	<u>Compromise Agreement</u>
Dredging or drilling § 938.6(a)(1)	A) 2,500-5,000 B) 5,000-25,000 C) 25,000-50,000	A) 1,250-2,500 B) 2,500-12,500 C) 12,500-25,000 D) available
Altering seabed in any way § 938.6(a)(1)	A) 150-2,500 B) 2,500-5,000 C) 5,000-50,000	A) 75-1,250 B) 1,250-2,500 C) 2,500-25,000 D) available
Constructing any structure other than navigational aids without a permit § 938.6(a)(1)	A) 1,000-10,000 B) 5,000-25,000 C) 25,000-50,000	A) 500-5,000 B) 2,500-12,500 C) 12,500-25,000 D) available
Depositing or discharging materials or substances other than fish, bait, etc.; effluent from marine sani- tation devices; or vessel cooling waters § 938.6(a)(2)	A) 150-1,000 B) 250-50,000 C) 2,500-50,000	A) 75-500 B) 125-25,000 C) 1,250-25,000 D) available
Operating watercraft in violation of federal rules and regulations § 938.6(a)(3)	A) 100-500 B) 250-2,500 C) 2,500-50,000	A) 50-250 B) 125-1,250 C) 1,250-25,000 D) available
Using or possessing wire fish traps within the sanctuary without a permit § 938.6(a)(4)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Using a bottom trawl or other vessel-towed bottom sampling device within the sanctuary without a permit § 938.6(a)(5)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Removing, damaging, or taking any bottom formation, any marine invertebrate, or any marine plant without a permit § 938.6(a)(6)(i)	A) 150-2,500 B) 2,500-5,000 C) 5,000-50,000	A) 75-1,250 B) 1,250-2,500 C) 2,500-25,000 D) available

<u>Offense</u>	<u>Penalty Range*</u>	<u>Compromise Agreement</u>
Taking of tropical fish without a permit § 938.6(a)(6)(ii)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Possessing any bottom formation, any marine invertebrate, any marine plant, or any tropical fish within the sanctuary without a permit § 938.6(a)(6)(iii)	A) 150-1,000 B) 250-2,500 C) 1,000-5,000	A) 75-500 B) 125-1,250 C) 500-2,500 D) available
Using poisons, electric charges, explosives, etc. to take any marine animal or plant § 938.6(a)(iv)	A) 250-1,000 B) 1,000-5,000 C) 5,000-10,000	A) 125-500 B) 500-2,500 C) 2,500-10,000 D) available
Tampering, damaging, or removing any historic or cultural resource without a permit § 938.6(a)(7)	A) 2,500-10,000 B) 25,000-50,000 C) 25,000-50,000	A) 1,250-5,000 B) 12,500-25,000 C) 12,500-25,000 D) available
Conducting an activity authorized by § 938.3 (related to research, education, or salvage) without a valid permit § 938.8	A) 500-5,000 B) 2,500-10,000 C) 1,000-25,000	A) 250-2,500 B) 1,250-5,000 C) 500-12,500 D) available

- A) First or "casual" violation
- B) Subsequent or "intentional" violation
- C) Severe violation
- D) No compromise

\*Including forfeiture of any seized items

COASTAL MIGRATORY PELAGIC RESOURCES OF THE  
GULF OF MEXICO AND THE SOUTH ATLANTIC  
50 CFR PART 642

I. Fishing Violations.

A. Commercial Fishermen.

1. The following penalties apply with respect to the enumerated violations:

a. Fishing for king or Spanish mackerel in closed areas or during closed seasons (50 CF § 647.7(b); or

b. Fishing for king or Spanish mackerel using a purse seine except in compliance with the specified provisions (50 CFR § 642.7(f)).

<u>Violation</u>	<u>Monetary Penalty</u>	<u>Seizure</u>
First:	\$12,000 - \$15,000	Entire catch; (vessel if aggravated)
Second:	\$15,000 - \$25,000	Entire catch; (vessel if aggravated)
Third or subsequent:	\$25,000	Entire catch and vessel

2. The following penalties apply with respect to the enumerated violations:

a. Possession of or harvest from the FCZ of Spanish mackerel (subject to the specified allowance) or cobia which are under the minimum size limit (50 CFR § 642.7(c) & (d)); or

b. Possession of king mackerel on board a vessel in the FCZ with gill nets having a mesh size smaller than the minimum, subject to the specified catch allowance (50 CFR § 624.7(e)).

NOAA ENFORCEMENT OPERATIONS MANUAL

Coastal Migratory Pelagic Resources—Continued

i. Base penalty:

First violation: \$1,500 - \$2,500  
 Second violation: \$2,500 - \$3,500  
 Third or subsequent violation: \$3,500 - 5,0000

ii. Additional monetary penalty:

<u>Pounds of illegal harvest on board</u>	<u>1st violation</u>	<u>2nd violation</u>	<u>3rd or subsequent violation</u>
0 - 100	\$ 50	\$ 5,050	\$10,050
100 - 250	\$ 125	\$ 5,125	\$10,125
250 - 500	\$ 250	\$ 5,250	\$10,250
500 - 1,000	\$ 500	\$ 5,500	\$10,500
1,000 - 2,000	\$ 1,000	\$ 6,000	\$11,000
2,000 - 5,000	\$ 2,500	\$ 7,500	\$12,500
5,000 - 10,000	\$ 5,000	\$10,000	\$15,000
More than 10,000	\$10,000	\$15,000	\$20,000

iii. Seizure of catch

<u>Violation</u>	<u>Catch</u>	<u>Vessel</u>
First:	*10 or fewer illegal fish; illegal fish only (for donation or destruction)	Yes—if aggravated
	*More than 10 illegal fish; entire catch	
Second:	Entire catch	Yes—if aggravated
Third or subsequent:	Entire catch	Yes

B. Recreational Fishermen.

1. Fishing for king or Spanish mackerel in closed areas or during closed seasons (50 CFR § 647.7(b)).

NOAA ENFORCEMENT OPERATION MANUAL

Coastal Migratory Pelagic Resources—Continued

a. Monetary penalty

First violation: \$1,000 - \$ 2,500  
 Second violation: \$2,500 - \$ 5,000  
 Third or subsequent violation: \$5,000 - \$10,000

b. Seizure of entire catch

c. Seizure of vessel on third or subsequent violation

2. Possession of or harvest from the FCZ of Spanish mackerel or cobia under the minimum size limit (50 CFR §642.7(c) & (d)).

a. Base monetary penalty: \$250 - \$1,500

b. Additional monetary penalty:

<u>Number of short fish</u>	<u>1st violation</u>	<u>2nd violation</u>	<u>3rd or subsequent violation</u>
2 - 10	\$ 25/fish	\$ 50/fish	\$100/fish
10 - 25	\$ 35/fish	\$ 70/fish	\$140/fish
25 - 50	\$ 45/fish	\$ 90/fish	\$180/fish
More than 50	\$ 75/fish	\$150/fish	\$300/fish

c. Seizure of catch

\*10 or fewer short fish: illegal fish only (for donation or destruction)

\*More than 10 short fish: entire catch

d. Seizure of vessel on third or subsequent violation

## Coastal Migratory Pelagic Resources—Continued

II. Enforcement Related Violations.

	<u>1st violation</u>	<u>2nd violation</u>	<u>3rd or subsequent violation</u>
A. Possessing, having custody or control of, shipping, transporting, offering for sale, selling, purchasing, importing, landing, or exporting any fish or fish part taken or retained in violation of the MFCMA or Part 642 regulations (50 CFR § 642.7(g)).			
1. 0 - 100 pounds of such fish	\$ 1,000- 2,000	\$ 2,000- 4,000	\$ 4,000+
2. 100 - 250 pounds of such fish	\$ 2,500- 5,000	\$ 5,000- 10,000	\$10,000+
3. 250 - 500 pounds of such fish	\$ 5,000- 10,000	\$10,000- 20,000	\$20,000+
4. More than 500 pounds of such fish	\$ 7,500- 15,000	\$15,000- 25,000	\$25,000
B. Failure to comply immediately with enforcement and boarding procedures (50 CFR § 642.7(a)).			
	\$ 5,000- 7,500	\$ 7,500- 10,000	\$10,000+
C. Refusal to permit an authorized officer to board a fishing vessel (50 CFR § 642.7(h)).			
	\$ 5,000- 7,500	\$ 7,500- 10,000	\$10,000+

NOAA ENFORCEMENT OPERATIONS MANUAL

Coastal Migratory Pelagic Resources—Continued

	<u>1st violation</u>	<u>2nd violation</u>	<u>3rd or subsequent violation</u>
D. Forcibly assault, resist, impede, etc. any authorized officer in the conduct of any search or inspection (50 CFR § 642.7(i)).	\$17,500- 20,000	\$20,000- 22,500	\$22,500 - \$25,000
E. Resisting a lawful arrest for any act prohibited by Part 642 (50 CFR § 647.7(j)).	\$17,500- 20,000	\$20,000- 22,500	\$22,500 - \$25,000
F. Interfering with, delaying or preventing the apprehension of another person, with knowledge that that person is a violator (50 CFR § 642.7(k)).	\$ 5,000- 7,500	\$ 7,500- 10,000	\$10,000 +
G. Transferring or attempting to transfer US-harvested CMPs to a foreign vessel without authorization to do so (50 CFR § 642.7(l)).	\$ 5,000- 7,500	\$ 7,500- 10,000	\$10,000 +



Coastal Migratory Pelagic Resources—Continued

H. Violating any other provision of the MFCMA or Part 642 (50 CFR § 642.7(m)).

Penalty to fit facts and circumstances of the case.

III. Aggravating or Mitigating Circumstances.

A. Mental state:

1. Culpability: Willful or intentional nature of the violation or attempted concealment of illicit conduct.

B. Attendant circumstances.

1. Extraordinary cooperation.
2. Lack of cooperation (including disobeying officer and evasion).

C. Prior record.

1. Prior written warnings or citations.
2. Time lapse since prior offense(s).

Office of General Counsel  
Southeast Region  
9450 Koger Boulevard  
St. Petersburg, FL 33702

June 7, 1983

TO: F/SERx2 - Suzanne Montero  
FROM: GCSE - Katherine A. Pease  
SUBJECT: Case Processing and Procedures

Recently, you mentioned that several constituents had expressed an interest about how enforcement cases are processed. This discussion paper will provide a general overview of case processing in the Southeast region.

I. Documentation of a Violation and Receipt of Case File

The documentation of a federal violation of fishing regulations, marine mammal or endangered species regulations or marine sanctuary regulations is done by several different groups of enforcement/conservation officers. Agents of the National Marine Fisheries Service (NMFS) are involved with enforcement of fishing, marine mammal and endangered species regulations. The Coast Guard or Customs may document violations of these regulations as well. In addition, the Department of Commerce, Department of Transportation and the State of Florida, Department of Natural Resources (DNR), have entered into a cooperative agreement authorizing the Florida Marine Patrol (FMP) to enforce federal fishing regulations in the fishery conservation zone (FCZ). The FMP has provided substantial assistance in enforcing federal fishing regulations.

After the agents or personnel of FMP, Customs, Coast Guard or enforcement agents of NMFS have documented a violation, NMFS field agents review the case and prepare an Offense Investigation Report (OIR). The OIR may be very brief (for violations documented by FMP as FMP agents submit a comprehensive report) or quite elaborate when the violation has been documented by NMFS agents. In the latter case, a thorough report is necessary as it may be the only documentation of the violation. The OIR names the violator (respondent), describes the enforcement operation and discusses any pertinent details concerning that particular case. The OIR plus the FMP report (if applicable) is forwarded from the field office to the Law Enforcement Group (LEG) at the NMFS regional office in St. Petersburg, FL. The LEG reviews the case file, determines whether the respondent is a repeat violator and verifies the owner of the vessel. When LEG has completed its review, it sends the case to the Office of General Counsel, Southeast Region (GCSE), which is co-located with the NMFS regional office, for prosecution.

Violations of marine sanctuary regulations are handled somewhat differently. NMFS agents are not involved with this type of case. Instead, the Coast Guard and the Florida DNR, Division of Parks and Recreation, patrol these sanctuaries located off the coast of Florida. The Departments of Commerce and Transportation and Florida DNR have entered into a cooperative agreement which authorizes the Parks and Recreation rangers to enforce the federal sanctuary regulations. The cases documented by the Coast Guard and/or the rangers are sent directly to GCSE.

The time lapse between the date of the violation and the arrival of the case at GCSE varies depending on the type of case involved and the workload of the agents. A simple marine sanctuary case (i.e. spearfishing or anchoring in coral) may arrive within a week or less. More complex cases may take between two to six or eight weeks.

Once GCSE receives the case, the attorney responsible for that type of violation reviews it to determine whether GCSE should prosecute it. This review includes plotting the position of the violation to verify that the violation occurred in federal waters and/or in a closed area. Sometimes the attorney may request more information on a case. When the attorney determines that the case is legally sound, the attorney will issue a Notice of Violation and Assessment (NOVA).

## II. Issuance of a NOVA

The NOVA is the charging document in all cases handled by GCSE. It supercedes any papers issued by boarding officers or investigating officers. The information in the NOVA includes respondent's name and address (there may be more than one respondent charged in the same NOVA), facts surrounding the violation, statutes and regulations violated, evidence seized (if any) and amount of the penalty. In addition, the NOVA also discusses actions which must be taken by the respondent within thirty days (see discussion infra).

### A. Determining the Respondent

In most fishing violation cases, both the owner of the vessel and the captain (if they are different persons) are charged jointly and severally. "Jointly and severally" means all respondents are collectively and individually liable for the full amount of the penalty. For example, a NOVA may charge Captain Jones and Owner Smith, jointly and severally, and assess a \$12,000 penalty. Both the captain and owner are individually liable for the whole amount, but only a maximum of \$12,000 could be collected for the violation. So, if the owner paid the full \$12,000, the captain would owe nothing to the federal government and vice versa. Or, the captain and the owner could split the penalty, and each could pay a portion of the penalty.

The latter situation frequently occurs. By charging jointly and severally, the government maintains flexibility in collecting the penalty.

Charging both the owner and captain serves another purpose besides flexibility in collecting fines. The practice is intended to encourage accountability and responsibility in the captain and the owner. The captain should be held accountable because he was the perpetrator of the violation and should not be allowed to benefit from his actions. Owners, however, frequently question why they should be held responsible when they personally did not commit the violation.

The legal principle of holding an employer responsible for the actions of an employee who is carrying out the employer's business is a well-established one. If a captain fishes in a closed area and is not apprehended, the owner benefits from the sale of the illegally harvested fish. Likewise, when the captain is caught, the owner shares the liability. The owner, therefore, is responsible for employing a captain who will fish in accordance with federal regulations.

What happens if an owner specifically instructs a captain not to fish in a restricted area, but the captain fishes there anyway? A United States district court has addressed this question in the context of a Magnuson Act fishing violation. In this case, the owners had instructed the captain not to fish in violation of federal fishing regulations. The captain disregarded these instructions and was caught. When the owners learned of the violation, they discharged the captain. Despite the instructions and the subsequent discharge, the court held the owners liable for the violation.

The owner, however, is not without recourse when the owner pays all or part of the penalty. The owner has the right to recover that amount from the captain. Some owners have done this by deducting a portion of the captain's share on later fishing trips. Others have made arrangements for monthly payments from the captain.

In the Gulf of Mexico shrimp fishery, some owners have captains sign a form which absolves the owner's liability should the captain be cited for a violation. From a legal standpoint, this does not affect the right of the federal government to charge the vessel owner and later collect the penalty from the owner. It, at best, merely reinforces the existing right of the owner to collect from the captain that portion of the penalty paid by the owner.

For violations not involving fishing regulations, the government is less likely to charge the owner and the captain, jointly and severally. These are cases concerning marine mammals, endangered species or marine sanctuary violations. In

the first two types of cases, there may not even be a boat involved. In the final category of cases, the violators are often recreational boaters operating their own vessels. Still, there may be occasions when it is appropriate to charge jointly and severally for these violations.

#### B. Assessing the Penalty

The determination of the penalty depends on several factors. The first factor is to determine whether a repeat violator is involved. Repeat violators are fined more heavily than first-time violators. Aggravating or mitigating circumstances are next considered. Did the violator attempt to flee from the enforcement officers? If he did, a greater penalty will be imposed. Extraordinary cooperation, on the other hand, could result in a lower penalty. For minor violations, a written warning, imposing no monetary penalty, might be issued.

Fashioning a penalty schedule is not an easy task. The schedule should be fair, yet provide sufficient deterrence to potential violators. Due to the lack of money and personnel to patrol continuously in the management areas, deterrence is crucial. If the penalties are too low, commercial fishermen would be tempted to violate the regulations and to write off the penalties as a cost of doing business. The impact of the fine on the individual, then, must be balanced against the protection of the resource. Based on these considerations, GCSE has developed penalty schedules designed for each regulated species or area (i.e. marine sanctuaries). These schedules attempt to be equitable and fair while providing sufficient deterrence. The penalty schedules, however, are intended to be flexible. All or portions of each schedule may be revised upward or downward depending on the number of violations occurring and feed-back from the enforcement personnel, fishermen and other constituents.

The penalty schedules typically list the current regulations and establish a penalty range for a first, second and third violation of each. In addition to a monetary penalty, seizure of the catch and/or vessel may be imposed for more serious violations. Seizure of the catch and/or vessel would apply for closed area violations and the taking of undersized fish. If the amount of the catch is small, the estimated value of the catch may be added to the penalty rather than seizing the catch. Vessel seizure is usually reserved for third-time violators, but may be imposed for a first-time violator should aggravating conditions exist.

#### C. Serving the Respondent

After the penalty has been determined, GCSE sends to the respondent the NOVA and copies of the governing statute, appropriate regulations and rules of civil procedure which explain the rights and responsibilities of the respondent. This package of documents is sent to each respondent by certified

mail. Certified mail is used to ensure that the respondent actually received the NOVA, for receipt of the NOVA begins the time period within which the respondent may take certain actions. Service by certified mail is considered effective when the respondent, a member of his household or his agent (i.e. business partner, attorney) signs for the package. Refusal to accept the certified mail also constitutes effective service. Sometimes the respondent may be away from his home when the certified mail is sent. In these circumstances, the certified mail is returned to GCSE as "Unclaimed." Unclaimed NOVAs are immediately resent using both certified and regular mail. Regular mail is considered served five days after it is sent. Occasionally, a respondent may move and leave no forwarding address. In this case, the NOVA is given to the NMFS enforcement office which will make personal service on a respondent once that individual is located.

When a violator receives a NOVA, he has three options. He may pay the penalty, attempt to settle the case for less than the penalty amount or request a hearing (the last two options are not mutually exclusive). If the respondent elects to pay the penalty, the case will be closed upon receipt of the penalty amount. Other respondents attempt to settle their cases below the amount. Typically these individuals plead financial inability to pay. When ability to pay is raised, GCSE will send out financial disclosure forms for individuals or corporate financial interrogatories. A respondent is under no obligation to provide financial information. If the information is provided, though, ability to pay can be considered. All financial information is independently verified. If GCSE is satisfied that the respondent cannot pay the penalty in a lump sum, monthly payments may be arranged. A number of violators are currently making monthly payments to the government. The remaining alternative that a respondent may select is to request an administrative hearing.

### III. Administrative Hearing Process

An administrative hearing is a civil, not a criminal proceeding. If a respondent wants a hearing, he must make a written request for hearing within thirty days of receipt of the NOVA. The request is sent to GCSE (this address is on the NOVA). The request does not have to follow any format -- merely the statement "I want a hearing" will suffice.

When GCSE reviews the hearing request, it forwards the request to the Office of Administrative Law Judge (ALJ) in Washington, D.C. About four to six weeks after the hearing request is forwarded to ALJ, that office will require the respondent and GCSE to submit a Preliminary Position on Issues and Procedures (PPIP). The PPIP is a simple statement which answers six basic questions:

1. What are the legal issues in dispute?
2. What are the factual issues in dispute?
3. Is the amount of penalty in dispute?
4. Who will be called as witness, and what will their testimony be?
5. What exhibits will be used at trial, and how will they relate to an issue at trial?
6. When and where should the hearing be held?

Usually the ALJ allows three to four weeks to submit the PPIP. Each side sends the PPIP to the ALJ and a copy to each other. The ALJ will try to schedule the hearing at a mutually convenient time and place. Often the hearing is scheduled near the place that the violation occurred.

At the hearing, the government presents its case first. The government gives an opening statement that outlines the government's theory of the case and what it will prove through the testimony of its witnesses. After the opening statement, the government calls its witnesses and questions them. The government's witnesses will be the enforcement officers who documented the violation. Other witnesses, such as scientists, may be called depending on the type of violation and the surrounding circumstances. The government may also introduce exhibits (i.e., chart illustrating the position of the violation; seized fishing gear). As the government presents its witnesses, the respondent or his attorney has the right to cross examine each witness. There is no requirement that a respondent have an attorney, and it is not unusual for a respondent to represent himself.

After the government has called all of its witnesses and has introduced all of its exhibits, the respondent presents his case. The respondent may make an opening statement, call witnesses and/or testify himself. The ALJ may ask questions of any witness.

To prove its case, the government must show by a preponderance of the evidence that a violation occurred. A "preponderance of evidence" means that it appears more likely than not that a violation happened.

When all the witnesses have testified and have been cross examined, the ALJ will close the hearing. A court reporter is present at the hearing and records all the testimony. The court reporter types the testimony, and the ALJ will provide a copy of the testimony to each side. Upon receipt of the testimony, each side has an opportunity to submit closing arguments and proposed findings (how each side would like the judge to decide).

The judge has a great deal of discretion in deciding cases. He may determine that a violation did not occur. Likewise, if he determines that a violation did occur, he may raise, lower or endorse the penalty assessed in the NOVA. Relatively few constraints exist when the judge determines a penalty. He may not exceed the maximum penalty authorized by law (i.e., \$25,000 for each violation of the Magnuson Act, \$50,000 for each violation of the Marine Protection, Research and Sanctuaries Act), and he must consider ability to pay if evidence is provided on that issue. Other than that, the judge has a great deal of flexibility when determining the penalty.

After the judge has issued the initial decision in the case, either side may petition for review of this decision within thirty days from the date of the decision. The petition is directed to the Administrator of the National Oceanic and Atmospheric Administration (NOAA). The review is discretionary, and it is up to the Administrator of NOAA (or his designee) to decide whether to grant the review. If the Administrator declines review, a petition for reconsideration of that decision will not be permitted. In this instance, the Administrator will specify the date upon which the judge's decision will become effective as the final agency decision.

If neither party petitions for review, the initial decision of the ALJ will become effective as the final agency decision thirty days after the date of the initial decision. Should the Administrator grant the petition for review, he may modify or endorse the initial decision. The modification or endorsement would then become the final agency decision.

Once the agency decision is final, the respondent may petition for review of the agency's decision in federal district court. This review is accomplished by filing a notice of appeal in the district court within thirty days of the final agency decision.

#### IV. Collection of Penalties/Final Assessments

On rare occasions, a respondent does not pursue any of his three options upon receiving a NOVA. In this situation, the penalty in the NOVA becomes the final agency decision thirty days after service of the NOVA. The respondent then has thirty days to file for review in federal district court.

Once there is a final agency decision and all possible reviews have been exhausted or not pursued, the final assessment is due and payable to the federal government. If this penalty is not paid within thirty days, the federal government will



initiate a collection action against the respondent in federal district court. The assets of the respondents are subject to seizure and forfeiture to satisfy the debt owed to the government.

#### V. Conclusion

The above discussion outlines the steps taken in a civil penalty case. Although the procedures are fairly standardized, GCSE attempts to treat each case as a unique one and encourages all respondents to contact this office (813/893-3617) to discuss their cases. Any general questions concerning this memorandum should also be directed to GCSE.

File No. 502-02.100(1)

cc: GC - Jim Brennan  
GCEL - Maggie Frailey  
GCSE - Craig R. O'Connor  
GCSE - Fred Kyle

**FINANCIAL STATEMENT OF INDIVIDUAL**

(See Privacy Act Statement on reverse of this page before completing this form.)

NOTE - USE ADDITIONAL SHEETS WHERE SPACE ON THIS FORM IS INSUFFICIENT  
OR CONTINUE ON REVERSE SIDE OF THESE PAGES

1. NAME (Last, first)	2. BIRTH DATE (mo., day, yr.)	3. SOCIAL SECURITY NO.
4. HOME ADDRESS		5. PHONE NO.
6. NAME OF SPOUSE (also address if different from yours)		7. DATE OF BIRTH (mo., day, year)

**EMPLOYMENT DATA**

8. OCCUPATION		9. HOW LONG IN PRESENT EMPLOYMENT?	
10. PRESENT EMPLOYER'S NAME	ADDRESS	PHONE NO.	
<b>11. OTHER EMPLOYMENT - WITHIN LAST THREE YEARS</b>			
EMPLOYER'S NAME	ADDRESS	PHONE NO.	EMPLOYMENT DATES
<b>12. PRESENT MONTHLY INCOME</b>			
SALARY OR WAGES \$ _____	COMMISSIONS \$ _____	OTHER (specify) \$ _____	TOTAL \$ _____

**SPOUSE'S EMPLOYMENT DATA**

13. OCCUPATION		14. HOW LONG IN PRESENT EMPLOYMENT?	
15. SPOUSE'S PRESENT EMPLOYER'S NAME	ADDRESS	PHONE NO.	
<b>16. OTHER EMPLOYMENT - WITHIN LAST THREE YEARS</b>			
EMPLOYER'S NAME	ADDRESS	PHONE NO.	EMPLOYMENT DATES
<b>17. PRESENT MONTHLY INCOME</b>			
SALARY OR WAGES \$ _____	COMMISSIONS \$ _____	OTHER (specify) \$ _____	TOTAL \$ _____

**DEPENDENTS**

18. TOTAL NUMBER	RELATIONSHIP	AGE	RELATIONSHIP	AGE	RELATIONSHIP	AGE	19. TOTAL MONTHLY INCOME OF DEPENDENTS (except spouse)
							\$ _____

**FINANCIAL DATA**

20. FOR WHAT PERIOD DID YOU LAST FILE A FEDERAL INCOME TAX RETURN	21. WHERE FILED	22. AMOUNT OF GROSS INCOME REPORTED	
<b>23. FIXED MONTHLY EXPENSES</b>			
RENT	FOOD	UTILITIES	INTEREST
DEBT REPAYMENTS (Mortgage, Auto, Student)	OTHER (specify)		
<b>TOTAL FIXED MONTHLY CHARGES</b>			

**24. LOANS PAYABLE**

OWED TO	PURPOSE & DATE OF LOAN	ORIGINAL AMOUNT	PRESENT BALANCE

PRIVACY ACT NOTICE

The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 44 U.S.C. 3101, 16 U.S.C. 1375(a), 16 U.S.C. 1540(a), 16 U.S.C. 1858(a), 16 U.S.C. 971a(e), 16 U.S.C. 1433, 18 U.S.C. 43, 16 U.S.C. 772f, 16 U.S.C. 957(c), 30 U.S.C. 1462(a), 42 U.S.C. 9152(c) and relevant treaties, international conventions, or agreements.

The disclosure of the information is voluntary. It is necessary to evaluate an individual's financial ability to pay a penalty. If the requested information is not supplied, NOAA will not be able to consider the information in assessing a penalty. There is no routine use of the information beyond the above stated purpose.

26. ASSETS AND LIABILITIES	
Assets (Give market value)	Liabilities
CASH \$ _____	BILLS OWED (grocery, doctor, lawyer, etc.) \$ _____
CHECKING ACCOUNTS (show location) _____	INSTALLMENT DEBT (car, furniture, clothing, etc.) _____
SAVINGS ACCOUNTS (show location) _____	TAXES OWED _____
	INCOME _____
	OTHER (interest) _____
MOTOR VEHICLES	LOANS PAYABLE (to bank, finance Co., etc.) _____
YEAR MAKE LICENSE NO. _____	JUDGMENTS YOU OWE _____
DEBTS OWED TO YOU (give name of debtor) _____	REAL ESTATE MORTGAGES _____
	OTHER DEBTS (interest) _____
JUDGMENTS OWED TO YOU _____	
STOCKS, BONDS AND OTHER SECURITIES (list) _____	
HOUSEHOLD FURNITURE AND GOODS _____	
ITEMS USED IN TRADE OR BUSINESS _____	
OTHER PERSONAL PROPERTY (list) _____	
REAL ESTATE _____	
TOTAL ASSETS \$ _____	TOTAL LIABILITIES \$ _____

26. REAL ESTATE OWNED				
ADDRESS	HOW OWNED (jointly, individually, etc.)	DATE ACQUIRED	COST	UNPAID AMOUNT OF MORTGAGE
27. REAL ESTATE BEING PURCHASED UNDER CONTRACT				
ADDRESS	NAME OF SELLER			
CONTRACT PRICE	PRINCIPAL AMOUNT STILL OWING	NEXT CASH PAYMENT DUE (date)	AMOUNT (of cash payment due)	
28. LIFE INSURANCE POLICIES				
COMPANY	FACE AMOUNT	CASH SURRENDER VALUE	OUTSTANDING LOANS	

29. ALL REAL AND PERSONAL PROPERTY OWNED BY SPOUSE AND DEPENDENTS VALUED IN EXCESS OF \$200,000 each (list separately)

30. ALL TRANSFERS OF PROPERTY INCLUDING CASH (BY BANK, MR. MRS. OR CASH) THAT YOU HAVE MADE WITHIN THE LAST THREE YEARS (Items of \$200 or more)

DATE	AMOUNT	PROPERTY TRANSFERRED	TO WHOM

31. ARE YOU A PARTY IN ANY LAW SUIT NOW PENDING?  YES, GIVE DETAILS BELOW  NO

32. ARE YOU A TRUSTEE, EXECUTOR, OR ADMINISTRATOR?  YES, GIVE DETAILS BELOW  NO

33. IS ANYONE HOLDING ANY MONIES ON YOUR BEHALF?  YES, GIVE DETAILS BELOW  NO

34. IS THERE ANY LIKELIHOOD YOU WILL RECEIVE AN INHERITANCE?  YES, FROM WHOM?  NO

35. DO YOU RECEIVE, OR UNDER ANY CIRCUMSTANCES, EXPECT TO RECEIVE BENEFITS, FROM ANY ESTABLISHED TRUST, FROM A CLAIM FOR FROM A CLAIM FOR COMPENSATION OR DAMAGES, OR FROM A CONTINGENT OR FUTURE INTEREST IN PROPERTY OF ANY KIND?  YES, EXPLAIN BELOW  NO

With knowledge of the penalties for false statements provided by 18 United States Code 1001 (\$10,000 fine and/or five years imprisonment) I certify that I believe the above statement is true and that it is a complete statement of all my income and assets, real and personal, whether held in my name or by any other.

DATE

SIGNATURE

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

NOTICE OF VIOLATION AND ASSESSMENT  
OF ADMINISTRATIVE PENALTY

MARINE MAMMAL PROTECTION ACT OF 1972

ISSUED TO:

CASE NO.:  
CERTIFIED MAIL NO.:

This is your official notice of the civil violation and penalty described below. This is an administrative proceeding, not a criminal prosecution. Copies of the statute and regulations concerning the prohibitions and penalty procedures are enclosed.

You are entitled to request a hearing (similar to a trial) before an Administrative Law Judge to deny and contest all, or any part, of the violation charged and the civil penalty proposed. You, your attorney, or other representative may contact the undersigned to discuss the violation and proceedings, or to urge any modification of the allegations or penalty based on the facts known to you.

If you do not choose to have a hearing on the violation or penalty, you may choose to accept the compromise offered within 30 days of receipt of this notice. To do so, sign the Compromise Agreement at the bottom and return it, with the compromise penalty, if any, to the address given below.

WARNING: WITHIN 30 CALENDAR DAYS FOLLOWING RECEIPT OF THIS NOTICE, IF YOU DO NOT RESPOND BY EXERCISING THE RIGHTS LISTED IN § 904.102 OF THE ENCLOSED REGULATIONS OR IF YOU DO NOT ACCEPT THE COMPROMISE, ALL OF THE ALLEGATIONS AND THE PENALTY WILL BE CONSIDERED ADMITTED, AND THIS ASSESSMENT WILL BECOME A FINAL ADMINISTRATIVE ORDER ENFORCEABLE IN ANY UNITED STATES DISTRICT COURT, in accordance with § 1375(a), Title 16 United States Code and §§ 904.104 and 904.105 of the regulations.

FACTS CONSTITUTING VIOLATION(S):

STATUTE/REGULATION VIOLATED: Marine Mammal Protection Act,

SEIZED ITEM(S):

FINDINGS, CONCLUSION, AND ORDER: Having considered all of the facts and circumstances presented in this matter, I do hereby find and conclude that the above Respondent(s) did violate the Marine Mammal Protection Act and regulations as alleged, in every particular, and that a just and reasonable disposition for such violation is a civil penalty in the amount of \$\_\_\_\_\_. IT IS SO ORDERED.

FOR THE SECRETARY OF COMMERCE: \_\_\_\_\_ DATED \_\_\_\_\_

Send reply or make inquiry to: U.S. Department of Commerce, NOAA, Office of General Counsel, ATTN: Penny A. Levin, Suite 127, Duval Building, 9450 Roger Boulevard, St. Petersburg, FL 33702; phone (813) 893-3617.

COMPROMISE AGREEMENT: I do not wish to contest this NOTICE OF VIOLATION AND ASSESSMENT. I hereby waive my right to a hearing and relinquish and transfer to the United States all right, title, and interest in any item(s) listed above as seized. I enclose payment (by check or money order made payable to "Treasurer of the United States") of a compromise civil penalty in the amount of \$\_\_\_\_\_. I take this action on the understanding that it is a settlement of all charges, claims, and complaints by the United States against me based on the Marine Mammal Protection Act resulting from the incident(s) described in this NOTICE OF VIOLATION AND ASSESSMENT.

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SIGNATURE OF RESPONDENT OR AUTHORIZED REPRESENTATIVE

DATE

UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration

NOTICE OF VIOLATION AND ASSESSMENT  
OF ADMINISTRATIVE PENALTY

LACEY ACT

RESPONDENT:

FILE NO:

CERTIFIED NO.:

This is your official notice of the civil violation(s) and administrative penalty described herein.

You are entitled to request a hearing (like a trial) before an Administrative Law Judge to deny and contest all, or any part, of the violation charged and the forfeiture and/or civil (administrative) penalty, imposed. This is not a criminal action. You, your attorney, or other representative, are also invited to contact the undersigned to discuss this Matter and its disposition, or to urge any modification of the allegations and penalty which you may feel is warranted by all of the facts and circumstances.

**WARNING, IF YOU SHOULD FAIL TO EXERCISE YOUR RIGHTS WITHIN 30 CALENDAR DAYS FOLLOWING RECEIPT OF THIS NOTICE, ALL OF THE ALLEGATIONS AND THE PENALTY HEREIN WILL BE TAKEN AS ADMITTED AND THIS ASSESSMENT WILL BECOME A FINAL ADMINISTRATIVE ORDER ENFORCEABLE IN ANY UNITED STATES DISTRICT COURT as provided in the Lacey Act and 15 C.F.R. Part 904 (copies attached for your information and guidance).**

FACTS CONSTITUTING VIOLATION(S):

STATUTE/REGULATION VIOLATED:

EVIDENCE SEIZED:

PENALTY:

FINDINGS, CONCLUSIONS, AND ORDER: Having considered all of the facts and circumstances presented in the Matter, and taking into account criteria for determining the amount of the civil penalty, I do hereby find and conclude that the Respondent(s) herein did violate the Lacey Act as alleged, in every particular, and a just and reasonable disposition for such violation(s) is forfeiture of all evidence seized plus the civil penalty stated above. **IT IS SO ORDERED.**

For the Secretary of Commerce \_\_\_\_\_

Dated \_\_\_\_\_

Should you have any questions, you may discuss them informally with:

NOAA, Office of General Counsel  
U.S. Department of Commerce  
ATTN: Katherine A. Pease  
Suite 127, Duval Building  
9450 Koger Boulevard  
St. Petersburg, FL 33702

AGREED DISPOSITION: I do not wish to contest this NOTICE OF VIOLATION AND ASSESSMENT. I hereby waive my right to a hearing and relinquish and transfer to the United States all right, title and interest in any items listed above as seized. I have enclosed payment of the penalty assessed, (by check or money order payable to the "Treasurer of the United States"). I take this action on the understanding that it is a settlement of all charges, claims, and complaints against me by the United States resulting from the Incident(s) described in this NOTICE OF VIOLATION AND ASSESSMENT.

DATE \_\_\_\_\_

Signature of Respondent or Authorized Representative \_\_\_\_\_

NOTICE OF VIOLATION AND ASSESSMENT  
OF ADMINISTRATIVE PENALTY

ATLANTIC TUNAS CONVENTION ACT

RESPONDENT:

FILE NO.:

CERTIFIED NUMBER:

VIOLATION:

STATUTES/REGULATIONS VIOLATED

SEIZED ITEMS:

PROPOSED PENALTY:

NOTICE

This is your official notice of the civil violation(s) and administrative penalty described herein.

You are entitled to request a hearing (like a trial) before an Administrative Law Judge to deny and contest all, or any part, of the violation charged and the forfeiture and/or civil (administrative) penalty, imposed. This is not a criminal action. You, your attorney, or other representative, are also invited to contact the undersigned to discuss this Matter and its disposition, or to urge any modification of the allegations and penalty which you may feel is warranted by all of the facts and circumstances.

WARNING, IF YOU SHOULD FAIL TO EXERCISE YOUR RIGHTS WITHIN 30 CALENDAR DAYS FOLLOWING RECEIPT OF THIS NOTICE, ALL OF THE ALLEGATIONS AND THE PENALTY HEREIN WILL BE TAKEN AS ADMITTED AND THIS ASSESSMENT WILL BECOME A FINAL ADMINISTRATIVE ORDER ENFORCEABLE IN ANY UNITED STATES DISTRICT COURT as provided in § 971(e), Title 16 United States Code, Atlantic Tunas Convention Act, and the implementing regulations in Part 904, Title 15, Code of Federal Regulations (copies attached for your information and guidance).

FINDINGS, CONCLUSIONS, AND ORDER: Having considered all of the facts and circumstances presented in the Matter, and taking into account criteria for determining the amount of the civil penalty, I do hereby find and conclude that the Respondent(s) herein did violate the Atlantic Tunas Convention Act as alleged, in every particular, and that a just and reasonable disposition for such violation(s) is forfeiture of all evidence seized plus the civil penalty

stated above. IT IS SO ORDERED.

For the Secretary of Commerce \_\_\_\_\_ Dated \_\_\_\_\_

Should you have any questions, you may discuss them informally with:

NOAA, Office of General Counsel  
U.S. Department of Commerce  
ATTN: Katherine A. Pease  
Suite 127, Duval Building  
9450 Koger Boulevard  
St. Petersburg, FL 33702

AGREED DISPOSITION: I do not wish to contest this NOTICE OF VIOLATION AND ASSESSMENT. I hereby waive my right to a hearing and relinquish and transfer to the United States all right, title and interest in any items listed above as payable to the "Treasurer of the United States"). I take this action on the understanding that it is a settlement of all charges, claims, and complaints against me by the United States resulting from the incident(s) described in this NOTICE OF VIOLATION AND ASSESSMENT.

Date \_\_\_\_\_

Signature of Respondent or Authorized Representative



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration

NOTICE OF VIOLATION AND ASSESSMENT  
OF ADMINISTRATIVE PENALTY

RESPONDENT:

FILE NO.:

CERTIFIED NO.:

This is your official notice of the civil violation(s) and administrative penalty described herein.

You are entitled to request a hearing (like a trial) before an Administrative Law Judge to deny and contest all, or any part, of the violation charged and the forfeiture and/or civil (administrative) penalty, imposed. This is not a criminal action. You, your attorney, or other representative, are also invited to contact the undersigned to discuss this matter and its disposition, or to urge any modification of the allegations and penalty which you may feel is warranted by all of the facts and circumstances.

WARNING, IF YOU SHOULD FAIL TO EXERCISE YOUR RIGHTS WITHIN 30 CALENDAR DAYS FOLLOWING RECEIPT OF THIS NOTICE, ALL OF THE ALLEGATIONS AND THE PENALTY HEREIN WILL BE TAKEN AS ADMITTED AND THIS ASSESSMENT WILL BECOME A FINAL ADMINISTRATIVE ORDER ENFORCEABLE IN ANY UNITED STATES DISTRICT COURT as provided in § 1858, Title 16 United States Code, The Fishery Conservation and Management Act of 1976, as amended, and the implementing regulations in Part 904, Title 15, Code of Federal Regulations (copies attached for your information and guidance).

FACTS CONSTITUTING VIOLATION(S):

STATUTE/REGULATION VIOLATION: Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1857(1)(A),

EVIDENCE SEIZED:

FINDINGS, CONCLUSIONS, AND ORDER: Having considered all of the facts and circumstances presented in the matter, and taking into account the criteria for determining the amount of the civil penalty (as provided in 16 U.S.C. § 1858(a)), I do hereby find and conclude that the Respondent herein did violate the Fishery Conservation and Management Act of 1976 as alleged, in every particular, and that a just and reasonable disposition for such violation(s) is forfeiture of all evidence seized plus a civil penalty in the amount of \$  
IT IS SO ORDERED.

For the Secretary of Commerce \_\_\_\_\_

Dated \_\_\_\_\_

Send reply or make inquiry to: NOAA, Office of General Counsel, U.S. Department of Commerce, ATTN: Katherine A. Pease, Suite 102, Duval Building, 9450 Roper Boulevard, St. Petersburg, FL 33702.

AGREED DISPOSITION: I do not wish to contest this NOTICE OF VIOLATION AND ASSESSMENT. I hereby waive my right to a hearing and relinquish and transfer to the United States all right, title and interest in any items listed above as seized. I have enclosed payment of the penalty assessed, (by check or money order payable to the "Treasurer of the United States"). I take this action on the understanding that it is a settlement of all charges, claims, and complaints against me by the United States resulting from the incident(s) described in this NOTICE OF VIOLATION AND ASSESSMENT.

Date \_\_\_\_\_

Signature of Respondent or Authorized Representative \_\_\_\_\_

CODE OF FEDERAL REGULATIONS

TITLE 50

PART 658--SHRIMP FISHERY OF THE GULF OF MEXICO

SUBPART A--GENERAL MEASURES

Sec.

- 658.1 Purpose and scope.
- 658.2 Definitions.
- 658.3 Relation to other laws.
- 658.4 Vessel permits and fees.
- 658.5 Recordkeeping and reporting. [Reserved]
- 658.6 Vessel identification.
- 658.7 Prohibitions.
- 658.8 Enforcement.
- 658.9 Penalties.

SUBPART B--MANAGEMENT MEASURES

- 658.20 Fishing year.
- 658.21 Allowable levels of harvest.
- 658.22 Tortugas Shrimp Sanctuary.
- 658.23 Stone crab area closure.
- 658.24 Texas closure.
- 658.25 Size restrictions.
- 658.26 Specifically authorized activities.

AUTHORITY: 16 U.S.C. 1801 et seq.

SOURCE: 46 FR 27494, May 20, 1981, unless otherwise noted.

SUBPART A--GENERAL MEASURES

§658.1 PURPOSE AND SCOPE

(a) The purpose of this Part is to implement the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, developed by the Gulf of Mexico Fishery Management Council under the Magnuson Fishery Conservation and Management Act.

(b) The regulations in this Part govern fishing for brown shrimp, white shrimp, pink shrimp, royal red shrimp, seabob shrimp, and rock shrimp by vessels of the United States within that portion of the Gulf of Mexico over which the United States exercises exclusive fishery management authority.

(c) Regulations governing foreign fishing for royal red shrimp appear in 50 CFR Part 611. Appendix I to §611.20 contains the total allowable level of foreign fishing for royal red shrimp.

#### §658.2 DEFINITIONS

In addition to the definitions in the Act, the terms used in this Part shall have the following meanings:

Act means the Magnuson fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

Authorized Officer means:

- (a) Any commissioned, warrant, or petty officer of the U.S. Coast Guard;
- (b) Any certified enforcement officer or special agent of the National Marine Fisheries Service;
- (c) Any officer designated by the head of any Federal or State Agency which has entered into an agreement with the Secretary and the Commandant of the Coast Guard to enforce the provisions of the Act; or
- (d) Any U.S. Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (a) of this definition.

Center Director means the Center Director, Southeast Fisheries Center, National Marine Fisheries Service, 75 Virginia Beach Drive, Miami, Florida 33149. Telephone 305-361-5761.

Catch, take, or harvest includes, but is not limited to, any activity which results in bringing any shrimp on board a vessel.

Fishery conservation zone (FCZ) means that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal States to a line on which each point is 200 nautical miles from the baseline from which the territorial sea of the United States is measured.

Fishery management plan (FMP) means the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico.

Fishing means any activity, other than scientific research conducted by a scientific research vessel, which involves:

- (a) The catching, taking, or harvesting of shrimp;
- (b) The attempted catching, taking, or harvesting of shrimp;
- (c) Any other activity which can reasonably be expected to result in the catching, taking, or harvesting of shrimp;

(d) Any operations at sea in support of, or in preparation for, any activity described in paragraph (a), (b), or (c) of this definition.

Fishing vessel means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for:

(a) Fishing; or

(b) Aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

Gulf of Mexico means the geographic area of authority of the Gulf of Mexico Fishery Management Council.

Operator, with respect to any vessel, means the master or other individual on board and in charge of that vessel.

Owner, with respect to any vessel, means:

(a) Any person who owns that vessel in whole or in part;

(b) Any charterer of that vessel, whether bareboat, time; or voyage;

(c) Any person who acts in the capacity of a charterer, including, but not limited to, parties to a management agreement, operating agreement, or other similar arrangement that bestows control over the destination, function, or operation of the vessel; or

(d) Any agent designated as such by any person described in paragraph (a), (b), or (c) of this definition.

Person means any individual (whether or not a citizen or national of the United States), corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

Regional Director means the Regional Director, Southeast Region, National Marine Fisheries Service, Duval Building, 9450 Koger Boulevard, St. Petersburg, Florida 33702, or a designee.

Shrimp means the following species:

Brown shrimp, Penaeus aztecus

White shrimp, P. setiferus

Pink shrimp, P. duorarum

Seabob shrimp, Xiphopenaeus kroyeri

Rock shrimp, Sicyonia brevirostris

Royal red shrimp, Hymenopenaeus robustus

United States harvested shrimp means shrimp caught, taken or harvested by vessels of the United States in the Gulf of Mexico, whether or not such shrimp is landed in the United States.

Vessel of the United States means:

(a) A vessel documented or numbered by the U.S. Coast Guard under United States law; or

(b) Any vessel under five net tons registered under the laws of any State.

[48 FR 17099, Apr. 21, 1983].

§658.3 RELATION TO OTHER LAWS

(a) Persons affected by these regulations should be aware that other Federal and State statutes and regulations may apply to their activities.

(b) The regulations found in this Part are intended to be compatible with regulations pertaining to the Everglades National Park in the State of Florida and Fort Jefferson National Monument. These regulations which prohibit commercial shrimping are found at 36 CFR 7.45 and 36 CFR 7.27, respectively.

(c) Certain responsibilities relating to data collection and enforcement may be performed by authorized State personnel under a cooperative agreement entered into by the State, the U.S. Coast Guard, and the Secretary.

§658.4 VESSEL PERMITS AND FEES

No permit is required for vessels of the United States fishing for shrimp under this Part.

§658.5 RECORDKEEPING AND REPORTING  
[RESERVED]

§658.6 VESSEL IDENTIFICATION

(a) Official Number. Each vessel of the United States engaged in the shrimp fishery in the Gulf of Mexico FCZ shall:

(1) Display its official number on the port and starboard sides of the deckhouse or hull and on an appropriate weather deck so as to be clearly visible from enforcement vessels and aircraft. The official number is the documentation number issued by the Coast Guard for documented vessels or the registration number issued by a State or the Coast Guard for undocumented vessels.

(2) The official number must be in block arabic numerals in contrasting color to the background.

(3) The official number shall be at least 18 inches in height for fishing vessels over 65 feet in length and at least 10 inches in height for all other vessels.

(4) The official number shall be permanently affixed to or painted on the vessel.

(b) Duties of Operator. The operator of each fishing vessel shall:

(1) Keep the registration number clearly legible and in good repair, and

(2) Insure that no part of the fishing vessel, its rigging, or its fishing gear obstructs the view of the official number from any enforcement vessel or aircraft.

#### §658.7 PROHIBITIONS

It is unlawful for any person to:

(a) Possess, have custody or control of, ship, transport, offer for sale, sell, purchase, import, land, or export any shrimp taken or retained in violation of the Act, this Part, or of any other regulation promulgated under the Act;

(b) Trawl in a closed area or during a closed season within the FCZ, except as allowed under §658.24(a);

(c) Transfer directly or indirectly, or attempt to so transfer, any United States harvested shrimp to any foreign fishing vessel, while such vessel is within the FCZ, unless the foreign fishing vessel has been issued a permit under section 204 of the Act which authorizes the receipt by such vessel of United States harvested shrimp;

(d) Falsify or fail to affix and maintain vessel markings as required by §658.6;

(e) Refuse to permit an Authorized Officer to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of the Act, this Part, or any other regulation issued under the Act;

(f) Fail to comply immediately with enforcement and boarding procedures specified in §658.8;

(g) Forcibly assault, resist, oppose, impede, intimidate, threaten, or interfere with any Authorized Officer in the conduct of any search or inspection under the Act;

(h) Resist a lawful arrest for any act prohibited by this Part;

(i) Interfere with, delay, or prevent by any means the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this Part;

(j) Interfere with, obstruct, delay, or prevent by any means a lawful investigation or search in the process of enforcing this Part;

(k) Interfere with, obstruct, delay, or in any other manner prevent the seizure of illegally taken shrimp or the final disposition of such shrimp through the sale of the shrimp; or

(f) Violate any other provision of this Part, the Act, or any regulation issued under the Act.

#### §658.8 ENFORCEMENT

(a) General. The owner or operator of any fishing vessel subject to this Part shall immediately comply with instructions issued by an Authorized Officer to facilitate safe boarding and inspection of the vessel, its gear, equipment, and catch for purposes of enforcing the Act and this Part.

(b) Signals. Upon being approached by a U.S. Coast Guard vessel or aircraft, or any other vessel or aircraft authorized to enforce the Act, the operator of a fishing vessel shall be alert for communications conveying enforcement instruction. The VHM-FM radiotelephone is the normal method of communicating between vessels. Should radiotelephone communications fail, however, other methods of communicating between vessels, including visual signals, may be employed. The following signals extracted from the International Code of Signals are among those which may be used, and are included here for the safety and information of fishing vessel operators:

(1) "L" meaning "You should stop your vessel instantly,"

(2) "SQ3" meaning "You should stop or heave to; I am going to board you,"

(3) "AA AA AA etc." which is the call to an unknown station, to which the signaled vessel should respond by illuminating the number required by §658.6, and

(4) "RYCY" meaning "You should proceed at slow speed, a boat is coming to you."

(c) Boarding. A vessel signaled to stop or heave to for boarding shall:

(1) Guard Channel 16, VHF-FM, if so equipped;

(2) Stop immediately and lay to or maneuver in such a way as to permit the Authorized Officer and his party to come aboard;

(3) Provide a safe ladder, if required, for the Authorized Officer and his party to come aboard;

(4) When necessary, to facilitate the boarding and/or when requested by an Authorized Officer, provide a man rope or safety line and illumination for the ladder; and

(5) Take such other actions as necessary to ensure the safety of the Authorized Officer and his party and to facilitate the boarding.

#### §658.9 PENALTIES

Any person or fishing vessel found to be in violation of this Part is subject to the civil and criminal penalty provisions and forfeiture provisions prescribed in the Act, and to 50 CFR Parts 620 (Citations) and 621 (Civil Procedures), and other applicable law.

### SUBPART B--MANAGEMENT MEASURES

#### §658.20 FISHING YEAR

The fishing year for all species of shrimp, except royal red shrimp, begins on May 1 and ends on April 30. The fishing year for royal red shrimp begins on January 1 and ends on December 31.

#### §658.21 ALLOWABLE LEVELS OF HARVEST

(a) Catch Quotas. The domestic quota for royal red shrimp is 111.6 metric tons. There is no domestic quota for other species of shrimp.

(b) Territorial Waters. These regulations do not limit the harvest of shrimp resources in waters landward of the FCZ. However, harvest from these waters will be taken into account in the calculation of the maximum sustainable yield and optimum yield from the fishery.

(c) Closure. When the domestic quota for royal red shrimp is reached, the Regional Director shall close the fishery by publishing a notice in the Federal Register.

#### §658.22 TORTUGAS SHRIMP SANCTUARY

(a) The area commonly known as the "Tortugas Shrimp Sanctuary," off the State of Florida, is closed to all trawl fishing. The area is that part of the fishery conservation zone shoreward of a line connecting the following points (see Figure 1):

Point	Latitude	Longitude	Common Name
N.....	25°52.9'N.....	81°37.95'W.....	Coon Key Light
F.....	24°50.7'N.....	81°51.3'W.....	
G.....	24°40.1'N.....	82°26.7'W.....	New Grounds Shoals Light
H.....	24°34.7'N.....	82°35.1'W.....	Rebecca Shoals Light
P.....	24°35'N.....	82°08'W.....	Marquesas Keys



(b) Notwithstanding the provisions of paragraph (a), effective through August 14, 1984, trawl fishing is allowed within that portion of the Sanctuary circumscribed by lines connecting the following points:

Point	Latitude	Longitude
F.....	24°50.7'N.....	81°51.3'W.
Q.....	24°46.0'N.....	81°52.4'W.
R.....	24°44.6'N.....	82°11.3'W.
F.....	24°50.7'N.....	81°51.3'W.

[48 FR 17099, Apr. 21, 1983].

§658.23 STONE CRAB AREA CLOSURE

(a) Between January 1 and May 20, the area described in this paragraph is closed to trawl gear, including live bait gear. The area is that part of the fishery conservation zone shoreward of a line connecting the following points (see Figure 2):

Point	Latitude	Longitude	Common Name
B.....	26°16'N.....	81°58.5'W.....	
C.....	26°00'N.....	82°04'W.....	
D.....	25°09'N.....	81°47.6'W.....	
E.....	24°54.5'N.....	81°50.5'W.....	
M.....	24°41.9'N.....	81°40.5'W.....	Snipe Point

(b) (1) Until 0001 hours May 16, 1983, it is unlawful to fish for shrimp in the following two areas of the FCZ (see Figure 4):

(i) That area of the FCZ bounded by a continuous line connecting the following points expressed by latitude and longitude (LORAN notations are unofficial, and are included only for the convenience of fishermen):

## AREA I

Point	Latitude	Longitude	W	LORAN Rate 7980		Z
				X	Y	
R.....	28°49.77'N.....	82°56.31'W.....	14375.....			62975
S.....	28°53.55'N.....	83°02.89'W.....	14375.....			63020
T.....	28°36.11'N.....	83°02.77'W.....	14325.....			63020
U.....	28°31.25'N.....	82°55.15'W.....	14325.....			62970
Y.....	28°42.07'N.....	82°55.37'W.....	14355.....			62970
Z.....	28°42.52'N.....	82°55.15'W.....	14355.....			62975
R.....	28°49.77'N.....	82°56.31'W.....	14375.....			62975

(ii) That area of the FCZ bounded by a continuous line connecting the following points expressed by latitude and longitude (LORAN notations are unofficial, and are included only for the convenience of fishermen):

## AREA II

Point	Latitude	Longitude	W	LORAN Rate 7980		Z
				X	Y	
X <sup>1</sup> ....	28°37.88'N.....	82°53.02'W.....	14347.2...	31285.....		62955
V.....	28°29.80'N.....	82°52.86'W.....	14325.....			62955
W <sup>1</sup> ....	28°28.93'N.....	82°51.50'W.....	14325.....	45060.....		62946.3

Thence northerly along the State boundary to Point X.

<sup>1</sup>This point is on the State boundary.

(2) It is unlawful to place into the FCZ any article, including fishing gear, with the intent to interfere with fishing or obstruct or damage fishing gear or fishing vessels of another; it is further unlawful to utilize fishing gear in such a fashion that it obstructs or damages the fishing gear or fishing vessel of another.

(3) In the event that conflicts between stone crab and shrimp fishermen occur in other portions of the FCZ prior to May 16, 1983, the Secretary may establish additional area closures by publication of a notice of such closures in the Federal Register. Any such additional area closures may be established only in response to gear conflicts similar in nature and degree of severity to those giving rise to this emergency rulemaking and may only be of such duration and geographic scope as is necessary to resolve such conflict. Such additional area closures may be established only if they would otherwise

be authorized under section 305(e) of the Magnuson Act and if the notice published in the Federal Register sets forth the reasons for the additional area closures.

[Effective Date Note: Secretarial emergency regulations published on 6 April 1983 (48 FR 14903); §658.23(b) is effective from 31 March 1983 until 16 May 1983.]

[48 FR 14907, April 6, 1983].

#### §658.24 TEXAS CLOSURE

(a) Area and Season Restrictions. Between June 1 and July 15, the area described in this paragraph is closed to all trawl fishing, except that a vessel may fish for royal red shrimp beyond the 100-fathom depth contour. The area is that part of the fishery conservation zone off the State of Texas west of a line connecting point A (29°32.1'N. lat., 93°47.7'W. long.) to point B (26°11.4'N. lat., 92°53'W. long.) (see Figure 3).

(b) Adjustment of Dates. The regional Director may adjust the closing or opening date by as much as 15 days, to provide an earlier, later, or longer closure; but the duration of the closure may not exceed 60 days, nor be less than 45 days.

(1) The Regional Director must base an adjustment of the closing or opening date of the following criteria:

(i) Biological data collected by the Texas Parks and Wildlife Department (TPWD) and used to predict when brown shrimp in the central and northern bays of Texas will reach a total length of 80 to 90 mm; and

(ii) The strength of outgoing tides at the time predicted under paragraph (b)(1)(i) of this section; and

(iii) Other ecological data relevant to the timing or duration of the closure.

(2) The Regional Director, after consulting with the TPWD, may adjust the closing or opening date by issuing a field order. The order will specify the adjusted date and the reasons for the adjustment.

(3) A field order advancing the closing date or delaying the opening date must be available to the public for 72 hours before its effective date. A field order delaying the closing date or advancing the opening date must be available to the public for 24 hours before its effective date.

(4) A field order may be made available to the public by any of the following methods:

(i) Procedures customarily used by the TPWD for posting and publicizing similar notices of opening or closure;

(ii) Publication of a notice in a newspaper of major circulation in each of the following cities: Brownsville, TX; Aransas Pass, TX;

Galveston, TX; Corpus Christi, TX; Freeport, TX; Port Arthur, TX; Cameron, LA; and Morgan City, LA;

(iii) Notification of shrimp fishery organizations in all the States bordering the Gulf of Mexico;

(iv) Broadcast of a notice at time intervals, channels, and frequencies customarily used by the TPWD to broadcast similar notices of opening or closure.

#### §658.25 SIZE RESTRICTIONS

There are no minimum size requirements for shrimp harvested in the fishery conservation zone.

#### §658.26 SPECIFICALLY AUTHORIZED ACTIVITIES

The Regional Director may authorize, for the acquisition of information and data, activities otherwise prohibited by these regulations.

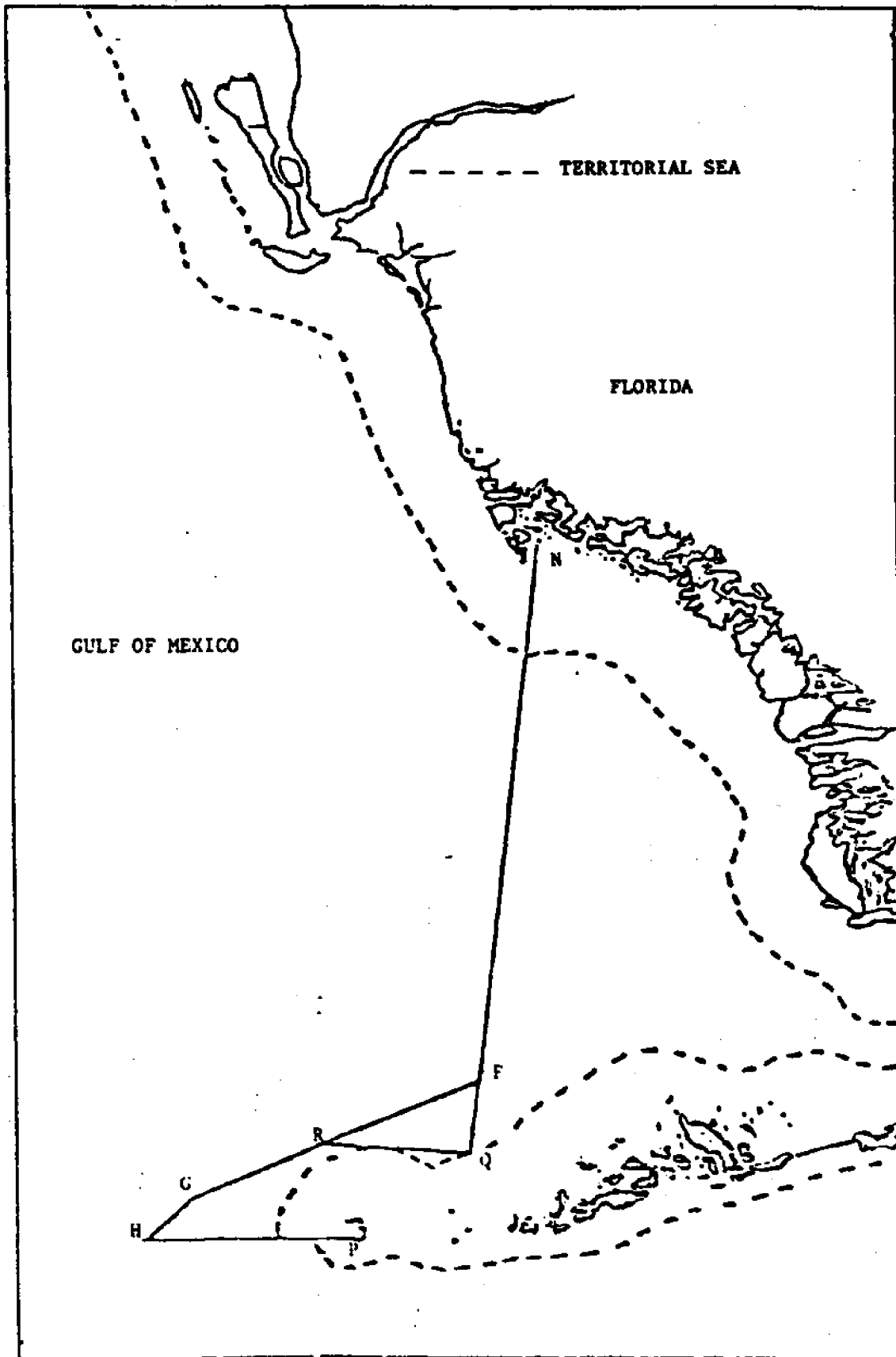


FIGURE 1. LOCATION OF TORTUGAS SHRIMP SANCTUARY.

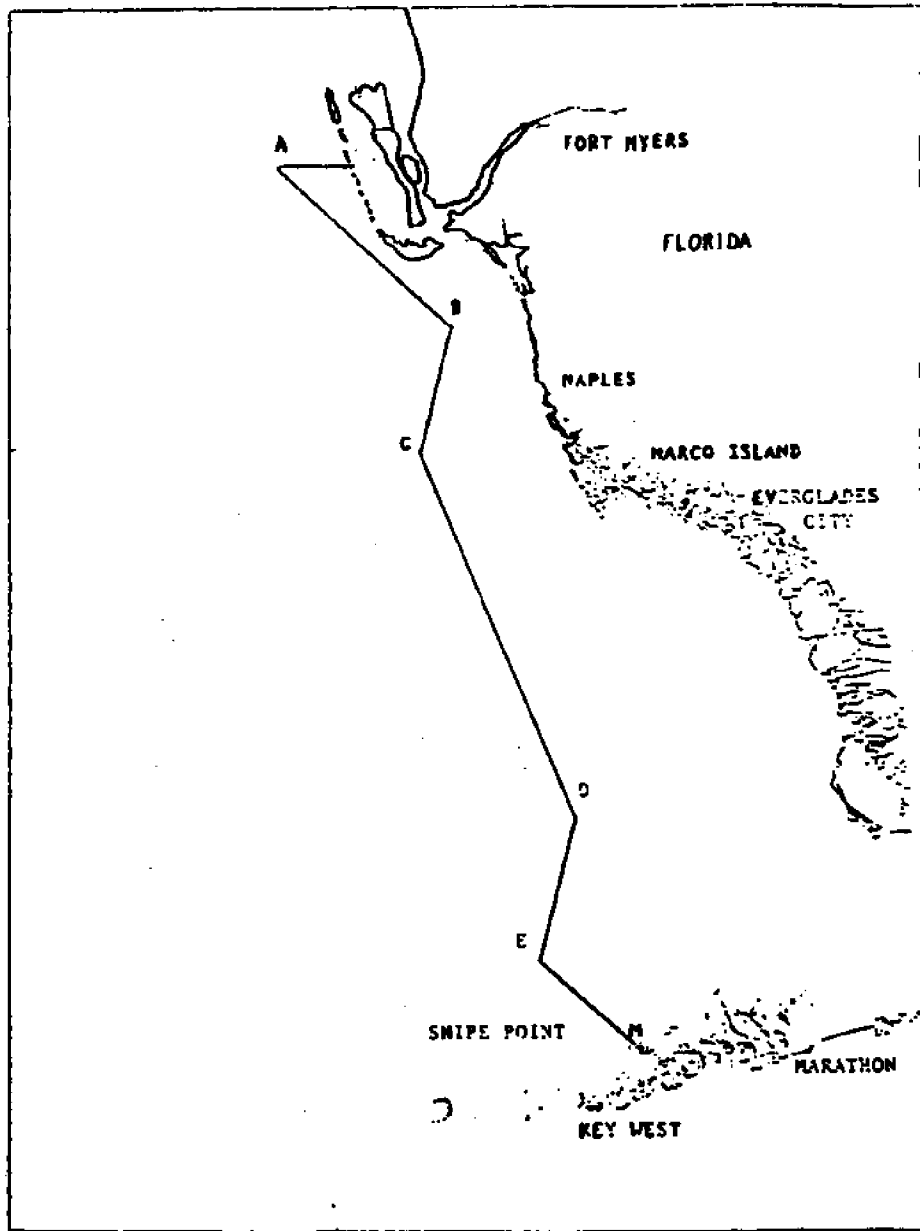


FIGURE 2. AREA CLOSED TO SHRIMPING BETWEEN JANUARY 1 AND MAY 20.

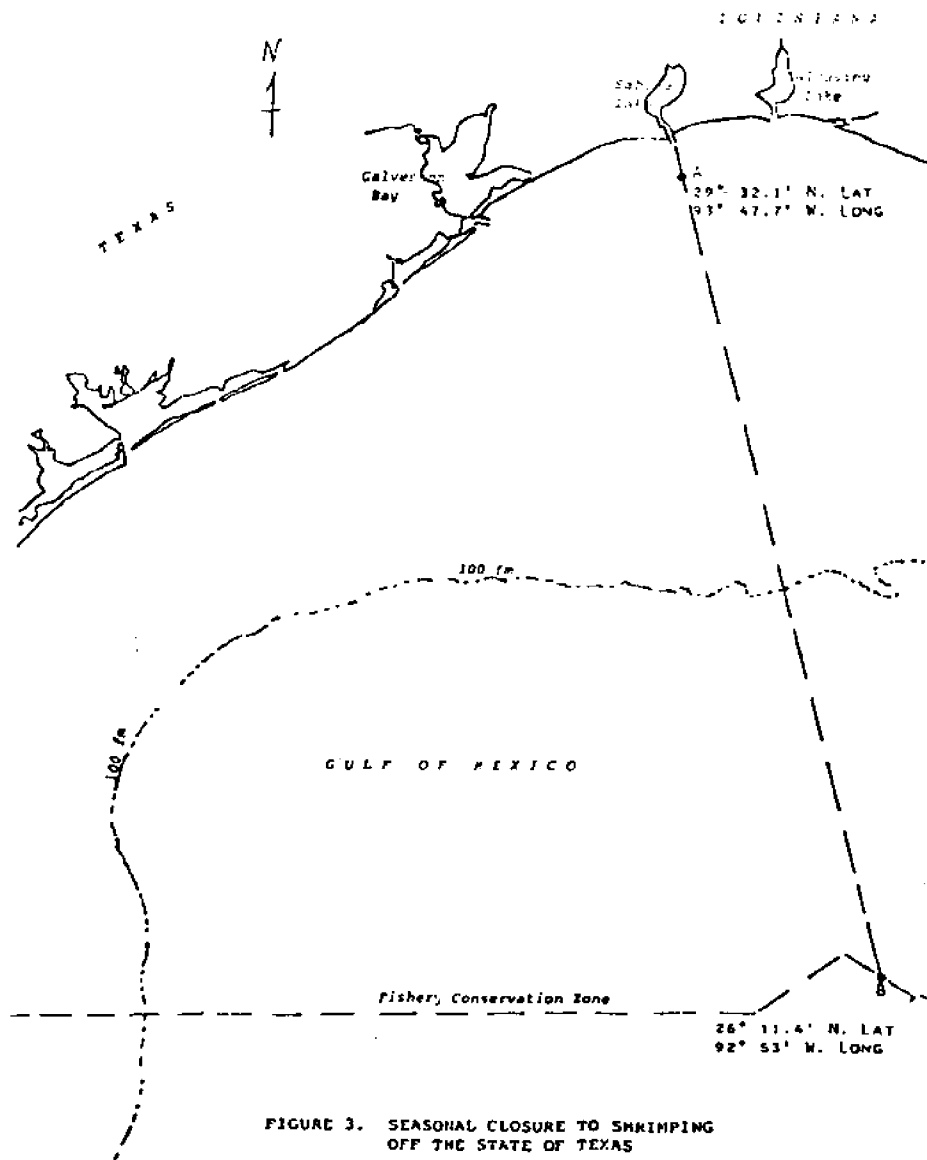


FIGURE 3. SEASONAL CLOSURE TO SHRIMPING OFF THE STATE OF TEXAS

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Outline of Presentation

Enforcement Issues: Vessel Seizures  
and Warrantless Vessel Searches

I. Introduction

II. Vessel Seizures

- A. Acquiring jurisdiction at federal level.
  - 1. Seizure laws and regulations within fisheries context.
  - 2. Other general seizure laws and regulations.
  - 3. Arrest of the conveyance.
- B. Effecting the seizure and subsequent forfeiture proceedings.
  - 1. What is forfeitable property?
  - 2. Probable cause to begin a civil forfeiture.
  - 3. Property must be "seized".
  - 4. Forfeiture proceedings.
    - a. Post-seizure Notice and Hearing.
    - b. Summary, judicial and administrative forfeiture.
    - c. Remission.
  - 5. Judicial Review
- C. Practical aspects in dealing with administrative agencies and the U.S. Attorney's Office in a vessel seizure case.



### III. Warrantless Vessel Searches

- A. General overview of government's authority to effect warrantless searches on vessels of the United States.
- B. Fishing regulations are not OSHA type regulations.
- C. Recent caselaw regarding warrantless searches of vessels.

### IV. Conclusion

## Title 50

## PART 620—CITATIONS

## Sec.

- 620.1 Purpose.  
 620.2 Definitions.  
 620.3-620.4 [Reserved]  
 620.5 Issuance of citations.  
 620.6 Record of citations.  
 620.7 Review of citations.

**AUTHORITY:** 16 U.S.C. 1861 and 1855.

**SOURCE:** 42 FR 11839, Mar. 1, 1977, unless otherwise noted.

**§ 620.1 Purpose.**

Regulations in this part are published jointly by the National Marine Fisheries Service and the Coast Guard to provide uniform rules for the issuance of citations to fishing vessel owners or operators under section 311(c) of the Fishery Conservation and Management Act of 1976 (the Act), 16 U.S.C. 1801, 1861(c).

**§ 620.2 Definitions.**

Unless the context otherwise requires, terms in these regulations have the meanings prescribed in sections 3 and 311(e) of the Act. In addition, the following definitions apply:

- (a) **Citation.** Written notice that a violation has been documented and a warning that a future offense may be dealt with more severely.
- (b) **Director.** Director, National Marine Fisheries Service, or his designee.

**§§ 620.3-620.4 [Reserved]****§ 620.5 Issuance of citations.**

(a) Any authorized enforcement officer who finds that a fishing vessel is operating or has been operated in violation of any provision of the Act may issue a citation to the owner or operator of the vessel.

(b) A citation is issued in the sole discretion of the authorized officer for minor or technical violations and substitutes for other law enforcement action the officer could take under the circumstances, such as seizure of the vessel and arrest of the master.

**§ 620.6 Record of citations.**

(a) If the offending vessel holds a permit under the Act, the issuance of a citation shall, as soon as practicable, be noted on the permit with the date of the citation and the reason for its issuance. If notation on the permit is impracticable, notice of issuance of the citation will promptly be served personally or by registered or certified mail, return receipt requested, on the vessel's owner, operator, or designated agent for service of process, and such service shall be deemed notation on the permit.

(b) The Director shall cause a record of citation to be maintained.

**§ 620.7 Review of citations.**

(a) Upon application by the persons to whom a citation was issued, the Director may review any citation issued under these regulations if:

(1) The application is filed in writing within 60 days of the date of the citation at the address of the Regional Director, National Marine Fisheries Service, nearest to the place where the citation was issued (Seattle, Washington 98102; Terminal Island, California 90731; Juneau, Alaska 99809; Gloucester, Massachusetts 01930; or St. Petersburg, Florida 33702); and

(2) The application sets forth circumstances which in the judgment of the Director make review appropriate in the interest of justice.

(b) Upon completion of his review, the Director will notify the applicant of his action, which shall be final and unappealable.

## Title 50

## PART 621—CIVIL PROCEDURES

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**Authority:** 16 U.S.C. 1801-1882, unless otherwise noted.

**Source:** 45 FR 18932, Mar. 24, 1980, unless otherwise noted.

## Subpart A—Introduction

## § 621.1 Purpose and scope.

(a) Section 308 of the Act authorizes the Secretary to assess a civil penalty, in an amount not to exceed \$25,000, for each violation against any person found to have committed an act prohibited by section 307. Each day of a continuing violation is considered a separate offense. The Administrator has been delegated the authority to assess these administrative money penalties.

(b) Section 204(b)(12) of the Act details the circumstances under which the Administrator is to revoke, suspend, or modify certain foreign fishing vessel permits. Regulations implementing specific fishery management plans contain provisions for permit sanctions in respect both to foreign and domestic fishing vessels.

(c) Section 310(c) of the Act makes provisions of the customs laws relating to, among other things, the remission or mitigation of forfeitures and the compromise of claims, applicable to forfeitures of fishing vessels and fish alleged to be authorized under the Act. The Department of Commerce is authorized to entertain petitions for administrative settlement of property seizures made under the Act which would otherwise proceed to judicial forfeiture.

(d) The regulations in this part provide uniform rules and procedures for the assessment of civil penalties (Subparts B and C), permit sanctions (Subpart D), and the remission or mitigation of forfeitures (Subpart E).

(e) Subparts B and C of this part shall apply to any civil penalty proceeding initiated by Notice of Violation and Assessment (NOVA) subsequent to the effective date of revisions to this part which authorized issuance of the NOVA, regardless of when the act or omission which is the basis of a civil penalty proceeding occurred. Proceedings initiated by Notice of Violation under former Subparts B and C, promulgated March 1, 1977, 42 FR 12026, shall be governed by those procedures, except as otherwise stipulated by the parties.

## § 621.2 Enforcement policy.

(a) The Act provides four basic enforcement remedies for violations, in ascending order of severity as follows: (1) Issuance of a citation (a type of warning), usually at the scene of the offense (see 50 CFR Part 620); (2) assessment by the Administrator of a civil money penalty; (3) for certain violations, judicial forfeiture action against the vessel and its catch; and (4) criminal prosecution of the owner or operator for some offenses. It shall be the policy of the Agency to enforce vigorously and equitably the provisions of the Act by utilizing that form or combination of authorized remedies best suited in a particular case to this end.

(b) Processing a case under one remedial form usually means that other remedies are inappropriate in that case. However, further investigation or later review may indicate the case to be either more or less serious than initially considered, or may otherwise reveal that the penalty first pursued is

inadequate to serve the purposes of the Act. Under such circumstances, the Agency may pursue other remedies either in lieu of or in addition to the action originally taken. Forfeiture of the illegal catch does not fall within this general rule and is considered in most cases as only the initial step in remedying a violation by removing the ill-gotten gains of the offense (see paragraph (d) of this section).

(c) If a fishing vessel for which a permit has been issued under the Act is used in the commission of an offense prohibited by section 307 of the Act, the Agency may impose permit sanctions whether or not civil or criminal action has been undertaken against the vessel or its owner or operator. In some cases, the Act requires permit sanctions following the assessment of a civil penalty or the imposition of a criminal fine. In sum, the Act treats sanctions against the fishing vessel permit to be the carrying out of a purpose separate from that accomplished by civil and criminal penalties against the vessel or its owner or operator.

(d) (1) In view of the perishable nature of fish, any person authorized to enforce the regulations contained in this chapter may cause to be sold, and any person may purchase, for not less than its fair market value, such quantities of perishable fish as may be seized pursuant to the Act.

(2) The proceeds of any such sale, after deducting the reasonable costs of the sale, if any, shall be submitted to an appropriate court of competent jurisdiction and an *in rem* complaint for forfeiture shall be filed with respect to such proceeds.

(3) Seizure and sale of fish shall be without prejudice to any other remedy or sanction authorized by law and this chapter.

#### § 621.3 Filing and service of documents.

(a) Whenever the regulations in this part require service of a document or other paper, such service may effectively be made on the agent for service of process or on the attorney for the person to be served. Refusal by the person to be served, or his or her agent or attorney, of service of a document or other paper shall be considered effective service of the document or other paper as of the date of such refusal.

(b) Whenever the regulations in this part or in an order issued hereunder require a document or other paper to be filed within a certain period of time, such document will be considered filed as of the date of the postmark, if mailed, or (if not mailed) as of the date actually delivered to the office where filing is required. Time periods shall begin to run on the day

following the date of the document, paper, or event which begins the time period and, unless otherwise provided by law or these regulations, includes the last day of the period, unless such day is a Saturday, Sunday, or Federal holiday, in which event it includes the next following day which is not a Saturday, Sunday, or Federal holiday.

(c) If an oral or written application is made to the Administrator within 10 calendar days after the expiration of a time period established in this part for the required filing of documents or other papers, the Administrator may permit a late filing if he or she finds reasonable grounds for an inability or failure to file within the time period. All such extensions shall be in writing. Except as provided in this paragraph, by § 621.22, or by order of an administrative law judge under Subpart C of this part, no requests for an extension of time may be granted.

#### § 621.4 Definitions.

Unless the context otherwise requires, terms in these regulations have the meanings prescribed in section 3 of the Act, and special reference is made to the following terms: "Fishery conservation zone," "fishery resource," "fishing vessel," and "Secretary." In addition, the following definitions apply:

(a) *Act*. Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 to 1882.

(b) *Administrator*. Administrator, National Oceanic and Atmospheric Administration, or his or her designee.

Subparts B and C were removed by Federal Register notice of 18 December 1981 (46 Fed. Reg. 61653). For civil procedure provisions, see Code of Federal Regulations, Title 15, Part 904 (TAB §3, infra).

Subpart B—[Reserved]

Subpart C—[Reserved]

**Subpart D—Permit Sanctions****§ 621.51 Application of subpart.**

The provisions of this subpart shall govern the revocation, suspension, and modification of any permit issued under the Act for a fishing vessel, including:

(a) Permits issued for foreign fishing vessels pursuant to section 204(b) of the Act in respect to a governing international fishery agreement;

(b) Registration permits issued for foreign fishing vessels pursuant to section 204(c) of the Act with respect to an existing international fishery agreement, except to the extent that such agreement is inconsistent with the provisions of this subpart; and

(c) Permits issued for fishing vessels of the United States in accordance with section 303(b)(1) of the Act and regulations issued by the Secretary under section 305 of the Act implementing a fishery management plan, except to the extent such regulations expressly limit application of the provisions of this subpart.

**§ 621.52 Basis for sanctions.**

(a) The Administrator may take action under this subpart with respect to a permit issued under the Act for a fishing vessel if:

(1) The fishing vessel for which the permit was issued has been used in the commission of an offense prohibited by section 307 of the Act; or

(2) A civil penalty pertaining to a fishing vessel for which the permit was issued has been assessed under Subparts B or C of this Part 621 but full payment of the penalty has not been made in accordance with § 621.24 of this part; or

(3) A criminal fine pertaining to a fishing vessel for which the permit was issued has been imposed under section 309 of the Act but full payment of the fine has not been made in accordance with the Court's decree; or

(4) The requirements of a regulation issued under the Act to govern permit sanctions in the implementation of a fishery management plan have been satisfied, including, but not limited to, permit sanction point systems.

(b) If the provisions of paragraphs (a)(2) or (a)(3) of this section are met and the fishing vessel involved is a foreign fishing vessel the permit for which was issued under section 204(b) of the Act in respect to a governing international fishery agreement, the Administrator shall take action under this subpart with respect to such permit.

(c) Any permit which is suspended solely on the basis described in paragraph (a)(2) of this section shall be reinstated by affirmative order of the

Administrator promptly upon receipt, in the manner prescribed in § 621.24 of this part, of full payment of the civil penalty assessed, together with interest thereon at the annual rate provided by current regulations of the Department of the Treasury as to late payment of amounts due the Government, computed from the date payment first became overdue under § 621.24 of this part.

**§ 621.53 Nature of sanctions.**

In his or her discretion and subject to the requirements of this subpart, the Administrator may take any of the following actions or combinations thereof with respect to a permit issued under the Act:

(a) Revoke the permit and, if appropriate, prohibit the issuance of a permit in future years to the fishing vessel involved, or impose additional requirements for such future issuance;

(b) Suspend the permit, either for a specified period of time or until certain stated requirements are met, or both;

(c) Modify the permit, as by imposing additional conditions and restrictions thereon and, if the permit was issued for a foreign fishing vessel operating under a governing international fishery agreement, by imposing additional conditions and restrictions on the application of the foreign nation involved which was approved under section 204 of the Act, and on any of the permits under such application.

**§ 621.54 Notice of permit sanction.**

(a) The Administrator shall prepare a notice of permit sanction (NOPS) setting forth the sanction to be imposed and the basis therefor. If an opportunity for hearing is provided by § 621.55 of this part, the notice will advise that the permit holder has 30 calendar days from receipt of the notice in which to request or waive a hearing. The notice shall further state the effective date of the sanction, which shall not be earlier than 30 calendar days after the date of the notice unless the Administrator takes action under paragraph (c) of this section. If a hearing opportunity is provided and a hearing is requested in a timely manner, the sanction shall become effective pursuant to § 621.56 of this part, unless the Administrator provides otherwise pursuant to the authority of paragraph (c) of this section.

(b) The NOPS shall be served personally or by registered or certified mail, return receipt requested, on the owner or operator of the fishing vessel for which the permit was issued. However, if the vessel is a foreign fishing vessel, service shall be made on the agent for service of process for such

owner or operator, except that if no agent for service of process has been appointed, or if the identity or location of such agent is unknown to the Administrator, service may be made on the consular or other officials of the foreign nation involved through, and as considered appropriate by, the U.S. Department of State.

(c) The Administrator may make the permit sanction effective immediately or otherwise earlier than 30 days after the notice of permit sanction if the Administrator finds, and summarizes such finding and the basis therefor in the notice, that

(1) Substantial harm to a fishery resource of the United States may result from a later effective date; or

(2) The offense serving as the basis for the permit sanction was willful or egregious; or

(3) The basis for the sanction is the accumulation of sufficient points under other regulations in this chapter implementing a fishery management plan.

If the Administrator acts under this paragraph, he or she shall seek to expedite a hearing the opportunity for which is provided by § 621.55, but a request for hearing shall not delay the effectiveness of the sanction.

#### § 621.55 Opportunity for hearing.

(a) The owner or operator of the fishing vessel for which the permit was issued, or the designated agent for service of process, shall have 30 calendar days from receipt of the NOPS to request a hearing. The Administrator shall not, however, be required to hold a hearing if such owner or operator had, with respect to the violation which forms the basis for the permit sanction, the previous opportunity to participate as a party in a judicial hearing on a criminal charge brought under section 309 of the Act or in an administrative hearing on a civil penalty action initiated under section 308 of the Act and Subparts B and C of this part, whether or not the owner or operator so participated, and whether or not such a hearing was held.

(b) If no hearing opportunity is required by paragraph (a) of this section, the Administrator may nonetheless order a hearing if he or she determines that there are material issues of fact or equity to be further explored.

#### § 621.56 Hearing and decision.

(a) If a timely request for the hearing provided by § 621.55(a) of this part is received or the Administrator orders a hearing under § 621.55(b) of this part, the Administrator shall appoint a hearing examiner to conduct a fact-finding inquiry into the matter.

(b) If the Administrator has initiated sanctions under § 621.53(c) of this part as to more than one permit and has received hearing requests properly made under § 621.55 of this part from the owners or operators of two or more of the affected fishing vessels, he or she may order the hearings to be consolidated into a single proceeding.

(c) The hearing examiner shall hold an informal hearing in the matter and expeditiously thereafter furnish the Administrator a report with recommendations.

(d) Upon receipt of the report and recommendations of the hearing examiner, the Administrator shall as soon as practicable decide the matter and serve notice of the decision on the permit holder in the manner provided by § 621.54(b). The decision of the Administrator shall be final and unappealable.

### Subpart E—Remission of Forfeitures

#### § 621.61 Application of subpart.

(a) Authorized enforcement officers are empowered by section 311 of the Act to seize any fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) which reasonably appears to have been used in violation of the Act, of any permit or regulation issued pursuant to the Act, or of any applicable international fishery agreement. Enforcement agents may also seize illegally taken or retained fish, as well as other evidence related to a violation. Section 310 provides for the judicial forfeiture of such vessels and fish. This subpart establishes procedures for filing with the Administrator a petition for relief from forfeitures incurred or alleged to be authorized under section 310 of the Act.

(b) For purposes of this part, the "remission or mitigation of a forfeiture" or "relief from forfeiture" means action by the Administrator, following coordination as necessary with other federal agencies and the courts, to release from the custody of the United States property seized and subject to forfeiture under the Act, or part of such property, upon compliance with any terms and conditions set by the Administrator, such as payment of a stated amount in settlement of the forfeiture aspects of a violation. Although the Administrator may properly combine consideration of a petition for relief from forfeiture with other consequences of a violation of the Act, his or her action in remission or mitigation of a forfeiture shall not be considered dispositive of a criminal charge which may be filed under section 309 of the Act, or a civil penalty which may be assessed under Subparts B and C of this part, or a permit sanction which may be imposed under Subpart

D, unless the action expressly so states. Remission or mitigation of a forfeiture is in the nature of executive clemency granted in the sole discretion of the Administrator only when consistent with the purposes of the Act and the provisions of this subpart.

**§ 621.62 Petition for relief from forfeiture.**

(a) Any person having an interest in a fishing vessel, fish, or other property seized and subject to forfeiture under the Act may file a petition for relief from such forfeiture. The petition shall be addressed to the Administrator and filed within 60 days of the seizure by mailing or delivering the petition to the Regional Director, National Marine Fisheries Service, nearest to the place where such property is held:

Seattle, Washington 98109.  
Terminal Island, California 90731.  
Juneau, Alaska 99801.  
Gloucester, Massachusetts 01930.  
St. Petersburg, Florida 33702.

(b) The petition need not be in any particular form, but shall set forth the following:

(1) A description of the property seized;

(2) The date and place of the seizure;

(3) The interest of petitioner in the property, supported as appropriate by bills of sale, contracts, mortgages, or other satisfactory evidence;

(4) The facts and circumstances relied upon by petitioner to justify the remission or mitigation;

(5) Any request for release under § 621.66 of all or part of the seized property pending final decision on the petition, together with any offer of payment to protect the Government's interest that petitioner makes in return for such release, and the facts and circumstances relied upon by petitioner in the request; and

(6) The signature of petitioner, his or her attorney, or other authorized agent. A false statement in a petition will subject petitioner to prosecution under 18 U.S.C. 1001.

**§ 621.63 Investigation.**

The Administrator shall promptly cause an investigation to be made of the facts and circumstances shown by the petition and the seizure, and may in this respect appoint an examiner to find the facts, by informal hearing on sworn testimony or otherwise, and to prepare a report with recommendations.

**§ 621.64 Decision on petition.**

(a) After the investigation authorized by § 621.63, the Administrator shall decide the matter and notify petitioner. The Administrator may remit

or mitigate the forfeiture, on such terms and conditions as under the Act and the circumstances he or she deems reasonable and just, if he or she finds:

(1) That the forfeiture to which the property is subject was incurred without willful negligence and without any intention on the part of petitioner to violate the Act; or

(2) That other circumstances exist which justify remission or mitigation of the forfeiture.

(b) Unless he or she determines no valid purpose would thereby be served, the Administrator will condition a decision to remit or mitigate a forfeiture upon the submission by petitioner of an agreement, in a form satisfactory to the Administrator, to hold the United States and its officers or agents harmless from any claim based on loss of or damage to the seized property. If petitioner is not the beneficial owner of the property, the Administrator may require petitioner to submit such an agreement executed by the beneficial owner. The Administrator may also require that the property be promptly exported from the United States.

**§ 621.65 Compliance with decision.**

A decision by the Administrator to remit or mitigate the forfeiture upon stated conditions, as upon payment of a specified amount, shall be effective for 60 days after the date of the decision. If petitioner has not within such period complied with the stated conditions, in the manner prescribed by the decision, or made arrangements satisfactory to the Administrator for later compliance, the matter will promptly be referred to the Attorney General of the United States to effect judicial forfeiture in full of the seized property to the United States under section 310 of the Act.

**§ 621.66 Release of seized property pending decision.**

(a) Upon request in the petition for relief from forfeiture, and taking account of any interim report or recommendation of an examiner appointed under § 621.63, the Administrator may order the release, pending final decision on the petition, of all or part of the seized property upon payment by petitioner of the full value of the property to be released or such lesser amount as the Administrator in his or her sole discretion deems sufficient to protect the interests served by the Act.

(b) If the Administrator grants the request, he or she will cause the amount paid by petitioner to be deposited in a suspense account maintained for the purpose. The amount so deposited shall for all purposes be considered to represent the property seized

and subject to forfeiture under the Act, and payment of the amount by petitioner constitutes a waiver of any claim of defective seizure, custody and control, commingling of proceeds, or related defenses. The Administrator will cause records to be kept of amounts deposited in the suspense account and will retain such deposits pending his or her further order or a court order issued under sections 310 or 311 of the Act.

(c) The provisions of paragraph (b) of § 621.64 of this part will apply to a release of property made under this section.

For NOAA policy with respect to seizure and forfeiture of fish taken or retained in violation of the Magnuson Fishery Conservation and Management Act, see materials beginning at page 1-6725.



**SEIZURE OF ILLEGALLY CAUGHT FISH  
1980 AND 1982 STATEMENTS OF POLICY**

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15 February 1980  
Pages 10349-10350

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric  
Administration**

**50 CFR Part 621**

**Administrative Sales of Seized Fish;  
Interpretive Rule**

**AGENCY:** National Oceanic and  
Atmospheric Administration/  
Department of Commerce.

**ACTION:** Interpretive rule: statement of  
policy.

**SUMMARY:** The National Oceanic and  
Atmospheric Administration (NOAA)  
publishes an interpretive rule which (1)  
describes NOAA's authority to seize  
fish taken or retained in violation of the  
Fishery Conservation and Management  
Act of 1976 (the Act), (2) announces  
NOAA policy with respect to such  
seizures, and (3) establishes NOAA  
procedures regarding the sale or other  
disposition of fish seized under the Act.

**DATE:** The policies and practices  
described by this Notice are effective  
February 15, 1980.

**FOR FURTHER INFORMATION CONTACT:**  
Stephen J. Powell, NOAA Office of  
General Counsel (GCEL), Room 280-L,  
Page 1 Building, 2001 Wisconsin Avenue,  
NW, Washington, D.C. 20235.  
Telephone: (202) 254-8350.

**SUPPLEMENTARY INFORMATION:**

1. *Seizure of illegal catch.* Section  
311(b) of the Act, 16 U.S.C. 1861,  
provides in part as follows:

(b) Powers of Authorized Officers.—Any  
officer who is authorized . . . to enforce the  
provisions of this Act may—

(1) with or without a warrant or other  
process—

(C) seize any fishing vessel (together with  
its fishing gear, furniture, appurtenances,  
stores, and cargo) used or employed in, or  
with respect to which it reasonably appears  
that such vessel was used in, the violation of  
any provision of this Act;

(D) seize any fish (wherever found), taken  
or retained in violation of any provision of  
this Act; . . .

These provisions serve as the  
statutory basis for seizures of allegedly  
excess or otherwise illegal catches by

enforcement agents of the National  
Marine Fisheries Service in carrying out  
their duties under the Act. They reflect  
the fact that, under section 307(1)(G) of  
the Act, 16 U.S.C. 1857(1)(G), possession,  
purchase, or sale of fish taken or  
retained in violation of the Act is  
prohibited.

Proper enforcement of the Act, and  
protection of the fishery resources,  
require prompt and effective action to  
neutralize the effect of resource-related  
violations of the Act. Those who violate  
the Act by exceeding applicable catch  
limitations, by fishing in a closed area or  
by engaging in fishing after the closure  
of a fishery should not be permitted to  
retain the fish so taken, or their value,  
pending adjudication of their status. It is  
therefore in the public interest, as well  
as good enforcement policy, to set aside  
fish reasonably believed to have been  
taken or retained in violation of the Act,  
and to fix their monetary value until a  
court of competent jurisdiction has,  
finally ordered appropriate disposition.

2. *NOAA Policy With Respect to  
Seizures.* It is the policy of NOAA to  
seize and seek forfeiture of all fish  
which it believes to have been taken or  
retained in violation of the Act,  
whenever such seizure is  
administratively feasible. Where excess  
catch is involved, an amount of fish  
commensurate with the excess will be  
seized. Where the amount of excess is  
substantial, or where other types of  
violations are involved, the entire catch  
may be seized. Disposition of seized fish  
will be made in accordance with  
procedures described below.

It is emphasized that seizure of illegal  
catch does not foreclose the possibility  
of subsequent civil penalty proceedings.  
To the contrary, civil penalties will  
continue as a principal response to  
violations of the Act. Seizure is regarded  
as an initial step in the process of  
remediating a violation, and sets the stage  
for subsequent civil or criminal  
proceedings, as appropriate.

3. *Sale of Seized Fish.* Section 310 of  
the Act, "Civil Forfeitures", 16 U.S.C.  
§ 1860, authorizes the agency to conduct  
administrative sales of perishable and  
other seized fish. In addition, Section  
310 provides NOAA with authority  
commensurate with that traditionally  
available to officers of the United States  
Customs Service for disposition of  
perishable and other seized goods.

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SEIZURE POLICY

Section 310(d) of the Act provides, in part, that:

(2) Any fish seized pursuant to this Act may be sold, subject to the approval and direction of the appropriate court, for not less than the fair market value thereof. The proceeds of any such sale shall be deposited with such court pending the disposition of the matter involved.

The perishable nature of seized fish requires that its value be preserved by expeditious sale and subsequent impounding of the proceeds pending final resolution of the matter at hand. Sale of fish seized under the Act therefore serves the Congressional intent, and protects the interests of all parties to the transaction. The interest of the public is likewise served by avoiding the spoilage and waste that would otherwise occur, and by insuring that the relative positions of NOAA and alleged violators are maintained pending resolution of the matter.

Therefore, pursuant to section 310 of the Act, officers authorized to enforce the Act may sell, for not less than fair market value and under such terms and conditions as they may deem reasonable, such fish as may be seized by them in the course of their duties. The proceeds of such sales, less costs, shall be promptly submitted to an appropriate court of competent jurisdiction, with a complaint *in rem* for forfeiture of the fish.

This is an interpretive rule establishing NOAA policy and procedures. As such it is exempt from the requirements of public hearing and notice in 5 U.S.C. 553.

Signed at Washington, D.C., this 6th day of February, 1980.

Winfred H. Meibohm,

Executive Director, National Marine Fisheries Service.

50 CFR Part 621 is therefore amended as follows:

Add new paragraph (d) to § 621.2 to read as follows:

§ 621.2 Enforcement policy.

(d)(1) In view of the perishable nature of fish, any person authorized to enforce the regulations contained in this Chapter may cause to be sold, and any person may purchase, for not less than its fair market value, such quantities of perishable fish as may be seized pursuant to the Act.

(2) The proceeds of any such sale, after deducting the reasonable costs of the sale, if any, shall be submitted to an appropriate court of competent jurisdiction and an *in rem* complaint for

forfeiture shall be filed with respect to such proceeds.

(3) Seizure and sale of fish shall be without prejudice to any other remedy or sanction authorized by law and this Chapter.

[18 U.S.C. § 1801, *et seq.*]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 621

Seizure of Illegally Caught Fish

**ACTION:** Statement of policy.

**SUMMARY:** NOAA publishes a notice which revises its policy, announced in the Federal Register of February 15, 1980 (45 FR 10349), with respect to seizure and forfeiture of fish taken or retained in violation of the Magnuson Fishery Conservation and Management Act (the Act). The revised policy is to seize a vessel's entire catch where there have been previous violations of the Act, where the violations are especially serious, or where there are multiple violations.

**DATE:** Effective February 17, 1982.

**FOR FURTHER INFORMATION CONTACT:** Stephen J. Powell, Assistant General Counsel for Enforcement and Litigation, Page Building I, Room 275, 2001 Wisconsin Avenue, NW, Washington, D.C. 20235, Telephone: (202) 254-6350.

**SUPPLEMENTARY INFORMATION:** The February 15, 1980, notice states that it is NOAA policy to seize and seek forfeiture of all fish the agency believes were taken or retained in violation of the Act, and that where excess catch is involved, an amount of fish commensurate with the excess will be seized. That notice also allows for seizing the entire catch where the amount of excess is substantial, or where other types of violations are involved. It does not, however, positively state that the entire catch will be seized in cases involving repeat or serious violations.

Effective enforcement of the Act, and protection of fishery resources, requires

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SEIZURE POLICY

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flagrant and repeated violations. Therefore, this notice makes clear that in cases involving excess catch it is NOAA policy to seize and seek forfeiture of a vessel's entire catch where a prior violation is involved, where the amount of excess is substantial, or where there are multiple violations. Seizure of the entire catch is also appropriate for violations other than excess catch violations, such as fishing in a closed area or with illegal mesh, or retaining undersized fish. In egregious cases, where lesser sanctions have not been or would not be successful deterrents, seizure and forfeiture of the vessel, in addition to its catch, may be appropriate.

Signed at Washington, D.C., this 11th day  
of February 1962.

William G. Gordon,

*Assistant Administrator for Fisheries.*

## Title 50

**PART 219—SEIZURE, FORFEITURE,  
AND DISPOSAL PROCEDURES****Subpart A—Introduction****Sec.**

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**Subpart B—Holding, Bonding, and Return of  
Certain Wildlife or Other Property**

- 219.11 Notification of seizure.  
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**Subpart C—Disposal of Forfeited or  
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- 219.20 Delivery to Administrator.  
219.21 Definitions.  
219.22 Purposes of disposal.  
219.23 Disposal of evidence.  
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219.27 Loan agreement.  
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219.29 Destruction of items.  
219.30 Food items.  
219.31 Record-keeping.

**AUTHORITY:** Black Bass Act, 16 U.S.C. 851-856; Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407; Endangered Species Act of 1973, 16 U.S.C. 1531-1543; Lacey Act, 18 U.S.C. 42-44, 3054, 3112; Fish and Wildlife Improvement Act of 1978, 16 U.S.C. 742(k); Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971-971g; Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801-1882; Northern Pacific Halibut Act of 1937, 16 U.S.C. 772-772j; North Pacific Fisheries Act of 1954, 16 U.S.C. 1021-1032; Sockeye Salmon or Pink Salmon Fishing Act of 1947, 16 U.S.C. 776-776f; Sponge Act, 16 U.S.C. 781-785; Tuna Conventions Act of 1950, 16 U.S.C. 951-961; Whaling Convention Act of 1949, 16 U.S.C. 916-916f; Fur Seal Act of 1966, 16 U.S.C. 1151-1187; Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434.

**SOURCE:** 46 FR 31648, June 17, 1981, unless otherwise noted.

**Subpart A—Introduction****§ 219.1 Purpose of regulations.**

The regulations in this part provide rules and procedures for the seizure, holding, bonding, abandonment, and forfeiture of wildlife and other property, which under certain laws enforced by the National Marine Fisheries Service are subject to seizure and forfeiture.

**§ 219.2 Scope of regulations.**

The regulations in this part apply to fish, wildlife, or any other items (referred to as "items" hereinafter) which have been forfeited or aban-

doned to the United States under the following laws and regulations issued thereunder:

- (a) Endangered Species Act of 1973, 16 U.S.C. 1531-1543;  
(b) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407;  
(c) Black Bass Act, 16 U.S.C. 851-856;  
(d) Lacey Act, 16 U.S.C. 42-44, 3054, 3112;  
(e) Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801-1882;  
(f) Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971-971g;  
(g) Northern Pacific Halibut Act of 1937, 16 U.S.C. 772-772j;  
(h) North Pacific Fisheries Act of 1954, 16 U.S.C. 1021-1032;  
(i) Sockeye Salmon or Pink Salmon Fishing Act of 1947, 16 U.S.C. 776-776f;  
(j) Sponge Act, 16 U.S.C. 781-785;  
(k) Tuna Conventions Act of 1950, 16 U.S.C. 951-961;  
(l) Whaling Convention Act of 1949, 16 U.S.C. 916-916f;  
(m) Fur Seal Act of 1966, 16 U.S.C. 1151-1187;  
(n) Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434.

The regulations in this part are in addition to, and not in contradiction of, any special rules which may provide for the sale of fish and perishable items seized under various of these laws.

**Subpart B—Holding, Bonding, and  
Return of Certain Wildlife or Other  
Property****§ 219.11 Notification of seizure.**

Except where the owner or consignee is personally notified or seizure is made pursuant to a search warrant, the Administrator, or his or her designee, shall, as soon as practicable following his seizure or other receipt of seized wildlife or other property, mail a notification of seizure by registered or certified mail, return receipt requested, to the owner or consignee, if known. Such notification shall describe the seized wildlife or other property, and shall state the time, place, and reason for the seizure.

**§ 219.12 Seizure by Customs.**

Any authorized employee or officer of the U.S. Customs Service who has seized any wildlife or other property shall deliver such seizure to the Enforcement Division (See § 217.23), or its designee, who shall either hold such seized wildlife or other property or arrange for its proper handling and care.

**§ 219.13 Bonded release.**

The Administrator, or his or her designee, may, in his or her sole discretion, accept an appearance bond or other security in place of wildlife or other property seized. Said bond or security may contain such additional conditions as may be appropriate. Such bond or security may be in an amount up to \$10,000 per offense and shall only be allowed where the Administrator, or his or her designee, determines either that the health or safety of any wildlife so requires, or that the release of the seized wildlife or other property would not frustrate the purposes of the statute.

**§ 219.14 Return of seized wildlife or other property.**

If, at the conclusion of the appropriate proceedings, the seized wildlife or other property is to be returned to the owner or consignee, the Administrator, or his or her designee, shall issue a letter or other document authorizing its return. This letter or other document shall be delivered personally or sent by registered or certified mail, return receipt requested, and shall identify the owner or consignee, the seized property, and, if appropriate, the bailee of the seized wildlife or other property. It shall also provide that upon presentation of the letter or other document and proper identification, the seized wildlife or other property is authorized to be released, provided it is properly marked in accordance with applicable State or Federal requirements.

**§ 219.15 Abandonment provisions.**

When any wildlife or other property is subject to seizure and forfeiture, a blank assent to forfeiture form (Customs Form 4607, or a similar National Oceanic and Atmospheric Administration form) may be given or sent, with the notification required by § 218.11 or by § 219.11 to the owner thereof. The owner may voluntarily abandon the wildlife or other property to the Government by executing and returning the assent to forfeiture form. Such abandonment will be considered by the Administrator or his or her designee in the disposition of the case, and may be the basis for the compromise of any proposed assessment of a civil penalty under Part 218.

**Subpart C—Disposal of Forfeited or Abandoned Items****§ 219.20 Delivery to Administrator.**

Upon forfeiture of any fish, wildlife, parts or products thereof, or other

property to the United States, or the abandonment or waiver of any claim to any such property, it shall be delivered to the Administrator, or his or her designee, for storage or disposal according to the provisions of this subpart.

**§ 219.21 Definitions.**

For the purpose of this Subpart C:

(a) "Abandon" means an owner's surrender of a seized item to NOAA by, but not limited to, expressly waiving any claim to the item, refusing or otherwise avoiding delivery of mail concerning the seizure (as by giving a false name or address), or failing for more than 180 days to make or maintain a claim to the item. An item will be declared finally abandoned, without recourse, upon a finding of abandonment, as defined here.

(b) "Disposal" includes, but is not limited to, loan, gift, sale or destruction of an item, except that no marine mammal or endangered species item may be sold.

(c) "Forfeiture" includes, but is not limited to, surrender or relinquishment of any claim to an item by written agreement, or otherwise; or extinguishment of any claim to, and transfer of title to an item to the Government by court order or by order of the NOAA Administrator (or designee) under a statute.

(d) "Waiver of any claim" includes, but is not limited to, failing to respond within 120 days of issuance of a Government Notice concerning the seizure; or voluntarily relinquishing any interest in an item by written agreement, or otherwise. An item will be declared finally abandoned, without recourse, upon a finding of waiver, as defined here.

**§ 219.22 Purposes of disposal.**

Disposal procedures may be used to alleviate overcrowding of evidence storage facilities, and to avoid the accumulation of seized items where disposal is not otherwise accomplished by court order, as well as to address the needs of governmental agencies and other institutions and organizations for such items for scientific, educational, and public display purposes. In no case shall items be used for personal purposes, either by loan recipients or government personnel.

**§ 219.23 Disposal of evidence.**

Items that are evidence shall be disposed of only after authorization by the NOAA Office of General Counsel. Disposal approval usually will not be given until the case involving the evidence is closed, except that perishable items may be authorized for disposal sooner.

**§ 219.24 Loans to institutions.**

Items approved for disposal may be loaned to institutions or organizations requesting such items for scientific, educational, or public display purposes. Items will be loaned only after execution of a loan agreement which provides, among other things, that the loaned items will be used only for non-commercial scientific, educational, or public display purposes, and that they will remain the property of the United States government, which may demand their return at any time. Parties requesting the loan of an item must demonstrate the ability to provide adequate care and security for the item. Loans may be made to responsible agencies of foreign governments in accordance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

**§ 219.25 Loans to individuals.**

Items generally will not be loaned to individuals not affiliated with an institution or organization unless it is clear that the items will be used in a non-commercial manner, and for scientific, educational, or public display purposes which are in the public interest.

**§ 219.26 Selection of loan recipients.**

Recipients of items will be chosen so as to assure a wide distribution of the items throughout the scientific, educational, public display and museum communities. Other branches of NMFS, NOAA, the Department of Commerce, and other governmental agencies will have the right of first refusal of any item offered for disposal. The Administrator, or his or her designee, may solicit applications, by publication of a notice in the FEDERAL REGISTER, from qualified persons, institutions, and organizations who are interested in obtaining the property being offered. Such notice will contain a statement as to the availability of specific items for which transferees are being sought, and instructions on how and where to make application. Applications will be granted in the following order: other offices of NMFS, NOAA, and the Department of Commerce; U.S. Fish and Wildlife Service; other Federal agencies; other governmental agencies; scientific, educational, or other public or private institutions; and private individuals.

**§ 219.27 Loan agreement.**

Items will be transferred pursuant to a loan agreement executed by the Administrator, or his or her designee, and the borrower. Any attempt on the part of the borrower to retransfer an item, even to another institution for

related purposes, will violate and invalidate the loan agreement, and entitle the United States to immediate re-possession of the item, unless the prior approval of the Administrator, or his or her designee, has been obtained pursuant to § 219.28. Violation of the loan agreement may also subject the violator to the penalties provided by the laws governing possession and transfer of the item.

**§ 219.28 Temporary reloans; documents to accompany items.**

Temporary reloans by the borrower to another qualified borrower (as for temporary exhibition) may be made if the Administrator, or his or her designee, is advised in advance by the borrowers. Temporary loans for more than thirty days must be approved in advance in writing by the Administrator or his or her designee. A copy of the original loan agreement, and a copy of the written approval for reloan, if any, must accompany the item whenever it is temporarily reloaned or is shipped or transported across state or international boundaries.

**§ 219.29 Destruction of items.**

This paragraph and other provisions relating to the destruction of property apply to items—

- (a) Which have not been handcrafted, or
- (b) Which have been handcrafted and are of less than one hundred dollars (\$100) value, and
- (c) For which no acceptable applications have been received, or for which publication in the FEDERAL REGISTER of the availability of similar items in the past has resulted in the receipt of no applications.

Such items may be destroyed if they have been in government ownership for more than one year. Perishable items which are not fit for human consumption may be destroyed sooner, if the authorization required by § 219.23 has been obtained. Destruction of items shall be witnessed by two persons, one of whom may be the disposing officer.

**§ 219.30 Food items.**

Food items shall, if possible, be disposed of by gift to nonprofit groups providing public welfare food services.

**§ 219.31 Record-keeping.**

A "fish and wildlife disposal" form shall be completed each time an item is disposed of pursuant to the policy and procedure established herein, and shall be retained in the case file for the item. These forms shall be available to the public.

CODE OF FEDERAL REGULATIONS  
TITLE 15

PART 904 CIVIL PROCEDURES

SUBPART A--[RESERVED]

SUBPART B--CIVIL PENALTIES

- Sec.  
 904.100 General.  
 904.101 Notice of Violation and Assessment  
           (NOVA).  
 904.102 Procedures upon receipt of NOVA.  
 904.103 Hearing and administrative review.  
 904.104 Final administrative decision.  
 904.105 Payment of final assessment.  
 904.106 Compromise of civil penalty.  
 904.107 Application of this subpart to permit holders and vessel owners

Authority: Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801-1882; Endangered Species Act of 1973, 16 U.S.C. 1531-1543; Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407; Lacey Act, 16 U.S.C. 3371-3378; Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401, et seq.; Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101, et seq.; Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434; Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971-971g; Northern Pacific Halibut Act, 16 U.S.C. 773-773j; Tuna Conventions Act of 1950, 16 U.S.C. 951-961; North Pacific Fisheries Act of 1954, 16 U.S.C. 1021, et seq.

Source: 46 FR 61644, December 18, 1981.

SUBPART C--HEARING AND APPEAL PROCEDURES

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 904.201 Definitions.  
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- 904.241 Depositions.
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- 904.252 Witnesses.
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- 904.255-904.259 [Reserved]

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904.272 Administrative review of decision.  
 904.273-904.299 [Reserved]

Authority: Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971, 89 Stat. 385; Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401, 94 Stat. 553; Endangered Species Act of 1973, 16 U.S.C. 1531, 87 Stat. 884; Lacey Act, 16 U.S.C. 3371-3378; Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801, 90 Stat. 331; Marine Mammal Protection Act of 1972, 16 U.S.C. 1361, 86 Stat. 1027; Marine Protection, Research, and Sanctuaries Act of 1972, Title III, 16 U.S.C. 1431, 86 Stat. 1061; Northern Pacific Halibut Act, 16 U.S.C. 772, 773-773j; Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101, 94 Stat. 974; Tuna Conventions Act of 1950, 16 U.S.C. 951, 64 Stat. 777; North Pacific Fisheries Act of 1954, 16 U.S.C. 1021 et seq.

SUBPART D--[RESERVED]

SUBPART E--[RESERVED]

SUBPART F--[RESERVED]

\*SUBPART G--FINANCIAL COMPENSATION OF PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS

904.600 Purpose.  
 904.601 Definition.  
 904.602 Criteria for Financial Compensation.  
 904.603 Submission of Application by Participants.  
 904.604 Amount of Financial Compensation and Procedures for Payment.

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#### SUBPART B - CIVIL PENALTIES

##### §904.100 GENERAL.

###### (a) Purpose and Scope.

(1) The following statutes administered by NOAA authorize the Administrator to assess a civil penalty for each violation against any person found to have committed an act prohibited by the statute or an implementing regulation (each day of a continuing violation is a separate offense):

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\* Suspended, 47 Federal Register 9820, March 8, 1982.

- (i) Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801-1882;
- (ii) Endangered Species Act of 1973, 16 U.S.C. 1531-1543;
- (iii) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407;
- (iv) Lacey Act 16 U.S.C. 3371-3378;
- (v) Deep Seabed Hard Mineral Resources Act 30 U.S.C. 1401, *et seq.*;
- (vi) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101, *et seq.*;
- (vii) Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434;
- (viii) Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971-971g;
- (ix) Northern Pacific Halibut Act, 16 U.S.C. 773-773j;
- (x) Tuna Conventions Act of 1950, 16 U.S.C. 951-961;
- (xi) North Pacific Fisheries Act, 16 U.S.C. 1021 *et seq.*

(2) This subpart provides uniform rules and procedures for assessing civil penalties under the statutes listed in paragraph (a)(1) of this section.

(b) Filing and Service of Documents.

(1) Whenever this Subpart requires service of a document or other paper, such service may effectively be made on the agent for service of process or on the attorney for the person to be served. Refusal by the person to be served, or his or her agency or attorney, of service of a document or other paper will be considered effective service of the document or other paper as of the date of such refusal.

(2) Whenever this Subpart or an order issued hereunder requires a document or other paper to be filed within a certain period of time, such document will be considered filed as of the date of the postmark (or as otherwise shown for government-franked mail), if mailed, or (if not mailed) as of the date actually delivered to the office where filing is required. Time periods begin to run on the day following the date of the document, paper, or event which begins the time period and, unless otherwise provided by law or these regulations, includes the last day of the period, unless such day is a Saturday, Sunday, or Federal holiday, in which event it includes the next following day which is not a Saturday, Sunday, or Federal holiday. This method of computing time periods also applies to any act, such as paying a civil penalty, required by this Subpart to take place within a specified period of time.

(3) If an oral or written application is made to the Administrator within 10 days after the expiration of a time period established in this Subpart for the required filing of documents or other papers, the Administrator may permit a late filing if the Administrator finds reasonable grounds for an inability or failure to file within the time period. All extensions will be in writing. Except as specifically provided in this Part, or by order of an Administrative Law Judge under this Part, no requests for an extension of time may be granted.

(c) Definitions. Unless the context otherwise requires, terms in this Subpart have the meanings prescribed in the applicable statute or in Subpart A. In addition, the following definitions apply:

(1) Administrator--means the Administrator of NOAA or a designee.

(2) Affected Permit--means a permit or license issued by NOAA under an applicable statute that may be subject to sanctions as a result of civil penalty proceedings under this Part.

(3) Affected vessel--means any vessel that is liable in rem for any civil penalty proceedings under this Part, or whose permit may be subject to sanction as a result of civil penalty proceedings under this Part.

(4) Applicable Statute--means a statute listed in §904.100(a), and its implementing regulations, under which a civil penalty is assessed, or proposed to be assessed.

(5) Final Administrative Decision--means an order of the Administrator assessing a civil penalty which is not subject to further agency review under this Part, and which is subject to collection proceedings or judicial review in an appropriate federal district court as authorized by law.

(6) Permit--means any license, permit, certificate or other approval issued by NOAA under an applicable statute.

(d) Exceptions. Whenever a particular statute under which a penalty is assessed requires procedures different from the procedures in this Subpart, the alternative procedures for that statute are set forth in the last paragraph of the section of this subpart which is affected.

#### §904.101 A NOTICE OF VIOLATION AND ASSESSMENT (NOVA).

(a) A notice of violation and assessment (NOVA) will be issued by the Administrator and served personally or by registered or certified mail, return receipt requested, upon the person alleged to be subject to a civil penalty (the respondent). A copy of the NOVA will similarly be served upon the holder of an affected permit, or the owner of an affected vessel, if the holder or owner is not the respondent. Although no

specific form is prescribed, the NOVA will contain: (1) A concise statement of the facts believed to show a violation; (2) a specific reference to the provisions of the Act, regulation, license, permit agreement, or order allegedly violated; (3) the findings and conclusions upon which the Administrator bases the proposed assessment; and (4) the amount of the civil penalty proposed to be assessed.

(b) In respect to the amount of civil penalty, the Administrator will take into account information available to the agency concerning any factor to be considered under the applicable statute, and any other matter that justice or the purposes of the statute require.

(c) The NOVA may also contain an initial proposal for compromise or settlement of the case. The Administrator may also attach documents which illuminate the facts believed to show a violation. The NOVA will advise of the respondent's rights at that point in the proceeding, and will be accompanied by a copy of the regulations in this Part governing civil procedures.

#### §904.102 PROCEDURES UPON RECEIPT OF NOVA.

(a) The respondent has 30 days from receipt of the NOVA in which to respond. During this time the respondent may:

(1) Accept the proposed penalty or compromise penalty, if any, by taking the actions specified in the NOVA;

(2) Seek to have the NOVA amended or modified under paragraph (b) of this section;

(3) Request a hearing under paragraph (e) of this section;

(4) Request an extension of time to respond to the NOVA under paragraph (c) of this section; or

(5) Take no action, in which case the NOVA becomes final in accordance with §904.104. Options (2), (3), (4), and (5) may also be exercised by the holder of an affected permit or the owner of an affected vessel.

(b) The respondent, the permit holder, or the vessel owner may seek amendment or modification of the NOVA to conform to the facts or law as that person sees them by notifying the Administrator at the telephone number or address specified in the NOVA. If amendment or modification is sought, the Administrator will either amend the NOVA or decline to amend it, and so notify the respondent, permit holder or vessel owner, as appropriate.

(c) The respondent, permit holder, or vessel owner may, within the 30-day period specified in paragraph (a) of this section, request an extension of time to respond. The Administrator may grant an extension of up to 30 days unless the Administrator determines that the requestor could, exercising reasonable diligence, respond within the 30-day period.

If the Administrator does not respond to the request within 48 hours of its receipt by the Administrator, the request is granted automatically for the extension requested, up to a maximum of 30 days. A telephonic response to the request within the 48 hour period is considered effective response, and will be followed by written confirmation.

(d) The Administrator may, for good cause, grant an additional extension beyond the thirty day period specified in paragraph (c) of this section.

(e) If the respondent, the permit holder, or the vessel owner wishes a hearing, the request shall be dated and in writing, and shall be served either in person or by certified or registered mail, return receipt requested, at the address specified in the NOVA. The request shall either attach a copy of the relevant NOVA or refer to the relevant NOAA case number.

(f) Any denial, in whole or in part, of any request under this section which is based upon untimeliness will be in writing.

(g) The Administrator may, in the Administrator's discretion, treat any communication from a respondent, a permit holder, or vessel owner as a request for a hearing under paragraph (e) of this section.

#### §904.103 HEARING AND ADMINISTRATIVE REVIEW.

(a) Any hearing request under §904.102(e) is governed by the hearing and review procedures in Subpart C.

(b) In any hearing held in response to a request under §904.102(e), the Administrative Law Judge will render an initial decision. Any party to the hearing may seek the Administrator's review of the Judge's initial decision, subject to the provisions of Subpart C.

#### §904.104 FINAL ADMINISTRATIVE DECISION.

(a) If no request for hearing is filed as provided in §904.102(e), the NOVA becomes effective as the final administrative decision and order of the Administrator on the 30th day after service of the NOVA, or on the last day of any delay period granted.

(b) If a request for hearing is filed in accordance with §904.102(e), the date of the final administrative decision is as provided in Subpart C.

#### §904.105 PAYMENT OF FINAL ASSESSMENT.

(a) Respondent shall make full payment of the civil penalty assessed within 30 days of the date upon which the assessment becomes effective as the final administrative decision and order of the Administrator under §904.104 or Subpart C, or, if the respondent initiates

judicial review of the assessment in accordance with the applicable statute during the 30 day period, within 10 days after the appropriate court enters final judgment in favor of the Administrator, unless the court's order provides otherwise. Payment shall be made by mailing or delivering to the Administrator at the address specified in the NOVA a check or money order made payable in United States currency in the amount of the assessment to the "Treasurer of the United States."

(b) Upon any failure to pay the civil penalty assessed, the Administrator may request the Attorney General of the United States to recover the amount assessed in any appropriate district court of the United States, or may act under §904.106.

**§904.106 COMPROMISE OF CIVIL PENALTY.**

(a) The Administrator, in the Administrator's sole discretion, may compromise, modify, remit, or mitigate, with or without conditions, any civil penalty imposed, or which is subject to imposition, except as stated in paragraph (e) of this section.

(b) The compromise authority of the Administrator under this section is in addition to any similar authority provided in any applicable statute or regulation, and may be exercised either upon the initiative of the Administrator or in response to a request of the alleged violator or other interested person.

(c) If the Administrator acts under this section prior to issuing a NOVA or after a final assessment is payable under §904.105, the Administrator will prepare a document indicating the action taken and citing this paragraph and the applicable statutory provision as authority. Once the case has been assigned for hearing under Subpart C, the Administrator will, except in unusual circumstances, defer any compromise action under this section until the Administrative Law Judge has rendered an initial decision in the matter. Neither the existence of the compromise authority of the Administrator under this section nor the Administrator's exercise thereof at any time changes the date upon which an assessment is final or payable.

(d) If compromise action is requested or otherwise becomes appropriate for the Administrator's consideration during the pendency of a petition for relief from forfeiture filed under Subpart F, the Administrator may consolidate in a manner consistent with the provisions of any statute or regulation applicable to the forfeiture, consideration of the two matters.

(e) Exception: The Administrator will not compromise, modify, or remit a civil penalty imposed, or subject to imposition, under the Deep Seabed Hard Mineral Resources Act while an action to review or recover the penalty is pending a a court of the United States.

**§904.107 APPLICATION OF THIS SUBPART TO PERMIT HOLDERS AND VESSEL OWNERS.**

(a) This Subpart applies to holders of the affected permits as defined in §904.100(c)(2).

(b) This Subpart also applies to owners of affected vessels as defined in §904.100(c)(3).

**SUBPART C--HEARING AND APPEAL PROCEDURES****General****§904.200 SCOPE AND APPLICABILITY.**

(a) These Rules establish uniform procedures for the conduct of hearings and the issuance of initial, recommended, and final decisions of the National Oceanic and Atmospheric Administration (NOAA) in cases involving alleged violations of the laws listed above and regulations implementing these Acts, including civil penalty assessments and permit sanctions. By separate regulation, these rules may be applied to proceedings which do not involve alleged violations of law. These rules shall govern proceedings for which no other rules of practice have been promulgated. By delegation from the Secretary of Commerce or the statute itself, the Administrator of NOAA has authority to carry out the provisions of the Acts and is authorized further to delegate these authorities. These rules are an exercise of that authority.

(b) Subject to the administrative direction of the Chief Administrative Law Judge, each Administrative Law Judge (Judge) assigned by the Chief Administrative Law Judge is delegated authority to make the initial, recommended, or final decision of the agency (whichever is made appropriate by regulation outside this subpart) in proceedings subject to the provisions of this subpart and to take actions to promote the efficient and fair conduct of hearings as set out in these Rules, except that no Administrative Law Judge has authority to rule on challenges to the validity of regulations promulgated by the agency.

(c) The Rules in this subpart will not serve as an independent basis for claiming the right to a hearing, but instead prescribe procedures for the conduct of hearings, the right to which is provided by other authority, including other subparts in this Part.

**§904.201 DEFINITIONS.**

"Administrator"--means the Administrator of NOAA or a designee.

"Affected licensee"--means the holder of a license or permit issued by the agency which may be subject to sanctions by the agency as a result of proceedings under this subpart.

"Affected vessel"--means a vessel whose agency-issued permit may be subject to sanctions by the agency as a result of proceedings under this subpart, or would be liable in rem for a civil penalty assessed under this subpart.

"Initial decision"--means a decision of the Administrative Law Judge which, under applicable statute and regulation, is subject to review by the Administrator, but which becomes the final agency decision in the absence of such review.

"Final decision"--when used in reference to an Administrative Law Judge decision, means a decision of the Administrative Law Judge which, under applicable statute and regulation, is the final agency decision and is not subject to review by the Administrator.

"Recommended decision"--means a decision of the Administrative Law Judge which, under applicable statute and regulation, is a recommendation considered by the Administrator in reaching a final agency decision, but which does not itself become the final agency decision.

"Agency"--means NOAA.

"Decision"--means an initial, recommended, or final decision of the Administrative Law Judge.

#### §904.202 USE OF GENDER AND NUMBER.

Words importing the singular number may extend and be applied to several persons or things; words importing the plural may include the singular; and words importing the masculine gender include the feminine gender and the feminine the masculine.

#### §904.203 DOCKET NUMBER.

Each request for hearing promptly upon its receipt for filing in the Office of Administrative Law Judges will be assigned a docket number and thereafter the proceeding shall be referred to by such number.

#### §904.204 NOTICE OF ASSIGNMENT.

Written notice of the assignment of hearing to the Judge will promptly be given to the parties and thereafter all pleadings, papers, and other documents in the proceeding shall be filed directly with the Judge with copies served on the opposing party.

#### §904.205 APPEARANCES.

A party may appear in person or by or with counsel or other qualified representative.



**§904.206 DUTIES AND POWERS OF JUDGE.**

(a) The Judge shall have all powers and responsibilities necessary to preside over the parties and the proceeding, to hold prehearing conferences, to conduct the hearing, and to make the decision in accordance with these regulations and 5 U.S.C. 554 through 557, including, but not limited to, the authority and duty to:

(1) Rule on a request to participate as a party in the proceeding by allowing, denying, or limiting such participation; provided, however, that the respondent, agency counsel, and if they enter an appearance, the owner of an affected vessel and the holder of an affected license, shall be parties, and provided further that the Judge shall prior to ruling ascertain the views of other parties and base the ruling on whether the request is from a person who could be directly and adversely affected by the decision and who may contribute materially to the disposition of the proceedings;

(2) Schedule the time and place and manner of conducting the pre-hearing conference or hearing, continue the hearing from day to day, adjourn the hearing to a later date or a different place, and reopen the hearing at any time before issuance of the decision, all in the Judge's discretion, having due regard for the convenience and necessity of the parties and witnesses;

(3) Schedule and regulate the course of the hearing and the conduct of the participants and the media, including the power to close the hearings in the interests of justice; seal the record from public scrutiny to protect privileged information, trade secrets, and confidential commercial or financial information; and strike testimony of a witness refusing to answer a question ruled to be proper;

(4) Administer oaths and affirmations to witnesses;

(5) Rule on discovery requests, establish discovery schedules and, whenever the ends of justice would thereby be served, take or cause depositions or interrogatories to be taken and issue protective orders under §904.240;

(6) Rule on motions, procedural requests, and similar matters;

(7) Receive, exclude, limit, and otherwise rule on offers of proof and evidence;

(8) Examine and cross-examine witnesses and introduce into the record on the Judge's own initiative documentary or other evidence;

(9) Rule on requests for appearance of witnesses or production of documents and take appropriate action upon a failure of a party to effect the appearance or production of a witness or document ruled relevant and necessary to the proceeding; as authorized by law, issue subpoenas for the appearance of witnesses or production of documents;

(10) Require a party or witness at any time during the proceeding to state his or her position concerning any issue or his or theory in support of such position;

(11) Take official notice of any matter not appearing in evidence which is among traditional matters of judicial notice; or of technical or scientific facts within the general or specialized knowledge of the Department of Commerce as an expert body; or of a non-privileged document required by law or regulation to be filed with or published by a duly constituted government body; or of any reasonably available public document; provided, that the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary;

(12) Prepare and submit a decision or other appropriate disposition document and certify the record;

(13) Award attorney fees and expenses as provided in Subpart D;  
and

(14) Grant preliminary or interim relief.

#### §904.207 DISQUALIFICATION OF JUDGE.

(a) The Judge may withdraw voluntarily from a particular case when the Judge deems himself/herself disqualified.

(b) A party may in good faith request the Judge to withdraw on the grounds of personal bias or other disqualification. The party seeking the disqualification shall file with the Judge a timely affidavit or statement setting forth in detail the fact alleged to constitute the grounds for disqualification, and the Judge shall rule on the matter. If the Judge believes himself/herself not disqualified, and so rules, the Judge shall also cause all matters relating to such claims of disqualification affirmatively to appear in the record.

§§904.208-904.219 [Reserved]

#### Prehearing

#### §904.220 PLEADINGS, MOTIONS, AND SERVICE.

(a) An original and one copy of all pleadings and documents shall be filed with the Office of Administrative Law Judges and a copy shall be served upon each party of record. All pleadings or documents when submitted for filing shall show that service has been made upon all parties. Such service shall be made by delivering one copy to each party in person or by mailing to the last known address by first-class mail properly addressed with postage prepaid.

(b) All papers to be filed under the Rules in the Subpart may be reproduced by printing or any other process, provided the copies are clear and legible, shall be dated, the original signed in ink, and shall show the docket description and title of the proceeding, and the title, if any, and address of the signatory. If typewritten, the impression shall be on only one side of the paper and shall be double spaced, pica type, if possible, except that quotations shall be single spaced and indented.

(c) Any documents filed shall be signed: (1) By the person or persons filing the same, (2) by an officer thereof if a corporation, (3) by an officer or employee if a government instrumentality, or (4) by an attorney or other person having authority to sign.

(d) The date of service of pleadings or documents shall, unless otherwise specified, be the day when the material is deposited in the United States mail, shown by the postmark thereon (or as otherwise shown for government-franked mailings) or is delivered in person, as the case may be.

(e) Motions shall normally be made in writing and shall state clearly and concisely the purpose of and the relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds requiring the relief requested.

(f) Unless otherwise provided, the answer to any written motion, pleading, or petition shall be served within 15 days after date of service thereof. If a motion states that opposing counsel has no objection, it may be acted upon as soon as practicable, without awaiting the expiration of the 15-day period. Answers shall be in writing, unless made in response to an oral motion made at a hearing, shall be so drawn as fully and completely to advise the parties and the Judge concerning the nature of the opposition, shall admit or deny specifically and in detail each material allegation of the pleading answered, and shall state clearly and concisely the facts and matters of law relied upon. Any new matter raised in an answer shall be deemed controverted.

(g) A response to an answer will be called a reply. A short reply restricted to new matters may be served within 10 days of service of an answer. The Judge, in his/her discretion, may dispense with the reply. No further responses are permitted.

#### §904.221 AMENDMENT OF PLEADINGS OR RECORD.

The Judge, upon his/her own initiative or upon application by a party, may order a party to make a more definite statement of any pleading. In his/her discretion, the Judge may permit either party to amend its pleadings upon conditions fair to both parties. Harmless errors may be corrected by deletion or substitution of words or figures and broad discretion shall be exercised by the Judge in permitting such corrections.

§904.222 TIME COMPUTATION AND EXTENSIONS.

(a) If appropriate and justified, the Judge may grant an extension of time. Requests for extensions of time shall, except in extraordinary circumstances, be made in writing.

(b) Saturdays, Sundays, and Federal holidays will be included in computing the time allowed for service of any document or paper, except that when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next business day.

(c) Time periods will begin on the day following the date of the document, paper, or event which starts the time period.

§904.223 EXPEDITION OF PROCEEDINGS.

(a) In the interests of justice and administrative efficiency, the Judge on his/her own initiative may expedite the proceeding.

(b) Additionally, a motion of a party to expedite the proceeding may, in the discretion of the Judge, be made orally or in writing with concurrent actual notice to all parties. If a motion for an expedited hearing is granted, the hearing on the merits shall not be scheduled within less than three days notice, unless all parties consent to an earlier hearing.

§904.224 SUMMARY DECISION.

(a) At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, or such later time as permitted by the Judge, a party or the Judge on his/her own motion may move for a summary decision disposing of all or part of the issues.

(b) A summary decision may be rendered if the entire record shows as to the issue or issues under consideration:

(1) That there is no genuine issue as to any material fact;  
and

(2) that the moving party is entitled to summary decision as a matter of law.

§904.225 FAILURE TO APPEAR.

(a) If a party fails to appear after service of notice proper under these rules, the hearing may proceed. A notation of failure to appear will be made in the record, and the hearing may be conducted with the parties then present, or the matter may be terminated if the Judge determines that proceeding with the hearing will not aid the decisional process.

(b) The Judge shall also cause to be placed in the record all the facts concerning the issuance and service of the notice of time and place of hearing.

(c) Failure of a party to appear after proper notice will be deemed a waiver of any right to a hearing and consent to the making of a decision on the record.

**§904.226 DISMISSAL FOR FAILURE TO PROSECUTE OR DEFEND.**

Whenever the record discloses the failure of either party to file documents, respond to orders or notices from the Judge, or otherwise indicates an intention on the part of either party not to participate further in the proceeding, the Judge may issue an order to show cause why the case should not be dismissed or disposed of adversely to that party's interest, or make such order as is necessary for the just and expeditious resolution of the case, including dismissal of the matter from the docket for failure to prosecute or defend. Such dismissal or other order shall be subject to §904.272.

**§904.227 SETTLEMENTS.**

If settlement is reached before the Judge has certified the record, the Judge in his/her discretion may require the submission of a copy of the agreement to assure the Judge's consideration of the case is completed and to order the matter dismissed on the basis of the agreement.

**§904.228 STIPULATION.**

The parties may, by stipulation, agree upon any facts involved in the proceeding and include them in the record with the consent of the Judge. Written stipulations shall be signed and shall be served upon all parties of record within the time period specified by the Judge.

**§904.229 CONSOLIDATION.**

The Judge may order two or more proceedings which involve substantially the same parties or the same issues consolidated and heard together.

**§904.230 PREHEARING CONFERENCES.**

(a) Prior to any hearing or at other times deemed appropriate, the Judge may, upon his/her own initiative, or upon the application of any party, arrange a telephone conference and where appropriate, record such telephone conference, or direct the parties to appear before him/her for a conference to consider:

- (1) Simplification or clarification of the issues or settlement of the case by consent;
- (2) The possibility of obtaining stipulations, admissions, agreeents, and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;
- (3) Agreements and rulings to facilitate the discovery process;
- (4) Limitation of the number of expert witnesses or other avoidance of cumulative evidence;
- (5) The procedure, course, and conduct of the hearing;
- (6) The distribution to the parties and the Judge prior to the hearing of written testimony and exhibits in order to expedite the hearing;
- (7) Such other matters as may aid in the disposition of the proceeding.

(b) The Judge in his/her discretion may issue an order showing the matters disposed of by Order or Agreement in such conference.

§§904.231-904.239 [Reserved]

### Discovery

#### §904.240 DISCOVERY GENERALLY.

(a) Parties may obtain discovery of any relevant matter, not privileged, that is admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. In connection with any deposition or other discovery procedure which the parties cannot voluntarily resolve, the Judge may make any order required to compel proper discovery, to protect a party or person from harassment, undue burden or expense, or to preserve confidentiality where requested or in the Judge's discretion.

(b) Any orders concerning discovery may include limitations on the scope, method, time, and place for same, and upon request, or within the Judge's discretion, an appropriate protective order.

(c) If a party fails to comply with a subpoena or order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories or requests for admissions, the Judge may, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary

delay despite such failure, take such action in regard thereto as is just, including but not limited to the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the proceeding, the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

#### §904.241 DEPOSITIONS.

(a) Any party desiring to take the deposition of a witness shall serve written notice on the other parties and the witness setting forth the time when, the place where, and the name and mailing address of the person before whom the deposition is to be taken; the name and address of each witness to appear for deposition; and the subject matter concerning which each witness is expected to testify.

(b) Depositions may be taken orally before any officer authorized to administer oaths by the law of the United States or of the place where the examination is to be held or before a person appointed by the Judge.

(c) Notice shall be given not less than five days before the deposition is to be taken if within the United States and not less than 20 days in advance when the deposition is to be taken elsewhere, unless the Judge by order specifies a different time or excuses the witness from appearing for good cause shown.

(d) Each witness testifying upon deposition shall be sworn and any party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, read to the witness, signed by the witness unless waived, and certified by the officer before whom the deposition is taken. All transcription costs associated with the testimony of a deposed witness are to be borne by the party seeking the deposition. Copies of the transcripts shall be made available to any party upon payment of the fee provided in the agreement with the reporter. See also §904.252(d).

(e) Subject to such objections to the questions and answers as were noted at the time of taking the deposition (or, if reserved, as made at the hearing) which would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by any party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof.

**§904.242 INTERROGATORIES, REQUESTS FOR ADMISSIONS, AND PRODUCTION OF DOCUMENTS.**

Any party may serve written interrogatories or a request for admission of facts upon another party. A party served with written interrogatories or a request for admissions shall answer such interrogatories or requests within 15 days of service, unless the Judge by order specifies a different time or excuses the party from answering for good cause shown. Interrogatories shall be answered under oath.

**§904.243 SUBPOENAS.**

(a) The attendance and testimony of witnesses and the production of documentary evidence at any designated place of hearing on behalf of any party to the proceeding may be required by subpoena as authorized by the statute under which the proceeding is conducted. Subpoenas shall be issued upon a reasonable showing by the applicant of the grounds and necessity thereof. With respect to subpoenas for the production of documents, the request shall also show their competency, relevancy, and materiality. All requests for subpoenas shall be in writing, unless waived for good cause shown. Except for good cause shown, requests for subpoenas shall be submitted by the applicant at least 10 days prior to the date set for hearing.

(b) Any person served with a subpoena may move within 10 days of service, or at hearing, whichever is sooner, to quash or modify the subpoena. The subpoena will be quashed or modified if it is beyond the scope of discovery; does not describe with sufficient particularity the evidence required to be produced; or is for any other reason insufficient in law, or the subpoena is found to be invalid or unreasonable. Any ruling quashing or modifying a subpoena will state the grounds for such action.

(c) Upon the failure of any person to comply with an order to testify or a subpoena directed or issued, the party requesting the order or subpoena may apply to the appropriate district court for enforcement of the order or subpoena.

(d) A subpoena for the attendance of an Agency employee or for the production of Agency evidence shall be served upon the Agency counsel. Agency counsel may file a motion to quash the subpoena within 10 days of service of the subpoena and prohibit such attendance or production until such time as the Judge rules on the motion to quash.



§§904.244-904.249 [Reserved]

Hearings

§904.250 NOTICE OF TIME AND PLACE.

(a) The Judge shall promptly cause to be served on the parties notice of the time and place of hearing, and the hearing will not, except in extraordinary circumstances, be held less than 10 days after service of the notice of hearing.

(b) Unless otherwise required by the statute involved, the hearing will not necessarily be scheduled to take place where the respondent resides; however, if practicable, an attempt will be made to schedule the hearing within a reasonable proximity of where the respondent resides.

(c) The Judge may order that all or part of a proceeding be heard on submissions or affidavits if it appears that substantially all important issues of material fact may be resolved by means of written materials and that efficient disposition of the proceeding can be made without oral hearing.

§904.251 EVIDENCE.

(a) At the hearing, every party shall have the right to present oral or documentary evidence in support of his/her case or defense, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. This paragraph shall not be interpreted to diminish the powers and duties of the Judge under this subpart.

(b) All evidence which is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, shall be admissible at the hearing, except that formal rules of evidence shall not necessarily apply to the proceedings; and hearsay evidence shall not be inadmissible as such.

(c) Formal exceptions to the rulings of the Judge are unnecessary. It is sufficient that a party, at the time of the ruling, makes known the action which he/she desires the Judge to take or his/her objection to an action taken, and the grounds therefor. Rulings on each objection shall appear in the record.

§904.252 WITNESSES.

(a) In any case involving a charged violation of law in which the party charged has admitted an allegation, evidence may be taken to establish matters of aggravation or mitigation.

(b) Any witness not a party may have personal counsel to advise him/ her as to his/her rights but such counsel may not otherwise participate in the hearing.

(c) If such procedure is requested by either party, or upon the Judge's own initiative, witnesses who are not parties may be excluded from the hearing room prior to taking of their testimony.

(d) Witnesses subpoenaed under these Rules, including §904.243, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken shall be entitled to the same fees as are paid for like services in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears or the deposition is taken.

(e) If a witness is expected to testify in a language other than the English language, the party sponsoring the witness shall provide for the services of an interpreter and advise opposing counsel 10 days prior to the hearing concerning the extent interpreters are to be used. Provisions shall also be made to have any exhibits in a foreign language translated into English before such exhibits are offered into evidence. Copies of both the untranslated and translated versions of the proposed exhibits shall be served on the opposing party at least 10 days prior to the hearing unless the parties otherwise agree.

#### §904.253 INTERLOCUTORY APPEALS.

(a) At the request of a party or on the Judge's own initiative, the Judge may certify to the Administrator authority for review a ruling which does not finally dispose of the proceeding if the Judge determines that an immediate appeal therefrom may materially advance the ultimate disposition of the matter.

(b) Upon certification by the Judge of the interlocutory ruling for review, the Administrator shall expeditiously decide the matter. The parties shall have 10 days to serve any briefs associated with the certification.

(c) No interlocutory appeal shall lie as to any ruling not certified by the Judge.

#### §904.254 EX PARTE COMMUNICATIONS.

(a) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports.

(b) Except to the extent required for disposition of ex parte matters as authorized by law, upon assignment of a matter to the Judge and until the final decision of the Agency is effective under these

regulations, no ex parte communication relevant to the merits of the proceeding shall be made, or knowingly caused to be made:

(1) By the Judge or by an Agency employee involved in the decisional process of the proceeding to any interested person outside the Department of Commerce; or

(2) By an interested person outside the Department of Commerce to the Judge or to any Agency employee involved in the decisional process of the proceeding.

(c) An Agency employee or Judge who makes or receives a prohibited communication must place in the hearing record the communication and any response thereto, and the Judge, or Administrator as appropriate, may take action in this respect consistent with these Rules, the applicable statute, and 5 U.S.C. 556(d) and 557(d).

(d) Paragraphs (b) and (c) of this section do not apply to communications to or from the Agency counsel; however, the Agency counsel may not participate or advise in the decision of the Judge or the Administrator's review thereof except as witness or counsel in the proceeding in accordance with this subpart. In addition, the Judge may not consult any person or party on a fact in issue unless notice and opportunity for all parties to participate is provided.

(e) (1) Paragraphs (b) and (c) of this section do not apply to communications concerning national defense or foreign policy matters. Such ex parte communications--

(i) On national defense or foreign policy matters to or from an Agency employee or

(ii) From employees of the United States Government involving intergovernmental negotiations

are permitted if the communicator's position with respect to those matters cannot otherwise be fairly presented for reasons of foreign policy or national defense.

(2) Ex parte communication subject to paragraph (e) of this section shall be made a part of the record to the extent that they do not include information classified pursuant to an Executive Order. Classified information shall be included in a classified portion of the record which shall be available for review only in accordance with applicable law.

§§904.255-904.259 [Reserved]

Post-Hearing

**§904.260 OFFICIAL TRANSCRIPT.**

(a) The official transcript of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith, shall be filed with the Office of Administrative Law Judges. Transcripts of testimony will be available in any proceeding and will be supplied to the parties upon the payment of fees at the rate provided in the agreement with the reporter.

(b) The Judge may determine whether "ordinary copy," "daily copy," or other copy (as those terms are defined by contract) will be necessary and required for the proper conduct of the proceeding.

**§904.261 PETITION FOR RECONSIDERATION.**

Unless an order of the judge specifically provides otherwise, any party may file a petition for reconsideration of an order or decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided and the alleged errors or relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of final orders. Neither the filing nor the granting of a petition for reconsideration shall operate as a stay of an order or its effectiveness date (including for purposes of § 904.272) unless specifically so ordered by the Judge. Within 10 days after the petition is filed, any party to the proceeding may file an answer in support or in opposition. The Judge may in his/her discretion reopen the hearing to consider matters raised in a petition which could not reasonably have been foreseen prior to issuance of the order or decision.

**§904.262 PROPOSED FINDINGS AND CONCLUSIONS.**

(a) Unless a different schedule is established in the discretion of the Judge, including the procedure of paragraph (b) of this section, the parties may file propose findings of fact and conclusions of law, together with supporting briefs, within 30 calendar days after the Judge closes the hearing. Reply briefs may be submitted within 15 days after service of the proposed findings and conclusions to which they respond, unless the Judge sets a different schedule.

(b) In cases involving few parties, limited issues, and short hearings, the Judge may require that any proposed findings and conclusions and reasons in support, be presented orally at the close of the hearing. In such case, the Judge will advise the parties in advance of hearing.

**§904.263 DOCUMENTS, COPIES AND EXHIBITS.**

(a) When documents have been received in evidence, a true copy thereof, or of such part as may be material or relevant, may be submitted in lieu of the original during the hearing or at its conclusion. After a

decision has become final, the Judge may, in his/her discretion, and after notice to other parties, permit the withdrawal of original exhibits or any part thereof by the party entitled thereto for the purpose of substituting copies. The substitution of true copies of exhibits, or any part thereof, may be required by the Judge in his/her discretion as a condition of granting permission for withdrawal of the original.

(b) Photographs may be substituted for physical evidence in the discretion of the Judge, before or after decision.

§§904.264-904.269 [Reserved]

### Decision

#### §904.270 RECORD OF DECISION.

(a) The official transcript of testimony and proceedings, exhibits, briefs, requests, and other documents filed or officially noticed in the proceeding, together with all rulings of the Judge thereon, shall constitute the exclusive record for decision. The record shall also be accompanied by any rejected exhibits, being specifically so marked, and any record of ex parte communications, also specifically so marked.

(b) The Chief Administrative Law Judge shall arrange for appropriate storage of the records of any proceeding, which place of storage need not necessarily be located physically within the Office of Administrative Law Judges.

#### §904.271 DECISION.

(a) After expiration of the period provided in §904.262 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge shall render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record, and the ruling on any findings or conclusions presented by the parties;

(2) A statement of any facts noticed or relied upon in the decision, if the parties have not previously been advised of such notice; and

(3) Such other matters as the Judge considers appropriate.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later

issuance of a written decision under paragraph (a) of this section. The Judge may in such case direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge may, after submission of briefs, direct the prevailing party to prepare proposed findings, conclusions, and an order within a time frame prescribed by the Judge.

(d) The Judge shall transmit the written decision to each of the parties by registered or certified mail, return receipt requested, and shall promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate, except in such particulars as are specified.

#### §904.272 ADMINISTRATIVE REVIEW OF DECISION.

(a) Subject to the requirements of this section, any party may petition for review of an initial decision of the Judge within 30 days after the date the decision is served.

(b) Review of an initial decision is not a matter of right, but rests with the sound discretion of the Administrator. Unless a petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative, an initial decision will become effective as the final decision of the Administrator 30 days after service, unless otherwise provided by statute or regulations. Such petition shall be accomplished by proof of service upon all parties. If a party files a timely petition for discretionary review within that 30 day period, or action to review is taken by the Administrator upon his/her own initiative, the effectiveness of the decision is stayed until further order of the Administrator.

(c) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(1) A finding of a material fact is clearly erroneous based upon the evidence in the record;

(2) A necessary legal conclusion is contrary to law or precedent;

(3) A substantial and important question of law, policy, or discretion is involved; or

(4) A prejudicial procedural error has occurred.

(d) Each issue shall be separately numbered and concisely stated. Each issue shall be supported by detailed citations of the record, and by statutes, regulations, or principal authorities relied upon. Matters of fact or law not argued before the Judge may not be raised on review unless they were raised for the first time in the initial decision of the Judge, or could not reasonably have been foreseen and raised by the parties during the hearing.

(e) No oral argument on petitions for discretionary review will be permitted.

(f) Within 21 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. No further replies shall be permitted.

(g) The Administrator's decision declining to exercise discretionary review will specify the date upon which the Judge's decision shall become effective as the final decision of the Administrator. Reasons for the Administrator's decision need not be stated unless he/she wishes to state a different reason than those of the Judge. To the extent the Administrator's decision is silent as to any material issue of fact, law, or discretion presented by the record, the decision is deemed to adopt the findings, conclusions, and reasons in the initial decision. A petition for reconsideration of an Administrator's decision declining review will not be permitted.

(h) The Administrator may review the record and issue a final order without further proceedings on any or all the issues where he/she finds that matters raised do not warrant further proceedings. If the Administrator desires further proceedings, he/she will issue an order for review limiting the issues for review and the procedures to be followed. Such issues may constitute one or more of the issues raised in a petition for discretionary review and/or matters which the Administrator desires to review on his/her own initiative. Only those issues specified in the order shall be argued on brief to the Administrator and considered by the Administrator.

§§904.273-904.299 [Reserved]

SUBPART D [RESERVED]

SUBPART E [RESERVED]

SUBPART F [RESERVED]

SUBPART G was removed by Federal Register final rule-making of 15 December 1982 (47 FR 56133). The revocation was effective 14 January 1983. The Subpart had been suspended on 8 March 1982 (see 47 FR 9820).

U.S. DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric  
Administration

Office of General Counsel  
Suite 127, Duval Building  
9450 Koger Boulevard  
St. Petersburg, FL 33702

April 16, 1982

TO: Enforcement Task Workshop

FROM: GCSE, Katherine A. Pease

SUBJECT: Case Processing in GCSE - Domestic MFCMA Violations

Processing violations of various fishing regulations consumes considerable time of GCSE. This discussion paper will give a general overview of this case processing procedure.

#### I. Receipt of Case

After a federal violation has been documented by either agents from the Florida Marine Patrol or the National Marine Fisheries Service (NMFS), the NMFS enforcement agents prepare an Offense Investigation Report (OIR). The OIR names the violator (Respondent), describes the enforcement operation and discusses any pertinent details concerning this particular case. The OIR is forwarded from the field to the Law Enforcement Division at the regional office. The Law Enforcement Division personnel review the OIR, and if they are satisfied with it, send the case to GCSE for prosecution.

Once the case arrives at GCSE, the attorney responsible for that type of violation reviews it to determine whether GCSE should prosecute the case. This review includes plotting loran and latitude and longitude readings to verify the fact that the violation occurred in federal waters and/or in a closed area. Sometimes the attorney may request more information on a case. Once the attorney feels that the case is legally sound, the attorney will issue a Notice of Violation and Assessment (NOVA).

#### II. Issuance of a NOVA

The NOVA is the charging document in domestic MFCMA cases. The information in the NOVA includes: respondent's name and address, facts surrounding the violation, laws violated and the amount of the penalty.

For the domestic MFCMA cases, both the owner of the vessel and the captain of the vessel are charged, jointly and severally. "Jointly and



severally" means both people are collectively or individually liable for the full amount of the penalty. For example, if the penalty were \$5,000, both the captain and the owner are individually liable for the whole amount. But only a maximum of \$5,000 could be collected. So, if the owner paid the full \$5,000, the captain would owe nothing, and vice versa. The captain and the owner could both pay part of the fine as well. By charging jointly and severally, the Government maintains flexibility in collecting the penalty.

Charging both the owner and captain serves another purpose besides flexibility in collecting fines. The practice is intended to instill accountability and responsibility into both parties. The captain should be held accountable because he was the perpetrator of the violation and should not be allowed to benefit from his action. The owner, too, must also be responsible for the violation because he employed the captain and benefited from the work done by the captain. Holding the owner liable is intended to insure that he will select his employees carefully and will tell them what standards of conduct he expects from them.

The actual determination of the penalty depends on several factors. The first factor is to determine whether a repeat violator is involved. Repeat violators are fined more heavily than first time violators. Aggravating or mitigating circumstances are next considered. Did the violator attempt to flee from the enforcement officers? If he did, a larger penalty will be imposed.

Fashioning a penalty schedule is not an easy task. The schedule should be fair, yet provide sufficient deterrence to potential violators. Due to the lack of money and personnel to patrol continuously the management areas, deterrence is crucial. If penalties are set too low, fishermen would be tempted to violate the regulations. The impact of the fine on an individual must be balanced against the protection of the resource. Based on these considerations, GCSE has developed and is using a penalty schedule designed to be equitable and fair while providing sufficient deterrence. . . .

After the penalty has been determined, GCSE sends the NOVA, a copy of the Magnuson Act and a copy of the appropriate regulations to the violator. When the violator receives the NOVA, he has three options to pursue. He may pay the penalty, attempt to settle the case for less than the penalty amount or request a hearing (the last two options are not mutually exclusive). If the violator elects to pay the penalty, his case will be closed. Other violators attempt to settle their cases below the penalty. Typically, these violators plead financial inability to pay. When ability to pay is raised, GCSE will send out financial disclosure statements and/or interrogatories. The returned information is verified and considered when determining the ultimate disposition of the case. The final alternative that a violator may select is to request an administrative hearing.

### III. Administrative Hearing Process

If a violator wants a hearing, he must make a written request within thirty days of receipt of the NOVA. GCSE forwards this request to the Administrative Law Judges (ALJ) Office in Washington, D.C. The ALJ Office assigns a docket number and a judge to the case.

Usually four to six weeks after the hearing request is forwarded, the ALJ Office will request the violator and the Government to submit a Preliminary Position on Issues and Procedures (PPIP). The PPIP helps the parties and the court determine what legal and factual issues are in dispute, whether the penalty is in dispute, who the witnesses will be, what exhibits will be used at trial and time and place preferences for trial. Typically, the court allows three to four weeks to submit the PPIP. After the PPIPs are submitted, the court will schedule a hearing. A hearing is generally scheduled at a location convenient to the violator.

At the hearing, the Government first presents its case against the violator. The Government's case will usually be based on the testimony of the enforcement agents involved and on exhibits (i.e., NOAA chart showing location of violation). The violator or his attorney has the right to cross examine the Government's witnesses. After the Government has presented its case, the violator may call his witnesses and/or testify himself.

After the judge has decided the case, either side may petition for review of the initial decision. This review is discretionary, and it is up to the Administrator of NOAA (or his designee) to decide whether to grant the review. The request for review must be filed within thirty days from the date the decision is served on the parties. If the Administrator declines review, a petition for reconsideration of that decision will not be permitted. In this instance, the Administrator will specify the date upon which the judge's decision will become effective as the final decision of the Administrator. If neither party petitions for review, the initial decision of the judge will become effective as the final decision of the Administrator thirty days after it is served. Once the agency decision is final, the violator may petition to obtain review of the agency decision in an appropriate court of the United States. This review is accomplished by filing a notice of appeal in the court within thirty days of the final agency decision.

On rare occasions, a violator does not pursue any of his three options after receiving the NOVA. In this situation, the penalty proposed in the NOVA becomes a final assessment. GCSE will send out a final assessment letter at that time and will inform the violator of his right to file for review of the penalty in federal court within thirty days. If the violator still does nothing, the Government will initiate a collection action against the violator in federal district court.

#### IV. Conclusion

The above outlines the steps taken in a civil penalty case involving a domestic Magnuson Act violation. Although the procedures are standardized, GCSE attempts to treat each case as a unique one and will try to deal with the people involved as individuals, not mere names on paper.

IT'S A PLEASURE BEING HERE WITH YOU THIS AFTERNOON AND ADDRESSING THE ISSUE OF HOW OUR INDUSTRY CAN INCREASE ITS EXPORTS OF FISHERY PRODUCTS.

THE INDUSTRY MADE REMARKABLE PROGRESS IN THE LATE 70S BY DEVELOPING EXPORT MARKETS IN JAPAN AND EUROPE. BY THE END OF THE DECADE, IT HAD JOINED THE CLUB OF LEADING WORLD EXPORTERS OF FISHERY PRODUCTS, ALONG WITH JAPAN, ICELAND, NORWAY, DENMARK, CANADA AND KOREA. SALES OF EDIBLE SEAFOOD PRODUCTS TO FOREIGN COUNTRIES EXCEEDED \$1 BILLION IN 1979 FOR THE FIRST TIME. DURING THE PERIOD FROM 1975 TO 1979, EXPORTS INCREASED OVER THREE-FOLD BY VALUE, GROWING FROM \$300 MILLION TO \$1.0 BILLION. THE EXPANSION OF EXPORTS BY QUANTITY WAS ALSO STRONG, INCREASING FROM 218 MILLION POUNDS TO 1975 TO 574 MILLION POUNDS IN 1979 AND 657 MILLION POUNDS IN 1982.

THIS GROWTH IN EXPORTS REFLECTED A UNIQUE COMBINATION OF FAVORABLE RESOURCE, MARKETING, AND TRADE CIRCUMSTANCES, ON THE ONE HAND, AND SOME KEY GOVERNMENT INITIATIVES ON THE OTHER. THESE CONDITIONS ENABLED THE SEAFOOD INDUSTRY TO INCREASE EXPORTS AT AN ACCELERATED PACE DURING THE 1970s. IN THE 3 YEARS THAT FOLLOWED, 1979 TO 1982, MOST OF THE PREVIOUSLY FAVORABLE CIRCUMSTANCES WERE MODIFIED, AND GROWTH IN U.S. FISHERY EXPORTS BECAME MORE DIFFICULT. AS A RESULT, THE INDUSTRY HAS BEEN UNABLE IN THE LAST 3 YEARS (1980-1982) TO INCREASE EXPORTS, AND MUST NOW DEVELOP NEW APPROACHES TO FIT THE CHANGED BUSINESS ENVIRONMENT. TO MEET THIS CHALLENGE, THE U.S. FISHING INDUSTRY MUST OFFER NEW

PRODUCTS, PENETRATE DIFFERENT MARKETS AND USE INNOVATIVE APPROACHES TO CONDUCTING BUSINESS IN EXPORT MARKETS.

DURING THE FIRST PHASE OF GROWTH, THE U.S. FISHING INDUSTRY BENEFITTED FROM IMPROVED LANDINGS, GENERALLY HIGHER PRICES, AND UNIQUELY FAVORABLE CIRCUMSTANCES IN THE MAJOR TARGET FOREIGN MARKETS. WITH THE IMPLEMENTATION OF EXTENDED JURISDICTION IN 1977, OPTIMISM IN THE INDUSTRY WAS WIDESPREAD THAT PRODUCTION AND PROFITS WOULD CONTINUE TO GROW AND THAT, WITH FAR BETTER CONTROL OVER FOREIGN FISHING EFFORT IN THE U.S. FCZ, DOMESTIC FISHERMEN AND EXPORTERS WOULD SOON BE ABLE TO SUPPLY FOREIGN MARKETS WITH SPECIES PREVIOUSLY TAKEN BY VESSELS OF THOSE COUNTRIES. THIS OPTIMISM WAS WELL-FOUNDED FOR CERTAIN SPECIES LIKE SALMON. IMPROVED MANAGEMENT AND FAVORABLE BIOLOGICAL TRENDS PUSHED U.S. SALMON LANDINGS FROM A LITTLE MORE THAN 300 MILLION POUNDS IN 1979, AND 648 MILLION POUNDS IN 1981. THIS TWO-FOLD INCREASE IN SALMON SUPPLIES IN A HALF OF DOZEN YEARS MADE POSSIBLE TREMENDOUS GROWTH IN EXPORTS OF FROZEN WHOLE AND CANNED SALMON TO JAPAN AND EUROPE.

AT THE SAME TIME, U.S. NEGOTIATORS WERE ABLE TO WIN APPRECIABLE REDUCTIONS IN JAPAN'S CATCH OF SALMON ON THE HIGH-SEAS. JAPANESE SALMON ALLOCATIONS OFF THE SOVIET UNION WERE ALSO CUT BACK; IN EUROPE, LANDINGS OF ATLANTIC SALMON DROPPED TO INSIGNIFICANT LEVELS. THUS, INCREASED U.S. PRODUCTION COINCIDED WITH REDUCED FOREIGN CATCHES. FROM 1976 TO 1979, U.S. EXPORTS OF

FROZEN WHOLE AND CANNED SALMON GREW FROM JUST OVER \$100 MILLION TO MORE THAN \$400 MILLION.

IN ADDITION, WHILE U.S. MANAGEMENT AND ALLOCATION ACTIONS BROUGHT REDUCTION IN JAPANESE CATCHES OF CRABS OFF ALASKA, DOMESTIC LANDINGS OF THESE SPECIES INCREASED SHARPLY. SIMILARLY, SUDDEN DECLINES IN THE AVAILABILITY OF HERRING ROE IN JAPAN STIMULATED IMPROVED U.S. PRODUCTION IN CALIFORNIA AND OFF ALASKA.

IT IS IMPORTANT TO NOTE THAT SHIFTS IN FOREIGN SUPPLIES AND U.S. PRODUCTION OF JUST A HANDFUL OF SPECIES ACCOUNTED FOR THE LARGE BULK OF THE INCREASE IN EXPORTS IN THE SECOND HALF OF THE 1970s. AT THE SAME TIME, U.S. EXPORTERS FACED RELATIVELY LITTLE COMPETITION IN THE JAPANESE AND EUROPEAN MARKETS FOR SALMON AND CRAB PRODUCTS. CANADA CHALLENGED THE U.S. IN SALMON AND ROE HERRING MARKETS BUT NOT SUFFICIENTLY TO ARREST THE STRONG GROWTH IN U.S. SALES TO THOSE COUNTRIES. CANADA'S SALMON PRODUCTION WAS AFTER ALL ONLY ABOUT ONE-FOURTH AS GREAT AS U.S. OUTPUT DURING THESE YEARS.

THE COMPETITIVE POSITION OF U.S. SEAFOOD EXPORTERS IN THESE MARKETS WAS FURTHER STRENGTHENED BY FAVORABLE TRENDS IN EXCHANGE RATES BETWEEN THE DOLLAR AND KEY FOREIGN CURRENCIES, SUCH AS THE JAPANESE YEN, THE BRITISH POUND, AND THE FRENCH FRANC. A WEAK U.S. DOLLAR MADE OUR FISHERY PRODUCTS LESS EXPENSIVE AND THEREFORE MORE ATTRACTIVE IN FOREIGN MARKETS.

IN ADDITION TO THE INCREASES IN RESOURCE AVAILABILITY AND CHANGES IN EXCHANGE RATES FAVORABLE TO FOREIGN IMPORTERS, THE U.S. GOVERNMENT TOOK SEVERAL INITIATIVES IN THE AREA OF INTERNATIONAL TRADE. IN THE AREA OF TRADE NEGOTIATIONS, THE U.S. GOVERNMENT OBTAINED A NUMBER OF CONCESSIONS DURING THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS (MTN). FOR EXAMPLE, JAPAN AGREED TO SUBSTANTIAL PHASED REDUCTIONS OF TARIFFS ON FROZEN SQUID AND EELS.

IN ADDITION TO TRADE CONSULTATIONS CONDUCTED MULTILATERALLY, THE UNITED STATES GOVERNMENT SUCCEEDED IN NEGOTIATING A NUMBER OF BILATERAL FISHERIES TRADE AGREEMENTS WHICH HAD THE COLLECTIVE EFFECT OF REDUCING FOREIGN BARRIERS TO U.S. SEAFOOD IMPORTS. THE MOST SUCCESSFUL OF THESE BILATERAL FISHERIES TRADE RELATIONSHIPS WAS ESTABLISHED IN THE LATE 1970S WITH JAPAN. AGREEMENTS MADE WITH JAPAN RESULTED IN A RELAXATION OF THEIR IMPORT QUOTA SYSTEM, SOME REDUCTIONS IN CUSTOMS DUTIES AND, MORE RECENTLY, IMPORTANT COMMITMENTS TO UNDERTAKE LARGE OVER-THE-SIDE PURCHASES OF UNDERUTILIZED ALASKAN BOTTOMFISH. BILATERAL AGREEMENTS WERE IN ADDITION CONCLUDED WITH PORTUGAL AND SPAIN. THESE EFFORTS TO NEGOTIATE BILATERAL FISHERIES TRADE CONCESSIONS WITH THE USE OF ALLOCATIONS IN THE U.S. FCZ AS A BARGAINING LEVER WERE MADE POSSIBLY BY AGGRESSIVE GOVERNMENT POLICY AND BY THE PASSAGE OF THE AMERICAN FISHERIES PROMOTION ACT IN DECEMBER 1980.

THE BASIC APPROACH OF USING ALLOCATIONS TO WIN TRADE CONCESSIONS WAS KNOWN AS THE "FISH AND CHIPS" POLICY. GIVEN THE

FACT THAT ABOUT 1.7 MILLION METRIC TONS OF FISH WERE TAKEN ANNUALLY DURING THIS PERIOD BY FOREIGN VESSELS IN OUR WATERS, THE UNITED STATES WAS IN AN UNIQUELY FAVORABLE POSITION TO USE THE "FISH AND CHIPS" TRADE LEVERAGE. DURING THE LATE 1970s, THE NATIONAL MARINE FISHERIES SERVICE ALSO INITIATED A MORE ACTIVE TRADE PROMOTION PROGRAM, INCLUDING THE ORGANIZATION OF SALES MISSIONS TO KEY FOREIGN MARKETS AND SPONSORSHIP OF U.S. PARTICIPATION IN SOME OF THE LARGER INTERNATIONAL FOOD SHOWS, PARTICULARLY IN EUROPE.

THUS, IN A SHORT PERIOD OF TIME, THE UNITED STATES BECAME A MAJOR EXPORTER OF A LIMITED NUMBER OF SEAFOOD PRODUCTS. ABOUT 90 PERCENT OF OUR FISHERY EXPORTS WENT TO JAPAN, A HANDFUL OF COUNTRIES IN EUROPE, AND CANADA. OUR TARGET MARKETS WERE AFFLUENT COUNTRIES, AND THE MAJORITY OF THE PRODUCTS WE SOLD WERE PRIMARILY HIGHLY VALUED, UNPROCESSED FROZEN FISH AND SHELLFISH. THE SINGLE HIGHLY PROCESSED PRODUCT THE U.S. INDUSTRY EXPORTED IN LARGE QUANTITIES WAS CANNED SALMON. IN ADDITION, THE LARGE BULK OF OUR SEAFOOD EXPORTS WAS TRANSACTED BY A RELATIVELY SMALL NUMBER OF FIRMS, MAINLY IN THE PACIFIC NORTHWEST AND ALASKA. THE SUCCESSES DURING THIS INITIAL STAGE OF EXPORT GROWTH WERE CONSIDERABLE, BUT FOR A VARIETY OF REASONS, A LEVELLING OFF BECAME EVIDENT BY AROUND 1980.

DURING THE LAST 3 YEARS, U.S. SEAFOOD EXPORTS HAVE VIRTUALLY CEASED TO GROW IN VALUE, FLUCTUATING AROUND THE \$1 BILLION PER YEAR LEVEL. SALES TO FOREIGN MARKETS HAVE, HOWEVER, IMPROVED BY

VOLUME, GROWING FROM 554 MILLION POUNDS IN 1979 TO 651 MILLION POUNDS IN 1982. THIS LEVELLING REFLECTS RECENT PROBLEMS IN OUR SALMON AND CRAB MARKETS. IT IS PERHAPS WORTH MENTIONING THAT THE SLOWER GROWTH IN SEAFOOD EXPORTS SEEMS TO BE AN INTERNATIONAL TREND. OUR MAJOR COMPETITORS, CANADA, NORWAY, AND DENMARK, HAVE ALSO HAD DIFFICULTIES PUSHING THEIR ANNUAL FISHERY EXPORTS MUCH ABOVE THE \$1 BILLION MARK.

THERE ARE A NUMBER OF REASONS WHY SEAFOOD EXPORTS HAVE LEVELLED OFF IN THE 1980-1982 PERIOD. STATED SIMPLY, THE UNIQUELY FAVORABLE RESOURCE, MARKETING AND EXCHANGE RATE CIRCUMSTANCES OF THE LATE 1970S CHANGED. U.S. LANDINGS OF THE NORTHERN CRABS, PARTICULARLY THE VALUABLE ALASKA KING CRAB, DECLINED SHARPLY. PRODUCTION OF ALASKA KING CRAB, SO IMPORTANT IN THE JAPANESE MARKET, DROPPED FROM 185 MILLION POUNDS IN 1980 TO 34.5 MILLION POUNDS IN 1982. CONVERSELY, SALMON LANDINGS INCREASED RAPIDLY IN 1981 AND 1982, LEADING TO LOWER PRICES AND LARGE INVENTORIES. A PROBLEM WITH AN INCIDENT OF BOTULISM IN CANNED SALMON UNDERMINED OUR EUROPEAN MARKETS FOR THAT PRODUCT. IN JAPAN, THE SUDDEN UPWARD SPIRAL OF PRICES FOR HERRING ROE COLLAPSED AS THE SPECULATIVE FEVER DIED DOWN, AND, AS A CONSEQUENCE, U.S. PRODUCERS WERE HURT. IN SOME INSTANCES, U.S. SEAFOOD EXPORTERS FACED NEW AND INTENSE COMPETITION IN ESTABLISHED FOREIGN MARKETS. THE BEST EXAMPLE IS THE RAPIDLY ADVANCING PENETRATION OF THE EUROPEAN MARKET BY NORWEGIAN EXPORTERS OF CULTURED SALMON.



IN ADDITION, THE INTERNATIONAL TRADE CLIMATE BECAME CLOUDED IN THE EARLY 1980s WITH GROWING DEMANDS FOR PROTECTION. THUS, AFTER THE 1979 CONCLUSION OF THE TOKYO ROUND MTN, THE IMPETUS BEHIND TRADE LIBERALIZATION APPEARED TO WANE. FOR EXAMPLE, THE U.S. GOVERNMENT HAD TO MAKE CONSIDERABLE EFFORTS TO TURN BACK AN ATTEMPT BY THE EUROPEAN COMMUNITY (EC) TO INTRODUCE NEW, MORE BURDENSOME TRADE REGULATIONS, INCLUDING A MINIMUM IMPORT PRICE ON SALMON AND LOBSTERS. OUR MOST RECENT TRADE DISCUSSION WITH THE JAPANESE CONCERNING FURTHER REDUCTION IN TARIFF AND NON-TARIFF BARRIERS HAVE BEEN NON-PRODUCTIVE.

FINALLY, THE U.S. DOLLAR HAS APPRECIATED SUBSTANTIALLY IN THE LAST 2 YEARS AGAINST THE CURRENCIES OF ALL OUR MAJOR SEAFOOD TRADING PARTNERS. THEREFORE, U.S. FISHERY EXPORTS HAVE BECOME RELATIVELY MORE EXPENSIVE AND LESS COMPETITIVE. AT A TIME WHEN THE ECONOMIES OF ALL THE INDUSTRIALIZED NATIONS ARE SUFFERING FROM SLUGGISH GROWTH AND WEAK DEMAND, THIS LAST FACTOR HAS A CONSIDERABLE IMPACT.

WITH ALL THIS, IT IS REMARKABLE THAT U.S. EXPORTERS HAVE FARED AS WELL AS THEY HAVE IN THE EARLY 1980s. EXPORTS TO JAPAN EVEN IMPROVED IN 1982 OVER THE DISAPPOINTING LEVEL OF THE PREVIOUS YEAR, AND SALES OF SPECIES NOT TRADITIONALLY HARVESTED BY U.S. FISHERMEN LIKE SQUID, EELS, HERRING, MACKEREL, AND SABLEFISH, TO JAPAN AND EUROPE HAVE INCREASED. IF WE ADD TO THE OFFICIAL EXPORT TOTALS THE AMOUNTS SOLD THROUGH OVER-THE-SIDE JOINT VENTURES, THE U.S. INDUSTRY IS CONTINUING TO INCREASE

EXPORTS. THUS, "CONVENTIONAL" EXPORTS AND JOINT VENTURE TRANSFERS IN 1982 ADDED TO 1.2 BILLION POUNDS OF FOREIGN SALES, A SHARP RISE FROM THE 980 MILLION POUNDS TOTAL IN 1981. AS THE ABOVE DISCUSSION MAKES CLEAR, HOWEVER, WE NOW FACE SERIOUS CHALLENGES IF WE ARE TO RESUME A TREND OF CONSISTENT GROWTH. THE U.S. SEAFOOD INDUSTRY MUST DEVELOP NEW PRODUCTS AND MARKETS, AND, WE BELIEVE, USE SOME NOVEL BUSINESS APPROACHES.

FOR EXAMPLE, THE UNITED STATES INDUSTRY NEEDS TO EXPORT TO ITS TRADITIONAL MARKETS HIGH VALUED SPECIES SUCH AS SALMON IN PROCESSED RATHER THAN RAW FORMS TO RETAIN MORE OF THE POTENTIAL VALUE ADDED OF THOSE PRODUCTS. WE ALSO HAVE TO RECOGNIZE THE EXPORT POTENTIAL OF OUR LOWER VALUE, HIGH VOLUME, SPECIES SUCH AS ALASKAN POLLOCK AND HERRING LIKE SPECIES IN THE GULF OF MEXICO IN NON-TRADITIONAL MARKETS SUCH AS MARKETS IN LATIN AMERICA, AFRICA, AND THE MIDDLE EAST. THESE MARKETS MAY NOT BE EASY FOR OUR INDUSTRY TO DO BUSINESS IN. HOWEVER, IF WE ARE TO MATCH UP OUR RESOURCE AND MARKET POTENTIALS, THE INDUSTRY AS WELL AS THE FEDERAL GOVERNMENT WILL HAVE TO DO THINGS DIFFERENTLY.

TO THIS END, EXPORTERS MUST BEGIN TO LOOK AT MORE CREATIVE FINANCING TECHNIQUES. TWO GOVERNMENT PROGRAMS MAY BE PARTICULARLY HELPFUL. THE COMMODITY CREDIT CORPORATION CHARTER IS SCHEDULED FOR AMENDMENT BY THE CONGRESS THIS YEAR TO INCLUDE FISH PRODUCTS AS AN ELIGIBLE COMMODITY. ACCESS TO THIS PROGRAM WILL ALLOW U.S. FISHERY EXPORTERS TO OBTAIN BUYER FINANCING IN THE FORM OF A U.S. GOVERNMENT GUARANTEE TO A FOREIGN BANK.

REPAYMENT TERMS OF UP TO 36 MONTHS ARE AVAILABLE TO PURCHASERS EVEN THOUGH THE U.S. SELLER IS PAID UPON ACCEPTANCE OF THE GOODS BY THE BUYER. THE U.S. GOVERNMENT GUARANTEES REPAYMENT BY THE BUYER OF WHAT IS IN EFFECT A LOAN FROM THE FOREIGN BANK. THE SECOND PROGRAM IS INCLUDED IN THE EXPORT TRADING ACT OF 1982. IT PROVIDES FOR A 90 PERCENT GUARANTEE ON LOANS IN EXCESS OF \$500,000 FOR REVOLVING LINES OF CREDIT BY EXIM BANK. A SIMILAR PROGRAM IS AVAILABLE FOR CREDIT BELOW \$500,000 FROM THE SMALL BUSINESS ADMINISTRATION.

THESE PROGRAMS, ALTHOUGH ATTRACTIVE, WILL NOT BE ENOUGH TO ALLOW OUR INDUSTRY TO SUSTAIN ITS PREVIOUS RATE OF GROWTH IN EXPORT SALES. THE INDUSTRY MUST BEGIN TO LOOK AT NEW CREATIVE MARKET STRATEGIES, EXPORT FINISHED PRODUCT WHERE POSSIBLE, AND PENETRATE NEW MARKETS. IT MUST LEARN TO USE BARTER, COUNTER AND SWITCH TRADE EFFECTIVELY, ESPECIALLY IN THIRD WORLD MARKETS. IT WILL HAVE TO MASTER WAYS IN RECEIVING PAYMENT, OTHER THAN IRREVOCABLE LETTERS OF CREDIT, OPEN ACCOUNTS AND FACTORING. A NEW LEVEL OF SOPHISTICATION WILL BE REQUIRED TO LEVERAGE ITS PRODUCTS INTO NEW MARKETS AND EXPAND TRADITIONAL MARKETS. THE OPPORTUNITY IS CLEARLY THERE; THE WORLD MARKET IN FISHERY PRODUCTS IS ENORMOUS, BUT THE INDUSTRY CAN NO LONGER EXPECT EXPANSION BASED ON AVAILABILITY OF RAW MATERIALS ALONE. IT MUST LOOK TO USING EXISTING AND SOON TO BE AVAILABLE GOVERNMENT PROGRAMS AND ITS OWN INGENUITY TO EXPAND TO THE NEXT BILLION.

## FINANCIAL SERVICES PROGRAMS

### A. FISHERIES OBLIGATION GUARANTEE PROGRAM

#### O STATUTORY AUTHORITY:

- TITLE XI OF MERCHANT MARINE ACT, 1936 (BASIC PROGRAM AUTHORITY).
- FEDERAL SHIP FINANCING ACT OF 1972 (CHANGED NATURE OF FINANCING TRANSACTION).
- AMERICAN FISHERIES PROMOTION ACT OF 1980 (ADDED FISHERIES SHORESIDE FACILITIES--ONLY FISHING VESSELS PREVIOUSLY ELIGIBLE).
- GAS TAX ACT AND 1983 CONTINUING RESOLUTION (BOTH PROHIBITED ANNUAL FINANCING CEILINGS).

#### O WHAT IT IS:

- \$850 MILLION REVOLVING GUARANTEE AUTHORITY.
- FINANCES LONG-TERM DEBT PORTION OF CONSTRUCTION OR REFURBISHING COST.

-- FISHING VESSELS AND SHORESIDE FACILITIES ELIGIBLE.

o How It Works:

-- CAN FINANCE UP TO 87 1/2 PERCENT OF COST FOR UP TO 25 YEARS (USEFUL-LIFE KEY).

-- LENDER RECEIVES 100 PERCENT GUARANTEE OF NOTE (FULL FAITH AND CREDIT OF U.S.).

-- BORROWER RECEIVES LONG-TERM FINANCING.

-- GOVERNMENT RECEIVES MORTGAGE TO SECURE ITS GUARANTEE.

-- IF BORROWER DOES NOT PAY LENDER, GOVERNMENT MUST REDEEM BORROWER'S NOTE WITHIN 30 DAYS OF LENDER'S DEMAND.

-- GOVERNMENT LIQUIDATES ITS COLLATERAL TO COLLECT REDEEMED NOTE.

-- ALL INCOME AND EXPENSE ARE ASSETS AND LIABILITIES OF PROGRAM FUND (I.E., SELF-SUPPORTING).

B. FISHERIES LOAN FUND

o STATUTORY AUTHORITY:

-- FISH AND WILDLIFE ACT OF 1956.

-- AMERICAN FISHERIES PROMOTION ACT OF 1980.

o WHAT IT DOES:

-- PROVIDES COUNTERCYCLICAL FINANCING TO VESSEL OWNERS IN  
DANGER OF DEFAULTING ON MORTGAGES.

o HOW IT WORKS:

-- THREE PRIORITIES.

-- THREE PERCENT LOANS FOR FIRST 2.

C. CCF

o STATUTORY AUTHORITY:

-- MERCHANT MARINE ACT OF 1936, §607. 46 U.S.C.117

O WHAT IT DOES:

- PROVIDES A TAX DEFERRAL ON CURRENT INCOME FOR NEW VESSELS, REFURBISHING EXISTING VESSELS AND NEW EQUIPMENT.

O HOW IT WORKS:

- AGREEMENT WITH NMFS.
- SET UP ACCOUNT WITH OWN FINANCIAL INSTITUTIONS.
- REPORT TO IRS ON TAX FORM.
- REDUCES BASIS OF NEW ASSET WHEN BOUGHT WITH TAX DEFERRED FUNDS.

NOTICE

FISHERIES LOAN FUND  
APPLICATION INSTRUCTIONS

The open season for emergency loans from the Fisheries Loan Fund will be from June 15 to July 29, 1983. These are countercyclical assistance loans for the purpose of avoiding default on mortgages financing the construction, reconstruction, or reconditioning of fishing vessels of at least five net tons.

\$9.7 million is available for these loans this year. \$3.9 million of that amount is reserved for fishermen financed under the Fisheries Obligation Guarantee Program. The other \$5.8 million is available to any other fishermen financed elsewhere who meet the eligibility criteria. Fishermen financed under the Fisheries Obligation Guarantee Program may apply at any time, but applications should be in before the end of July. All other fishermen financed elsewhere may apply only during the open season.

Fishermen financed under the Fisheries Guarantee Program should contact their nearest NMFS Financial Services Branch for application instructions. The balance of this notice applies only to other fishermen not financed under the Fisheries Obligation Guarantee Program.

o What's Available.

- \$1.16 million in emergency loan funds are available to residents of each of the following areas (\$5.8 million in total):
  - o New England, Mid-Atlantic, and Great Lakes
  - o Gulf of Mexico, South Atlantic, and Caribbean.
  - o California and Pacific Islands
  - o Washington and Oregon
  - o Alaska
- Interest rate is 3 percent.
- Repayment maturity is up to 10 years.



0 Who it's Available to:

- You must be a U.S. citizen.
- You must own a commercial fishing vessel of at least 5 net tons.
- You must be in jeopardy of defaulting on a mortgage which financed the above vessel's construction, reconstruction, or reconditioning.
- You must personally skipper and own the vessel whose mortgage you are in jeopardy of defaulting (vessels with hired skippers don't qualify).
- You must have at least 5 years experience as a skipper of vessels you owned.
- You must have made a profit during at least 2 of the 5 years above.
- You cannot be in bankruptcy.
- Your mortgage cannot already be in process of foreclosure.
- You cannot have any other assets capable of generating the funds for which this loan is sought.
- Your vessel must have a sufficient debt-to-equity ratio and insurable value to safely secure the loan amount requested (maximum loan amount is one year's mortgage debt service, but all loans will be kept as small as possible).
- Your situation must be such that the requested loan, if approved, will result in a strong assurance of continued operation and repayment of the loan.
- Only the owner of the vessel himself may apply (don't have someone apply on your behalf).
- Applications which aren't materially complete at the time of our receipt will be returned.
- Do not apply unless you meet all the above requirements.

0 How It'll Be Made Available:

- Applications submitted before or after the open season won't be accepted.

- Applications will be considered in the order of their receipt by us.
- Qualified applications will be approved in the order of their receipt until available funds are exhausted.

o What MUST BE Included in Applications. (Since no application form is available, send the following information in the order indicated).

(1) Personal.

- (a) Name.
- (b) Address.
- (c) Telephone number.
- (d) Marital status.
- (e) Social security number.
- (f) IRS taxpayer number.
- (g) Complete biography. Include age, place of birth (proof of naturalization if naturalized), health, experience, references, operating history, accomplishments, etc. Be specific about what fishing vessels you owned and skippered, what they fished for, when you owned and skippered them, etc.
- (h) Balance sheet for yourself (current within 60 days of application). All personal debts must be disclosed, with the amount and frequency of repayment requirements. List acquisition cost and market value for all non-cash assets. All items must be described thoroughly to permit our verification. Give names, addresses, and telephone numbers of each person you owe money to and each person who owes money to you. 1/
- (i) Federal income tax returns for yourself for the last 5 years. 1/

2) Loan Purpose:

- (a) Amount of loan requested (maximum is one year's debt service on mortgaged vessel).
- (b) What loan will be used for (who it will be paid to and for what).
- (c) Why a lesser amount would not be enough.
- (d) Why the amount requested will assure your ability to continue in operation and repay the loan (be specific).
- (e) A letter from each of two banks declining to lend you the amount you are requesting from the Fisheries Loan Fund.

(3) Financial Information:

- (a) Balance sheet for your vessel's business (this must be current within 60 days of application and must be for the vessel whose mortgage is in jeopardy of default). All vessel debts must be disclosed, with the amount and frequency of repayments. List acquisition cost and market value for all non-cash assets. All items must be described thoroughly enough to permit our verification. Give names, addresses, and telephone numbers of each person you owe money to and each person who owes you money. 1/
- (b) Profit and loss statement for your vessel during last 12 months (this must be current within 60 days of application and must be for the vessel whose mortgage is in jeopardy of default). Please be specific about all items of profit and loss.
- (c) Federal income tax returns for your vessel business for the last five years. 1/
- (d) Trip settlement sheets for the past 90 days (for the vessel whose mortgage is in jeopardy of default).
- (e) Current balance sheet and profit and loss statement for any other business you own.
- (f) Name, address, and telephone number of your bookkeeper and your attorney.
- (g) Name, address, and telephone number of the principal people who buy your vessel's catch and the principal people who sell your vessel supplies and services.

(4) Vessel Information (for the vessel whose mortgage is in jeopardy of default):

- (a) Copy of all vessel mortgages (include names, addresses, and phone numbers of mortgagees and present outstanding balance of each mortgage).
- (b) Current U.S. Coast Guard form 1330 (certificate of ownership).
- (c) Recent photograph of vessel.
- (d) Inventory of vessel equipment and description of vessel's rigging.
- (e) Survey report for vessel (no older than one year).
- (f) Copy of vessel's insurance policy (plus name, address, and telephone number of agent).

- (g) Number of engine hours and date of last engine overhaul.
- (h) Date of last vessel dry dock.
- (i) Vessel acquisition cost and present market value.
- (j) Complete disclosure of all lienable vessel debt.

° Where to Send Application:

- Residents of New England, Mid-Atlantic, and Great Lakes states, send to: National Marine Fisheries Service, 14 Elm Street, Federal Bldg., Gloucester, Massachusetts 01930
- Residents of Gulf of Mexico and South Atlantic States, send to: National Marine Fisheries Service, 9450 Koger Blvd., St. Petersburg, Florida 33702
- Residents of California and Pacific Islands, send to: National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731
- Residents of Washington, Oregon, and Alaska, send to: National Marine Fisheries Service, 7600 Sand Point Way, NE, BIN C15700, Seattle, Washington 98115

1/. If you own the vessel as a sole proprietor, you need send only your personal balance sheet and tax returns. If you own the vessel through a corporation or partnership, you must send both your personal balance sheet and tax returns and those for the corporation or partnership.

# **federal register**

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**Thursday  
December 23, 1982**

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## **Part IV**

### **Department of Commerce**

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**National Oceanic and Atmospheric  
Administration**

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**Fisheries Obligation Guarantee Program;  
Final Rule**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 255

[Docket No. 21 117-233]

## Fisheries Obligation Guarantee Program

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service, Commerce.

**ACTION:** Final rule.

**SUMMARY:** NOAA issues a final rule to implement the American Fisheries Promotion Act amendments to Title XI of the Merchant Marine Act, 1936. This final rule is a modification of the rule proposed on August 3, 1982 (47 FR 33648). The modification is in response to public comment and for clarification. This rule will extend the availability of guaranteed financing under the Title XI Program to fisheries shoreside facilities and make other changes in the existing vessel financing program.

**EFFECTIVE DATE:** December 23, 1982.

**FOR FURTHER INFORMATION CONTACT:**

Michael L. Grable, Chief, Financial Services Division, National Marine Fisheries Service, 202-634-7496.

**SUPPLEMENTARY INFORMATION:** The Fisheries Obligation Guarantee Program provides a Federal guarantee of the debt portion of the cost of constructing, reconstructing, reconditioning, or (under limited circumstances) purchasing fishing vessels and fisheries shoreside facilities. The Agency is authorized to guarantee financing of up to 87½ percent of the cost of such vessels or facilities. Guaranteed debt maturities may be up to 25 years. In order to secure its guarantee, the Federal Government holds and services (as mortgagee) a mortgage on the property financed and such other collateral as the Agency deems necessary. The security for the private obligee (the lender or investor) who funds the guaranteed financing is the Federal guarantee of the debt obligation held and serviced by that private obligee.

The following is a description of how the Program works:

(1) An obligor (the borrower) applies to the Agency. A filing and commitment fee, 75 percent of which is nonrefundable, is required at the time of application.

(2) The Agency conducts an investigation of the obligor and an analysis of the project to determine eligibility for a guarantee. This is a

standard risk assessment evaluation, involving such factors as the obligor's demonstrated fisheries ability and experience, character and reputation, past record of operations, and financial condition; and the financial, economic, and technical feasibility of the project.

(3) If the project is approved for a guarantee, the Agency issues a letter approving in principle the issuance of a guarantee for financing. This letter states all the terms and conditions under which a guarantee will be issued. The remaining 25 percent of the obligor's filing and commitment fee is earned by the Agency at this point. If the project is not approved for a guarantee, the Agency issues a declination letter and returns to the applicant the remaining 25 percent of the filing and commitment fee.

(4) The obligor accepts the Agency's terms and conditions as stated in the Approval in Principle letter.

(5) The obligor and the Agency cooperate in selecting a private obligee (the lender or investor) willing, with the Agency's guarantee, to fund the financing under terms acceptable to the obligor and the Agency.

(6) Once a private obligee has agreed to commit funds to the obligor, under terms acceptable to the Agency and the obligor, the Agency issues a guarantee commitment which is signed by the obligor, the private obligee, and the Agency. At this point, all three parties are bound to the terms and conditions of the financing and the guarantee.

(7) Closing documents are prepared and approved as to form, the financing is closed, and the proceeds are disbursed. The private obligee receives a debt obligation from the obligor and a guarantee of repayment from the Federal Government. The Agency receives from the obligor a mortgage on the property financed and such other collateral as has been required. The obligor receives from the private obligee the proceeds of the financing.

(8) Payments on the debt obligation are made by the obligor to the private obligee. Annual guarantee fees are paid by the obligor to the Agency.

(9) If the obligor fails to pay the private obligee as provided in the guaranteed debt obligation, the private obligee may demand payment under the Agency's guarantee.

(10) Once the Agency is required to make payment under the guarantee, the Agency liquidates the debt obligation by foreclosing on its collateral and/or by pursuing all other collection remedies available to the Agency.

Prior to enactment of the American Fisheries Promotion Act (AFPA), the Agency was authorized to guarantee

financing only for the construction, reconstruction, or reconditioning of fishing vessels. The American Fisheries Promotion Act made the following changes in the fisheries portion of the Title XI Program:

(1) Authorized guaranteed financing of the cost of constructing, reconstructing, or reconditioning fisheries shoreside facilities.

(2) Authorized, under certain limited conditions, guaranteed financing of the cost of purchasing used fishing vessels or fisheries shoreside facilities.

(3) Authorized guaranteed financing for fishing vessels and fisheries shoreside facilities to be used in developing fisheries, where risks may be greater than in more traditional fisheries.

(4) Created separate subfunds in the Federal Ship Financing Fund for income/expenses related to traditional financing risks and income/expenses related to higher-risk developing fisheries.

(5) Expanded the definitions of reconstruction and reconditioning, but excluded routine minor repairs and maintenance.

(6) Extended eligibility for guarantees to nationals of the United States and citizens of the Northern Mariana Islands.

(7) Made it clear that, for the purposes of determining eligibility for guarantees, the term "State" as used in section 2 of the Shipping Act, 1916 (46 U.S.C. 802) includes any State, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands of the United States, the Northern Mariana Islands, or any other Commonwealth, territory, or possession of the United States.

(8) Authorized guaranteed financing for the purchase, reconstruction, or reconditioning of previously guaranteed vessels or facilities which are sold at a foreclosure sale instituted by the Agency or sold by the Agency itself after purchase of such collateral at a foreclosure sale.

A notice of proposed rulemaking relative to these changes in Title XI was published on August 3, 1982 (47 FR 33648). Sixty-six comments were received in response to this notice. After considering these comments, the Agency has decided to make the following changes in the proposed rulemaking.

*Comments and responses:*

(1) Several parties commented that filing and commitment fees based on a flat percentage of project cost could produce higher than warranted filing and commitment fees in connection with higher-cost projects.

In general, higher-cost projects do involve higher processing costs. Since the risk of loss is higher, the degree of investigation is also higher. Higher-cost projects also most often involve more complicated closing, and this will be particularly true when the Agency is ready to begin using guaranteed bonds, rather than guaranteed notes, for the higher-cost financings. The Agency does agree, however, that the proposed fee basis could produce fees higher than warranted in the case of very high cost projects. The proposed filing and commitment fee has, consequently, been reduced from  $\frac{1}{2}$  of 1 percent of the total project cost to  $\frac{1}{4}$  of 1 percent of the first \$2,000,000 (or any portion thereof) of project cost and  $\frac{1}{4}$  of 1 percent of all project cost over \$2,000,000.

(2) One party commented that the filing fee should be partially refundable if changed circumstances required withdrawing an application.

Nonrefundability of the Agency's filing fee is one way of controlling the incidence of speculative applications. The Agency desires to keep the filing fee nonrefundable. The commitment fee (which is 25 percent of the total filing and commitment fee) is refundable if an application is declined or if an application is withdrawn before issuance of an approval in principle letter.

(3) Several parties commented that the proposed rules should specifically cover inland fisheries facilities which involve freshwater fish.

The rules, as proposed, include inland fisheries facilities whether they involve saltwater or freshwater fish. The word "shoreside" was not intended to mean that a facility needed to be in proximity to a shoreline.

(4) One party commented that the proposed rules should: (a) Provide for "call" protection on guaranteed financings, (b) provide additional information on the method of calculating interest on guaranteed financings, and (c) revise the current guarantee termination provisions.

These are contractual matters which need not appear in the rules. In general, reasonable "call" provisions acceptable to the borrower are permissible, but prepayment penalties are not part of the amount guaranteed. The Agency is now revising its contracts to (a) provide for a uniform method of calculating interest and (b) revise the current guarantee termination provisions by restricting termination to the defaulted payments for which demand has not been timely (rather than termination of the entire guarantee).

(5) One party commented that domestic corporation whose stock is

owned by noncitizens of the United States should be eligible for the Program.

The term "citizen or national of the United States" is defined by Title XI. In the case of fishing vessels, U.S. citizen corporations must meet the coastwise trade requirements of section 2 of the Shipping Act, 1916; this means, among other things, that 75 percent of the corporation's stock must be owned by U.S. citizens or nationals. In the case of fisheries shoreside facilities, Title XI itself requires that 75 percent of a corporate obligors stock must be owned by U.S. citizens or nationals. This comment cannot, consequently, be adopted.

(6) One party commented that excess proceeds realized from the resale of collateral previously acquired by the Agency at a foreclosure sale should be credited to the previous obligor.

Once the Agency has acquired collateral at a foreclosure sale, its resale risk is borne by the Agency and no portion of the resale proceeds will be credited to the previous obligor.

(7) Two parties commented that equity investors without demonstrated fisheries ability and experience should be limited to a minority interest in a project eligible for program financing, rather than the proposed rules' requirement that the person with the demonstrated fishing industry ability and experience have a "significant" equity interest in the project.

This suggestion could adversely affect a few projects which were highly desirable even though outside equity investors would own more than 49 percent of the project. Nevertheless, the Agency so strongly believes that the commitment of solid fisheries experience is such a prime requirement of success in the fishing industry that this comment has been adopted. Outside equity investors will, consequently, be restricted to *no more than* 49 percent ownership of a project eligible for Program financing.

(8) One party commented that political subdivisions of the states should be included in the definition of "citizen or national of the United States."

This comment has been adopted.

(9) One party commented that the Program should provide short-term financing of construction costs during the property's construction interim.

The proposed rules do not preclude this. Because the program's staff is presently limited, however, applications will for the foreseeable future be limited to long-term financing. Should circumstances permit it in the future, applications will also be accepted for

short-term financing during the construction interim. The reasonable interest cost of non-guaranteed, short-term financing during the construction interim can, however, presently be included in the amount of the guaranteed financing.

(10) One party commented that irrevocable letters of credit might be acceptable in lieu of guarantees from parties whose net worths would otherwise have to be pledged.

This comment has been adopted.

(11) One party commented about the lack of loss payee and other mortgagee provisions concerning casualty insurance on program collateral.

Although this is a matter of standard contractual procedure, the Agency has included its standard mortgagee requirements in the insurance section of the final rules.

(12) One party commented that provisions should be made for trustees in the paying agency section of the rules.

This comment has been adopted.

(13) One party commented that: (a) Provision should be made for trustees, acting on behalf of guaranteed obligees, to tender those obligees' demands, (b) the time limits within which demands must be made should be specified, and (c) provision should be made with respect to the avoidable preference provisions of the Bankruptcy Act.

The Agency has made it clear in the final rules that the word "obligees" in the demands and payment section includes obligees' agents and trustee. The time limits within which demands must be made are established by Title XI and specified in each guarantee contract, and this need not be addressed by these final rules. It is not the Agency's intent that payment of any demand be avoided by the avoidable preference provisions of the Bankruptcy Act, but the Agency cannot predict what a Bankruptcy Court might or might not do.

(14) One party commented that dredging costs should be specifically included as eligible.

This comment has been adopted.

(15) Several parties commented that the exclusion from program financing of local distribution facilities was undesirable. One of these parties, representing 1,200 seafood companies, commented that this exclusion was contrary to Title XI and inconsistent with its legislative history.

The Agency has revised this section of the final rules to make program financing available to local fisheries distribution facilities.

(16) One party commented that fisheries shoreside facilities for

commercial passenger carrying fishing vessel operations should be eligible for program financing, but would often be excluded by the definition of fisheries shoreside facilities in the proposed rules.

The definition of fisheries shoreside facilities follows Title XI's language and must, consequently, stay as it was proposed.

(17) Several parties commented that the definition of "underutilized fishery" should be broadened.

The Agency believes the definition of underutilized fisheries, as proposed, is adequate. The final rules have, however, been modified to make it clear that a State's determination of underutilized status for a fisheries resource within that State's fishery management jurisdiction is sufficient to qualify that resource as underutilized for the purpose of program financing.

(18) One party commented that Title XI prohibits financing fisheries processing vessels built in foreign countries, and requested modification of the proposed rules to reflect the same.

A fisheries processing vessel can fall under the Title XI definition either of "fishing vessel" or "fishery facility," since both definitions are clearly broad enough to encompass fisheries processing vessels. If fisheries processing vessels were in every case to be considered as falling under the Title XI definition of "fishery facility," then they clearly would have to be built in the United States because the statutory definition of "fishery facility" requires that vessels eligible as fishery facilities be built in the United States. If fisheries processing vessels were in every case to be considered as falling under the Title XI definition of "fishing vessel," then they clearly would not have to be built in the United States because the statutory definition of "fishing vessel" requires only that eligible fishing vessels (a) meet the *citizenship* requirements for documenting vessels in the coastwise trade and (b) fall within the statutory definition of "fishing vessel" established in the Fishery Conservation and Management Act of 1976. Moreover, the Title XI language pertaining to program financing of the purchase (as opposed to the construction, reconstruction, or reconditioning) of used fishing vessels or fisheries shoreside facilities permits program financing of the purchase price of used equipment when (a) the equipment " \* \* \* will be reconstructed or reconditioned in the United States and contribute to the development of the United States fishing industry \* \* \*" or (b) will be used in connection with an underutilized fishery. The Agency's conclusion is that all fisheries vessels

must have been constructed in U.S. shipyards in order to be eligible for program financing, with the exception of *used, noncatching* fisheries vessels which will "contribute to the development of the U.S. fishing industry" or be used in connection with an underutilized fishery. In the latter instance, the purchase price of *used, noncatching* fisheries vessels built in foreign shipyards may be financed under the program if those vessels are also to be reconstructed or reconditioned in the United States and are properly documented as U.S. vessels.

The final rules will be modified to incorporate this conclusion.

(19) One party commented that the proposed rules' requirement that all partners in a partnership owning a fishing vessel be U.S. citizens is not consistent with either Title XI or Federal documentation requirements for vessels engaged in the coastwise trade.

The final rules will be changed to provide that, although all *general* partners in a partnership eligible for Program financing of a fishing vessel or fisheries shoreside facility must be U.S. citizens, up to 25 percent of the partnership may be owned by *limited* partners who are not U.S. citizens.

(20) One party commented that the requirement that reconstructed or reconditioned property have an economically useful life of at least 10 years could be counterproductive in the instance of modern processing equipment which might have an economically useful life of less than 10 years. This party suggested that the 10-year requirement be reduced to a 5-year requirement.

The final rules have been modified to accommodate this comment.

(21) One party requested clarification of the exclusion from program financing of fisheries shoreside facilities not "primarily" engaged in wholesale operations.

The final rules provide clarification.

(22) Several parties commented that heavy, product-transportation equipment not intended for highway operation should not have been excluded from the definition of fisheries shoreside facilities.

This comment has been accommodated.

(23) One party commented that the weighted average method of determining financing maturity where equipment with differing economically useful lives is involved should be optional because other methods might be more desirable.

This comment has been adopted.

(24) One party commented that minimum working capital requirements

should be based on an applicant's consolidated operation to prevent transferring assets from one affiliate to another in order to meet minimum requirements for the project proposed for program financing.

The general intent of this comment has been adopted.

(25) One party commented that the minimum working capital requirements should be based upon the projected amount of the financing's first annual principal and interest payment rather than upon a flat percentage of a project's total capitalizable cost.

This comment has not been adopted.

(26) Several parties commented on the conditional fisheries issue. One party opposed any change in the present conditional fisheries policy. One party suggested that the conditional fisheries concept be applied to fisheries processing facilities. Another party suggested exactly the opposite.

There is no authority in Title XI for applying the conditional fisheries concept to fisheries processing facilities (the Title XI authority upon which the conditional fisheries concept is based is limited specifically to fishing vessels). Even if there were Title XI authority to extend the conditional fisheries concept to fisheries processing facilities, the Agency does not believe doing so would be productive. In order to remain economically viable, fisheries processing facilities need the flexibility to vary their operating plans consistently with supply and demand factors. The Agency believes that the best way to make sound financing decisions is through the risk assessment process. The degree of commitment of principals with solid experience in the fishing industry, the financial condition of the principals and the project, and the project's profit potential in the operation intended are the best criteria for financing decisions.

The conditional fisheries mechanism for fishing vessels has been slightly modified to provide a greater program ability to finance vessels with a strong fisheries development potential. The Agency believes this is consistent both with the American Fisheries Promotion Act amendments to Title XI and with the results of a previously published Advance Notice of Proposed Rulemaking regarding the conditional fisheries issue. The great majority of the extensive comment received as a result of that Notice favored complete elimination of the conditional fisheries concept. The Agency has, however, made the least change possible in the conditional fisheries concept consistent



with the fisheries development initiative in Title XI.

(27) Several parties commented that the Fishing Vessel Capital Construction Fund Program should be made available to fisheries shoreside facilities.

The legislative authority for the Fishing Vessel Capital Construction Fund Program limits that program to vessels. No change can, consequently, be made through a rulemaking.

(28) Several parties suggested that the program should guarantee tax-exempt industrial revenue bonds.

This is not consistent with overall Administration policy.

(29) Two parties opposed implementation of the Fisheries Obligation Guarantee Program.

(30) One party expressed a strong view that the Fisheries Obligation Guarantee Program does not go nearly far enough in addressing the fishing industry's economic problems.

This final rulemaking has been reviewed in accordance with Executive Order 12291 ("Federal Regulation") and the Commerce Department guidelines implementing that Order. The Agency has determined that this final rulemaking is not "major" within the context of the Order or its implementing guidelines because the final rulemaking does not significantly affect the economy, costs or prices, competition, employment, investment, or productivity. Accordingly, no regulatory impact analysis is required.

This rulemaking was initially exempt from the notice and comment provisions of the Administrative Procedure Act. Therefore, it is exempt from regulatory flexibility analysis under the Regulatory Flexibility Act.

Because the AFPA authorizes guaranteed financing of previously ineligible projects, the collection of additional information from applicants will be required. The collection of this additional information is necessary for determining eligibility. This final rulemaking has, consequently, been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980.

This final rulemaking will affect only those who choose to apply for guaranteed financing. This final rulemaking will, consequently, not have a significant economic impact on a substantial number of small entities. The Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, has also determined that these regulations do not require the preparation of an environmental impact analysis under the National Environmental Policy Act.

This final rulemaking establishes rules for those provisions of Title XI of the Merchant Marine Act, 1936, as amended by the American Fisheries Promotion Act, which authorize the Secretary of Commerce to guarantee financing for fishing vessels and fisheries shoreside facilities. Elements of Title XI which did not need to be elaborated in this final rulemaking have not been included. Additional details of program administration not addressed by this final rulemaking will be covered by guidance issued from time-to-time by the Chief, Financial Services Division, National Marine Fisheries Service.

#### List of Subjects in 50 CFR Part 255

Fisheries, Fishing vessels, Financing, Business.

Dated: December 20, 1982.

William G. Gordon,  
Assistant Administrator for Fisheries.

For the reasons stated in the preamble, 50 CFR Part 255 is revised to read as follows:

### PART 255—FISHERIES OBLIGATION GUARANTEE PROGRAM

- |        |  |
|--------|--|
| Sec.   |  |
| 255.1  | Purpose.   |
| 255.2  | Definitions.   |
| 255.3  | Applications.  |
| 255.4  | Citizenship requirements.                              |
| 255.5  | Project requirements.                                  |
| 255.6  | Guarantee limits, debt maturities, and interest rates. |
| 255.7  | Fishing industry ability and experience.               |
| 255.8  | Economic soundness.                                    |
| 255.9  | Financial requirements.                                |
| 255.10 | Collateral.  |
| 255.11 | Miscellaneous requirements.                            |
| 255.12 | Fees.  |
| 255.13 | Demands and payment.                                   |
| 255.14 | Default/liquidation of collateral.                     |
| 255.15 | Program guidelines.                                    |
| 255.16 | Applicability of rules.                                |

Authority: Title XI, Merchant Marine Act, 1936, as amended (46 U.S.C. 1271-1279, Pub. L. 96-561) and Reorganization Plan No. 4 of 1970 (86 Stat. 909).

#### § 255.1 Purpose.

These rules govern guaranteed financing for fishing vessels and fisheries shoreside facilities under the provisions of Title XI of the Merchant Marine Act, 1936 (46 U.S.C. 1271-1279), as amended by the American Fisheries Promotion Act (Pub. L. 96-561). The purpose of the Fisheries Obligation Guarantee Program is to make long-term financing available to the United States fishing industry by providing a U.S. Government guarantee of repayment of the debt portion of fishing vessel and shoreside facility construction, reconstruction, reconditioning, or (where eligible) purchasing costs.

#### § 255.2 Definitions.

(a) *Act* means Title XI of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1271-1279).

(b) *Actual cost* means the total amount paid or owed by an obligor for the construction, reconstruction, reconditioning or (where eligible) purchase of fishing vessels or fisheries shoreside facilities.

(c) *Agency* means the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

(d) *Chief, Financial Services Division* means the Chief, Financial Services Division, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or his designee.

(e) *Citizen of the Northern Mariana Islands* means:

(1) Any individual who is a citizen of the Northern Mariana Islands (and qualifies as such under Section 8 of the Schedule on Transitional Matters attached to the Constitution of the Northern Mariana Islands);

(2) Any corporation formed under the laws of the Northern Mariana Islands, if at least 75 percent of it is owned by individuals specified in paragraph (e)(1) of this section or citizens or nationals of the United States; or

(3) Any partnership or other form of association, if all the general partners, and at least 75 percent of all partners, are individuals specified in paragraph (e)(1) of this section or citizens or nationals of the United States.

(f) *Citizen or national of the United States* means:

(1) Any individual who is a citizen of the Northern Mariana Islands or a citizen or national of the United States of America;

(2) Any corporation, if at least 75 percent of it is owned by citizens of the Northern Mariana Islands or by citizens or nationals of the United States of America within the meaning of the provisions of Section 2 of the Shipping Act, 1916 (46 U.S.C. 802); or

(3) Any partnership or association, if all the general partners, and at least 75 percent of all partners, are citizens of the Northern Mariana Islands or citizens or nationals of the United States of America.

(g) *Conditional fishery* means any fishery which has been declared as conditional under 50 CFR Part 251.

(h) *Contribute to the development of the U.S. fishing industry* means any project which:

(1) Enables fishing vessels to reduce harvests in conditional fisheries;

- (2) Applies new technology;
- (3) Makes any fisheries operation afloat or ashore more efficient, productive, or competitive;
- (4) Has a potential for increasing fisheries exports;
- (5) Aids in the development of an underutilized fishery; or
- (6) In any other demonstrable way, contributes to the stability, growth, productivity, or development of the U.S. fishing industry.

(i) *Depreciated actual cost* means the actual cost of a fishing vessel or fisheries shoreside facility, depreciated (excluding land, which is not depreciable) on a straightline basis at one-year intervals over the vessel or facility's economically useful life, less a 10 percent salvage value.

(j) *Economically useful life* means the period during which the fishing vessel or fisheries shoreside facility, with proper maintenance, will remain economically productive.

(k) *Fish* means all forms of aquatic animal and plant life other than marine mammals and birds.

(l) *Fisheries shoreside facility* means any land, or structure or equipment on land, used for unloading, receiving, holding, processing, or distributing fish of every kind (including fish caught as a result of commercial passenger carrying fishing operations). This term does not include:

- (1) Office furniture, equipment, or supplies;
- (2) Any rolling equipment which will be used outside the primary production site;
- (3) Any other non-fixed equipment which should be financed either from working capital or by the proceeds of short-term financing from other sources; or
- (4) Any facility where more than 49 percent of the gross income is projected to be from the retail selling of fish or fisheries products or from anything else other than the unloading, receiving, holding, processing, or distribution of fish.

(m) *Fishing vessel* means any vessel, boat, ship, or other craft which is documented under United States law and is used for, equipped to be used for, or of a type which is normally used for commercial fishing (including commercial passenger carrying fishing vessels) or aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing (including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing).

(n) *Obligee* means the party who lends the proceeds of a guaranteed

obligation or invests in a guaranteed obligation.

(o) *Obligor* means the party who borrows the proceeds of a guaranteed obligation.

(p) *Program* means the Fisheries Obligation Guarantee Program under Title XI of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1271-1279).

(q) *Project* means a construction, reconstruction, reconditioning, or (where eligible) purchase of fishing vessels or fisheries shoreside facilities, whose financing will be guaranteed under the Program.

(r) *Reconstruction or reconditioning* means any improvements of used fishing vessels or fisheries shoreside facilities provided that:

- (1) At least 75 percent of improvement expenditures are capital, rather than expense, items;
- (2) The improved vessel or facility will have an economically useful life of at least 10 years (or longer if the term of the proposed financing for which a guarantee is sought is longer), but specific equipment involved in a reconstruction or reconditioning may individually have economically useful lives of less than 10 years;
- (3) The improved vessel or facility will be fit and sufficient for its intended operation; and
- (4) The improvement project involves more than routine repair or maintenance.

(s) *Secretary of Commerce* means the Secretary of Commerce, or his designee.

(t) *State* means any State of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands of the United States, Guam, the Northern Mariana Islands, any other commonwealth, territory, or possession of the United States of America, or any political subdivision of any of the above.

(u) *Underutilized fishery* means:

- (1) Any species of fish for which foreign fishing within the U.S. Fishery Conservation Zone is permitted or any species of fish within or without such zone for which a demonstration can be made that such species is not fully utilized by U.S. fishing vessels (including species designated as underutilized by states under whose fishery management jurisdiction those species fall); or

(2) For fisheries shoreside facilities, any facility which will utilize the species defined in paragraph (u)(1) of this section, or any facility for which a demonstration can be made that existing fisheries shoreside facilities are inadequate to fully, properly, or efficiently utilize fishing vessel

production, regardless of the species involved.

#### § 255.3 Applications.

Applications for a program guarantee should be submitted to the Agency office listed below which corresponds to the region in which the proposed project will operate:

National Marine Fisheries Service,  
Northeast Region, Financial Services  
Branch, Post Office Building, Box 1109,  
Gloucester, Massachusetts 01930 (617)  
281-3600

National Marine Fisheries Service,  
Northwest Region, Financial Services  
Branch, 7600 Sand Point Way, NE., Bin  
C15700, Seattle, Washington 98115  
(206) 527-6122

National Marine Fisheries Service,  
Southwest Region, Financial Services  
Branch, 9450 Koger Blvd., Duval Bldg.,  
St. Petersburg, Florida 33702 (813) 893-  
3148

National Marine Fisheries Service,  
Southwest Region, Financial Services  
Branch, 300 South Ferry Street,  
Terminal Island, California 90731 (213)  
548-2478

Application forms are obtainable from the offices listed above. *All potential applicants should discuss their project with a regional Program officer before submitting an application.*

#### § 255.4 Citizenship requirements.

Any citizen or national of the United States is eligible to apply for a guarantee under the Program.

#### § 255.5 Project requirements.

(a) *Qualifications for program guarantees.* Program guarantees are available for financings (including reimbursement of obligors for expenditures previously made) for the construction, reconstruction, reconditioning, or (where eligible) purchase of any fishing vessel documented under United States law or any fisheries shoreside facility located anywhere in any State of the United States.

(b) *Used fishing vessels and fisheries shoreside facilities.* Financing of the purchase cost of any used fishing vessel or fisheries shoreside facility may be guaranteed only if the vessel or facility will (1) aid in the development of an underutilized fishery or (2) contribute to the development of the U.S. fishing industry and be reconstructed or reconditioned in the United States.

(c) *Conditional fisheries.* Program guarantees are available for financing the construction of a new fishing vessel which will operate in a conditional fishery, or which will result in the

transfer of a used vessel into operation in a conditional fishery, only if one of the following conditions is met:

(1) The vessel whose financing is guaranteed (despite the fact that it will operate in a conditional fishery) is also fully equipped for, and fully capable of, operating in an underutilized fishery;

(2) The vessel involved will replace a vessel of comparable fishing capacity which had operated in the conditional fishery prior to the designation of such fishery as conditional;

(3) The vessel whose financing is guaranteed was constructed for prior to the designation of the fishery in which it will be operated as conditional;

(4) The financing to be guaranteed will be used for the reconstruction or reconditioning of a vessel already operating in the conditional fishery; or

(5) The application for Program guarantee had been submitted prior to the designation as conditional of the fishery in which the vessel will be operated. See 50 CFR Part 251 for those fisheries which are designated as conditional.

(d) *Eligibility for vessels or facilities which will be used in underutilized fisheries.* In order for the financing of a fishing vessel or fisheries shoreside facility to be eligible for a Program guarantee because such vessel or facility will be used in an underutilized fishery (including the underutilized fisheries aspects of the conditional fisheries requirements), such vessel or facility must be fully equipped for, and be fully capable of, operating in an underutilized fishery. This determination will be made by the Chief, Financial Services Division, at the time of Program guarantee approval. The Obligor will be required to execute an agreement to operate the vessel in the underutilized fishery.

**§ 255.6 Guarantee limits, debt maturities, and interest rates.**

(a) *Actual cost.* In addition to the cost of construction, reconstruction, reconditioning, or (where eligible) purchase of a fishing vessel or fisheries shoreside facility, the actual cost of such a vessel or facility may also include:

(1) Reasonable architectural, engineering, or inspection expenses incurred with regard to the vessel or facility before completion;

(2) Reasonable expenses for interest on debt incurred to finance the vessel or facility during its construction, reconstruction, or reconditioning;

(3) The reasonable expenses of any contract for consulting services to assess the financial, economic, or technical feasibility of a vessel or facility or its fitness and sufficiency, if

such services are required by the Chief, Financial Services Division, as a precondition to a decision about the approval of a guarantee.

(4) Dredging or other costs deemed by the Program to be necessary. Actual costs do not include any other expenses which cannot be capitalized under generally accepted accounting principles (except acceptable items for repair or maintenance associated with reconstruction or reconditioning).

(b) *Guarantee limits.* The Program may guarantee financing representing up to 87½ percent of the actual cost or depreciated actual cost of the construction, reconstruction, reconditioning, or (where eligible) purchase of fishing vessels or fisheries shoreside facilities. Consideration of the risk involved may, however, result in a guarantee approval for less than 87½ percent of actual cost.

(c) *Debt maturities.* Debt maturities on obligations guaranteed under this Program may not exceed 25 years. No debt maturity may, however, exceed the economically useful life of the fishing vessel or fisheries shoreside facility involved. The economically useful life will be determined by the Chief, Financial Services Division, on a case-by-case basis.

(1) *Fishing vessels.* Generally, 25-year maturities for obligations on fishing vessels guaranteed under the Program will be restricted to financings for the construction of large and expensive fishing vessels with economically useful lives supporting a 25-year maturity. Debt maturities on guaranteed obligations for financing smaller and less expensive fishing vessels will generally be restricted to 15-20 years (or less, if their economically useful lives are less or if risk considerations require less).

(2) *Fisheries shoreside facilities.* Debt maturities on guaranteed obligations for financing major fisheries shoreside facilities construction Projects may generally be up to 25 years if the economically useful life of the facility is at least that long. If a major facility Project involves a significant amount of financing for fixed equipment which has a shorter economically useful life than that of the structure which houses it, an acceptable maturity date for the whole Project will be determined by a weighted average of the differing economically useful lives involved or by such other method as the Chief, Financial Services Division, deems appropriate (including separate financings if that is warranted). More minor facilities Projects will generally be restricted to debt maturities of 15-20 years (or less, if their economically

useful lives are less or if risk considerations require less).

(3) *Reconstruction and reconditioning.* The debt maturity of guaranteed financing for reconstruction or reconditioning will not extend beyond the economically useful life of the vessel or facility in its reconditioned or reconstructed state. The economically useful life of a reconstructed or reconditioned vessel or facility will be determined by the Chief, Financial Services Division, on a case-by-case basis.

(d) *Interest rates.* Interest rates on obligations to be guaranteed under the Program shall be approved by the Program and shall not exceed the rate determined to be reasonable, taking into account the range of interest rates prevailing in the private market for similar transactions.

(e) *Refinancing.* Refinancings may be guaranteed if the financing which is being refinanced would itself have been eligible for a Program guarantee.

(f) *Foreclosure purchase.* The financing of the purchase price of a vessel or facility whose previous financing was guaranteed under the Program and which is then sold at a foreclosure sale (or sold subsequent to the foreclosure sale after the Program purchases the vessel or facility at foreclosure) may be guaranteed under the Program.

**§ 255.7 Fishing industry ability and experience.**

(a) *Owner-operated Projects.* Fishing vessel and fisheries shoreside facility owners must possess the necessary ability, experience, resources, character, reputation, and other qualifications to operate properly and maintain the vessel or facility and protect the Program against undue risk. Owners who cannot demonstrate a successful background of ability and experience in the fishing industry of an appropriate duration, degree, and nature considering the type and magnitude of the Project for which financing is being sought will not be eligible for a Program guarantee. Under appropriate circumstances, and at the Program's sole discretion, the lessee of a financing lease may be considered as an "owner" for the purposes of meeting the requirements of this section.

(b) *Equity contributors.* Equity contributors without this demonstrated fishing industry ability and experience may be allowed to own a portion, not to exceed 49 percent, of the vessel or facility for which guaranteed financing is sought only if:

(1) At least 51 percent of the vessel or facility is owned by persons who do possess the requisite fishing industry ability and experience, and such persons have made a full pro-rata equity contribution, are severally 100 percent liable for the debt obligation, and are responsible for the management and operation of the Project; and

(2) The vessel or facility being financed is so large and so expensive as to be beyond the normal equity funding capability of an owner with the requisite fishing industry ability and experience.

(c) *Limitation of liability.* In no event will equity contributors be permitted to limit their liability to the amount of their original equity contribution. Each equity contributor shall, additionally, be jointly and severally liable for at least the amount of the guaranteed debt obligation which corresponds to the percentage of such equity contributor's ownership interest in the vessel or facility. This limitation of liability provision shall apply to all equity contributors in closely-held corporations, partnerships, and joint ventures.

#### § 255.8 Economic soundness.

(a) *Income and expense projections.* Conservative income and expense projections must reasonably assure adequate net earnings from operation of the vessel or facility. This projection must allow the prospective accumulation of net retained earnings sufficient to provide for operational contingencies, to establish a reasonable reserve for depreciation, and to protect the Project against cyclical economic conditions in the fishing industry.

(b) *Underutilized fisheries.* An economic soundness test for vessels or facilities to be operated in underutilized fisheries that is less stringent than the requirements for vessels or facilities to be operated in more developed fisheries may, at the Program's discretion, be applied. This less stringent economic soundness test will, however, not extend to factors beyond the uncertainty of cash-flow projections in an underutilized fishery. Moreover, the Program will otherwise only guarantee financing for vessels or facilities which are to operate in the *initial* development stages of an underutilized fishery if the owners of those vessels or facilities adequately share with the Program a higher degree than ordinary of the greater financial risk. Demonstrated fisheries ability and experience requirements, financial condition requirements, and collateral requirements all may be stringent when the vessel or facility financed is to operate in the *initial* development

stages of an underutilized fishery rather than in a more developed fishery. Owners of vessels or facilities which are to operate in the *initial* development stages of an underutilized fishery must possess *exceptional* fisheries ability and experience.

(c) *Consultant services.* The Program may require, as a pre-condition to a decision about approving a guarantee, that expert consulting services be provided. This requirement will generally be restricted to situations where a guarantee is sought for financing for larger and more expensive vessels to be operated in underutilized fisheries, or for larger and more expensive fisheries shoreside facilities, but may also be imposed where a guarantee is sought for financing for larger and more expensive vessels to be operated in more developed fisheries. The expert consulting services may be required to assist in assessing economic, technical, and financial feasibility, property design and engineering or other factors. When such a requirement is imposed, the Program (under conditions acceptable to the Obligor) will choose the consultant and specify the consultant's duties, and the Obligor will reimburse the Program for the Program's payment of the consultant's services. No approved application will be closed until satisfactory arrangements have been made for such reimbursement. If an application is declined, the 25 percent commitment fee may be used by the Program for such reimbursement. *When such a requirement is imposed by the Program, the cost of such consulting services may be included in the actual cost of the Project (if approved) for purposes of determining the amount of the guarantee.*

#### § 255.9 Financial requirements.

(a) *Working capital.* The vessel or facility owner must be in sufficiently sound financial condition to meet obligations, to continue to operate successfully the vessel or facility and all other business operations, and to protect the Program against undue risk. Audited financial statements will ordinarily be required in applications for guaranteed financing for large fisheries shoreside facilities Projects, and may be required in applications for other purposes. Working capital (current assets minus current liabilities) requirements will be established on a case-by-case basis, but must in all cases be sufficient to fund vessel or facility operations until the vessel or facility can generate sufficient income to do so. Working capital must be sufficient not only for the Project for which guaranteed financing is sought, but for all other affiliated projects,

businesses, or interests. The *minimum* working capital from *equity* sources must in the case of fishing vessel construction equal at least 8 percent of the total capitalizable cost of the vessel. In the case of fisheries shoreside facility construction, the minimum working capital required from equity sources will be determined on a case-by-case basis, but will ordinarily be considerably greater than that required for fishing vessels. Minimum working capital requirements for reconstruction, reconditioning, and (where eligible) purchasing Projects will be decided on a case-by-case basis. *Additional* working capital may be required on a case-by-case basis and may, at the Program's discretion, consist of readily convertible investments, other assets readily capable of being used to generate working capital, lines or letters of credit, or the presence of a co-maker or guarantor with sufficient financial resources.

(b) *Equity.* No financing shall be approved for a guarantee unless the Obligor can demonstrate that, at the time of the financing's closing, *minimum* capital provided from *equity* sources is equal to at least the total of the following:

(1) 12½ percent of the total capitalizable cost of the construction, reconstruction, reconditioning, or (where eligible) purchase of the vessel or facility (the downpayment);

(2) The Program's first-year guarantee fee;

(3) The first year's premium for all required insurance;

(4) The minimum working capital requirement; and

(5) Such other *additional* amounts as the Program may deem necessary on a case-by-case basis.

(c) *Guarantees of financing for fisheries shoreside facilities or processing vessels.* Applicants for guarantees for financing of fisheries shoreside facilities and processing vessels will be required to obtain acceptable lines or letters of credit (some may be required to be in the form of irrevocable letters of credit) for all foreseeable inventory financing needs (beyond those to be met by the working capital available from equity sources) during at least the first year of operation of the facility or vessel.

#### § 255.10 Collateral.

(a) *Mortgage.* The vessel or facility for which the financing is to be guaranteed should always be collateral for the Program guarantee. This property ordinarily will be secured by a first mortgage or, and in the case of vessels,

by a first preferred ship mortgage in favor of the Secretary of Commerce. In the case of equipment, the security interest may be perfected by a filing in accordance with the Uniform Commercial Code and/or by the recording of any form of security agreement or mortgage (e.g. chattel mortgage) necessary in a jurisdiction where the Uniform Commercial Code has not been adopted.

(b) *Guarantees.* If, in considering the risk involved in guaranteeing a financing, net worth is a significant factor relied on to offset other risks, such net worth must ordinarily be pledged as additional collateral for the program guarantee (an irrevocable letter of credit may be substituted under terms and conditions acceptable to the Program). If a closely-held corporation will be the Obligor, all major stockholders will ordinarily be required to provide their personal guarantees as additional collateral for the Program guarantee. If a subsidiary corporation, without substantial assets in addition to the vessel or facility is Obligor, the parent corporation will ordinarily be required to provide its guarantee as additional collateral for the Program guarantee. Personal or entity guarantees will always be required as additional collateral for Program guarantees where necessary to assure that the principal parties in interest, who ultimately stand most to benefit from the Project, are held accountable for the performance and operation of the Project.

(c) *Limitation of liability.* In no instance will equity contributors be permitted to limit their liability on a guarantee only to the amount of their initial equity contribution. Equity contributors will, additionally, be required to be *at least* jointly and severally liable for the amount of the guaranteed obligation which corresponds to the percentage of their ownership interest in the Project. Such equity contributors may, however, be required to be liable for more than such percentage. Under appropriate circumstances, and at the Program's sole discretion, the lessor of a financing lease may be treated differently.

(d) *Dual-use Capital Construction Fund agreement.* In the case of fishing vessels, the Program may require, as additional collateral, execution of a dual-use Capital Construction Fund Program agreement, and annual deposit into such fund (on a tax-deferred basis) of a reasonable portion of the net income of the vessel. Dual-use agreements provide for all the normal benefits of the Capital Construction Fund Program, but also give the Program

control of withdrawals from a Capital Construction Fund and allow the Program to use these reserved funds, in the event of a default, to repay the debt obligation involved in the guaranteed financing. This control insures that the Obligor will have an emergency reserve of funds, as well as a reserve for reconditioning of the vessel. At the Program's discretion, reserved funds not required in connection with the vessel for which financing is guaranteed may be withdrawn for other qualified purposes.

(e) *Reconstruction or reconditioning.* The Chief, Financial Services Division, may, in his discretion, require such additional security or collateral as may be necessary to secure the Program's interest.

#### § 255.11 Miscellaneous requirements.

(a) *Insurance.* All vessels and facilities for which financing is guaranteed shall be continuously insured during the term of the Program guarantee with such casualty, liability, breach of warranty, keyman, title, and/or other insurance in such form and amounts as the Program deems necessary. The Program shall ordinarily be the sole loss payee on all such insurances. No such insurances may be cancelled without 20 days prior written notice to the Chief, Financial Services Division. The Program's standard endorsements regarding the insured's breach of warranties, negligence, omission, etc., as well as an admission of seaworthiness or property soundness, shall be a part of all such insurances.

(b) *Bids and project costs.* If application for Program guarantee is first made before a contract for the vessel or facility to be financed is executed, not less than three responsive bids for the vessel or facility will ordinarily be required. Ordinarily, the lowest bid will be accepted, unless the Obligor and the Program agree that it is advisable to accept a higher bid. If application for a Program guarantee is first made after a contract for the vessel or facility has been executed, the Program may not guarantee a financing in an amount higher than would fairly and reasonably have resulted if competitive bidding had occurred. All applicants are encouraged to obtain at least three competitive bids, and applicants without such bids who first apply after a contract has been executed may be required by the Program to establish, at their expense, independent confirmation acceptable to the Program that the contract cost is both fair and reasonable. Approvals and commitments for Program guarantees will be based on the initial contract cost, and contract cost overruns may or may

not, at the sole discretion of the Program, be added to the amount of the guaranteed financing.

(c) *Property inspection.* The Program will require inspection and approval of all vessels and facilities before providing a financing guarantee. For all guarantees involving financings of more than \$500,000, the Program, where appropriate, will require inspection and approval by certified architects or engineers (either marine or real property architects or engineers). For program guarantees for financing of less than \$500,000, the required property inspection and approval may, at the Program's discretion, be made by any competent authority acceptable to the Program. The required property inspection and approval should involve assessment of at least the following:

- (1) Adequacy of workmanship;
- (2) Fitness and sufficiency for the intended purpose;
- (3) Reasonableness of cost;
- (4) Compliance with basic contract specifications regarding the property; and
- (5) The identification and recommended resolution of any significant deficiencies.

Where financing for used vessels or facilities is to be guaranteed, the inspection and approval assessment will be adjusted to provide the normal assurances associated with financing the acquisition of used property. Issuance of guarantees of financings involving more than \$5,000,000 may be conditioned upon additional requirements regarding the inspection and approval of a vessel or facility. Program guarantees of financings involving more than \$5,000,000 should always be conditioned on comprehensive *on site* inspection, by certified architects and engineers, and inspection of the vessel or facility to be financed at appropriate times during construction, reconstruction, or reconditioning. The Program may require American Bureau of Shipping *classification* requirements for all Program guarantees involving fishing vessels costing more than \$5,000,000, and applicants are urged presently to consider voluntary use of the American Bureau of Shipping *classification* program for the construction of all fishing vessels costing over \$5,000,000. All required property inspections and approvals must be conducted by competent and impartial authorities acceptable to the Program. Architects, engineers, surveyors, or appraisers employed by contractors constructing, reconstructing, or reconditioning a vessel or facility, or by parties selling

used vessels or facilities, are not acceptable for meeting this requirement. The cost of inspection and approval services in connection with a vessel or facility may be included in the actual cost of the vessel or facility and, thus, guaranteed by the Program.

(d) *Maintenance reviews.* All vessels and facilities for which financing is guaranteed under the Program shall be inspected at least once every three years by a competent and impartial authority acceptable to the Program. A full inspection report, identifying deficiencies and recommending the action necessary for their correction, will be provided to the Obligor and to the Program. Failure to provide this tri-annual inspection, or correct deficiencies identified by it, will constitute a default of the terms and conditions of mortgages securing the Program's guarantee and a cause, at the Program's discretion, for acceleration and liquidation of the debt obligation. Special property inspections may be required whenever the Program deems it necessary to preserve its collateral. All such inspections shall be at the expense of the Obligor. This requirement extends to all supplementary collateral for Program guarantees.

(e) *Terms and conditions of Program guarantees.* The Program will, on a case-by-case basis, specify in detail the precise terms and conditions prerequisite to the Program's willingness to provide a guarantee. These terms and conditions are at the Program's sole discretion, and an applicant's failure to comply with them will result in nonqualification for a Program guarantee.

(f) *Program Obligees.* The applicant may choose the Obligee to fund the debt to be guaranteed by the Program. Obligees may be any financial institution, public agency, or other party. The Program may, however, refuse to guarantee financing unless it has approved the terms and conditions of the financing (including particularly the interest rate and other amortization provisions) before the Obligor makes a firm commitment to an Obligee. Failure to first obtain the Program's approval may result in the Program's refusal to issue the guarantee despite the fact that the Obligor may have created a binding contract with an Obligee, abrogation of which may result in loss to the Obligor. The Program will assist those whose applications for Program guarantees are approved to gain access to the private market for appropriate financing, but only as a gratuitous service. Arrangements between the Obligor and the Obligee are a matter of private

contract between those two parties, and the Program will not in any way be responsible to either for nonperformance by the other.

(g) *Closing—(1) Contracts.* All debt obligations and associated contractual arrangements which comprise the financing will be documented by *standard Program forms*, which may not be altered or amended in any way by insertion, deletion, or variation without prior Program approval (which will be sparingly granted).

(2) *Closing schedules.* The Program will attempt to meet the closing schedules (where reasonable) of Obligors and Obligees. The Program, however, accepts no responsibility for adverse interest-rate fluctuations, loss of commitments, or other consequences of non-compliance with Obligors' or Obligees' closing schedules. Obligors and Obligees should work closely with the Program to assure reasonable closing schedules, since internal workload and personnel considerations sometimes affect the Program's ability to meet otherwise desirable schedules.

(3) *Closing vessel financings.* The Program will attempt to close guarantees on financings involving fishing vessels with minimal services from private attorneys and/or other private contractors.

(4) *Closing shoreside facilities financings.* Closings for guarantees of financing for fisheries shoreside facilities will require substantial services from private attorneys and/or other contractors at the expense of the Obligor. The choice of such private contractors for any portion of the closing process is subject to Program approval. Services required to be provided by private contractors may include: title searches; preparation of legal documents; actual closing, escrow, and disbursement services; and the provision of a *legal opinion* from acceptable counsel regarding the validity and binding effect of transactions, compliance with procedures specified by the Program, and other assurances.

(5) *Paying agents.* The Chief, Financial Services Division, in his discretion, may require the use of a paying agent or trustee. Where paying agents are used, Obligors or Obligees will be responsible for their cost.

#### § 255.12 Fees.

(a) *Filing and commitment fees.* The Program's filing and commitment fee shall be  $\frac{1}{2}$  of 1 percent of the first \$2,000,000 principal amount (or portion thereof) of the Program guarantee for which application is made and  $\frac{1}{4}$  of 1 percent of all principal amount over

\$2,000,000. The fee shall be due at the time an application is submitted, and no application for guarantee shall be accepted unless the full filing and commitment fee accompanies it. The filing fee shall be 75 percent of the filing and commitment fee, and once an application for a guarantee is accepted, no portion of the filing fee shall be returned for any reason. The commitment fee shall be the remaining 25 percent of the filing and commitment fee, and shall be returnable only if a refund is requested before the Program issues an Approval in Principle letter or if the application is declined.

(b) *Guarantee fee.* The Agency guarantee fee shall be:

(1) For guarantees on financings not involving underutilized fisheries risks,  $\frac{1}{2}$  of 1 percent of the average unpaid principal balance of the debt obligation for which the guarantee is outstanding during each year of the life of the guarantee; and

(2) For guarantees on financings involving underutilized fisheries risks, 1 percent of the average unpaid principal balance of the debt obligation for which the guarantee is outstanding during each year of the life of the guarantee.

The guarantee fee shall be due in advance based upon the financing's amortization schedule. The first annual guarantee fee shall be due at closing of the guarantee. Each subsequent annual guarantee fee shall be due on the anniversary date of the closing of the guarantee. No refund of guarantee fees shall be made regardless of the status of the financing or the guarantee during the year to which the guarantee fee relates.

(c) *Refinancing/assumption fee.* The Program's refinancing/assumption fee shall be  $\frac{1}{2}$  of 1 percent of the principal amount of the debt obligation to be refinanced or assumed, and is due upon application for a guarantee for the refinancing/assumption. The refinancing/assumption fee is non-returnable regardless of the subsequent disposition of an application. The Chief, Financial Services Division, may, however, (1) waive the refinancing/assumption fee where the refinancing/assumption is primarily to protect the Program's interest or (2) charge an actual cost fee, not to exceed \$1,000, where the refinancing/assumption does not substitute a wholly different obligor for the initial obligor.

(d) *Where payable.* Fees shall be paid by check mailed to: U.S. Department of Commerce, National Oceanic and Atmospheric Administration, NBOC 1, Room 122, 11420 Rockville Pike, Rockville, Maryland 20852. Checks shall be made payable to: "NMFS/FSFF".



**§ 255.13 Demands and payment.**

All demands by Obligees, whose debt has been guaranteed under the provisions of this Program, for payment of all or any portion of a guaranteed obligation in default shall be made in writing to the Chief, Financial Services Division, F/UD5, 3300 Whitehaven St., NW., Washington, D.C. 20235, by certified mail, return receipt requested. In the event the Program does not acknowledge timely receipt of a demand alleged to have been timely made, the demander must possess evidence of the demand's timely delivery to the Program. Payment of demands shall be made within 30 days after receipt of a timely demand by the Chief, Financial Services Division. Demands may be made by Obligees' duly authorized agents or trustees.

**§ 255.14 Default/liquidation of collateral.**

(a) *Default.* In the event of default by an Obligor which results in the payment by the Program to an Obligee of the guaranteed debt, the Program shall

ordinarily foreclose on its collateral and institute personal collection proceedings against the Obligor and the guarantors of the financing. At the Program's sole discretion, other remedies which are deemed most appropriate to protect the Program's interest may be pursued.

(b) *Liquidation of collateral.* If the Program is the highest bidder at a foreclosure sale of collateral, the Program (as the new owner of the collateral) may, in its sole discretion, subsequently complete, recondition, reconstruct, renovate, repair, maintain, operate, charter, lease, or sell such collateral. In the event there is a willing buyer for such collateral at an amount at least equal, or almost equal, to the amount owed the Program, the Program may convey title to such collateral, upon proper payment, without competitive bidding or other contracting procedures. If there is not a willing buyer for such collateral at an amount equal, or almost equal, to the amount owed the Program, the collateral will ordinarily be disposed of by competitive bidding—unless the

Program decides that it can best recover without competitive bidding. Any deficiency resulting from the Program's purchase of collateral at a foreclosure sale shall not be offset by receipts from a subsequent sale of such collateral in the event the Program purchases the collateral and sells it for an amount greater than that owed the Program; the original Obligor and guarantors of the guaranteed financing remain liable for such deficiency.

**§ 255.15 Program guidelines.**

The Chief, Financial Services Division, will issue Program guidelines from time to time, as the need arises, to govern national Program policy and administrative issues which are not addressed by these rules.

**§ 255.16 Applicability of rules.**

These rules will be applicable to all Program applications first accepted after the rules' effective date.

[FR Doc. 82-34603 Filed 12-22-82; 8:45 am]  
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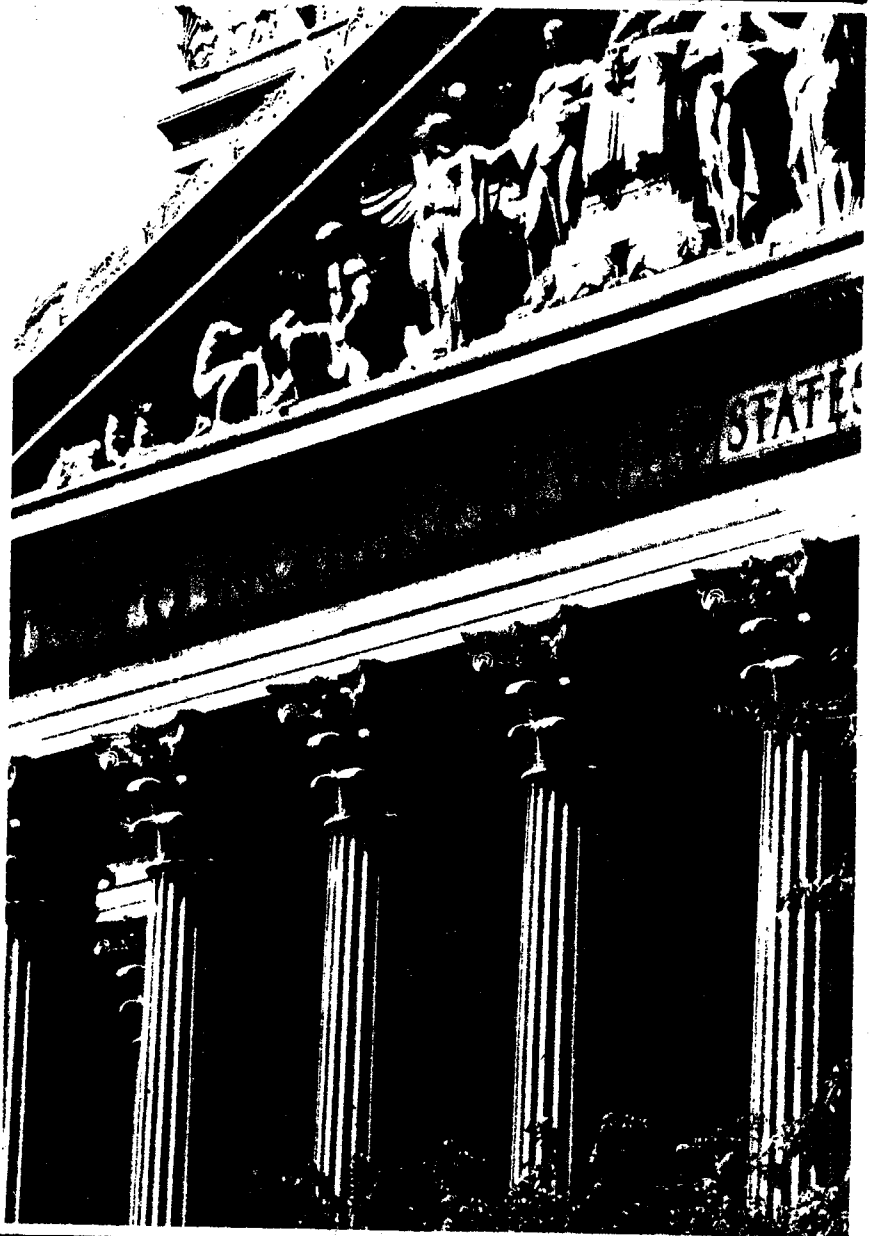
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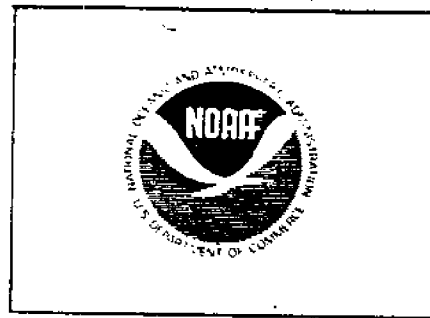
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NOAA Makes \$9.7 Million in  
Low-interest Loans Available  
to Fishermen

FOR IMMEDIATE RELEASE

Nine million, seven hundred thousand dollars in emergency low-interest loans have been made available from the government's Fisheries Loan Fund to help fishermen avoid default on fishing vessel mortgages, the National Oceanic and Atmospheric Administration announced today.

According to NOAA officials, eligible mortgages must be on vessels of at least five net tons and must have been used to finance the building, rebuilding or reconditioning of those vessels.

A total of \$3.9 million is earmarked for fishermen whose vessels are financed under the federal Fisheries Obligation Guarantee Program. These fishermen may apply at any time, but are urged to do so by the end of July.

The remaining \$5.8 million is reserved for fishermen whose vessels are not financed under the federal program. These fishermen may apply only during the open season, from June 15 to July 29.

Loan applications will be considered in the order of their receipt. Because the loan funds are limited and are expected to be exhausted quickly, those applying soonest have the best chance of receiving a loan. Application standards are very specific in order to limit applicants to a number consistent with the funds available.

No one should apply without first contacting the Financial Services Branch of the nearest National Marine Fisheries Service regional office for details on eligibility criteria and information on how to apply.

(more)

Residents of New England and the Mid-Atlantic and Great Lakes states should call (617) 281-3600 or write the National Marine Fisheries Service, 14 Elm Street, Federal Building, Gloucester, Mass. 01930.

Residents of the Gulf and South Atlantic states and the Caribbean should call (813) 893-3148 or write to the National Marine Fisheries Service, 9450 Koger Blvd., St. Petersburg, Fla. 33702.

Residents of California and the Pacific Islands should call (213) 548-2478 or write to the National Marine Fisheries Service, 300 South Ferry St., Terminal Island, Calif. 90731.

Residents of Washington, Oregon, and Alaska should call (206) 527-6122 or write to the National Marine Fisheries Service; 7600 Sand Point Way, NE; Bin C15700; Seattle, Wash. 98115.

###

5/27/83

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PRESENTATION

A CONFERENCE ON EAST COAST FISHERIES LAW

June 24-25, 1983

UNIVERSITY OF MAINE  
SCHOOL OF LAW  
PORTLAND, MAINE

by

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FISHING VESSEL DOCUMENTATION

THE REVISED STRUCTURE

I. The Agencies Concerned

A. U.S. Coast Guard

1. Headquarters:

Commandant (G-MVD-1)  
U.S. Coast Guard  
Washington, D.C. 20593  
(202) 426-1492

2. First Coast Guard District:

U.S. Coast Guard  
Marine Documentation Office  
447 Commercial Street  
Boston, MA 02109  
(617) 523-0248

B. U.S. Customs Service

II. The Relevant Statutes

A. The Vessel Documentation Act of 1980,  
P.L. 96-594, codified at 46 U.S.C. §§65a-65w

1. Implementing Regulations codified at  
46 C.F.R., Part 67, June 24, 1982

2. Proposed Regulations - 48 F.R. 20249  
(May 5, 1983)

B. The Merchant Marine [Ship Mortgage] Act of 1920,  
41 Stat. 1000, as amended, codified at 46 U.S.C.  
§911 et seq.

C. Customs Statutes

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B. Fisheries

C. Registry

D. Pleasure

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- A. Initial Documentation - Appendix B to 46 C.F.R. Part 67
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- D. Declaration of Citizenship (MA 899)

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PUBLIC LAW 96-594 [H.R. 1196]; December 24, 1980

## VESSEL DOCUMENTATION ACT

*For Legislative History of Act, see Pamphlet No. 12B*

An Act to revise and improve the laws relating to the documentation of vessels, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### TITLE I

#### SEC. 101. SHORT TITLE.

This title may be cited as the "Vessel Documentation Act".

#### SEC. 102. DEFINITIONS.

As used in this title—

- (1) "documented vessel" means a vessel for which a certificate of documentation has been issued under this title;
- (2) "fisheries" includes the planting, cultivation, catching, taking, or harvesting of fish, shellfish, marine animals, pearls, shells, or marine vegetation at any place within the fishery conservation zone established by section 101 of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1811); and
- (3) "Secretary" means the Secretary of the department in which the Coast Guard is operating.

#### SEC. 103. PORTS OF DOCUMENTATION.

The Secretary shall designate ports of documentation in the United States where vessels may be documented and instruments affecting title to, or interest in, documented vessels may be recorded. The Secretary shall specify the geographic area to be served by each designated port, and he may discontinue, relocate, or designate additional ports of documentation.

#### SEC. 104. VESSELS ELIGIBLE FOR DOCUMENTATION.

Any vessel of at least five net tons that is not registered under the laws of a foreign country is eligible for documentation if it is owned by—

- (1) an individual who is a citizen of the United States;
- (2) a partnership or association whose members are all citizens of the United States;
- (3) a corporation created under the laws of the United States, or any State, territory, or possession thereof, or of the District of Columbia, or the Commonwealth of Puerto Rico, whose president or other chief executive officer and chairman of its board of directors are citizens of the United States and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum;
- (4) the United States Government; or
- (5) the government of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.



**SEC. 105. HOME PORTS.**

(a) With the approval of the Secretary and subject to such regulations as he may prescribe, the port of documentation selected by an owner for the documentation of his vessel shall be the vessel's home port.

(b) Once a vessel's home port has been fixed as provided in subsection (a), it may not be changed without the approval of the Secretary, subject to such regulations as he may prescribe.

**SEC. 106. NAME OF VESSEL.**

(a) At the time of application for initial documentation of a vessel, the owner shall provide a name for the vessel. Subject to the approval of the Secretary and upon the issuance of a certificate of documentation, that name shall become the vessel's name of record.

(b) Once a vessel's name of record has been fixed as provided in subsection (a), it shall not be changed without the approval of the Secretary, subject to such regulations as he may prescribe.

(c) The Secretary may prescribe a reasonable fee for changing a documented vessel's name of record.

**SEC. 107. CERTIFICATE OF DOCUMENTATION: APPLICATION; ISSUANCE; FORM; EXHIBITION.**

(a) Upon application by the owner of any vessel eligible for documentation, the Secretary shall issue a certificate of documentation of a type specified in section 110, 111, 112, 113, or 114 of this title.

(b) The Secretary may prescribe the form of, the manner of filing, and the information to be contained in, applications for certificates of documentation.

(c) Each certificate of documentation shall—

(1) contain the name, the home port, and a description of the vessel for which it is issued;

(2) identify its owner, and

(3) be in the form and contain any additional information prescribed by the Secretary.

(d) The Secretary shall, by regulation, prescribe procedures to insure the integrity of, and the accuracy of information contained in, certificates of documentation issued under this title.

(e) The owner and the master of each documented vessel shall make the vessel's certificate of documentation available for examination as the law may require or as the Secretary may prescribe.

**SEC. 108. NUMBERS; SIGNAL LETTERS; IDENTIFICATION MARKINGS.**

(a) The Secretary shall maintain a numbering system for the identification of documented vessels and shall assign a number to each documented vessel.

(b) The Secretary may maintain a system of signal letters for documented vessels.

(c) The owner of each documented vessel shall affix to the vessel and maintain in the manner prescribed by the Secretary the number assigned under subsection (a) and any other identification markings the Secretary may prescribe.

**SEC. 109. PURPOSE OF DOCUMENTATION.**

A certificate of documentation issued under this title is—

(1) conclusive evidence of nationality for international purposes, but not in any proceeding conducted under the laws of the United States;

- (2) except in the case of a pleasure vessel license, conclusive evidence of qualification to be employed in a specified trade; and
- (3) not conclusive evidence of ownership in any proceeding in which ownership is in issue.

**SEC. 110. CERTIFICATE OF DOCUMENTATION; REGISTRY.**

(a) A registry may be issued for any vessel that is eligible for documentation.

(b) A vessel for which a registry is issued may be employed in foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef.

(c) Upon application of the owner of any vessel that qualifies for a coastwise license under section 111 of this title, a Great Lakes license under section 112 of this title, or a fishery license under section 113 of this title, the Secretary may issue a registry appropriately endorsed authorizing the vessel to be employed in the coastwise trade, the Great Lakes trade, or the fisheries, as the case may be.

(d) Except as provided in sections 111, 112, and 113 of this title, a foreign built vessel registered pursuant to this section may not engage in the coastwise trade, the Great Lakes trade, or the fisheries.

**SEC. 111. CERTIFICATE OF DOCUMENTATION; COASTWISE LICENSE.**

(a) A coastwise license or, as provided in section 110(c) of this title, an appropriately endorsed registry, may be issued for any vessel that—

- (1) is eligible for documentation;
- (2) was built in the United States (or in the case of a vessel not built in the United States, has been captured in war by citizens of the United States and lawfully condemned as prize, has been adjudged to be forfeited for a breach of the laws of the United States, or has qualified for documentation under section 4136 of the Revised Statutes of the United States, as amended (46 U.S.C. 14)); and

(3) otherwise qualifies under laws of the United States to be employed in the coastwise trade.

(b) Only a vessel for which a coastwise license or an appropriately endorsed registry is issued may, subject to the laws of the United States regulating those trades, be employed in—

- (1) the coastwise trade; and
- (2) the fisheries.

**SEC. 112. CERTIFICATE OF DOCUMENTATION; GREAT LAKES LICENSE.**

(a) A Great Lakes license, or, as provided in section 110(c) of this title, an appropriately endorsed registry, may be issued for any vessel that—

- (1) is eligible for documentation;
- (2) was built in the United States (or in the case of a vessel not built in the United States, has been captured in war by citizens of the United States and lawfully condemned as prize, has been adjudged to be forfeited for a breach of the laws of the United States, or has qualified for documentation under section 4136 of the Revised Statutes of the United States, as amended (46 U.S.C. 14)); and

(3) otherwise qualifies under the laws of the United States to be employed in the coastwise trade.

(b) Only a vessel for which a Great Lakes license or an appropriately endorsed registry is issued may, on the Great Lakes and their

tributary and connecting waters and subject to the laws of the United States regulating those trades, be employed in—

- (1) the coastwise trade;
- (2) trade with Canada; and
- (3) the fisheries.

**SEC. 113. CERTIFICATE OF DOCUMENTATION: FISHERY LICENSE.**

(a) A fishery license, or, as provided in section 110(c) of this title, an appropriately endorsed registry, may be issued for any vessel that—

- (1) is eligible for documentation;
- (2) was built in the United States (or in the case of a vessel not built in the United States, has been captured in war by citizens of the United States and lawfully condemned as prize, has been adjudged to be forfeited for a breach of the laws of the United States, or has qualified for documentation under section 4136 of the Revised Statutes of the United States, as amended (46 U.S.C. 14)); and
- (3) otherwise qualifies under the laws of the United States to be employed in the fisheries.

(b) Subject to the laws of the United States regulating the fisheries, only a vessel for which a fishery license or an appropriately endorsed registry is issued may be employed in that trade.

**SEC. 114. CERTIFICATE OF DOCUMENTATION: PLEASURE VESSEL LICENSE.**

(a) A pleasure vessel license may be issued for any vessel that—

- (1) is eligible for documentation, and
- (2) is to be used exclusively for pleasure.

(b) A licensed pleasure vessel may proceed from or to any port of the United States and to any foreign port without entering or clearing with the United States Customs Service.

(c) Notwithstanding any other law, the Secretary may prescribe reasonable fees for issuing, renewing, or replacing a pleasure vessel license; or for providing any other service in connection with a pleasure vessel license. The fees shall be based on the costs of the service provided.

**SEC. 115. VESSEL LIMITED TO TRADE COVERED BY CERTIFICATE OF DOCUMENTATION: EXEMPTIONS; PENALTY.**

(a) A vessel may not be employed in any trade other than a trade covered by the certificate of documentation issued for that vessel. A documented pleasure vessel may not be used for purposes other than pleasure. However, any certificate of documentation may, under regulations prescribed by the Secretary, be exchanged for any other type of certificate of documentation, or appropriately endorsed for any trade, for which the vessel qualifies.

(b) A non-self-propelled vessel which is qualified to be employed in the coastwise trade may, without being documented, be employed in that trade within a harbor or on the rivers or inland lakes of the United States, or on the internal waters or canals of any State.

(c) Whenever a vessel is employed in a trade that is not covered by the certificate of documentation issued for that vessel or a documented pleasure vessel is used other than for pleasure, the vessel, together with its equipment, is liable to seizure by and forfeiture to the United States.

(d) A documented vessel may not be placed under the command of a person other than a citizen of the United States.

**SEC. 116. FALSIFICATION IN DOCUMENTATION: FRAUDULENT USE OF DOCUMENT; PENALTY.**

(a) Whenever the owner of a vessel knowingly falsifies or conceals a material fact, or makes a false statement or representation in connection with the documentation of his vessel under this title, in addition to any other penalty provided by law, that vessel, together with its equipment, is liable to seizure by and forfeiture to the United States.

(b) Whenever a certificate of documentation is knowingly and fraudulently used for any vessel, that vessel, together with its equipment, is liable to seizure by and forfeiture to the United States.

**SEC. 117. CERTIFICATE OF DOCUMENTATION: TERMINATION OF VALIDITY.**

(a) A certificate of documentation is invalid if the vessel for which it is issued—

(1) no longer meets the requirements of this Act and the regulations prescribed thereunder pertaining to that certificate of documentation; or

(2) is placed under the command of a person who is not a citizen of the United States.

(b) Except as provided by subsection (c) of section 30 of the Act of June 5, 1920, as amended (46 U.S.C. 961(a)), an invalid certificate of documentation shall be surrendered in accordance with regulations prescribed by the Secretary.

**SEC. 118. VESSELS PROCURED OUTSIDE THE UNITED STATES.**

(a) The Secretary and the Secretary of State, acting jointly, may provide for the issuance of an appropriate document for any vessel procured outside the United States that meets the ownership requirements of section 104 of this title.

(b) Subject to any limitations the Secretary may prescribe, a vessel for which an appropriate document is issued under this section may proceed to the United States and engage en route in the foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef. Upon the vessel's arrival in the United States the document shall be surrendered in accordance with regulations prescribed by the Secretary.

(c) A vessel for which a document is issued under this section is subject to the jurisdiction and laws of the United States. However, the Secretary may suspend for a period not to exceed six months the application of any vessel inspection law administered by him, or any regulation issued thereunder, if he considers the suspension to be in the public interest.

**SEC. 119. RECORDING OF UNITED STATES BUILT VESSELS.**

The Secretary may provide for the recording and certifying of any information pertaining to vessels built in the United States that he considers to be in the public interest.

**SEC. 120. REGISTRATION OF FUNNEL MARKS AND HOUSE FLAGS.**

The Secretary shall provide for the registration of funnel marks and house flags by owners of vessels.

**SEC. 121. LIST OF DOCUMENTED VESSELS.**

The Secretary shall publish periodically a list of all documented vessels together with any information pertaining to them that he considers pertinent or useful.

**SEC. 122. REPORTS.**

To insure compliance with this title and the laws governing the qualifications of vessels to engage in the coastwise trade and the fisheries, the Secretary may require owners and masters of documented vessels to submit reports in any reasonable form and manner he may prescribe.

**SEC. 123. VIOLATIONS; PENALTY.**

(a) Any person who is found by the Secretary, after notice and an opportunity for a hearing, to have violated this title or a regulation issued hereunder shall be liable to the United States for a civil penalty, not to exceed \$500 for each violation. Each day of a continuing violation shall constitute a separate violation. The amount of the penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of the penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(b) The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty under this section.

(c) If any person fails to pay an assessment of a civil penalty after it has become final, the Secretary may refer the matter to the Attorney General for collection in any appropriate district court of the United States.

**SEC. 124. DELEGATIONS AND REGULATIONS.**

The Secretary may—

- (1) delegate, and authorize successive redelegations of, any of the duties or powers conferred on him by this title; and
- (2) prescribe regulations to carry out this title.

**SEC. 125. RELATED TERMS IN OTHER LAWS.**

With respect to the documentation of a vessel whenever used in any law, regulation, document ruling, or other official act—

- (1) "certificate of registry", "registry", and "register" mean a registry as provided for in section 110 of this title;
- (2) "license", "enrollment and license", "license for the coastwise (or coasting) trade", and "enrollment and license for the coastwise (or coasting) trade" mean a coastwise license as provided for in section 111 of this title;
- (3) "enrollment and license to engage in the foreign and coastwise (or coasting) trade on the northern, northeastern, and northwestern frontiers, otherwise than by sea" means a Great Lakes license as provided for in section 112 of this title;
- (4) "license for the fisheries" and "enrollment and license for the fisheries" mean a fishery license as provided for in section 113 of this title; and
- (5) "yacht" means a pleasure vessel whether or not documented.

## SEC. 126. AMENDMENTS TO OTHER LAWS.

(a) Section 4131 of the Revised Statutes of the United States, as amended (46 U.S.C. 221), is further amended to read as follows: "Only a citizen of the United States may serve as master, chief engineer, or officer in charge of a deck watch or engineering watch on any vessel documented under the laws of the United States. However, if a documented vessel is deprived of the services of any officer, other than the master, while on a foreign voyage and a vacancy is thereby created, until the vessel's first return to a United States port where a United States citizen replacement can be obtained, a person who is not a citizen of the United States may serve in—

"(1) the vacancy; or

"(2) any vacancy resulting from the promotion of another to fill the original vacancy."

(b) Section 4311 of the Revised Statutes of the United States, as amended (46 U.S.C. 251), is further amended by striking the first and third sentences of subsection (a).

(c) Section 4320 of the Revised Statutes of the United States, as amended (46 U.S.C. 262), is further amended by—

(1) striking the word "licensed" in the first sentence and inserting in lieu thereof the word "documented"; and

(2) striking the last sentence.

(d) Section 4377 of the Revised Statutes of the United States, as amended (46 U.S.C. 325), is further amended by striking the second sentence.

(e) Section 7 of the Act of June 19, 1886, as amended (46 U.S.C. 319), is further amended by—

(1) striking the first sentence and inserting in lieu thereof the following:

"Whenever a vessel, entitled to be documented and not so documented, is employed in a trade for which certificates of documentation are issued under the vessel documentation laws, other than a trade covered by a registry, the vessel is liable to a civil penalty of \$500 for each port at which it arrives without the proper certificate of documentation, and if it has on board any merchandise of foreign growth or manufacture (sea stores excepted), or any taxable domestic spirits, wines, or other alcoholic liquors, on which the duties or taxes have not been paid or secured to be paid, the vessel, together with its equipment and cargo, is liable to seizure and forfeiture."; and

(2) striking the last sentence.

## SEC. 127. REPEALS.

The following laws are repealed, except with respect to rights and duties that matured, penalties that were incurred, and proceedings that were begun before the effective date of this title:

Revised statutes section	Revised statutes section	Revised statutes section
4182	4168	4318
4187	4169	4319
4138	4170	4321
4139	4171	4322
4141	4174	4323
4142	4176	4324
4143	4177	4325
4144	4178	4326
4146	4179	4327
4147	4180	4328
4150	4182	4329
4155	4183	4330
4156	4187	4333
4157	4189	4335
4158	4190	4337
4159	4191	4338
4160	4214	4339
4161	4215	4372
4162	4217	4384
4163	4312	4385
4164	4313	4495
4166	4314	4498
4167	4315	

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1879				
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June 19	421.....	6.....	24	81
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1897				
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1936				
May 20	434.....		49	1367
1938				
May 24	265.....		52	437
1939				
May 31	159.....		53	794
Do.....	160.....		53	795
June 2	168.....		53	795
1957				
Aug. 30	Public Law 85-237.....	1.....	71	517
1961				
Aug. 17	Public Law 85-157.....		75	392
1965				
Sept. 29	Public Law 85-219.....	10.....	79	892

#### SEC. 12A. EFFECTIVE DATE.

This title shall be effective on the first day of the eighteenth month following the month in which enacted.

### TITLE II

SEC. 201. SHORT TITLE.—This Act may be cited as the "Tonnage Measurement Simplification Act".

SEC. 202. MEASUREMENT.—Section 4148 of the Revised Statutes of the United States, as amended (46 U.S.C. 71) is further amended to read as follows:

"SEC. 4148. (a) Before a vessel is documented or recorded under the laws of the United States, or where the application of a law of the United States to a vessel is determined by its tonnage, the vessel shall be measured by the Secretary of the department in which the Coast Guard is operating. The Secretary may, by regulation, provide for the temporary documentation of a vessel prior to the measurement required by this section.

"(b) A vessel required to be measured under subsection (a) of this section, other than a vessel used exclusively for pleasure, shall be measured as prescribed in sections 4151 and 4153 of the Revised Statutes of the United States, as amended, and to the extent applicable, as prescribed in Public Law 89-219, September 29, 1965 (79 Stat. 891; 46 U.S.C. 83-83k) if—

"(1) it engages or intends to engage in an international voyage by sea; or

"(2) it is at least twenty-four meters in length and is self-propelled.

"(c) A vessel not required to be measured under subsection (b) of this section may be so measured if requested by its owner. A vessel not measured under subsection (b) shall be assigned gross and net tonnages by the Secretary which are functions of its length, breadth, depth, and other dimensions, including appropriate coefficients. The Secretary shall prescribe the manner in which dimensions are



measured and which coefficients are appropriate. The resulting gross tonnages, taken as a group, shall reasonably reflect the relative internal volumes of the vessels measured, and the resulting net tonnages shall be in approximately the same ratios to corresponding gross tonnages as are the net and gross tonnages of comparable vessels measured under subsection (b) of this section. In accordance with regulations issued under this subsection, the Secretary may determine the gross and net tonnages of a vessel which is representative of a designated class, model, or type and may assign those gross and net tonnages to other vessels of the same class, model, or type.

“(d) A vessel shall be remeasured if—

“(1) the vessel is altered or the use of its space is changed so that its gross or net tonnage is affected;

“(2) having been measured under subsection (c) of this section, the vessel becomes, by use or alteration, subject to subsection (b) of this section; or

“(3) having been measured under subsection (b) of this section and not required to be so measured, the owner requests that the vessel be measured under subsection (c) of this section.

Except as provided in this subsection, a vessel that has been measured is not required to be remeasured to obtain another document.

“(e) The Secretary shall make such regulations as may be necessary to carry out the provisions of sections 4148, 4149, 4150, 4151, and 4153 of the Revised Statutes, as amended (46 U.S.C. 71, 72, 74, 75, 77).”

SEC. 203. APPLICATION.—A vessel measured prior to the effective date of this title under sections 4151 and 4153 of the Revised Statutes of the United States, as amended, is considered as having been measured under section 4148(b) of the Revised Statutes of the United States, as amended by this Act.

SEC. 204. EFFECTIVE DATE.—The provisions of this title shall take effect on the first day of the twelfth month following the month in which enacted.

### TITLE III

SEC. 301. The penultimate sentence of section 5(b) of the Act of May 27, 1936 (49 U.S.C. 369(b)), as amended, is amended by striking “November 1, 1983,” and substituting “November 1, 1988.”

SEC. 302. There is authorized to be appropriated to the Secretary of Transportation \$500,000 for fiscal year 1981 to conduct a study of the feasibility of constructing a new two track railroad drawbridge across Coos Bay, Oregon, which would replace the existing Southern Pacific Railroad drawbridge located at mile 9.0 and would have a clear navigational opening of 400 feet or such lesser clearance as the Secretary may determine to be reasonable. Such study shall include an analysis of any modifications to the Coos Bay City Airport that would be required to permit construction of a new railroad drawbridge.

SEC. 303. Notwithstanding the provisions of title V, Merchant Marine Act of 1936 and section 11, Merchant Ship Sales Act of 1946, the Secretary of Commerce is hereby authorized to transfer, without reimbursement, the title and ownership of V4-M-A1 ocean tug Scotch Cap to the Superior-Douglas County Museum in Superior, Wisconsin, for use as a maritime museum. The vessel shall be delivered to the museum at the place where the vessel is located on the effective date of this Act, in its present condition, without cost to the United States. While the vessel is owned by the Superior-Douglas County Museum it shall be used solely as a maritime museum, and such vessel shall not be used for operation or transportation purposes

of any nature whatsoever. In the event that the United States should have need for the vessel, the Superior-Douglas County Museum, on request of the Secretary of Commerce shall make the vessel available to the United States without cost. In the event the Superior-Douglas County Museum no longer requires the vessel for the purposes of this Act, such vessel shall be conveyed back to the United States in as good condition as when received, except for ordinary wear and tear, to be delivered by the Superior-Douglas County Museum to the point of original delivery without any cost to the United States.

Appendix A to 46 CFR Part 67

ADDITIONAL REQUIREMENTS FOR SPECIALLY QUALIFIED VESSELS UNDER 46 CFR SUBPART 67.19

Vessel type	Initial or subsequent application for documentation	Requirements	Refer to
Captured (§ 67.19-3) or forfeited (§ 67.19-5)	Initial	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Title evidence from point of court determination 5. Citizenship evidence from point of court determination 6. [Citizenship declaration] 7. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Section 67.05-15(a); Subpart 67.07. Section 67.29-11. Section 67.43-13.
	Subsequent	1. Application form (CG-1258) 2. [Marking evidence] 3. Title evidence from point of court determination 4. [Citizenship declaration] 5. [Recording fee]	Section 67.21-1. Section 67.15-6, 7. Section 67.05-15(a); Subpart 67.07. Section 67.29-11. Section 67.43-13.
Special legislation (§ 67.19-7)	Initial	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Copy of last registration 5. Title evidence from last registration 6. Citizenship evidence from point of last registration 7. [Evidence of removal from foreign registry] 8. [Citizenship declaration] 9. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Section 67.05-15(b)(1). Section 67.05-15(b)(1); Subpart 67.07. Section 67.05-15(b)(1). Section 67.05-15(b)(1). Section 67.29-11. Section 67.43-13.
	Subsequent	1. Application form (CG-1258) 2. [Marking evidence] 3. [Evidence of removal from foreign registry] 4. Title evidence from last documentation 5. [Citizenship declaration] 6. [Recording fee]	Section 67.21-1. Section 67.15-5, 7. Section 67.05-15(b)(2). Section 67.05-15(b)(2); Subpart 67.07. Section 67.29-11. Section 67.43-13.
Special legislation	Subsequent	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Title evidence from point of administrative determination 5. Citizenship evidence from point of administrative determination 6. [Citizenship declaration] 7. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Section 67.05-15(a). Section 67.05-15(a). Section 67.29-11. Section 67.43-13.
Wrecked (§ 67.19-9)	Initial	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Title evidence from point of administrative determination 5. Citizenship evidence from point of administrative determination 6. [Citizenship declaration] 7. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Section 67.05-15(a). Section 67.05-15(a). Section 67.29-11. Section 67.43-13.
	Subsequent	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Title evidence from point of administrative determination 5. [Citizenship declaration] 6. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-6, 7. Section 67.05-15(a). Section 67.29-11. Section 67.43-13.

NOTE.—Bracket indicates requirement not necessarily applicable to all transactions. These requirements apply regardless of license sought.

Appendix B to 46 CFR Part 67

REQUIREMENTS FOR INITIAL DOCUMENTATION UNDER 46 CFR SUBPART 67.23

License sought	Vessel	Method	Requirements	Refer to
Registry (§ 67.17-3)	New	N/A	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Build evidence to establish title	Section 67.21-1. Section 67.11-3. Section 67.15-7. Sections 67.09-7, 11, 67.05-7(a), and 67.07-1.
	Used	N/A	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Copy of last registration 5. [Evidence of removal from foreign registry] 6. Title evidence from last registration 7. [Citizenship declaration] 8. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Section 67.05-7(b)(2). Section 67.05-3. Section 67.05-7(b)(2); Subpart 67.07. Section 67.29-11. Section 67.43-13.
Coastwise or Great Lakes (§§ 67.17-5 and 7)	New	N/A	1. Application form (CG-1258) 2. Tonnage evidence 3. Build evidence 4. Marking evidence	Section 67.21-1. Section 67.11-3. Sections 67.09-1, 7, 67.05-7(a), and 67.07-1. Section 67.15-7.
	Used	N/A	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Build evidence 5. Evidence of complete chain of title 6. Citizenship evidence for all owning entities in chain 7. [Citizenship declaration] 8. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Section 67.09-1, 7. Section 67.05-5, Subpart 67.07. Section 67.05-5. Section 67.29-11. Section 67.43-13.

REQUIREMENTS FOR INITIAL DOCUMENTATION UNDER 46 CFR SUBPART 67.23—Continued

License sought	Vessel	Method	Requirements	Refer to
Fishery (§ 67.17-9)	New	N/A	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Build evidence	Section 67.21-1. Section 67.11-3. Section 67.15-7. Sections 67.09-1, 7, 67.05-7(a) and 67.07-1.
	Used	N/A	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Build evidence 5. Copy of last registration 6. [Evidence of removal from foreign registry] 7. Title evidence from last registration 8. [Citizenship declaration] 9. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Section 67.09-1, 7. Section 67.05-3. Section 67.05-7(b)(2). Section 67.05-7(b)(2); Subpart 67.07. Section 67.29-11. Section 67.43-13.
Pleasure	New	N/A	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Build evidence 5. Fee	Section 67.21-1. Section 67.11-3. Section 67.15-7. Sections 67.09-7, 67.05-7(a) and 67.07-1. Section 67.43.11(a).
	Used	Simplified (§ 67.05-7(b)(3)).	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Fee 5. Copy of last registration 6. [Evidence of removal from foreign registry] 7. Title evidence from last registration 8. [Citizenship declaration] 9. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Section 67.43-11(a). Section 67.05-7(b)(3). Section 67.05-3. Section 67.05-7(b)(3); Subpart 67.07. Section 67.29-11. Section 67.43-13.
		Non-simplified (46 CFR 67.05-7(b)(3)).	1. Application form (CG-1258) 2. Tonnage evidence 3. Marking evidence 4. Build evidence 5. Fee 6. Evidence of complete chain of title 7. Citizen evidence from each owning entry in chain 8. [Citizenship declaration] 9. [Recording fee]	Section 67.21-1. Section 67.11-3. Section 67.15-7. Sections 67.09-1, 7. Section 67.43-11(a). Section 67.05-7(b)(3); Subpart 67.07. Section 67.05-7(b)(3). Section 67.29-11. Section 67.43-13.

NOTE.— Brackets indicate requirement not necessarily applicable to all transactions. Applications for multiple licenses do not require duplicate submissions.

Appendix C To 46 CFR Part 67

REQUIREMENTS FOR SUBSEQUENT DOCUMENTATION TRANSACTIONS UNDER 46 CFR SUBPART 67.25.

Transaction and reason	Requirements	Refer to
Renewal (§ 67.23-1); License expired (§§ 67.23-1; 67.25-1)	1. Renewal application (CG-1280)	Section 67.25-1(a).
Surrender (§ 67.23-3); Name change (§§ 67.23-3(a)(5); 67.25-3)	1. Application form (CG-1258) 2. Certificate of documentation 3. Marking evidence 4. Fee 5. [Mortgage consent]	Section 67.25-3. Sections 67.17-1 and 67.23-3. Section 67.15-7. Section 67.43-3. Section 67.25-9.
	1. Application form (CG-1258) 2. Certificate of documentation 3. Abstract of title 4. Marking evidence 5. [Pleasure vessel fee] 6. [Mortgage consent]	Section 67.25-5. Sections 67.17-1 and 67.23-3. Sections 67.25-5 and 67.41-3. Section 67.15-7. Section 67.43-11(b). Section 67.25-9.
Home port change (§§ 67.23-3(a)(3); 67.25-5)	1. Application form (CG-1258) 2. Certificate of documentation 3. Abstract of title 4. Marking evidence 5. [Pleasure vessel fee] 6. [Mortgage consent]	Section 67.25-5. Sections 67.17-1 and 67.23-3. Sections 67.25-5 and 67.41-3. Section 67.15-7. Section 67.43-11(b). Section 67.25-9.
Ownership change (§§ 67.23-3(a)(1); 67.25-7)	1. Application form 2. Certificate of documentation 3. Title evidence 4. [Pleasure vessel fee] 5. [Recording fee] 6. [Mortgage consent] 7. [Citizenship declaration]	Section 67.25.7. Sections 67.25-7 and 67.23-3. Subparts 67.05 and 67.07. Section 67.43-11(b). Section 67.43-13. Section 67.25-9. Section 67.29-11.
Change in general partners (§§ 67.23-3(a)(2); 67.25-7)	1. Application form (CG-1258) 2. Certificate of documentation 3. Title evidence 4. [Pleasure vessel fee] 5. [Mortgage consent]	Section 67.25.7. Sections 67.25-3(c) and 67.23-3. Sections 67.05-09 and 67.07-13. Section 67.43-11(b). Section 67.25.9.
Tonnage or dimension change (§§ 67.23-3(a)(4); 67.25-7)	1. Application form (CG-1258) 2. Certificate of documentation 3. Tonnage evidence 4. [Pleasure vessel fee] 5. [Mortgage consent]	Section 67.25-7. Sections 67.25-3(c) and 67.23-3. Section 67.11-1, 5. Section 67.43-11(b). Section 67.25-9.
Change in vessel restrictions (§§ 67.23-3(a)(6); 67.25-7)	1. Application form (CG-1258) 2. Certificate of documentation 3. [Pleasure vessel fee] 4. [Mortgage consent]	Section 67.25.7. Sections 67.25-3(c) and 67.23-3. Section 67.43-11(b). Section 67.25-9.

REQUIREMENTS FOR SUBSEQUENT DOCUMENTATION TRANSACTIONS UNDER 46 CFR SUBPART 67.25.—Continued

Transaction and reason	Requirements	Refer to
Change of legal name (§§ 67.23-3(a)(7); 67.25-7)	1. Application form 2. Certificate of documentation 3. Title evidence	Section 67.25-7. Sections 67.25-3(c) and 67.23-3 Section 67.07-15.
Death of tenant by the entirety (§§ 67.23-3.4(k); 67.25-7)	4. (Mortgage consent) 1. Application form 2. Certificate of documentation 3. Title evidence	Section 67.25-6. Section 67.25-7. Sections 67.25-3(c) and 67.23-3. Section 67.07-15.
Change in propulsion (§ 67.23-3.6(i); 67.25-7)	4. (Mortgage consent) 1. Application form	Section 67.25-6. Section 67.25-7.
Change in trade endorsements (§§ 67.23-3(a)(10); 67.25-7)	2. Certificate of documentation 1. Application form (CG-1256) 2. Certificate of documentation	Sections 67.25-3(c) and 67.23-3. Section 67.25-7.
Command by non-citizen (§§ 67.23-3.4(j)(2); 67.25-7)	3. (Title evidence) 4. (Mortgage consent) 5. (Marking evidence)	Sections 67.25-7 and 67.23-3. Section 67.05-5; Subpart 67-01. Section 67.43-11(d).
Vessel returned to U.S. command (§§ 67.23-3.4(j)(2); 67.25-7)	1. Certificate of documentation 1. Application form (CG-1258) 2. Certificate of documentation 3. Statement that vessel has been returned to command of U.S. citizen	Sections 67.25-7 and 67.23-3. Section 67.25-7. Sections 67.25-7 and 67.23-3. Section 67.25-7.
Correction of error by documentation officer (§§ 67.23-3.6(i)(11); 67.25-7)	4. (Mortgage consent) 1. Certificate of documentation	Section 67.43-11(d). Sections 67.25-7 and 67.23-3.
Change of owner's address (§§ 67.23-3(b); 67.25-7)	1. (a) Letter advising new address or (b) Renewal application if license due for renewal 2. Certificate of documentation	(a) Section 67.25-7; (b) Section 67.25-1. Sections 67.25-7 and 67.23-3
Replacement (67.25-7): No further spaces for notation of changes (§§ 67.23-7(a)(1); 67.25-11)	1. Application form (CG-1256) 2. Certificate of documentation 3. (Mortgage consent)	Sections 67.25-11. Sections 67.25-11 and 67.23-3(b). Section 67.43-11(d)
Certificate lost (§§ 67.23-7.2(2); 67.25-11)	1. Application form (CG-1258) 2. (Mortgage consent)	Section 67.25-11. Section 67.43-11(d)
Certificate mutilated (§§ 67.23-7.6(i)(2); 67.25-11)	1. Application form (CG-1256) 2. Certificate of documentation 3. (Mortgage consent)	Section 67.25-11. Sections 67.25-11 and 67.23-3(b). Section 67.43-11(d)
Certificate wrongfully withheld (§§ 67.23-7.6(i)(2); 67.25-11)	1. Application form (CG-1258) 2. Statement of facts of withholding	Section 67.25-11. Section 67.25-11.
Deletion (§ 67.23-9)	1. Certificate of documentation 2. Consent of Maritime Administration 3. (Evidence of sale)	Sections 67.25-13 and 67.23-9(d). Section 67.25-12. Section 67.25-12.
Vessel sold, sold and/or placed under foreign flag (§§ 67.23-9.2(1)(2); 67.25-13)	1. Certificate of documentation None—Deletion automatic upon discovery of failure	Sections 67.25-12 and 67.23-9(d).
Owner ceases to be a citizen (§ 67.23-9.6(i)(2); 67.25-13)	1. Certificate of documentation	Sections 67.25-7(b), 67.23-9(d), and 67.25-13.
Failure to renew or surrender (§§ 67.23-9.6(i)(5); 67.25-13)	1. Certificate of documentation	Sections 67.25-13 and 67.23-9(d).
Owner no longer elects documentation (§§ 67.23-9.6(i)(6); 67.25-13)	1. Certificate of documentation	Sections 67.25-13 and 67.23-9(d).
Vessel ceases to measure 5 net tons (§§ 67.23-9.6(i)(7); 67.25-13)	1. Certificate of documentation	Sections 67.25-13 and 67.23-9(d).
Vessel ceases to be capable of transportation (§§ 67.23-9.6(i)(8); 67.25-13)	1. Certificate of documentation	Sections 67.25-13 and 67.23-9(d).
Cancellation (§ 67.23-11); improper issuance (§§ 67.23-11; 67.25-15)	1. Certificate of documentation	Section 67.25-15.

NOTE—Brackets indicate items not necessarily applicable to all transactions in category. Multiple changes do not require duplicate submissions.

Appendix D to 46 CFR Part 67

Ports of Documentation

The following is a list of Coast Guard Districts and Marine Inspection Zones indicating the ports of documentation within each District and Zone having such ports. The territorial limits of a port of documentation encompass all those localities to which that port is closest by normal means of travel.

District and marine inspection zone	Port of documentation
First: Boston	Boston, Gloucester, and Salem, Mass.
Portland, Me.	Portland and Rockland, Maine.
Providence	New Bedford, Mass.; and Providence, R.I.

District and marine inspection zone	Port of documentation
Second: St. Louis	St. Louis, Mo.
Cincinnati	Cincinnati, Ohio
Minneapolis	Minneapolis, Minn.
Louisville	Louisville, Ky.
Memphis	Greenwood, Miss.; and Memphis, Tenn.
Nashville	Nashville, Tenn.
Pittsburgh	Pittsburgh, Pa.
Third: New York	Albany, N.Y.; Bridgeport and New London, Conn.; and New York, N.Y.
Philadelphia	Philadelphia, Pa. and Wilmington, Del.
Fifth: Hampton Roads	Elizabeth City, N.C.; Norfolk, and Reedville, Va.
Baltimore	Baltimore, and Cambridge, Md.; and Washington, D.C.
Wilmington	Beaufort-Morehead City and Wilmington, N.C.
Seventeenth: Miami	Key West, Miami, and West Palm Beach, Fla.

District and marine inspection zone	Port of documentation
Charleston	Charleston, S.C.
Jacksonville	Jacksonville, Fla.
San Juan	San Juan, P.R.
Savannah	Savannah, Ga.
Tampa	Tampa, Fla.
Eighth: New Orleans	Baton Rouge, Houma, Morgan City, La., and New Orleans, La.
Corpus Christi	Brownsville and Corpus Christi, Tex.
Galveston	Galveston, Tex.
Houston	Houston, Tex.
Mobile	Biloxi, Miss.; Mobile, Ala.; and Pensacola, Fla.
Port Arthur	Port Arthur, Tex.
Ninth: Cleveland	Cleveland, Ohio.
Buffalo	Buffalo, and Oswego, N.Y.
Chicago	Chicago, Ill. and Ludington, Mich.
Detroit	Detroit, Mich.
Duluth	Duluth, Minn.
Milwaukee	Milwaukee, Wis.
St. Ignace	Sault Ste. Marie, Mich.

District and marine inspection zone	Port of documentation
Eleventh: Los Angeles-Long Beach	Los Angeles-Long Beach, Calif.
San Diego	San Diego, Calif.
Twelfth: San Francisco	Eureka, and San Francisco, Calif.
Thirteenth: Seattle	Bellingham and Port Angeles, Wash.
Thirteenth: Seattle	Seattle and Tacoma, Wash.
Portland, Oreg.	Aberdeen, Wash.; Astoria, Coos Bay, and Portland, Oreg.
Fourteenth: Honolulu	Honolulu, HI.
Guam	Guam
Seventeenth: Southeast Alaska	Juneau and Ketchikan, Alaska.
Western Alaska	Anchorage, Alaska.

3. By adding Part 68 to read as follows:

**PART 68—DOCUMENTATION OF VESSELS PURSUANT TO EXTRAORDINARY LEGISLATIVE GRANTS**

**Subpart 68.01—Regulations Implementing the Act of September 2, 1958 (46 U.S.C. 883-1)**

**Sec.**

- 68.01-1 Definitions for the purposes of this subpart
- 68.01-3 Requirements for citizenship under 46 U.S.C. 883-1
- 68.01-5 Qualification as an 883-1 corporation
- 68.01-7 Qualification as a parent or subsidiary
- 68.01-9 Cessation of qualification
- 68.01-11 Privileges conferred—documentation of vessel
- 68.01-13 Privileges conferred—operation of vessel
- 68.01-15 Restrictions
- 68.01-17 Application by an 883-1 corporation to document a vessel

**Subpart 68.03—Reserved for Regulation, as Necessary, of Vessels Under the Act of August 9, 1954**

**Appendices**

- A—Oath for qualification of corporation as a citizen of the United States under the Act of September 2, 1958 (46 U.S.C. 883-1)
  - B—Oath of parent or subsidiary corporation Act of September 2, 1958 (46 U.S.C. 883-1)
- Authority: 72 Stat. 1736 (46 U.S.C. 883-1); 68 Stat. 675 (50 U.S.C. 198)

OMB Control Number: Information collection requirements contained in this Part have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-111) and have been assigned OMB control number 2115-0110.

**Subpart 68.01—Regulations Implementing the Act of September 2, 1958 (46 U.S.C. 883-1)**

**§ 68.01-1 Definitions for the purposes of this Subpart.**

*Act* means the Act of September 2, 1958 (46 U.S.C. 883-1).

*883-1 citizen or 883-1 corporation* means a corporation which qualifies for the special citizenship status created by the Act of September 2, 1958 (46 U.S.C. 883-1).

*Parent corporation* means one incorporated under the laws of the United States, or any state, territory, or district of the United States, which controls (directly or indirectly) at least 50 percent of the voting stock of another corporation.

*Subsidiary corporation* means one incorporated under the laws of the United States, or any state, territory, or district of the United States, which has not less than 50 percent of its voting stock controlled (directly or indirectly) by another corporation.

**§ 68.01-3 Requirements for citizenship under 46 U.S.C. 883-1.**

A corporation seeking to establish its citizenship under the Act of September 2, 1958 (46 U.S.C. 883-1) must meet the following criteria as specified in the Act:

- (a) It must be incorporated under the laws of the United States, or any state, territory, district, or possession of the United States;
- (b) A majority of the officers and directors of the corporation must be citizens of the United States;
- (c) Not less than 90 percent of the employees of the corporation must be residents of the United States;
- (d) Such corporation must be engaged primarily in a manufacturing or mineral industry in the United States or any territory, district, or possession of the United States;
- (e) The aggregate book value of the vessels owned by the corporation must not exceed 10 percent of the aggregate book value of the assets of the corporation; and
- (f) The corporation must purchase or produce in the United States, its territories or possession not less than 75 percent of the raw materials used or sold in its operations.

Note.—A corporation which qualifies as an 883-1 citizen by meeting the criteria in paragraph (a) of this section is not thereby precluded from qualifying as a citizen under any definition in Part 67 upon compliance with all applicable requirements.

**§ 68.01-5 Qualification as an 883-1 corporation.**

- (a) To be formally qualified as an 883-1 corporation for all purposes under the

Act, a corporation which meets the requirements of § 68.01-3 must file with the Commandant a certificate under oath as described in Appendix A.

(b) Upon the filing of the certificate required under paragraph (a) of this section, the Commandant will furnish the corporation a Certificate of Compliance which is valid for a period of 3 years from the date of its issuance, unless there is a change in corporate status requiring a report under § 68.01-9(a) of this subpart. On or before the date of expiration of the Certificate of Compliance, a new certificate under oath as described in Appendix A must be filed with the Commandant.

**§ 68.01-7 Qualification as a parent or subsidiary.**

(a) To be formally qualified as a parent corporation, as defined in § 68.01-1, a corporation must file with the Commandant a certificate under oath as described in Appendix B.

(b) To be formally qualified as subsidiary corporation as defined in § 68.01-1, a corporation must file with the Commandant a certificate under oath as described in Appendix B.

(c) Upon the filing of the certificate required under paragraph (a) or (b) of this section, the Commandant will furnish the corporation a certificate of parent or subsidiary status which is valid for a period of 3 years from the date of its issuance unless there is a change in corporate status requiring a report under § 68.01-9(a) of this subpart. On or before the date of expiration of the certificate of parent or subsidiary status, a new certificate under oath as described in Appendix B must be filed with the Commandant.

**§ 68.01-9 Cessation of qualification**

(a) If after filing the certificate required by § 68.01-5 of this subpart, a change occurs whereby an 883-1 corporation no longer meets the criteria in § 68.01-3(a), that corporation's qualification for the privileges enumerated in § 68.01-11 and 13 is terminated effective as of the date and time of the change. The corporation must report the change in writing to the Commandant.

(b) If, after filing the certificate required by § 68.01-7 of this subpart, a change occurs whereby the corporation is no longer entitled to be deemed a parent or subsidiary corporation, that corporation's qualification for the privileges in § 68.01-11 and 13 is terminated effective as of the date and time of the change. The corporation must report such change in writing to the Commandant.

SAMPLE COAST GUARD FORMS

1. Builder's Certification CG-1261
2. Application for Admeasurement CGD1-5949-1
3. Application for Documentation, etc. CG-1258
4. Declaration of Citizenship MA-899
5. Certificate of Marking CG-1322
6. Application, Consent and Approval for Surrender CG-4593
7. Bill of Sale CG-1340  
Marshal's Bill of Sale CG-1356 (not attached)
8. Certificate of Documentation CG-1270
9. Certificate of Ownership CG-1330

Exhibit "C"

0790B

BUILDER'S CERTIFICATION

INSTRUCTIONS

- Block 1. D. Insert city, state, and country where vessel was built.  
E. Check appropriate block. If vessel is sailing vessel with auxiliary engine or a vessel with an outboard motor, check self-propelled.  
F. Check appropriate block. If vessel is composite of wood and fibrous reinforced plastic, check fibrous reinforced plastic.
- Block 2. Check appropriate block and fill in year vessel completed for its intended use. Modify categories as necessary.
- Block 3. Insert the names of all parties for whom the vessel was built, and the individual interest owned by each.
- Block 4. Check appropriate blocks. Leave blank if vessel is foreign-built.
- Block 5. Insert name of person completing form. Check appropriate block. If second block checked, insert name of company which constructed the vessel.

**NOTE:** The term "United States" includes Puerto Rico, Guam, the Northern Marianas, and American Samoa.

1. Vessel Data

- A. Hull number or hull Identification Number \_\_\_\_\_
- B. Vessel name (if known) \_\_\_\_\_
- C. Length \_\_\_\_\_ Breadth \_\_\_\_\_ Depth \_\_\_\_\_
- D. Place of build \_\_\_\_\_
- E.  Self-propelled  
 Non-self-propelled
- F. Hull material  
 Wood  Steel  Aluminum  Fibrous reinforced plastic  Other

2. Phase of Construction covered by Certificate

- Hull only
- Completion only Year completed \_\_\_\_\_
- Entire construction Year completed \_\_\_\_\_

3. Party(ies) for Whom Built

4. United States Build

- A. All major components of the hull and superstructure were fabricated in the United States.
- B. The vessel was constructed entirely in the United States.
- C. At least fifty (50) percent of the cost of all machinery (including propulsion) and components which are not an integral part of the hull or superstructure relate to items procured in the United States.

5. I, \_\_\_\_\_ Do Hereby Certify:  
(Name)

that the facts recited herein are true and that I have personal knowledge of these facts because I:

- A. Personally performed the construction
- B. Supervised the construction at and on behalf of

\_\_\_\_\_  
(Name of Company)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date



DEPARTMENT OF TRANSPORTATION - U.S. COAST GUARD

APPLICATION FOR ADMEASUREMENT

Optional Simplified Admeasurement Method for Vessels - Under Public Law 89-476, Secs. 69.17-3, 69.17-7, Title 46 CFR  
Public Law 96-594, Secs. 69.19-1, 69.19-17

FILE NUMBER:

1. MOTOR BOAT OR OFFICIAL NUMBER:	2. HULL NUMBER:	3. DATE:
-----------------------------------	-----------------	----------

4. COMMERCIAL       PLEASURE       BARGE

5. NAME OF VESSEL:	6. HOME PORT
--------------------	--------------

7. APPLICANT:

8. NAME OF OWNER:

9. ADDRESS (Street, City, State, & ZIP CODE)	10. TELEPHONE NOS.
	HOME:
	BUSINESS:

- EXPLANATION OF DIMENSIONS REQUIRED BELOW IS FURNISHED ON THE REVERSE SIDE OF THIS APPLICATION -

11. TYPE

SAILING	HOUSEBOAT	TRIMARAN
CRUISER	CATAMARAN	BARGE
12. OVERALL LENGTH	13. OVERALL BREADTH	14. OVERALL DEPTH

ADDITIONAL INFORMATION REQUIRED FOR MULTI-HULLED VESSELS  
(Complete Item 13 Above)

15. MAIN HULL	OVERALL LENGTH:	16. PORT OR STARBOARD HULL	OVERALL LENGTH:
	OVERALL BREADTH:		OVERALL BREADTH:
	OVERALL DEPTH:		OVERALL DEPTH:

17. VESSEL BUILT BY	18. YEAR:
---------------------	-----------

19. VESSEL BUILT AT

19. MATERIAL OF CONSTRUCTION

WOOD	STEEL	OTHER (specify)
ALUMINUM	FIBERGLASS	

20. ENGINE      LOCATION  IN HULL       OUTSIDE HULL

REMARKS

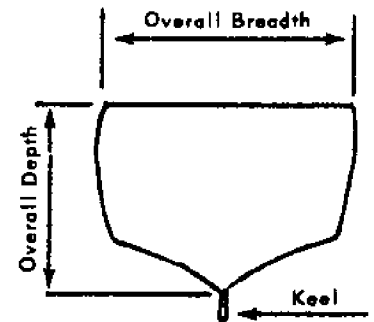
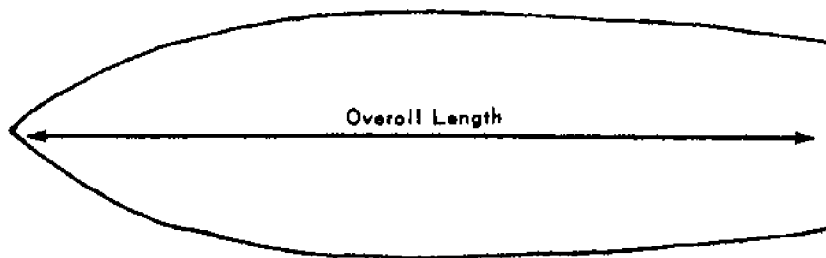
I ATTEST THAT THE INFORMATION & DIMENSIONS CONTAINED ABOVE, TO BE TRUE AND ACCURATE.

SIGNATURE

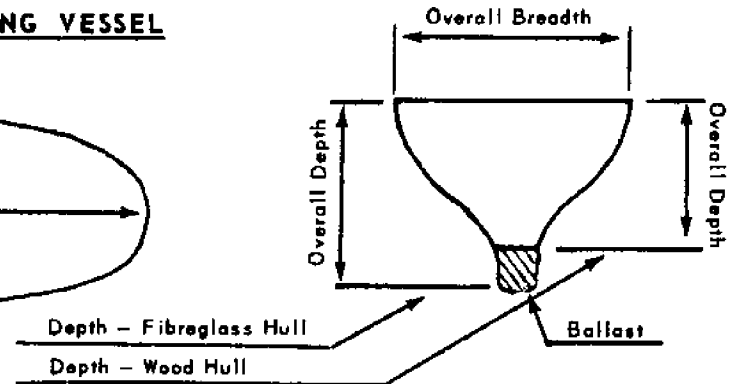
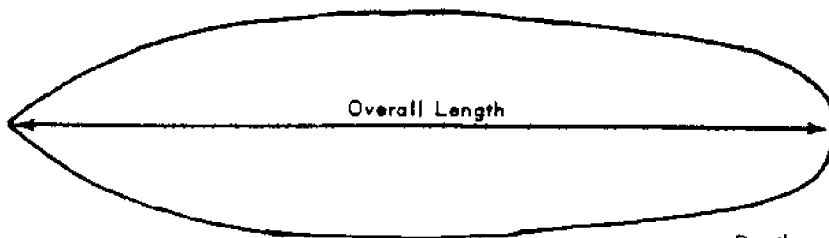
**PRIVACY ACT STATEMENT**

- A. **AUTHORITY.** 46 USC 71; 46 CFR 69.01-17. Disclosure is mandatory.
- B. **PRINCIPAL PURPOSE OR PURPOSES FOR WHICH INFORMATION IS INTENDED TO BE USED.**  
To guide the admeasurer in identifying the vessel, the builder, the place of build, location of vessel, and vessel's principal dimensions for ascertaining tonnage.
- C. **ROUTINE USES WHICH MAY BE MADE OF THE INFORMATION.** After transcribing this information onto the certificate of admeasurement, this Coast Guard internal form is inserted into the vessel file at the home port.
- D. **THE EFFECTS ON INDIVIDUAL, IF ANY, OF NOT PROVIDING ALL OR ANY PART OF THE REQUESTED INFORMATION.** Certificate of admeasurement cannot be issued; vessel documentation cannot proceed.

**POWER VESSEL**



**SAILING VESSEL**



**NOTE**

**"OVERALL LENGTH"**

means the horizontal distance between the foremost part of the stem and the aftermost part of the stern, excluding bowsprits, bumpkins, rudders, outboard motor brackets, and similar fittings or attachments.

**"OVERALL BREADTH"**

is the horizontal distance from the outside of the skin (outside planking or plating) on one side to the outside of the skin on the other, taken at the widest part of the hull, and excluding rub rails.

**"OVERALL DEPTH"**

is the vertical distance taken at or near midships from a line drawn horizontally through the uppermost edges of the skin at the sides of the hull (excluding trunks, cabins or deckhouses) to the outboard face of the bottom skin of the hull. This excludes the keel unless the keel is covered by the skin.

APPLICATION FOR DOCUMENTATION OR FOR SURRENDER,  
REPLACEMENT, OR REDOCUMENTATION

I. Complete For All Applications

A. NAME OF VESSEL	B. Propulsion <input type="checkbox"/> Self-propelled <input type="checkbox"/> Non-self-propelled
C. Home port of Vessel	D. Present location of vessel
E. Name(s) of owner(s)	F. Address of owner

G. Citizenship

<p>1. For vessel owned by one or more individuals <input type="checkbox"/> I (we) certify that all owners of this vessel are citizens of the U.S.</p> <p>2. For vessel owned by joint venture or association <input type="checkbox"/> I (we) certify that all members of this (joint venture) (association) are citizens of the U.S.</p> <p>3. For vessel owned in a trust arrangement <input type="checkbox"/> I (we) certify that all trustees and all beneficiaries in this arrangement are citizens of the U.S.</p> <p>4. For vessel owned by partnership</p> <p>a. General Partnership <input type="checkbox"/> I (we) certify that all partners in this partnership are citizens of the U.S.</p> <p>b. Limited Partnership <input type="checkbox"/> I (we) certify that all general partners in this partnership are citizens of the U.S. and that at least the controlling interest in the partnership is owned by citizens of the U.S.</p> <p>c. <input type="checkbox"/> I (we) certify that all general partners in this partnership are citizens of the U.S. and that at least 75% of the partnership is owned by citizens of the U.S.</p>	<p>5. For vessel owned by a corporation</p> <p>a. State of incorporation _____</p> <p>b. Citizenship of Chief Executive officer _____</p> <p>c. Citizenship Chairman of the board _____</p> <p>d. Number of directors necessary to constitute a quorum _____</p> <p>e. Number of alien directors _____</p> <p>f. Percentage of stock owned by U.S. citizens:</p> <p><input type="checkbox"/> 0-50%</p> <p><input type="checkbox"/> 51-74%</p> <p><input type="checkbox"/> 75% or more</p> <p>6. For corporations qualified and applying under 46 C.F.R. Subpart 68.01 <input type="checkbox"/> Current certificate of compliance attached. I (we) certify that the corporate structure has not changed since issuance of that certificate, and that the vessel, if self-propelled, is less than 500 gross tons.</p>
---	---

H. Intended use(s) of vessel \_\_\_\_\_

II. Complete For Initial Documentation Only

A. Build of vessel <input type="checkbox"/> 1. Vessel was built at _____ in _____ <input type="checkbox"/> 2. Vessel is under construction at _____ and is scheduled for completion in _____	
B. Hull material <input type="checkbox"/> Wood <input type="checkbox"/> Steel <input type="checkbox"/> Aluminum <input type="checkbox"/> Fibrous reinforced plastic <input type="checkbox"/> Other	
C. Hull number/Hull identification number	D. Approximate overall length of vessel
E. Previous names/numbers of vessel	
F. Name of person signing	G. Capacity

H. I (we) certify that the above facts are true, and that I am (we are) a citizen(s) of the United States and legally authorized to execute this application in the capacity shown. I (we) further certify that this vessel has never been awarded an official number.

Signature \_\_\_\_\_

Date \_\_\_\_\_

III. Complete For All Applications Other Than Initial Documentation	
A. Official number of vessel	B. Intervening Names or Numbers
C. Reason(s) for application	
D. Name of person signing	E. Capacity
F. I (we) certify that the above facts are true, and that I am (we are) a citizen(s) of the United States legally authorized to execute this application in the capacity shown.	
Signature _____	Date _____

IV. For Official Use Only	
A. Approval Approval of this application, including any designation of home port contained therein, is approved.	
B. Name of Documentation Officer	C. Signature of Documentation Officer
D. Date	E. Port

**NOTE: THIS IS AN INITIAL APPLICATION AND DOES NOT OF ITSELF ENTITLE THE VESSEL TO DOCUMENTATION NOR TO ANY CHANGES SOUGHT. OFFICIAL NUMBERS DESIGNATED ON THE BASIS OF THIS APPLICATION ARE NOT TRANSFERRABLE.**

**INSTRUCTIONS FOR COMPLETION OF FORM CG-1258**

- I.
  - A. Insert present name of vessel. If application is to change the name of a vessel, insert new name, and last documented name in parentheses.
  - B. Check appropriate block. If a sailing vessel with an auxiliary engine or a vessel with an outboard engine, check self-propelled.
  - C. See 46 C.F.R. 67.13-3.
  - D. Self-explanatory. Leave blank if vessel is under construction. (See II.A.2.)
  - E. Insert the name of all owners, the proportion in the vessel owned by each, and the manner in which owned.  
If the vessel is owned by a partnership, the names of all general partners must be recited.  
If the vessel is owned by a joint venture, the names of all the venturers must be recited.  
If the vessel is owned in a trust arrangement, the names of all trustees and all beneficiaries must be recited.  
Attach extra sheets if necessary.
  - F. Insert the address which was used to determine the home port. In cases of multiple ownership, specify the owner whose address was used to determine the home port. If the home port was determined by using the address of the vessel's charterer, so specify.
  - G. Check appropriate block. For a corporation, provide requested information. If G.8. is checked, attach copy of certificate of compliance. If vessel is owned by a governmental entity, leave G blank.
  - H. Insert registry, coastwise trade, Great Lakes trade, fishery, and/or pleasure. Multiple uses are permitted for eligible vessels. (See 46 CFR Subpart 67.17.)
  
- II.
  - A. 1. Insert place and year of build. The year to be shown is the year in which the vessel was completed for its intended purpose.  
If the place of build is not known at the time of application, or if application is made only for registry or for a pleasure license under the simplified procedures of 46 CFR 67.05-7(b)(3), leave this section blank.
  - A. 2. Self-explanatory. Also complete II.C.
  - B. Check appropriate block. If vessel is a composite of wood and fibrous reinforced plastic, check fibrous reinforced plastic.
  - C. Insert builder's hull number of hull identification number, if known.  
If application is made to document a vessel which has resulted from the severance of another vessel, insert the name and official number of the original vessel.  
This block must be completed if II.A.2. is completed.
  - D. Self-explanatory
  - E. Insert all known names used for and numbers assigned to the vessel, including numbers assigned under state or foreign registration systems.
  - F. Self-explanatory
  - G. Insert legal capacity which entitles you to make this application. Examples of legal capacity include (but are not limited to) owner, trustee, general partner, corporate officer, or authorized agent.
  - H. Self-explanatory
  
- III.
  - A. See 46 CFR 67.13-1.
  - B. Complete only for vessel being returned to documentation after having been deleted. Insert all names used for and numbers assigned to vessel during the period it was out of documentation.
  - C. Insert reason(s) you are making this application. Select among: record of surrenders filled; trade endorsements filled; document (lost) (mutilated) (wrongfully withheld); ownership change; change in general partners of partnership; home port change; vessel name change; tonnage change; change in dimension(s); change in restrictions; change in legal name of owner; removal of alien master; and/or return of vessel to documentation.
  - D. Self-explanatory
  - E. See II.G.
  - F. Self-explanatory



**DECLARATION OF CITIZENSHIP FOR VESSEL RECORDATION PURPOSES**

(Section 40, Shipping Act, 1916, as amended,  
46 U.S.C. 838, 40 Stat. 902, as amended)

**I. VESSEL**

A. NAME:

B. OFFICIAL NUMBER:

**II. ENTITY ON BEHALF OF WHICH DECLARATION IS MADE**

A. NAME:

B. ADDRESS:

C. STATE WHERE INCORPORATED, ORGANIZED, CHARTERED, OR RESIDING:

D. LEGAL NATURE (*check appropriate entry*)

\_\_\_\_\_ Individual

\_\_\_\_\_ Association

\_\_\_\_\_ Corporation

\_\_\_\_\_ Mutual Savings Bank/Insurance Co.

\_\_\_\_\_ Partnership/joint venture

\_\_\_\_\_ Other (*specify*)

CAPACITY (*check appropriate entry*)

\_\_\_\_\_ Purchaser/transferee

\_\_\_\_\_ Mortgagee

\_\_\_\_\_ Trustee-mortgagee

**III. DECLARATION:**

I hereby declare that I am legally authorized to make this declaration on behalf of the entity named above, and that this transaction does not violate the provisions of 46 U.S.C. 808 and 835 (*if applicable*) because said entity meets the applicable criteria set forth on the reverse of this form and is therefore a citizen of the United States within the meaning of 46 U.S.C. 802.

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
DATE

NAME OF PERSON SIGNING (*Print*): \_\_\_\_\_

**PENALTY FOR FALSE STATEMENT:** Any person who knowingly makes a false statement of a material fact in this declaration shall be guilty of a misdemeanor and subject to a fine of not more than \$5,000 or to imprisonment for not more than five years, or both (46 U.S.C. 838).

If two or more vessels are involved, attach schedule of vessel names and official numbers.

## DECLARATION OF CITIZENSHIP — CITIZENSHIP CRITERIA

**A. INDIVIDUAL.** An individual is a citizen by virtue of birth in the United States, birth abroad of U.S. citizen parents, by naturalization during minority through the naturalization of a parent, by marriage (if a woman) to a U.S. citizen prior to September 22, 1922, naturalized, or as otherwise authorized by law.

**B. CORPORATION.** A corporation is a citizen if (a) it is incorporated under the laws of the United States or of a state, territory, district or possession thereof; (b) its president or other chief executive officer and its chairman of the board are United States citizens; (c) no more of its directors than a minority of the number necessary to constitute a quorum are non-citizens; and (d) the controlling interest in the corporation is owned by United States citizens or, if the vessel is documented for coastwise trade, at least 75 percent of the interest in the corporation is owned and controlled by U.S. citizens.

**NOTE:** (1) The controlling interest in a corporation is owned and controlled by United States citizens only if (i) title to at least a majority of the stock is vested in United States citizens free of any trust or fiduciary obligation in favor of any person who is not a United States citizen; (ii) at least the majority of the voting power is vested in United States citizens; (iii) there is no contract or understanding through which it is arranged that the majority of the voting power may be exercised directly or indirectly on behalf of any person who is not a United States citizen; and (iv) there are no other means whatsoever by which control of the corporation is conferred upon or permitted to be exercised by any person who is not a United States citizen.

(2) Seventy-five percent of the interest in a corporation is owned and controlled by United States citizens only if (i) the title to at least 75 percent of the stock of said Corporation is vested in citizens of the United States free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; (ii) that such proportion of the voting power of said Corporation is vested in citizens of the United States; (iii) that through no contract or understanding is it so arranged that more than 25 percent of the voting power of said Corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; and (iv) that by no means whatsoever, is any interest in said Corporation in excess of 25 percent conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

**C. PARTNERSHIP/JOINT VENTURE.** A partnership or a joint venture is a citizen of the United States if requisite ownership and control is vested in United States citizens pursuant to 46 U.S.C. 802.

**D. ASSOCIATION.** An association is a citizen if the requisite ownership is vested in United States citizens pursuant to 46 U.S.C. 802.

**E. MUTUAL SAVINGS BANK/INSURANCE COMPANY.** A mutual savings bank or mutual insurance company is one which has no directors, the duties of the directors being exercised by the trustees, and which is not authorized to issue stock. Such an entity is a citizen if (a) its president or other chief executive officer and the chairman of its board of trustees are United States citizens; (b) no more of the trustees than a minority of the number necessary to constitute a quorum are non-citizens; (c) at least the majority of the voting power and control in the entity is vested in the board of trustees free from any trust or fiduciary obligation whatsoever by which control of the corporation is conferred upon or permitted to be exercised by any person who is not a United States citizen.

**F. TRUSTEE-MORTGAGEE.** A trustee-mortgagee is a citizen if it is approved under the provisions of 46 U.S.C. 808 and 835.

**G.** If you check "Other" please submit full details of the legal arrangement or character with supporting documents attached. Direct contact with the Maritime Administration at an early date is recommended.

**NOTE:** Questions concerning the construction and interpretation of the above criteria should be directed to the Maritime Administration.

CERTIFICATE OF MARKING

OMB APPROVED

2115-0110

1. VESSEL NAME

2. OFFICIAL NUMBER

3. HAILING PORT

4. MARKING CERTIFICATION *(Complete certification by marking "X" in appropriate boxes, signing and dating.)*

A. ALL VESSELS

I certify that the official number of the vessel, preceded by the abbreviation "No.", has been permanently marked in block-type arabic numerals not less than three (3) inches in height on some clearly visible interior part of the hull, and that the number cannot be obliterated or obscured.

B. PLEASURE VESSEL

I further certify that the above-named vessel is documented exclusively for pleasure and that its name and hailing port are marked together in clearly legible and durable letters not less than four (4) inches in height on a clearly visible exterior part of the hull.

C. VESSEL MARKED TO AVOID OBLITERATION

I further certify that the above-named vessel has been marked at variance with the requirements contained in D below. The vessel name has been marked in clearly legible and durable letters not less than four (4) inches in height on clearly visible exterior parts adjacent to the port and starboard bows in order to avoid obliteration. The name and hailing port have been marked in clearly legible and durable letters not less than four (4) inches in height on a clearly visible exterior part adjacent to the stern in order to avoid obliteration.

D. ALL OTHER VESSELS

I further certify that the name of this vessel has been marked in clearly legible and durable letters not less than four (4) inches in height on some clearly visible exterior part of its port and starboard bows and on the stern. The hailing port has been marked in clearly legible and durable letters not less than four (4) inches in height on some clearly visible exterior part of its stern.

Signature

Date

MARKING OF VESSELS:

1. Acceptable are:

- a. Any permanent method for official number, for example:  
NO. 123456
- b. No longer required to apply Net Tonnage after the official number
- c. Any durable, legible method for name and hailing port, including script
- d. Marking boards are permitted
- e. A signed Affidavit of Marking will be the certification that the vessel has been properly marked. This certificate will be signed by the owner of the vessel

f. NO photographs will be required

g. What is a homeport?

- 1. The homeport of a documented vessel is that port of documentation nearest to the owner's legal domicile address. This is the port where records for the vessel are maintained. The use of Post Office Boxes, c/o addresses, etc., cannot be accepted for the establishment of a homeport.

h. What is the hailing port?

- 1. The owner of a documented vessel must designate a hailing port to be marked on the vessel

a. The hailing port must be:

- 1. The place which the owner used to determine the home port of the vessel
- 2. The hailing port may also be the homeport of the vessel
- 3. The hailing port marked on the vessel must include the state, territory, or possession and must be a place recognized by the United States Post Office as a bona fide mailing address, for example:

BOSTON, MASS.

When the vessel has been properly marked, check block 4-A (All Vessels).

Pleasure Vessels, also check block 4-B

Commercial Vessels, also check Block 4-C and 4-D

Return the Certificate of Marking form to the address appearing in the lower left hand corner within thirty (30) days from the date above the office address.



PRIVACY ACT STATEMENT

No approval will be given for surrender of the marine document of any vessel covered by one or more preferred mortgages unless a completed application covering each preferred mortgage has been received (46 U.S.C. 961; Reorganization Plan No. 1 of 1967; 46 C.F.R. 67 23-5).

APPLICATION

1. NAME OF VESSEL	2. OFFICIAL NUMBER	
3. MORTGAGOR		
4. MORTGAGEE	AMOUNT OF MORTGAGE	DATE OF MORTGAGE

Application is hereby made for approval, pursuant to Section 30, Subsection O(a), Ship Mortgage Act, 1920, as amended (46 U.S.C. 961), for surrender of the outstanding certificate of documentation of the subject vessel for the following purpose(s):

AGREEMENT

The owner/seller and buyer agree that upon the surrender of the certificate of documentation the vessel will remain documented under the laws of the United States and all endorsements necessary to preserve the preferred status of the mortgage will remain intact.

OWNER/SELLER	BUYER
DATE _____	DATE _____

CONSENT

As preferred mortgagee, I (we) consent to surrender of the outstanding certificate of documentation of said vessel for the purposes stated in the above application provided that upon the surrender of the outstanding certificate of documentation the vessel will remain documented under the laws of the United States and all endorsements necessary to preserve the preferred status of the mortgage will remain intact.

PREFERRED MORTGAGEE: \_\_\_\_\_

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

APPROVAL

Upon the above application and the consent of the preferred mortgagee(s), approval is granted for surrender of the certificate of documentation outstanding to the above named vessel issued at \_\_\_\_\_ on \_\_\_\_\_

PORT \_\_\_\_\_ DATE \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE

PROCEDURES FOR FILING APPLICATIONS UNDER  
SECTION 30, SUBSECTION 0(a), SHIP MORTGAGE  
ACT 1920, AS AMENDED (46 U.S.C. 961(a))

1. APPLICABILITY

- (a) Subsection 0(a) in effect requires consent of the mortgagee and approval of the Coast Guard for the surrender of the certificate of documentation of a vessel of the United States covered by a preferred mortgage.
- (b) Consent and approval under Subsection 0(a) are not required when the reason for surrender is occasioned exclusively by a change in the owner's address, a clerical error for which the documentation officer is responsible, a change in the vessel's trade(s), the vessel's being placed under the command of an alien or the return of the vessel to citizen command.
- (c) In cases of simultaneous surrender and replacement, except as noted in (b), the transaction is to be regarded as a surrender requiring consent and approval.

2. PROCEDURE

- (a) If application is made and approval is to be granted at the home port of the vessel, a properly executed Form CG-4593 shall be submitted to cover each preferred mortgage.
- (b) If application is made and approval is to be granted at other than the home port of the vessel, Form CG-4593 shall be accompanied by a Certificate of Ownership (Form CG-1330) issued at the home port of the vessel not more than 15 days prior to the date of the application.

DEPARTMENT OF  
TRANSPORTATION  
U.S. Coast Guard  
CG-1340 (Rev. 5-82)

**BILL OF SALE**

OMB APPROVED  
2115-0110

VESSEL NAME

2. OFFICIAL NUMBER/

3. NAME(S) OF SELLER(S) AND INTEREST OWNED BY EACH

4. NAME(S) OF BUYER(S) AND INTEREST TRANSFERRED TO EACH

5. CONSIDERATION RECEIVED

I (we) do hereby sell to the buyer(s) named above, my (our) right, title, and interest in the vessel together with the following necessities and appurtenances:

This sale is made to the buyers in the proportion specified, subject to the following warranties and conditions:

7. SIGNATURE(S) OF SELLER(S)

8. DATE

9. CAPACITY

10. ACKNOWLEDGEMENT *(Insert such acknowledgement language as is required by state law.)*

The acknowledgement may not be taken by an officer or employee of the Coast Guard.

*1/If vessel has never been awarded an official number, complete those items of vessel data on reverse of form as are known.*

*(Complete only if Vessel Does Not Have An Official Number)*

**VESSEL DATA**

- a. Builder \_\_\_\_\_
- b. Builder's hull number \_\_\_\_\_
- c. Hull identification number \_\_\_\_\_
- d. Former names \_\_\_\_\_
- e. Former motorboat numbers \_\_\_\_\_
- f. Former alien registrations \_\_\_\_\_
- g. Person from whom seller obtained vessel \_\_\_\_\_
- h. Dimensions \_\_\_\_\_

**SIGNATURE OF SELLER**

\_\_\_\_\_ Coast Guard District

port of \_\_\_\_\_

Received for record on the \_\_\_\_\_ Day of \_\_\_\_\_

\_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ M.,

and recorded in Book No. \_\_\_\_\_, instrument \_\_\_\_\_

No. \_\_\_\_\_.

**DOCUMENTATION OFFICER**

1. VESSEL NAME		14. PROPULSION		15. HULL MATERIAL	
2. OFFICIAL NUMBER		3. TONNAGE GROSS      NET      L. B. D.		16. TRADE ENDORSEMENTS. DO NOT INSERT ANY TRADES FROM WHICH VESSEL IS RESTRICTED. SEE BLOCK 8.	
4. HOME PORT		THIS VESSEL IS PRESENTLY DOCUMENTED FOR:		THIS VESSEL IS PRESENTLY DOCUMENTED FOR:	
5. BUILD: PLACE(S)      YEAR					
6. OWNER		DATE SIGNATURE <i>[Signature]</i>		DATE SIGNATURE	
7. OWNER'S ADDRESS		THIS VESSEL IS PRESENTLY DOCUMENTED FOR:		THIS VESSEL IS PRESENTLY DOCUMENTED FOR:	
8. RESTRICTIONS					
9. ENTITLEMENTS		DATE SIGNATURE		DATE SIGNATURE	
10. PORT OF ISSUANCE		11. DATE OF ISSUANCE		THIS VESSEL IS PRESENTLY DOCUMENTED FOR:	
12. SIGNATURE & SEAL <i>[Signature]</i> J. B. L. [Signature] Master Documentation Officer		CD-1290A <div style="font-size: 2em; font-weight: bold; border: 1px solid black; padding: 5px; display: inline-block;">3</div> 6-14-05 6-21-05			

\*INDICATES CHANGE IN ITEM. NATURE OF WHICH IS REFLECTED ON REVERSE OF DOCUMENT.

PREFERRED MORTGAGE ENDORSEMENTS		
MORTGAGE ENDORSEMENT		MORTGAGE AMENDMENTS
INSTRUMENT PM _____, INST. _____ MORTGAGOR	INSTRUMENT PM _____, INST. _____ MORTGAGOR	1. INSTRUMENT AMENDED PM _____, INST. _____ CHANGE
MORTGAGEE	MORTGAGEE	DATE AND TIME OF ENDORSEMENT
AMOUNT	AMOUNT	SIGNATURE AND SEAL
MATURITY DATE	MATURITY DATE	PORT
DATE AND TIME OF ENDORSEMENT	DATE AND TIME OF ENDORSEMENT	2. INSTRUMENT AMENDED PM _____, INST. _____ CHANGE
SEPARATE DISCHARGE (IF ANY)	SEPARATE DISCHARGE (IF ANY)	DATE AND TIME OF ENDORSEMENT
SIGNATURE AND SEAL <i>[Signature]</i>	SIGNATURE AND SEAL	SIGNATURE AND SEAL
PORT	PORT	PORT
SATISFACTION SATISFIED BY PM _____ INST. _____ FILED AT _____	SATISFACTION SATISFIED BY PM _____ INST. _____ FILED AT _____	3. INSTRUMENT AMENDED PM _____, INST. _____ CHANGE
DATE OF ENTRY	DATE OF ENTRY	DATE AND TIME OF ENDORSEMENT
SIGNATURE & SEAL	SIGNATURE & SEAL	SIGNATURE AND SEAL
		PORT

**RECORD OF SURRENDERS OF CERTIFICATE OF DOCUMENTATION**  
 (ON FACE OF DOCUMENT INSERT ASTERISK NEXT TO ITEM BEING CHANGED)

CHANGE 1      DATE NATURE    PORT SIGNATURE	CHANGE 4      DATE NATURE    PORT SIGNATURE
CHANGE 2      DATE NATURE    PORT SIGNATURE	CHANGE 5      DATE NATURE    PORT SIGNATURE
CHANGE 3      DATE NATURE    PORT SIGNATURE	CHANGE 6      DATE NATURE    PORT SIGNATURE
<input type="checkbox"/> REPLACED <input type="checkbox"/> DELETED <input type="checkbox"/> CANCELLED  REASON:	DATE:    PORT SIGNATURE

**PREFERRED MORTGAGE ENDORSEMENTS**

MORTGAGE ENDORSEMENT		MORTGAGE AMENDMENTS
INSTRUMENT PM _____ INST. _____ MORTGAGOR	INSTRUMENT PM _____ INST. _____ MORTGAGOR	1. INSTRUMENT AMENDED PM _____ INST. _____ CHANGE
		DATE AND TIME OF ENDORSEMENT
MORTGAGEE	MORTGAGEE	SIGNATURE AND SEAL
AMOUNT	AMOUNT	PORT
MATURITY DATE	MATURITY DATE	2. INSTRUMENT AMENDED PM _____ INST. _____ CHANGE
DATE AND TIME OF ENDORSEMENT	DATE AND TIME OF ENDORSEMENT	DATE AND TIME OF ENDORSEMENT
SEPARATE DISCHARGE (IF ANY)	SEPARATE DISCHARGE (IF ANY)	SIGNATURE AND SEAL
SIGNATURE AND SEAL	SIGNATURE AND SEAL	PORT
PORT	PORT	3. INSTRUMENT AMENDED PM _____ INST. _____ CHANGE
SATISFACTION SATISFIED BY PM _____ INST. _____ FILED AT _____	SATISFACTION SATISFIED BY PM _____ INST. _____ FILED AT _____	DATE AND TIME OF ENDORSEMENT
DATE OF ENTRY	DATE OF ENTRY	SIGNATURE AND SEAL

CERTIFICATE OF OWNERSHIP OF VESSEL

1. VESSEL

A. NAME OF VESSEL	B. OFFICIAL NUMBER	C. HOME PORT
-------------------	--------------------	--------------

2. OWNERSHIP CERTIFICATION

I HEREBY CERTIFY THAT THE ABOVE-NAMED VESSEL BEARING THE OFFICIAL NUMBER INDICATED, IS OWNED AS FOLLOWS:

3. ENCUMBRANCES

AND THAT THE FOLLOWING MORTGAGES, LIENS, OR OTHER ENCUMBRANCES ARE ON RECORD AT THIS OFFICE:

A. KIND OF ENCUMBRANCE:

Preferred Ship's Mortgage

(1) GRANTOR	(2) GRANTEE	(3) DATE OF INSTRUMENT 5/25/82
		(4) AMOUNT \$250,000.00
		(5) MATURITY DATE 11/25/87

6. RECORDATION DATA	(a) DATE 6/1/82	(b) TIME 6:15 p.m.	(c) BOOK BK	(d) PAGE
---------------------	--------------------	-----------------------	----------------	----------

7. ENDORSEMENT DATA	(a) DATE 6/1/82	(b) TIME 6:45 p.m.	(c) PORT Boston, Massachusetts
---------------------	--------------------	-----------------------	-----------------------------------

B. KIND OF ENCUMBRANCE:

(1) GRANTOR	(2) GRANTEE	(3) DATE OF INSTRUMENT
		(4) AMOUNT
		(5) MATURITY DATE

6. RECORDATION DATA	(a) DATE	(b) TIME	(c) BOOK	(d) PAGE
---------------------	----------	----------	----------	----------

7. ENDORSEMENT DATA	(a) DATE	(b) TIME	(c) PORT
---------------------	----------	----------	----------

C. KIND OF ENCUMBRANCE:

(1) GRANTOR	(2) GRANTEE	(3) DATE OF INSTRUMENT
		(4) AMOUNT
		(5) MATURITY DATE

6. RECORDATION DATA	(a) DATE	(b) TIME	(c) BOOK	(d) PAGE
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7. ENDORSEMENT DATA	(a) DATE	(b) TIME	(c) PORT
---------------------	----------	----------	----------

ISSUED: DATE 12 April 1983 TIME 8:00 a.m.

SEAL

Anthony L. Antonino  
DOCUMENTATION OFFICER

FEDERAL LICENSING REQUIREMENTS

Coastwise Trade and Use of Foreign Vessels

1. Coastwise Trade Definition: 46 U.S.C. 883 and 19 CFR 4.80.
2. Coastwise License Requirements: 46 U.S.C. 11, 802 and 883.
  - United States-flag
  - United States-built
  - United States citizen ownership
3. Loss of Coastwise Privileges.
4. Practical Effect of Coastwise License.
  - Carriage of supplies
  - Carriage of products
  - Transfer of product to another vessel in internal waters, in the territorial sea, or in the Fishery Conservation Zone
5. Inspection Requirements: 46 U.S.C. 367, 395 and 404.
  - Fishing vessels
  - Processing and support vessels
  - Combination vessels
6. Manning Requirements: 46 U.S.C. 221, 643, 672, 672a, 673, and 690.
  - United States citizen crew
  - Licensed officers
  - Watches
  - Visa requirements



REGULATIONS  
PAST PRESENT & FUTURE

LCDR L.P. MINOTT, JR., USCG  
MARINE SAFETY DIVISION  
FIRST COAST GUARD DISTRICT  
BOSTON, MASSACHUSETTS

OUTLINE

- I. LAW SINCE THE BEGINNING
- II. FISHERMEN ARE RESOURCES
- III. FISHERIES-LEAST SAFETY REGULATED
- IV. BROAD BASED REGULATIONS
- V. A PRESENT BILL
- VI. UNINSPECTED COMMERCIAL VESSEL SAFETY BOARDINGS
- VII. FUTURE LEGISLATION
- VIII. CONCLUSION

AUDIENCE QUESTIONS

PRIVATE FINANCING OF FISHERIES DEVELOPMENT  
A COMBATANT'S PERSPECTIVE

PRESENTATION

A CONFERENCE ON EAST COAST FISHERIES LAW

June 24-25, 1983

UNIVERSITY OF MAINE  
SCHOOL OF LAW  
PORTLAND, MAINE

by

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PRIVATE FINANCING OF FISHERIES DEVELOPMENT

A COMBATANT'S PERSPECTIVE

- I. The Recent History
- II. Sources of Financing
  - A. Commercial Lenders
  - B. Bank Finance
  - C. Industrial Revenue Bonds
  - D. Federal Assistance
    - 1. NMFS
    - 2. Capital Construction Fund
- III. Borrower's Application Requirements
  - A. Type of Borrower
    - 1. Corporation
    - 2. Partnership
    - 3. Individual
    - 4. Guarantors involved?
  - B. Experience in the Industry
    - 1. Source/amount of equity
    - 2. Experience in the same capacity that the loan will be for
  - C. Financial history
    - 1. Minimum 3 years of financials prepared by CPA or 3 years tax returns prepared by CPA
    - 2. Credit references
    - 3. Commercial/trade reference
    - 4. Customer references

IV. Vessel Finance - Trend is away from loaning on collateral value of vessels

A. Who will run it

1. Owner operator?
2. If not, reasons for owner investment; who will be Captain?
3. For b., experienced master?
4. Vessel to be managed?

B. Quality of the Vessel

1. New or used
2. Survey from surveyor known by owner and/or lender
3. If new construction - reputation and performance of yard - should allow surveyor of owner or lender observe construction

C. Type of Vessel

1. Single fishery - resource/marketing questions
2. Combination vessel - cost of change over - adequate perfection of security interests

D. Vessel Construction

1. Steel, wood, fiberglass - may alter term of loan
2. Northern Yard/Southern Yard

E. Related Equipment

1. Electronics - scheduled for insurance purposes
2. Related fishing gear not in use, C.2., above

V. Facility Finance

A. Facilities Contemplated

1. Processing
2. Support - fuel, ice, supplies

B. Qualifications/Experience of Management

C. Pro Formas - 5 years - Debt and Equity

1. Fish price trends
2. Regulatory trends

D. If a Processing Facility -

1. Marketing ability
2. Transportation facilities
3. Customer base
4. Reliability of sources of product

E. Use of Funds

1. Operating funds
2. Line of credit
3. Contingency account

VI. Securing the Loans (Apart from the Promissory Note)

A. Vessel loans

1. Documentation with U.S.C.G.
2. Preferred Ship Mortgage
3. Financing Statements
4. Real Estate Mortgages
5. Cross - Collateralization
6. Guarantys
7. Stock pledges

**B. Shore - facility loans**

1. Financing statements
2. Real Estate Mortgages
3. Guarantys
4. Cross - Collaterization
5. Stock pledges

**C. Insurance**

1. Vessel Insurance
  - a. Hull min. 110% outstanding balance - better to have agreed value policy
  - b. P&I - \$1 Million - Number in crew?
  - c. Pollution
  - d. Scheduled electronics
  - e. Breach of Warranty/ mortgagee's single interest coverage
  - f. Notice of cancellation
2. Facility Insurance
  - a. Fire with extended coverage
  - b. Liability
3. Life insurance (decreasing term) or key man insurance on principals

VII. Areas of Concern/Rules of Thumb

- A. Vertically Integrated Entities - Vessel to Processor to Market
- B. "Managed Vessels"
- C. Vessel Migration
- D. Financing of Insurance Premiums
- E. Lapse of Insurance Policies
- F. Green Grouper
- G. On start-up - Preparation costs about 5% of amount to be financed
- H. Use of CPAs, surveyors, other advisors

0791B

## CODE OF FEDERAL REGULATIONS

## TITLE 50

PART 255 - FISHERIES OBLIGATION GUARANTEE PROGRAMSec.

- 255.1 Purpose.
- 255.2 Definitions.
- 255.3 Applications.
- 255.4 Citizenship requirements.
- 255.5 Project requirements.
- 255.6 Guarantee limits, debt maturities, and interest rates.
- 255.7 Fishing industry ability and experience.
- 255.8 Economic soundness.
- 255.9 Financial requirements.
- 255.10 Collateral.
- 255.11 Miscellaneous requirements.
- 255.12 Fees.
- 255.13 Demands and payment.
- 255.14 Default/liquidation of collateral.
- 255.15 Program guidelines.
- 255.16 Applicability of rules.

AUTHORITY: Title XI, Merchant Marine Act, 1936, as amended (46 U.S.C. 1271-1279, Pub. L. 96-561) and Reorganization Plan No. 4 of 1970 (86 Stat. 909).

SOURCE: 47 Fed. Reg. 57435, Dec. 23, 1982, unless otherwise indicated.

REGULATORY HISTORY: Notice of proposed rulemaking, 47 FR 33648, Aug. 3, 1982; final rule, 47 FR 57432, Dec. 23, 1982.

§255.1 PURPOSE.

These rules govern guaranteed financing for fishing vessels and fisheries shoreside facilities under the provisions of Title XI of the Merchant Marine Act, 1936 (46 U.S.C. 1271-1279), as amended by the American Fisheries Promotion Act (Pub. L. 96-561). The purpose of the Fisheries Obligation Guarantee Program is to make long-term financing available to the United States fishing industry by providing a U.S. Government guarantee of repayment of the debt portion of fishing vessel and shoreside facility construction, reconstruction, reconditioning, or (where eligible) purchasing costs.



§255.2 DEFINITIONS.

(a) Act means Title XI of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1271-1279).

(b) Actual Cost means the total amount paid or owed by an obligor for the construction, reconstruction, reconditioning or (where eligible) purchase of fishing vessels or fisheries shoreside facilities.

(c) Agency means the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

(d) Chief, Financial Services Division means the Chief, Financial Services Division, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or his designee.

(e) Citizen of the Northern Mariana Islands means:

(1) Any individual who is a citizen of the Northern Mariana Islands (and qualifies as such under Section 8 of the Schedule on Transitional Matters attached to the Constitution of the Northern Mariana Islands);

(2) Any corporation formed under the laws of the Northern Mariana Islands, if at least 75 percent of it is owned by individuals specified in paragraph (e)(1) of this section or citizens or nationals of the United States; or

(3) Any partnership or other form of association, if all the general partners, and at least 75 percent of all partners, are individuals specified in paragraph (e)(1) of this section or citizens or nationals of the United States.

(f) Citizen or National of the United States means:

(1) Any individual who is a citizen of the Northern Mariana Islands or a citizen or national of the United States of America;

(2) Any corporation, if at least 75 percent of it is owned by citizens of the Northern Mariana Islands or by citizens or nationals of the United States of America within the meaning of the provisions of Section 2 of the Shipping Act, 1916 (46 U.S.C. 802); or

(3) Any partnership or association, if all the general partners, and at least 75 percent of all partners, are citizens of the Northern Mariana Islands or citizens or nationals of the United States of America.

(g) Conditional Fishery means any fishery which has been declared as conditional under 50 CFR Part 251.

(h) Contribute to the Development of the U.S. Fishing Industry means any project which:

(1) Enables fishing vessels to reduce harvests in conditional fisheries;

- (2) Applies new technology;
- (3) Makes any fisheries operation afloat or ashore more efficient, productive, or competitive;
- (4) Has a potential for increasing fisheries exports;
- (5) Aids in the development of an underutilized fishery; or
- (6) In any other demonstrable way, contributes to the stability, growth, productivity, or development of the U.S. fishing industry.

(i) Depreciated Actual Cost means the actual cost of a fishing vessel or fisheries shoreside facility, depreciated (excluding land, which is not depreciable) on a straightline basis at one-year intervals over the vessel or facility's economically useful life, less a 10 percent salvage value.

(j) Economically Useful Life means the period during which the fishing vessel or fisheries shoreside facility, with proper maintenance, will remain economically productive.

(k) Fish means all forms of aquatic animal and plant life other than marine mammals and birds.

(l) Fisheries Shoreside Facility means any land, or structure or equipment on land, used for unloading, receiving, holding, processing, or distributing fish of every kind (including fish caught as a result of commercial passenger carrying fishing operations). This term does not include:

- (1) Office furniture, equipment, or supplies;
- (2) Any rolling equipment which will be used outside the primary production site;
- (3) Any other non-fixed equipment which should be financed either from working capital or by the proceeds of short-term financing from other sources; or
- (4) Any facility where more than 49 percent of the gross income is projected to be from the retail selling of fish or fisheries products or from anything else other than the unloading, receiving, holding, processing, or distribution of fish.

(m) Fishing Vessel means any vessel, boat, ship, or other craft which is documented under United States law and is used for, equipped to be used for, or of a type which is normally used for commercial fishing (including commercial passenger carrying fishing vessels) or aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing (including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing).

(n) Obligee means the party who lends the proceeds of a guaranteed obligation or invests in a guaranteed obligation.

(o) Obligor means the party who borrows the proceeds of a guaranteed obligation.

(p) Program means the Fisheries Obligation Guarantee Program under Title XI of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1271- 1279).

(q) Project means a construction, reconstruction, reconditioning, or (where eligible) purchase of fishing vessels or fisheries shoreside facilities, whose financing will be guaranteed under the Program.

(r) Reconstruction or Reconditioning means any improvements of used fishing vessels or fisheries shoreside facilities provided that:

(1) At least 75 percent of improvement expenditures are capital, rather than expense, items;

(2) The improved vessel or facility will have an economically useful life of at least 10 years (or longer if the term of the proposed financing for which a guarantee is sought is longer), but specific equipment involved in a reconstruction or reconditioning may individually have economically useful lives of less than 10 years;

(3) The improved vessel or facility will be fit and sufficient for its intended operation; and

(4) The improvement project involves more than routine repair or maintenance.

(s) Secretary of Commerce means the Secretary of Commerce, or his designee.

(t) State means any State of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands of the United States, Guam, the Northern Mariana Islands, any other commonwealth, territory, or possession of the United States of America, or any political subdivision of any of the above.

(u) Underutilized Fishery means:

(1) Any species of fish for which foreign fishing within the U.S. Fishery Conservation Zone is permitted or any species of fish within or without such zone for which a demonstration can be made that such species is not fully utilized by U.S. fishing vessels (including species designated as underutilized by states under whose fishery management jurisdiction those species fall); or

(2) For fisheries shoreside facilities, any facility which will utilize the species defined in paragraph (u)(1) of this section, or any facility for which a demonstration can be made that existing fisheries shoreside facilities are inadequate to fully, properly, or efficiently utilize fishing vessel production, regardless of the species involved.

### §255.3 APPLICATIONS.

Applications for a program guarantee should be submitted to the Agency office listed below which corresponds to the region in which the proposed project will operate:

National Marine Fisheries Service, Northeast Region, Financial Services Branch, Post Office Building, Box 1109, Gloucester, Massachusetts 01930 (617) 281-3600

National Marine Fisheries Service, Northwest Region, Financial Services Branch, 7600 Sand Point Way, NE., Bin C15700, Seattle, Washington 98115 (206) 527-6122

National Marine Fisheries Service, Southeast Region, Financial Services Branch, 9450 Koger Blvd., Duval Bldg., St. Petersburg, Florida 33702 (813) 893-3148

National Marine Fisheries Service, Southwest Region, Financial Services Branch, 300 South Ferry Street, Terminal Island, California 90731 (213) 548-2478

Application forms are obtainable from the offices listed above. All potential applicants should discuss their project with a regional Program officer before submitting an application.

### §255.4 CITIZENSHIP REQUIREMENTS.

Any citizen or national of the United States is eligible to apply for a guarantee under the Program.

### §255.5 PROJECT REQUIREMENTS.

(a) Qualifications for Program Guarantees. Program guarantees are available for financings (including reimbursement of obligors for expenditures previously made) for the construction, reconstruction, reconditioning, or (where eligible) purchase of any fishing vessel documented under United States law or any fisheries shoreside facility located anywhere in any State of the United States.

(b) Used Fishing Vessels and Fisheries Shoreside Facilities. Financing of the purchase cost of any used fishing vessel or fisheries shoreside facility may be guaranteed only if the vessel or facility will (1) aid in the development of an underutilized fishery or (2) contribute to the development of the U.S. fishing industry and be reconstructed or reconditioned in the United States.

(c) Conditional Fisheries. Program guarantees are available for financing the construction of a new fishing vessel which will operate in a conditional fishery, or which will result in the transfer of a used vessel into

operation in a conditional fishery, only if one of the following conditions is met:

(1) The vessel whose financing is guaranteed (despite the fact that it will operate in a conditional fishery) is also fully equipped for, and fully capable of, operating in an underutilized fishery;

(2) The vessel involved will replace a vessel of comparable fishing capacity which had operated in the conditional fishery prior to the designation of such fishery as conditional;

(3) The vessel whose financing is guaranteed was contracted for prior to the designation of the fishery in which it will be operated as conditional;

(4) The financing to be guaranteed will be used for the reconstruction or reconditioning of a vessel already operating in the conditional fishery; or

(5) The application for Program guarantee had been submitted prior to the designation as conditional of the fishery in which the vessel will be operated. See 50 CFR Part 251 for those fisheries which are designated as conditional.

(d) Eligibility for Vessels or Facilities Which Will be Used in Underutilized Fisheries. In order for the financing of a fishing vessel or fisheries shoreside facility to be eligible for a Program guarantee because such vessel or facility will be used in an underutilized fishery (including the underutilized fisheries aspects of the conditional fisheries requirements), such vessel or facility must be fully equipped for, and be fully capable of, operating in an underutilized fishery. This determination will be made by the Chief, Financial Services Division at the time of Program guarantee approval. The Obligor will be required to execute an agreement to operate the vessel in the underutilized fishery.

#### §255.6 GUARANTEE LIMITS, DEBT MATURITIES, AND INTEREST RATES.

(a) Actual Cost. In addition to the cost of construction, reconstruction, reconditioning, or (where eligible) purchase of a fishing vessel or fisheries shoreside facility, the actual cost of such a vessel or facility may also include:

(1) Reasonable architectural, engineering, or inspection expenses incurred with regard to the vessel or facility before completion;

(2) Reasonable expenses for interest on debt incurred to finance the vessel or facility during its construction, reconstruction, or reconditioning;

(3) The reasonable expenses of any contract for consulting services to assess the financial, economic, or technical feasibility of a vessel or facility or its fitness and sufficiency, if such services are required by the Chief, Financial Services Division, as a precondition to a decision about the approval of a guarantee.

(4) Dredging or other costs deemed by the Program to be necessary. Actual costs do not include any other expenses which cannot be capitalized under generally accepted accounting principles (except acceptable items for repair or maintenance associated with reconstruction or reconditioning).

(b) Guarantee Limits. The Program may guarantee financing representing up to 87½ percent of the actual cost or depreciated actual cost of the construction, reconstruction, reconditioning, or (where eligible) purchase of fishing vessels or fisheries shoreside facilities. Consideration of the risk involved may, however, result in a guarantee approval for less than 87½ percent of actual cost.

(c) Debt Maturities. Debt maturities on obligations guaranteed under this Program may not exceed 25 years. No debt maturity may, however, exceed the economically useful life of the fishing vessel or fisheries shoreside facility involved. The economically useful life will be determined by the Chief, Financial Services Division, on a case-by-case basis.

(1) Fishing Vessels. Generally, 25-year maturities for obligations on fishing vessels guaranteed under the Program will be restricted to financings for the construction of large and expensive fishing vessels with economically useful lives supporting a 25-year maturity. Debt maturities on guaranteed obligations for financing smaller and less expensive fishing vessels will generally be restricted to 15-20 years (or less, if their economically useful lives are less or if risk considerations require less).

(2) Fisheries Shoreside Facilities. Debt maturities on guaranteed obligations for financing major fisheries shoreside facilities construction Projects may generally be up to 25 years if the economically useful life of the facility is at least that long. If a major facility Project involves a significant amount of financing for fixed equipment which has a shorter economically useful life than that of the structure which houses it, an acceptable maturity date for the whole Project will be determined by a weighted average of the differing economically useful lives involved or by such other method as the Chief, Financial Services Division, deems appropriate (including separate financings if that is warranted). More minor facilities Projects will generally be restricted to debt maturities of 15-20 years (or less, if their economically useful lives are less or if risk considerations require less).

(3) Reconstruction and Reconditioning. The debt maturity of guaranteed financing for reconstruction or reconditioning will not extend beyond the economically useful life of the vessel or facility in its reconditioned or reconstructed state. The economically useful life of a reconstructed or reconditioned vessel or facility will be determined by the Chief, Financial Services Division, on a case-by-case basis.

(d) Interest Rates. Interest rates on obligations to be guaranteed under the Program shall be approved by the Program and shall not exceed the rate determined to be reasonable, taking into account the range of interest rates prevailing in the private market for similar transactions.

(e) Refinancing. Refinancings may be guaranteed if the financing which is being refinanced would itself have been eligible for a Program guarantee.

(f) Foreclosure Purchase. The financing of the purchase price of a vessel or facility whose previous financing was guaranteed under the Program and which is then sold at a foreclosure sale (or sold subsequent to the foreclosure sale after the Program purchases the vessel or facility at foreclosure) may be guaranteed under the Program.

#### §255.7 FISHING INDUSTRY ABILITY AND EXPERIENCE.

(a) Owner-Operated Projects. Fishing vessel and fisheries shoreside facility owners must possess the necessary ability, experience, resources, character, reputation, and other qualifications to operate properly and maintain the vessel or facility and protect the Program against undue risk. Owners who cannot demonstrate a successful background of ability and experience in the fishing industry of an appropriate duration, degree, and nature considering the type and magnitude of the Project for which financing is being sought will not be eligible for a Program guarantee. Under appropriate circumstances, and at the Program's sole discretion, the lessee of a financing lease may be considered as an "owner" for the purposes of meeting the requirements of this section.

(b) Equity Contributors. Equity contributors without this demonstrated fishing industry ability and experience may be allowed to own a portion, not to exceed 49 percent, of the vessel or facility for which guaranteed financing is sought only if:

(1) At least 51 percent of the vessel or facility is owned by persons who do possess the requisite fishing industry ability and experience, and such persons have made a full pro-rata equity contribution, are severally 100 percent liable for the debt obligation, and are responsible for the management and operation of the Project; and

(2) The vessel or facility being financed is so large and so expensive as to be beyond the normal equity funding capability of an owner with the requisite fishing industry ability and experience.

(c) Limitation of Liability. In no event will equity contributors be permitted to limit their liability to the amount of their original equity contribution. Each equity contributor shall, additionally, be jointly and severally liable for at least the amount of the guaranteed debt obligation which corresponds to the percentage of such equity contributor's ownership interest in the vessel or facility. This limitation of liability provision shall apply to all equity contributors in closely-held corporations, partnerships, and joint ventures.

#### §255.8 ECONOMIC SOUNDNESS.

(a) Income and Expense Projections. Conservative income and expense projections must reasonably assure adequate net earnings from operation of the vessel or facility. This projection must allow the prospective accumulation of net retained earnings sufficient to provide for operational contingencies, to establish a reasonable reserve for depreciation, and to protect the Project against cyclical economic conditions in the fishing industry.

(b) Underutilized Fisheries. An economic soundness test for vessels or facilities to be operated in underutilized fisheries that is less stringent than the requirements for vessels or facilities to be operated in more developed fisheries may, at the Program's discretion, be applied. This less stringent economic soundness test will, however, not extend to factors beyond the uncertainty of cash-flow projections in an underutilized fishery. Moreover, the Program will otherwise only guarantee financing for vessels or facilities which are to operate in the initial development stages of an underutilized fishery if the owners of those vessels or facilities adequately share with the Program a higher degree than ordinary of the greater financial risk. Demonstrated fisheries ability and experience requirements, financial condition requirements, and collateral requirements all may be stringent when the vessel or facility financed is to operate in the initial development stages of an underutilized fishery rather than in a more developed fishery. Owners of vessels or facilities which are to operate in the initial development stages of an underutilized fishery must possess exceptional fisheries ability and experience.

(c) Consultant Services. The Program may require, as a pre-condition to a decision about approving a guarantee, that expert consulting services be provided. This requirement will generally be restricted to situations where a guarantee is sought for financing for larger and more expensive vessels to be operated in underutilized fisheries, or for larger and more expensive fisheries shoreside facilities, but may also be imposed where a guarantee is sought for financing for larger and more expensive vessels to be operated in more developed fisheries. The expert consulting services may be required to assist in assessing economic, technical, and financial feasibility, property design and engineering or other factors. When such a requirement is imposed, the Program (under conditions acceptable to the Obligor) will choose the consultant and specify the consultant's duties, and the Obligor will reimburse the Program for the Program's payment of the consultant's services. No approved application will be closed until satisfactory arrangements have been made for such reimbursement. If an application is declined, the 25 percent commitment fee may be used by the Program for such reimbursement. When such a requirement is imposed by the Program, the cost of such consulting services may be included in the actual cost of the Project (if approved) for purposes of determining the amount of the guarantee.

#### §255.9 FINANCIAL REQUIREMENTS.

(a) Working Capital. The vessel or facility owner must be in sufficiently sound financial condition to meet obligations, to continue to operate successfully the vessel or facility and all other business operations, and to protect the Program against undue risk. Audited financial statements will ordinarily be required in applications for guaranteed financing for large fisheries shoreside facilities Projects, and may be required in applications for other purposes. Working capital (current assets minus current liabilities) requirements will be established on a case-by-case basis, but must in all cases be sufficient to fund vessel or facility operations until the vessel or facility can generate sufficient income to do so. Working capital must be sufficient not only for the Project for which guaranteed financing is sought, but for all other affiliated projects, businesses, or interests. The minimum working capital from equity sources must in the case of fishing vessel con-



struction equal at least 8 percent of the total capitalizable cost of the vessel. In the case of fisheries shoreside facility construction, the minimum working capital required from equity sources will be determined on a case-by-case basis, but will ordinarily be considerably greater than that required for fishing vessels. Minimum working capital requirements for reconstruction, reconditioning, and (where eligible) purchasing Projects will be decided on a case-by-case basis. Additional working capital may be required on a case-by-case basis and may, at the Program's discretion, consist of readily convertible investments, other assets readily capable of being used to generate working capital, lines or letters of credit, or the presence of a co-maker or guarantor with sufficient financial resources.

(b) Equity. No financing shall be approved for a guarantee unless the Obligor can demonstrate that, at the time of the financing's closing, minimum capital provided from equity sources is equal to at least the total of the following:

- (1) 12½ percent of the total capitalizable cost of the construction, reconstruction, reconditioning, or (where eligible) purchase of the vessel or facility (the downpayment);
- (2) The Program's first-year guarantee fee;
- (3) The first year's premium for all required insurance;
- (4) The minimum working capital requirement; and
- (5) Such other additional amounts as the Program may deem necessary on a case-by-case basis.

(c) Guarantees of Financing for Fisheries Shoreside Facilities or Processing Vessels. Applicants for guarantees for financing of fisheries shoreside facilities and processing vessels will be required to obtain acceptable lines or letters of credit (some may be required to be in the form of irrevocable letters of credit) for all foreseeable inventory financing needs (beyond those to be met by the working capital available from equity sources) during at least the first year of operation of the facility or vessel.

#### §255.10 COLLATERAL.

(a) Mortgage. The vessel or facility for which the financing is to be guaranteed should always be collateral for the Program guarantee. This property ordinarily will be secured by a first mortgage or, and in the case of vessels, by a first preferred ship mortgage in favor of the Secretary of Commerce. In the case of equipment, the security interest may be perfected by a filing in accordance with the Uniform Commercial Code and/or by the recording of any form of security agreement or mortgage (e.g. chattel mortgage) necessary in a jurisdiction where the Uniform Commercial Code has not been adopted.

(b) Guarantees. If, in considering the risk involved in guaranteeing a financing, net worth is a significant factor relied on to offset other risks, such net worth must ordinarily be pledged as additional collateral for the program guarantee (an irrevocable letter of credit may be substituted under

terms and conditions acceptable to the Program). If a closely-held corporation will be the Obligor, all major stockholders will ordinarily be required to provide their personal guarantees as additional collateral for the Program guarantee. If a subsidiary corporation, without substantial assets in addition to the vessel or facility is Obligor, the parent corporation will ordinarily be required to provide its guarantee as additional collateral for the Program guarantee. Personal or entity guarantees will always be required as additional collateral for Program guarantees where necessary to assure that the principal parties in interest, who ultimately stand most to benefit from the Project, are held accountable for the performance and operation of the Project.

(c) Limitation of Liability. In no instance will equity contributors be permitted to limit their liability on a guarantee only to the amount of their initial equity contribution. Equity contributors will, additionally, be required to be at least jointly and severally liable for the amount of the guaranteed obligation which corresponds to the percentage of their ownership interest in the Project. Such equity contributors may, however, be required to be liable for more than such percentage. Under appropriate circumstances, and at the Program's sole discretion, the lessor of a financing lease may be treated differently.

(d) Dual-Use Capital Construction Fund Agreement. In the case of fishing vessels, the Program may require, as additional collateral, execution of a dual-use Capital Construction Fund Program agreement, and annual deposit into such fund (on a tax-deferred basis) of a reasonable portion of the net income of the vessel. Dual-use agreements provide for all the normal benefits of the Capital Construction Fund Program, but also give the Program control of withdrawals from a Capital Construction Fund and allow the Program to use these reserved funds, in the event of a default, to repay the debt obligation involved in the guaranteed financing. This control insures that the Obligor will have an emergency reserve of funds, as well as a reserve for reconditioning of the vessel. At the Program's discretion, reserved funds not required in connection with the vessel for which financing is guaranteed may be withdrawn for other qualified purposes.

(e) Reconstruction or Reconditioning. The Chief, Financial Services Division, may, in his discretion, require such additional security or collateral as may be necessary to secure the Program's interest.

#### §255.11 MISCELLANEOUS REQUIREMENTS.

(a) Insurance. All vessels and facilities for which financing is guaranteed shall be continuously insured during the term of the Program guarantee with such casualty, liability, breach of warranty, keyman, title, and/or other insurance in such form and amounts as the Program deems necessary. The Program shall ordinarily be the sole loss payee on all such insurances. No such insurances may be cancelled without 20 days prior written notice to the Chief, Financial Services Division. The Program's standard endorsements regarding the insured's breach of warranties, negligence, omission, etc., as well as an admission of seaworthiness or property soundness, shall be a part of all such insurances.

(b) Bids and Project Costs. If application for Program guarantee is first made before a contract for the vessel or facility to be financed is executed, not less than three responsive bids for the vessel or facility will ordinarily be required. Ordinarily, the lowest bid will be accepted, unless the Obligor and the Program agree that it is advisable to accept a higher bid. If application for a Program guarantee is first made after a contract for the vessel or facility has been executed, the Program may not guarantee a financing in an amount higher than would fairly and reasonably have resulted if competitive bidding had occurred. All applicants are encouraged to obtain at least three competitive bids, and applicants without such bids who first apply after a contract has been executed may be required by the Program to establish, at their expense, independent confirmation acceptable to the Program that the contract cost is both fair and reasonable. Approvals and commitments for Program guarantees will be based on the initial contract cost, and contract cost overruns may or may not, at the sole discretion of the Program, be added to the amount of the guaranteed financing.

(c) Property Inspection. The Program will require inspection and approval of all vessels and facilities before providing a financing guarantee. For all guarantees involving financings of more than \$500,000, the Program, where appropriate, will require inspection and approval by certified architects or engineers (either marine or real property architects or engineers). For program guarantees for financing of less than \$500,000, the required property inspection and approval may, at the Program's discretion, be made by any competent authority acceptable to the Program. The required property inspection and approval should involve assessment of at least the following:

- (1) Adequacy of workmanship;
- (2) Fitness and sufficiency for the intended purpose;
- (3) Reasonableness of cost;
- (4) Compliance with basic contract specifications regarding the property; and
- (5) The identification and recommended resolution of any significant deficiencies.

Where financing for used vessels or facilities is to be guaranteed, the inspection and approval assessment will be adjusted to provide the normal assurances associated with financing the acquisition of used property. Issuance of guarantees of financings involving more than \$5,000,000 may be conditioned upon additional requirements regarding the inspection and approval of a vessel or facility. Program guarantees of financings involving more than \$5,000,000 should always be conditioned on comprehensive on site inspection, by certified architects and engineers, and inspection of the vessel or facility to be financed at appropriate times during construction, reconstruction, or reconditioning. The Program may require American Bureau of Shipping classification requirements for all Program guarantees involving fishing vessels costing more than \$5,000,000, and applicants are urged presently to consider voluntary use of the American Bureau of Shipping classification program for the construction of all fishing vessels costing over \$5,000,000. All required property inspections and approvals must be conducted by competent and impartial authorities

acceptable to the Program. Architects, engineers, surveyors, or appraisers employed by contractors constructing, reconstructing, or reconditioning a vessel or facility, or by parties selling used vessels or facilities, are not acceptable for meeting this requirement. The cost of inspection and approval services in connection with a vessel or facility may be included in the actual cost of the vessel or facility and, thus, guaranteed by the Program.

(d) Maintenance Reviews. All vessels and facilities for which financing is guaranteed under the Program shall be inspected at least once every three years by a competent and impartial authority acceptable to the Program. A full inspection report, identifying deficiencies and recommending the action necessary for their correction, will be provided to the Obligor and to the Program. Failure to provide this tri-annual inspection, or correct deficiencies identified by it, will constitute a default of the terms and conditions of mortgages securing the Program's guarantee and a cause, at the Program's discretion, for acceleration and liquidation of the debt obligation. Special property inspections may be required whenever the Program deems it necessary to preserve its collateral. All such inspections shall be at the expense of the Obligor. This requirement extends to all supplementary collateral for Program guarantees.

(e) Terms and Conditions of Program Guarantees. The Program will, on a case-by-case basis, specify in detail the precise terms and conditions prerequisite to the Program's willingness to provide a guarantee. These terms and conditions are at the Program's sole discretion, and an applicant's failure to comply with them will result in nonqualification for a Program guarantee.

(f) Program Obligees. The applicant may choose the Obligee to fund the debt to be guaranteed by the Program. Obligees may be any financial institution, public agency, or other party. The Program may, however, refuse to guarantee financing unless it has approved the terms and conditions of the financing (including particularly the interest rate and other amortization provisions) before the Obligor makes a firm commitment to an Obligee. Failure to first obtain the Program's approval may result in the Program's refusal to issue the guarantee despite the fact that the Obligor may have created a binding contract with an Obligee, abrogation of which may result in loss to the Obligor. The Program will assist those whose applications for Program guarantees are approved to gain access to the private market for appropriate financing, but only as a gratuitous service.

Arrangements between the Obligor and the Obligee are a matter of private contract between those two parties, and the Program will not in any way be responsible to either for nonperformance by the other.

(g) Closing:

(1) Contracts. All debt obligations and associated contractual arrangements which comprise the financing will be documented by standard Program forms, which may not be altered or amended in any way by insertion, deletion, or variation without prior Program approval (which will be sparingly granted).

(2) Closing Schedules. The Program will attempt to meet the closing schedules (where reasonable) of Obligors and Obligees. The Program, however, accepts no responsibility for adverse interest-rate fluctuations, loss of commitments, or other consequences of non-compliance with Obligors' or Obligees' closing schedules. Obligors and Obligees should work closely with the Program to assure reasonable closing schedules, since internal workload and personnel considerations sometimes affect the Program's ability to meet otherwise desirable schedules.

(3) Closing Vessel Financings. The Program will attempt to close guarantees on financings involving fishing vessels with minimal services from private attorneys and/or other private contractors.

(4) Closing Shoreside Facilities Financings. Closings for guarantees of financing for fisheries shoreside facilities will require substantial services from private attorneys and/or other contractors at the expense of the Obligor. The choice of such private contractors for any portion of the closing process is subject to Program approval. Services required to be provided by private contractors may include: title searches; preparation of legal documents; actual closing, escrow, and disbursement services; and the provision of a legal opinion from acceptable counsel regarding the validity and binding effect of transactions, compliance with procedures specified by the Program, and other assurances.

(5) Paying Agents. The Chief, Financial Services Division, in his discretion, may require the use of a paying agent or trustee. Where paying agents are used, Obligors or Obligees will be responsible for their cost.

§255.12 FEES.

(a) Filing and Commitment Fees. The Program's filing and commitment fee shall be  $\frac{1}{2}$  of 1 percent of the first \$2,000,000 principal amount (or portion thereof) of the Program guarantee for which application is made and  $\frac{1}{4}$  of 1 percent of all principal amount over \$2,000,000. The fee shall be due at the time an application is submitted, and no application for guarantee shall be accepted unless the full filing and commitment fee accompanies it. The filing fee shall be 75 percent of the filing and commitment fee, and once an application for a guarantee is accepted, no portion of the filing fee shall be returned for any reason. The commitment fee shall be the remaining 25 percent of the filing and commitment fee, and shall be returnable only if a refund is requested before the Program issues an Approval in Principle letter or if the application is declined.

(b) Guarantee Fee. The Agency guarantee fee shall be:

(1) For guarantees on financings not involving underutilized fisheries risks,  $\frac{3}{4}$  of 1 percent of the average unpaid principal balance of the debt obligation for which the guarantee is outstanding during each year of the life of the guarantee; and

(2) For guarantees on financings involving underutilized fisheries risks, 1 percent of the average unpaid principal balance of the debt obligation for which the guarantee is outstanding during each year of the life of the guarantee.

The guarantee fee shall be due in advance based upon the financing's amortization schedule. The first annual guarantee fee shall be due at closing of the guarantee. Each subsequent annual guarantee fee shall be due on the anniversary date of the closing of the guarantee. No refund of guarantee fees shall be made regardless of the status of the financing or the guarantee during the year to which the guarantee fee relates.

(c) Refinancing/Assumption Fee. The Program's refinancing/assumption fee shall be  $\frac{1}{4}$  of 1 percent of the principal amount of the debt obligation to be refinanced or assumed, and is due upon application for a guarantee for the refinancing/assumption. The refinancing/assumption fee is non-returnable regardless of the subsequent disposition of an application. The Chief, Financial Services Division, may, however, (1) waive the refinancing/assumption fee where the refinancing/assumption is primarily to protect the Program's interest or (2) charge an actual cost fee not to exceed \$1,000, where the refinancing/assumption does not substitute a wholly different obligor for the initial obligor.

(d) Where Payable. Fees shall be paid by check mailed to: U.S. Department of Commerce, National Oceanic and Atmospheric Administration, NBOC 1, Room 122, 11420 Rockville Pike, Rockville, Maryland 20852. Checks shall be made payable to: "NMFS/FSFF"

#### §255.13 DEMANDS AND PAYMENT.

All demands by Obligees, whose debt has been guaranteed under the provisions of this Program, for payment of all or any portion of a guaranteed obligation in default shall be made in writing to the Chief, Financial Services Division, F/UD5, 3300 Whitehaven St., NW., Washington, D.C. 20235, by certified mail, return receipt requested. In the event the Program does not acknowledge timely receipt of a demand alleged to have been timely made, the demander must possess evidence of the demand's timely delivery to the Program. Payment of demands shall be made within 30 days after receipt of a timely demand by the Chief, Financial Services Division. Demands may be made by Obligees' duly authorized agents or trustees.

#### §255.14 DEFAULT/LIQUIDATION OF COLLATERAL.

(a) Default. In the event of default by an Obligor which results in the payment by the Program to an Obligee of the guaranteed debt, the Program shall ordinarily foreclose on its collateral and institute personal collection proceedings against the Obligor and the guarantors of the financing. At the Program's sole discretion, other remedies which are deemed most appropriate to protect the Program's interest may be pursued.

(b) Liquidation of Collateral. If the Program is the highest bidder at a foreclosure sale of collateral, the Program (as the new owner of the collateral) may, in its sole discretion, subsequently complete, recondition, reconstruct, renovate, repair, maintain, operate, charter, lease, or sell such collateral. In the event there is a willing buyer for such collateral at an amount at least equal, or almost equal, to the amount owed the Program, the Program may convey title to such collateral, upon proper payment, without

competitive bidding or other contracting procedures. If there is not a willing buyer for such collateral at an amount equal, or almost equal, to the amount owed the Program, the collateral will ordinarily be disposed of by competitive bidding--unless the Program decides that it can best recover without competitive bidding. Any deficiency resulting from the Program's purchase of collateral at a foreclosure sale shall not be offset by receipts from a subsequent sale of such collateral in the event the Program purchases the collateral and sells it for an amount greater than that owed the Program; the original Obligors and guarantors of the guaranteed financing remain liable for such deficiency.

§255.15 PROGRAM GUIDELINES.

The Chief, Financial Services Division, will issue Program guidelines from time to time, as the need arises, to govern national Program policy and administrative issues which are not addressed by these rules.

§255.16 APPLICABILITY OF RULES.

These rules will be applicable to all Program applications first accepted after the rules' effective date.

Terry Leitzell  
Bogle & Gates  
Washington, D.C.

FISHERIES DEVELOPMENT

Financial Assistance

1. Shoreside Facility Loan Guarantees: 46 U.S.C. 1271-1279;  
47FR 57432 to 57441.
  - Citizenship of applicant
  - Financial standing
  - Working capital
  - Collateral
  - Guaranty charges
  - Availability of NMFS authority
  
2. Capital Construction Fund
  - Extension to cover shoreside facilities
  - Citizenship of applicant



Ken Coons  
New England Fisheries Development  
Foundation, Boston, MA.

SELECTED ACCOMPLISHMENTS OVER PAST TWO YEARS  
of the  
REGIONAL FISHERIES DEVELOPMENT FOUNDATIONS

Submitted as testimony for U.S. Senate Commerce Committee  
(per hearing March 10, 1983)

Alaska Fisheries Development Foundation  
Chris Mitchell, Executive Director  
805 W. 3rd Avenue  
Anchorage, AK 99501

Great Lakes Fisheries Development Foundation  
Claude VerDuin, Executive Director  
P.O. Box 658  
Grand Haven, MI 49417

Gulf & South Atlantic Fisheries Development Foundation  
Roger Anderson, Executive Director  
5401 W. Kennedy Blvd., Suite 571  
Tampa, FL 33609

Mid-Atlantic Fisheries Development Foundation  
Kerry Muse, Executive Director  
2200 Somerville Road, Suite 600  
Annapolis, MD 21401

New England Fisheries Development Foundation  
Ken Coons, Executive Director  
253 Northern Avenue  
Boston, MA 02210

Pacific Tuna Development Foundation  
Susumo Ono, Chairman/President  
P.O. Box 2359  
Honolulu, HI 96804

West Coast Fisheries Development Foundation  
Pete Granger, Executive Director  
812 SW Washington, Suite 900  
Portland, OR 97205

## ALASKA FISHERIES DEVELOPMENT FOUNDATION

### Pollock Industry Development Program

AFDF's most significant accomplishment has been the development of a new methodology for stimulating growth of the seafood industry. This new approach is embodied in the "Pollock Industry Development Program" begun recently with a pilot project.

The key to the new approach is that it relies on the profit motive of the private sector, forging new business relationships between the U.S. food industry and Alaska's seafood industry that will result in development of new markets and new products.

The new methodology for fisheries development has provoked such a positive response from so many sectors of private industry that the Foundation considers it a major achievement. As a corollary to the integrated nature of the new program, the Foundation's membership and industry participation network has diversified to include food companies, financial institutions, and suppliers of goods and services.

### Model White Fish Processing Facility

The Model White Fish Processing Facility project being conducted by the Alaska Foundation with subcontractor Trident Seafood Corporation was initiated in January 1982. The \$1.7 million in federal S-K funds invested in the project will carry through June 1984. This one facility has not only generated a tremendous wealth of technical and economic information for use in business planning, but also has added, since June 1982, 11 million pounds of Pacific cod to the 1982 domestic catch, 18 million pounds to the landings of first quarter 1983, and over 6 million pounds of wet salted split cod to U.S. seafood exports.

Since shore-based processing capacity is the most obvious missing link in the development of Alaska's underutilized fisheries, this plan represents a true pioneering effort. The experiences gained by Trident Seafoods at their remote Akutan Island facility are made accessible via the Foundation's employment of an on-site observer and its compilation, analysis and communication of information for its seafood industry constituents.

### Utilization of Fish Waste

Another pioneering venture in Alaska's seafood industry is represented by the groundfish catcher-processor "Arctic Trawler". The Alaska Foundation, with subcontractor Trans-Pacific International Industries (owner of "Arctic Trawler"), has been engaged for a year in a project to identify economically viable uses for portions of Pacific cod and pollock that are normally discarded by such a space-limited processing operation. With

assistance from private firms and the National Marine Fisheries Service, several new product concepts have been produced and tested, with production input factors monitored and analyzed. The results of this research will allow greater utilization of the entire fish, which is essential to profitability in processing such low-value species, and are expected to lead to commercial introduction of at least one new product in domestic markets.

### Crabber Conversion

Like some other regions of the U.S., Alaska has the problem of over-capitalization, or underutilized capacity, in some sectors of its fishing fleet. Severe problems of this nature are being experienced by the crab fleet, so a Foundation project was aimed at examining the economics of adapting a crabber to longline and process Pacific cod. This experimental venture was not an economic success for the vessel owners but did generate significant technical and economic data to guide similar enterprises.

## GULF & SOUTH ATLANTIC FISHERIES DEVELOPMENT FOUNDATION

### Export Market Expansion

This activity has been designed to expand export marketing opportunities throughout the Southeast. With major markets developing in Africa, the Far East, Europe, the Middle East and South America, the coordination of foreign marketing assistance has proven to be an appropriate and functional activity between government and industry. As a result, the industry has participated in foreign trade missions, fairs and related export activities. Industry participants cover the costs of their travel and expenses, as well as provide most of the samples used in promotions. The Foundation engages marketing specialists to coordinate these activities, as well as schedule participation. Foreign market investigations have been cooperatively scheduled with the Foreign Agricultural Service of the Department of Agriculture, Southern United States Trade Association and United States Department of Commerce.

This work has been cooperatively pursued with the regional and national offices of the National Marine Fisheries Service and has yielded the following:

- 36 export promotions in the past five years which have meant an increase in exports of over 30 million pounds per year since 1978; and
- Over 40 firms now exporting traditional and nontraditional fishery resources of the Southeast. This reflects a tripling of export participation since the program was initiated.

## Resource Assessment and Exploratory Fishing

This program has been established to assemble and disseminate information on underutilized demersal and pelagic stocks. Though scientists have commented on the unique potential for commercial development, the lack of historical interest has hindered even the most basic data collections. In recognizing this problem, investigators have been working with the Foundation to define the character of these stocks. Of particular interest are the herrings, squid, deepwater crabs, et al., species that have only been nominally harvested. Because of the projected magnitude of these stocks, and the sales potential already identified, the interest in accumulating and assessing the existing data is acute.

Besides reviewing the status of these species, attention has been devoted to the harvest potential of blue runners, bonito, jack crevasses and other migratory fish. Because of export potentials, these fish have been test-harvested using modified drum seines, pair trawls, deepwater purse seines, etc. Six to ten fishing vessels, with support aircraft, are continually involved.

As a result of such efforts, major new fisheries have been established for coastal herrings and migratory pelagics, with new fisheries opening on squid, red crabs and shark. Approximately two billion pounds of new annual harvest is reflected in these efforts.

## New Product Development

The harvesting of a wide variety of new species has posed a complex set of problems for the processing sector. While many species are being frozen and exported in the round, others require special handling as well as custom processing. Beyond directed harvests, this work has emphasized selected aspects of shrimp by-catch utilization, particularly handling and processing, but more particularly, custom product formulations.

While a number of seafood products are well represented in the world marketplace, many items are only regionally understood. This is a particular problem with many Southeastern species. As a result, this project has endeavored to reduce species-by-species introductions, handling much of the work by implementing broad-scale testing. Specific examples of this work include product development and testing with fish flakes, surimi and fish oils. In each of these instances, a variety of species have been proposed for future testing, primarily for export or domestic sale in ethnic markets.

As a result of this work, at least six new companies have been established, each producing products developed specifically through the work described above.

### Gear Testing and Demonstrations

Because of increased harvest interest in black drum and other "rough fish", a number of new gear-types have been introduced into the Northern Gulf. However, because of the high conversion costs, the experimental nature and overall newness, much of this work has been both expensive and risky. To offset these concerns, and maximize data collection, cooperative fishing activities have been initiated. To date this work has included drum seining, deepwater purse seining, bottom longlining and at least a dozen other gear technology introductions.

Since the initiation of this effort, at least 100 vessels have left the over-capitalized shrimp fleet, with three other custom built vessels entering the new fisheries. Expansion of swordfishing, snapper-grouper, migratory pelagic and the coastal herring fisheries, all relate to this work. Over 150 vessels have taken part in organized Foundation demonstration/gear-testing activities.

### Non-Traditional Fisheries Promotions

This work has focused on the promotion of domestic seafood resources through marketing and consumer education efforts. The Foundation enlists the support of federal and state agencies, along with academic institutions. In addition, the Foundation has generated support from the commercial fishing industry throughout the Southeast. These agencies, institutions and industries provide expertise, time and sample products.

The promotion of selected fishery resources and follow-up efforts has involved:

- Materials development: food photographs, with accompanying recipes and fact sheets, recipe leaflets and posters have been produced and distributed;
- Product samples: funds have been provided to purchase and transport selected products for demonstrations with consumer groups, professional food educators, distributors, restaurant chain personnel, supermarket chain executives and others directly involved in the merchandising of seafood products; and
- Trade and media contacts: this involves travel by marketing personnel to distribute educational materials to newspaper food editors; to conduct live and taped radio and television demonstrations; to distribute product samples and discuss same with wholesalers and distributors; and to visit restaurant and supermarket chain executives to enlist their support for product introduction.

Over a five year period, this program has generated over eight million dollars in complimentary media support, representing over 2,000 television presentations, thousands of inches of newspaper coverage, plus over 10 million pieces of promotional material distributed.

## MID-ATLANTIC FISHERIES DEVELOPMENT FOUNDATION

### Conversion of Blue Crab Raw Materials into New Improved Products

This project addressed the acute problem of crab waste in the Chesapeake Bay area, and combined it with a fuller utilization of the product. Results successfully indicated to industry that greater usable meat yields could be achieved by placing the "picked" shell through a deboning machine. The resulting product could be formulated into several new products. Industry has already implemented the results, which also reduce waste generated from processing, but using "more" of the raw material than before. A final report is available to interested industry members.

### Gear Technology Transfer Demonstration

During the first year of operation, this project was very successful in getting fishermen to try and subsequently implement new harvesting techniques, namely pair trawling for squid, butterfish and others, and have not only increased their catches and productivity but reduced fuel costs. More recently, the project was very successful in demonstrating squid jigging to fishermen. Not only have fishermen been using the machines, but fishermen throughout the region are "waiting in line" to put the machines on their boats.

### Economic Prospectus and Five Year Development Plan

Completed in mid-fall 1982, this project was one of the most significant contributions for the betterment of the industry that the S-K program will have produced for the Mid-Atlantic region. As a briefing document, it is to be used to educate the financial community about the development potential of the fishing industry in this region--on their level, with straightforward economics. Additionally, it will be a planning document for the entire Mid-Atlantic region to follow in developing the fishing industry effectively and realistically.

### Domestic Marketing and Consumer Education

Between 1980 and mid-1982, the Foundation has conducted more than 25 Educational Seminars for teachers, home economists, extension agents, and retail meat managers; participated in more than 50 TV and radio programs and seafood demonstrations; received more than a half-million dollars worth of free print publicity; conducted seafood products workshops for state home economists and marketing specialists; distributed more than 100,000 seafood recipe brochures with nutritional and cooking information; produced public service spots for radio stations in the Mid-Atlantic region; and developed and produced a directory of Mid-Atlantic seafood processors which has been extensively distributed throughout the Northeast region and Mid-west.

### Demonstration of a Quality Maintenance Program for Fresh Fish Products

To conclude in mid-summer of 1983, this project will be a significant step forward to better maintain high quality of seafood products produced within the Mid-Atlantic region. At this time, the contractor has already identified several aspects of the participating plant operation that need changing so as to improve the quality of product he produces. The processor has already indicated he will make the necessary changes at his own cost. Ultimately, the project will develop a "Good Manufacturing Practice (GMP)" aimed at maintaining a 12-day shelf-life for several seafood products and include Midwest marketing.

### A Preliminary Study to Determine the Feasibility of Marketing Spiny Dogfish

This project successfully marketed over 10,000 pounds of shark on the retail level during a 5-6 week period. Several other independent chains over and above those that were participating also started selling shark after the project began generating results. A copy of the final report is available to interested industry members.

## NEW ENGLAND FISHERIES DEVELOPMENT FOUNDATION

### On-Board Quality Program

Upgrading the quality of domestic seafood products has been a major concern of the National Marine Fisheries Service, the General Accounting Office, and the U.S. fishing industry. The NEFDF has attacked this problem through a program that improves handling of fish on-board vessels, upgrades quality control procedures in plants, and delivers high quality fish to retail and foodservice buyers.

The universal impediment to higher quality is that the independent fishermen in our industry require an incentive or economic reward in order to work harder taking care of their fish. If the fishermen only receive the average price because of supply and demand, they have no incentive to improve quality.

The Foundation has succeeded in introducing bleeding and boxing on board vessels in New Bedford, MA and has succeeded in getting a market premium for high quality fish. In 1982 over 500,000 pounds of bled fish and 250,000 pounds of boxed fish were sold at from 7 to 12 cents over average market price. In 1983, this program is expanding to additional New England ports, including Boston, Gloucester, and Rockland, ME.

This is the first fish to be landed in European type plastic boxes on a commercial scale in the United States. Through this program, our industry is adopting the measures which have allowed our international competitors, such as Iceland and Norway, to maintain a reputation for the highest quality fish.

*- Co marketing  
- domestic trade  
- mass pub  
- self sufficient  
- rec. Fishery trade  
- talk*

## Seafood '83

Trade shows are one of the most cost-effective means for increasing the consumption of fish by bringing producers in direct contact with their customers. The NEFDF pioneered the concept of the all seafood trade show, and for the past three years has sponsored increasingly successful shows.

In 1983, the Foundation assisted U.S. producers to exhibit at SEAFOOD '83, an international seafood trade show held in Boston with Canadian, Norwegian, and Icelandic exhibitors as well. The show provided an opportunity for U.S. producers to directly compete with their foreign competitors, and attracted over 2000 qualified buyers.

The industry avidly supports these efforts on the part of the NEFDF. Increased sales attributable to these shows and other marketing efforts help the industry as a whole remain healthy and competitive. Because of the small size and fragmentation of the industry, few producers can afford to exhibit on their own at large national trade shows, and most need assistance to take advantage of this effective medium. The results of the Foundation's efforts are a healthier competitive position for New England producers, cost-effective sales tools, and increased seafood consumption.

## International Squid Symposium

In August 1981 the NEFDF held the first International Squid Symposium in Boston. Nearly 200 industry, academic, and government representatives from 14 countries attended. The Symposium successfully focused international attention on the determination of the U.S. industry to develop our East Coast squid resources.

The symposium effectively served to transfer knowledge about squid processing, harvesting, and handling techniques from user countries to the U.S. industry. The number of industry participants served to convince the National Marine Fisheries Service that the U.S. industry was in fact committed to expanding use of squid resources, and the conference also convincingly demonstrated the increased consumer demand, both in the United States and abroad, for squid products.

Out of this conference came a major S-K project to experiment with squid jigging, substantial interest in joint ventures, and firm commitment on the part of New England processors to pack and export more squid.

## "Catch America" and "Seafood USA" Marketing Campaigns

The NEFDF has served as a focal point for developing interest in under-utilized species, and for promoting increased consumption of all domestic seafood. Through these marketing campaigns, the Foundation has assisted retailers and foodservice suppliers in target inland markets to become



more familiar with fish and seafood, has assisted in media and publicity related to seafood, and has been able to supply food editors, supermarket personnel, and foodservice companies with timely and effective seafood information, point of sale material, and training.

Participation in these campaigns has been closely coordinated with the National Marketing Coordinating Committee of the National Marine Fisheries Service and the Regional Development Foundations.

Foundation activities in target markets have resulted in increased sales opportunities for domestic seafood, and have helped New England suppliers to reach new markets. Such activity allows consumers to get a broader variety of wholesome, nutritious fish and seafood products from all regions of the country.

#### Red Hake and Whiting Surimi Tests

Red Hake and whiting are two New England species which have been traditionally caught for industrial use. Red Hake in particular has had very limited food use, because it deteriorates rapidly in the fresh state and is not suitable for long term frozen storage. New England has long looked to minced fish products to provide potential avenues of utilization for these species. However, due to the low prices of minced blocks, and the storage problems of red hake, no attempts to use these species in minced products have been successful on a commercial scale.

In cooperation with the Gulf and South Atlantic Fisheries Development Foundation and North Carolina State University, the New England Foundation has tested these two species for their potential in surimi and surimi based fabricated products.

Red Hake was found to be more suitable for high grade surimi than any U.S. fish so far tested. Whiting was also found to make very good surimi. This test has opened the possibility for New England to become a major producing region for surimi, and suppliers of surimi based products, based upon our red hake and whiting resources.

The Foundation has been very encouraged by the results of these tests and will pursue every avenue to assist in the full utilization of these two promising species of fish.

### PACIFIC TUNA DEVELOPMENT FOUNDATION

#### Tuna Purse Seining - Western Pacific

During the mid 1970's the U.S. tuna purse seine fleet faced multiple operational problems in traditional fishing grounds of the Eastern Pacific Ocean. These problems included spiraling costs, stagnant catch rates, 200 mile fishing limits and vessel seizures, increased foreign competition from Latin American countries, and federal restrictions on taking tuna associated with porpoise.

In 1977 the Pacific Tuna Development Foundation undertook a multi-year purse seine fishing/survey program to explore and develop new tuna fishing grounds in the Western Pacific that will continue through 1983. Each year contracted United States tuna purse seiners explore selected regions and report on concentrations of surface tuna and their vulnerability to purse seine gear, catch rates, tuna behavior, the need for modifications of gear and fishing techniques, and costs of operation.

To date the charter vessels have accounted for a catch in excess of 6,000 tons of mixed tuna and provided invaluable exposure to western Pacific tuna fishing conditions.

Encouraged by the success of PTDF's charter program, the number of United States seiners operating in the western equatorial Pacific has increased from only one in the mid-1970's to over 50 by August 1982. The 1982 catch by these vessels exceeded 70,000 tons of mixed tuna that generated a gross stock of over \$70,000,000 for the U.S. tuna vessels participating in the fishery.

#### Pole and Line Fishing - Truk

Prior to World War II, local Japanese pole and line fishermen landed up to 9,000 tons of mixed skipjack and yellowfin tuna per year at Truk in the Eastern Caroline Island group.

This fishery was not pursued by U.S. or local fishermen after the war. The new generation lacked the equipment and techniques required to redevelop the fishery. As a result the only fresh tuna available to the local population was caught by small outboard powered boats using trolling lines. The production from these small vessels was sporadic and fell far short of filling demand for tuna on the local market. Additionally the price demanded for fish was more than could be afforded by the local inhabitants of Truk.

In 1980 the PTDF funded a pole and line fishing project in an attempt to revive the pole and line tuna fishery. The project provided the use of a completely equipped local vessel and the services of an experienced fisherman to train local fishermen.

The end result of the one-year term of the project was a landed catch of 224,006 pounds of mixed yellowfin and skipjack tuna. The total catch was the largest recorded for any one-year period by a vessel manned by local island fishermen in the western Pacific area.

All tuna were sold either fresh or frozen on the local market. Prices to the public were reduced from over \$1.00 per pound to a reasonable \$.50 as a result of the project.

Several additional vessels have since been added to the fleet and in 1982 sufficient tuna was produced to satisfy local demand and to enable Truk to export frozen tuna to Hawaii.

### Trochus Reseeding for Commercial Exploitation - Palau

The large marine snail trochus niloticus is the object of a multi-million dollar mother of pearl industry in the Indo-Pacific region. In Palau, trochus shell exports account for more foreign exchange than any other marine resource except tuna. However, catch records indicate that the reef areas where trochus are found have been overexploited and annual yields are now 50-70% lower than those reported in previous decades, despite an apparent increase in fishing effort. No comprehensive management plan to protect the resource has been introduced.

A Pacific Tuna Development project to culture trochus, reseed reefs, and develop a model trochus management plan was initiated in 1981 and will continue through 1983.

To date the project has resulted in the production of 1.5 million hatchery raised juveniles, the development of significantly improved methods of induced spawning and for applying permanent tags to adult specimens, the completion of a comprehensive study of growth rates in nature based on over 1,000 recaptures, the analysis of the 1982 trochus landings by volume and by size frequency, the completion of a stock assessment survey in Koror State, Palau and the adoption of a trochus sanctuary management plan by the State Government.

### Marketing and Management - Guam Fishermens Cooperative

The Guam Fishermens Cooperative was formed in 1979. During its first year of operation the organization was plagued by a multitude of problems. It had no operational base or facilities to freeze excess production and operated from a temporary sales outlet in the Guam Farmers' Market. Accounting records were neglected and communications with the board of directors had broken down. Quality control, sanitation and product displays, in addition to organized marketing, were not being properly handled. Product price mark-ups were inconsistent and were adversely affecting profit margins.

In 1980 the Pacific Tuna Development Foundation funded a project to organize marketing and management and endeavor to develop a long-range plan that would include a Coop-owned freezing, storing, selling and distribution facility.

During the first-year term of the project, the Coop accounting system was changed and books were brought up to date. Quantity control guidelines were introduced which cut losses suffered from spoiled fish. Gross profit margins increased from 6% to 22% and gross sales increased from \$10,000 in 1980 to \$30,000 in 1981. Two successful export shipments of fresh chilled fish were made to Hawaii establishing an additional outlet for Coop production. A long range plan was developed to establish a facility to accommodate all sections of the Coop organization, and the Coop is now in the process of completing the new facility.

## WEST COAST FISHERIES DEVELOPMENT FOUNDATION

### Blue Shark Fishery

Under a grant from the West Coast Fisheries Development Foundation during the four-month period from mid-July through mid-November 1980, the vessel "J.J." harvested 7,980 Blue Sharks and delivered shoreside 145,855 pounds of dressed Blue Shark at an average price of \$1.25 per pound. In addition, the shark fins were sold as by-products for export. The WCFDF provided marketing assistance and developed consumer information materials. The market effort was sufficient to sell all of the product by January 1981, with market interest ranging from Southern California to the Pacific Northwest and as far east as Denver.

The project established Pacific Blue Shark as an alternative fishery for the entire West Coast. The fishery is presently providing additional income for commercial fishermen with annual landings in the hundreds of thousands of pounds.

### Offshore Factory Trawler Demonstration on Pacific Whiting

The Foundation funded the M/V BLUE OCEAN, a U.S. flag 162' factory trawler, to operate for 39 days catching and processing Pacific Whiting off the Washington coast in the summer of 1980. The primary objective was to produce frozen blocks of fillets of acceptable quality for use in the existing market.

It was amply demonstrated that whiting can be caught in sufficient quantities by this sort of operation, but in the production of blocks, both from a product quality and economic standpoint, the operation proved to be unfeasible. The project has let the West Coast processors, who asked for it in the first place, know that the venture is not worth the ink, and that serves a very useful purpose.

In addition, the project demonstrated much more favorable results in producing headed and gutted product and suggested serious developmental efforts in this direction. The industry has indeed picked up the ball: over 2 million pounds of Pacific whiting were caught, processed and marketed in headed and gutted form in Puget Sound last year, and the effort is very close to exploiting ocean stocks as well.

The Foundation has great hopes for its bilingual promotion of this product, scheduled to take place next year in the Hispanic community of Los Angeles.

### Groundfish Marketing

During 1979 the market for all West Coast groundfish products collapsed. As a result, prices to the fishermen dropped by over 50% and processors faced excessive (and costly) levels of slow-moving frozen inventories. This, coupled with high interest rates, caused several processors to close their doors and a few fishing boat owners to lose their vessels.

A complex mix of factors caused the collapse. Perhaps the major contributor to the problem was the increased import level of subsidized Canadian groundfish. However, a limited market area, together with increased landings of fish, aggravated the problem even more. (These increased landings included the previously underutilized Widow Rockfish.) In an attempt to provide some relief for the West Coast groundfish industry, the Oregon Trawl Commission and the West Coast Fisheries Development Foundation requested and received Saltonstall-Kennedy funds to initiate a groundfish marketing program. The effect of our program and others has been to help the market assimilate this doubling of groundfish landings. Prices to fishermen have risen as a result. Foundation staff members and adjunct groups such as the Fishermen's Wives continue this consumer education and marketing program.

### Squid Fishery Development

The Foundation at present is orchestrating a concerted effort toward orderly development of a commercial squid fishery off the Oregon and Washington coast. Fishermen and processors on the coast are being encouraged to prospect for squid. The Foundation sponsored and helped organize a Squid Symposium, held in February of this year, which we feel provides a cornerstone for development. This is what National Fisherman had to say about it:

"Can conferences help the fishing industry develop? Most of us sneer at the thought. However, a recent gathering in coastal Oregon may have changed some people's attitudes about the effectiveness of fishery development conferences...For a day and a half, information flowed. Fishermen talked to brokers; processors met with folks from food service; everyone talked to each other. By the time the final panelist had answered the last question, the audience was approaching overload but still had not lost interest. The event succeeded as a true fishery-development conference, a conference in which one sector of the industry is forced to develop a better understanding of the needs and difficulties facing all the others. Without conferences like these, future development could be delayed interminably."

### Foundation Membership Recruitment

Over the first three years of its existence, the Foundation has endeavored to build an organization that encompasses all aspects of the West Coast fishing industry--harvesting, processing, distribution, and marketing--and delivers services that the industry perceives as unique and valuable to its long-term viability. It would appear that this effort is bearing fruit: membership in the Foundation has virtually doubled in the last nine months, from 55 firms and organizations to 104 presently. This bodes very well for the long-term future of the organization and its concept.

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Effect of the EEZ on Fisheries Law

by

Ralph J. Gillis

- A. The concepts on "exclusive rights to explore and exploit" and of the "right to manage resources"
  - 1. Truman Proclamations
  - 2. Submerged Lands Act, & Outer Continental Shelf Lands Act
  - 3. Bartlett Act
- B. International Law of Fisheries
  - 1. Convention of the High Seas
  - 2. Convention on Fishing and Conservation of Living Resources of the High Seas
- C. Evolution of U.S. Fisheries Law
  - 1. Contiguous Fisheries Zone Act
  - 2. FCMA 1976
  - 3. MFCMA 1983 & GIFA's
- D. International Law of Fisheries as Interpreted and Applied by the United States
  - 1. The LOS Convention and the FCMA
  - 2. The EEZ Proclamation
- E. Evolved Parity of Shelf & Water Column Resources for application of U.S. Law

CONFERENCE ON EAST COAST FISHERIES LAW  
FISHERIES DEVELOPMENT SESSION

IMPLEMENTING THE RECOMMENDATIONS OF THE KIRBY TASK FORCE -  
POSSIBLE IMPLICATIONS FOR THE U.S. GROUND FISH INDUSTRY  
PRESENTATION OUTLINE

GUY MARCHESSEAULT



IMPLEMENTING THE RECOMMENDATIONS OF THE KIRBY TASK FORCE -  
POSSIBLE IMPLICATIONS FOR THE U.S. GROUND FISH INDUSTRY  
PRESENTATION OUTLINE

Introduction

In February, 1983 the Canadian Task Force on Atlantic Fisheries released its final report, "Navigating Troubled Waters." Chaired by Michael Kirby, the Task Force sought to formulate a recovery program for the fisheries of Atlantic Canada, which incorporates 75 recommended actions and is responsive to three major objectives:

The long-term economic viability of the Atlantic fishing industry;

The maximization of industry related employment;

Canadian harvesting and processing of Canadian fishery resources.

Because the U.S. is the major market for Canadian fishery products, and because full implementation of the Task Force's recommendations implies increased utilization of that market, the U.S. Atlantic fishing industry may well be impacted.

Current Canadian Involvement in U.S. Markets

Canada exports 80% of its Atlantic fishery products, 57% to the U.S.

The Canadian share of total U.S. groundfish consumption has risen from 30% in 1977 to 37% in 1981, and may be as high as 50% in some sectors.

Canada supplies about 34% of U.S. demand for frozen groundfish blocks.

Canada has traditionally participated in the frozen retail and food service sectors of the market, where price is an important consideration, but has not been able to compete with Iceland and some Scandinavian countries in those market sectors which favor high quality frozen fillets.

Virtually all of the U.S. domestic groundfish catch is sold as fresh product. U.S. supply accounts for about 90% of all U.S. consumption of fresh groundfish. Canada has traditionally supplied most of the U.S. imports of fresh fish.

Some Task Force Recommended Industry Objectives

To compete in the high quality U.S. frozen fillet market now dominated by Iceland and Norway;

To increase U.S. per capita consumption through generic advertising;

To expand the share of Canadian fish in U.S. markets for frozen blocks;

To try to reduce tariff and non-tariff barriers to international trade competition in the EEC;

To forward the integration of Canadian processors into final U.S. markets;

To coordinate the marketing and distribution of Canadian fishery products in order to maximize the economic potential of the projected increase in Canadian landings (particularly cod).

#### Some Near-Term Implementing Strategies

Mandatory bleeding, gutting, and icing of groundfish at sea;

Subsidization of port development, especially ice making equipment, where needed;

Dockside grading;

The incorporation of quality control measures into a production bonus program;

Universal enforcement of a 5-1/8 inch minimum mesh size for otter trawl gear, and the encouragement of long line gear.

#### Some Limitations to the Task Force's Recommendations

An increase of about 370,000 mt is projected for Atlantic Canadian groundfish landings between 1982 and 1987. Although there is concern that these landings may be targeted for the U.S. market, the extent to which any market sector may be affected is not clear. Of the expected 334,000 mt increase in cod landings, 80% will come from Newfoundland and Labrador where size, quality, seasonality and distance to distribution centers continue to pose serious marketing problems.

Nova Scotia landings are expected to increase by 6% (18,000 mt) over the same 5-year period. Although some of this product has previously been trucked into New England as fresh fillets, the majority has entered other market sectors. The expected increase will not likely compete significantly with the U.S. dominated fresh fish market.

#### U.S. Northeast Coast Industry Overview

In 1981 New England landings of the major commercial species totaled \$340,000 ex-vessel. The most important species in terms of their landed value were: sea scallops (33%); lobster (25%); flounders (15%); cod (11%); and haddock (6%). Other species combined to account for the remaining 10%.

The recommendations of the Task Force will not have an effect on the competitive relationship between the U.S. and Canada in markets for sea scallops and lobster. The potential interaction will come only in the markets for cod products, and to a lesser extent flounder and haddock products.

### Preliminary Implications for the U.S. Industry

For Canada to be able to significantly increase the amount of fish it sells into the U.S. market, the majority of recommendations of the Task Force will have to be successfully implemented- quality, productivity, distribution and marketing will all have to be addressed. So far, quality, distribution, and seasonal availability (price) are the major impediments to entry into the fresh fish sector where competition with the U.S. industry would be the greatest.

Assuming that Canadian firms decide to further compete in the fresh fish market, the most likely buyers would be those that handle large volumes or who did not demand a full range of services from their suppliers. Thus, there would be several effects:

There would be direct competition with U.S. processors that already import whole groundfish from Canada for further processing, as well as those that process U.S. caught fish. In the first instance an increase in market size would be necessary to avoid unproductive competition, and in the second instance quality limitations would have to be overcome;

If Canada succeeds in selling a large quantity of fresh fish in the U.S. market without expanding the size of the market in the process, prices to U.S. fishermen will decline as will total revenues. However, because the area of increased direct competition would be limited primarily to fresh cod products, the expected revenue impact on the U.S. industry would likely be substantially less than 20%.

Those firms (fishing vessels) most directly impacted by the increased competition will become more efficient (cost effective) or be forced out of the groundfish (cod and to a lesser extent flounder) fishery. A decrease in fishing activity following a decrease in price will cause catch to drop in the short run, possibly followed by increases in local stocks and, as a consequence, lower per unit fishing costs.

U.S. processors of fresh groundfish products may adopt measures to remain competitive and possibly regain their market share:

more careful production planning;

contract buying and selling;

merchandizing a range of fishery products, in addition to fresh fillets;

new quality initiatives.

Fishing vessels forced to leave the groundfish (cod and to some extent flounders) fishery may well switch to fishing for other species, most likely those that have rapidly developing markets such as butterfish, squid and possibly mackerel.

In the event that the increase in Canadian cod landings materializes, and the Canadian firms continue to concentrate on the frozen block market, or displace other foreign supplies to the frozen fillet market, then the marketing and quality efforts required may well benefit the domestic industry through increased consumer demand.

Seminar Outline

The Role of Associations

Presented by

Roy D. Tate, Deputy Director and Legislative Agent  
Massachusetts Lobstermen's Association, Inc.

Presented to

A Conference on East Coast Fisheries Law  
University of Maine School of Law, Portland, Maine  
June 25, 1983

1. Background - - Founding the Association, developing membership, identifying the issues, organizing the members, raising funds, developing programs and a communications network.
2. Membership Services - - Property and casualty insurance, continuing education and training programs, goods and services information, sub group support services, law enforcement.
3. Professional Services - - Legal, legislative, financial, business and personal insurance, investments, marine surveying, appraising and adjusting.
4. Public Affairs - - Representation of the Association by officers and staff on Boards, Councils, Commissions and Committees of federal, state and local governments and of the private sector.
5. Reaching for the Future - - Computerization, Electronic Marketing and Cooperative buying and selling.

ORGANIZATION AND OPERATION OF A  
COOPERATIVE ASSOCIATION OF FISHERMEN

Don E. Graham  
McDermott, Will & Emery  
Washington, D.C.

For Discussion Before The  
East Coast Fisheries Law Conference  
Portland, Maine  
June 24-25, 1983

## I. PRELIMINARY ACTIONS

### A. Determine Need - Feasibility And Potential For Success.

1. Establish Survey Committee of potential members to work with state, regional and federal agencies.
2. Consider advantages and disadvantages of other forms of business organizations.
  - a. Joining an organization already in existence.
  - b. Consider a partnership or joint venture.
3. Potential members and patrons.
4. Extent of potential members' experience with and knowledge of operating on a cooperative basis.
5. Market analysis.
6. Availability of competent management.
7. Capital requirements; facilities needed, availability and cost.

### B. Meeting Of Interested Potential Members.

1. Receive and discuss report of survey committee.
2. Decide whether to proceed with organization.
3. If decision is to proceed, form an organization committee and make arrangements to defray expenses of organization.

### C. Choice of State of Incorporation.

1. Review of various state statutes should be compared as to provisions most favorable to the planned method of cooperative operation, and comparable filing and annual license fees.
  - a. Obvious advantages of incorporating where most members transact their business or principal office is located.
  - b. Disadvantages of operating in a state where the cooperative must qualify as a foreign corporation.

D. Choice of Type of Incorporation Statute.

1. Advantages of incorporation under a cooperative corporation statute.
  - a. These statutes are tailored specifically for cooperative type of organization and operation.
  - b. May contain regulatory provisions, the most common being annual report filing requirements.
  - c. Special state antitrust treatment for cooperatives are frequently found in cooperative incorporation statutes.
  - d. Filing and license fees may be significantly lower than under business corporation statute.
  - e. May simplify proof of qualification as a cooperative organization for tax or other purposes.
  - f. May provide special privileges as to filing for public record of member patronage agreements and consequent legal notice of the contract relations, and remedies (injunction, damages) for interference.
  - g. Bylaws and patronage agreements may be shortened to extent statutes specifies requirements of operating on a cooperative basis.
  - e. Many states provide for exemption from Blue Sky laws for cooperatives.
2. Some states have a general cooperative corporation statute applicable to all types of cooperatives. In others, separate statutes apply to different types of cooperatives or there may be no statute specifically referring to fishery cooperatives. See California Fish Marketing Act, § 13200; Revised Code of Washington Chapter 24.36 Marketing Act.
3. If not incorporated under a cooperative corporation statute, a cooperative method of operation may nevertheless be based on appropriate provisions of bylaws and patronage agreements.

- a. Nonprofit corporation statutes. Some are not appropriate because they forbid payment of net earnings to members.
- b. Business (for profit) corporation statute. Used by some farmer cooperatives. However, it is not appropriate if it requires distribution of earnings according to stock ownership regardless of patronage. See Packel, The Organization and Operation of Cooperatives, 4th Ed.

E. Formulation of Organization Plan.

1. Assistance of professionals (accountants, attorneys, economists, financial advisers) with knowledge of cooperative operations.
2. Determine basic services to be performed by the cooperative, i.e., marketing, supplies.
3. Capital structure; financing.
  - a. A stock cooperative or nonstock (membership) cooperative?
  - b. If a membership cooperative (nonstock), the membership fee, or amount of common stock required to be owned by and restricted to members (membership stock).
  - c. Capital stock other than membership stock.
    - (1) May be required if organized under a general business corporation statute.
    - (2) Some cooperative corporation statutes do not authorize a cooperative which charges a membership fee or issues membership stock to also issue any other type of capital stock.
    - (3) Should be specific limitation of dividend rate on capital stock to protect status as a cooperative.



- (i) The dividend rate may not exceed the greater of 8% or the legal rate of interest in the state of incorporation or the articles must provide for one-person, one-vote, to come under the limited antitrust exemption of the Fishermen's Collective Marketing Act, 15 U.S.C. §521-522.
  - (ii) Is payment of dividends on stock to be a priority over patronage distributions?
- d. Patronage capital.
- (1) Will patronage retains from members' shares of net earnings be relied upon? Any limitation on rate or amount?
    - (i) Will the members be able and willing to put up the required capital? Will the cooperative's retention of earnings generate loyalty, or resentment?
  - (2) Capital charges to members at fixed patronage unit rates rather than based on net earnings (per unit retains)? Any limitation?
- e. Is patronage or membership capital to be permanent capital, or will there be an equity redemption program such as revolving or base capital system?
- (1) Taxation to patron of full amount of capital retain may make permanent capital treatment or lengthy retention by cooperative uneconomic for large-volume patron in high tax brackets, [see Schroeder, Goldberg, Farmers' Cooperatives and Federal Income Taxes, Ballinger Publishing Co. (1975), Chapter Five] and the cooperative unattractive even to smaller producers.
- f. Debt capital, such as debt securities offered to public, and bank financing.

- g. Application of state and federal securities laws. Will cooperative qualify for exemption?
  - h. Inability of a cooperative to resort to the normal investment capital market requires heavy reliance upon equity capital required from its patrons.
- 4. If a marketing cooperative, the requirements for Fisherman's Collective Marketing Act (15 U.S.C. § 521-522) antitrust status should be considered.
  - 5. Income tax factors to be taken into consideration; qualification for single-tax treatment.
  - 6. Bank for cooperatives loan eligibility requirements should be considered, if a fishermen's cooperative. See Farm Credit Act, 12 U.S.C.A. 2001, 2129.
  - 7. If the geographical area of membership will be large, or diversified as to products to be handled or services to be performed by the cooperative, it may be advisable to district the area for election of directors and regional membership meetings, if permitted by the incorporation statute.
  - 8. The organization plan should include names of the initial directors to be named in the Articles of Incorporation if required by the incorporation statute.
- F. Written Pre-Organization Agreement May Be Advisable, Including:
- 1. Specification of basic features of the cooperative, possibly including copy of proposed Articles of Incorporation. Proposed bylaws sometimes are included.
  - 2. Pledge of contribution to organization expense.
  - 3. Commitment to become member and patron.
  - 4. Contents will vary according to whether is to be a marketing, supply, bargaining cooperative, or other type of cooperative organization.
  - 5. Agreement to be effective only if signed within specific time limit by specified minimum number of potential members representing specified minimum potential patronage volume.

6. Sample form: USDA FCS Information Bulletin 66 (May 1970), Legal Phases of Farmer Cooperatives - Part 1 - Sample Legal Documents, page 1.

## II. THE ARTICLES OF INCORPORATION

- A. The provisions and method of execution must conform to the applicable incorporation statute.
- B. Constitute a state charter which authorizes, limits, and binds the corporation.
- C. Create rights and obligations as between the corporation and its members and the corporation and its shareholders if any.
- D. The Articles may be detailed and extensive, or confined to the bare minimum required by statute. The statement of authorized purpose or business, and other provisions, should be worded as broadly as the incorporation statute will permit, unless a specific requirement or limitation is desired. The incorporation statute should be closely checked for provisions which are authorized as optional but can be effective only if in the Articles.
  1. Amendment of the Articles in the manner required by the incorporation statute is likely to be more difficult than a bylaws amendment. Shareholders not entitled to vote upon bylaw amendments may have the right to vote upon any proposed amendment of the Articles which would affect their legal rights under those Articles, and to vote on the basis of the number of shares owned.
- E. Terminology used in Articles of Incorporation and Bylaws should be precise, appropriate, and accurate. "Member", "Patron", "Shareholder", "Producer", "Patronage Dividends" and many other terms, have technical meanings when applied to a cooperative organization, and their legal significance under the incorporation statute, tax laws and regulations, and various statutes specifically applicable to fishery cooperatives, should be clearly understood and correctly applied by the draftsman of the Articles of Incorporation, bylaws, and any patronage contracts of the cooperatives. For example:

1. The standards of what constitutes a "cooperative association" in the Fisherman's Cooperative Marketing Act (15 U.S.C., § 521-522)
2. "Patronage dividend", "written notice of allocation", "per-unit retain allocation", and other terms defined by Internal Revenue Code § 1.1381 through 1.1388, and by various revenue rulings, revenue procedures, and court opinions.
3. See Nieman, "How to Start and How to Dissolve a Cooperative", Proceedings of the Second National Symposium on Cooperatives and the Law, University of Wisconsin (1975), page 122; and Watch your Cooperative Language, Farmer Cooperatives (USDA Farmer Cooperative Service), May 1975, page 1.

### III. ORGANIZATION MEETING OF DIRECTORS.

Although the corporation is legally established on filing of the Articles of Incorporation and issuance of the certificate of filing, it is not organized for business until certain actions are taken at an organizational meeting of the initial board of directors held on call of the incorporators named in the Articles. Depending upon requirements of the applicable statute, the directors at that meeting will adopt bylaws (unless required to be adopted by the members), and elect officers. Other customary action: ratify pre-incorporation agreement, if any, and prior acts of the incorporators; accept membership applications and stock subscriptions, if any; direct opening of minutes book, membership list and stock book; designate bank depositories and officers authorized to draw thereon; fix date of first membership meeting, if not specified in the Articles; approve for payment the organization expenses; arrange for employment of managerial and other personnel; and transact other business to make the cooperative operational.

### IV. THE BYLAWS.

- A. Initial bylaws are adopted by the board of directors (or by the members under some cooperative statutes). Power of amendment usually is vested by statute only in the members of the cooperative.
- B. Two schools of thought as to bylaws:
  1. Detailed bylaws, including substantive and procedural provisions of the governing statute, to serve as a complete and readily available guide for members, officers, and employees; or

2. Relatively short, confined to barest essentials and only provisions not effectively stated elsewhere.
3. In either form, bylaws should not be so detailed and rigid as to restrict flexibility and adaptability to changed conditions. Inadvertent failure to comply with an unnecessary bylaw requirement, such as that all voting be by ballot, may have serious legal consequence.

C. Provisions peculiar to cooperatives:

1. Requirement and description of basic cooperative method of operation (if not included in the Articles of Incorporation or patronage agreements, or prescribed by the incorporation statute).
  - a. The obligation of the cooperative to apportion and distribute its net earnings among its member patrons on the basis of each member's relative patronage of the cooperative, the cooperative thus receiving no net profit for itself.
    - (1) This pre-patronage obligation is essential for tax exclusion by the cooperative of its patronage distributions.
  - b. Equitable distribution of voting power among the members, such as one-member, one-vote, possibly combined with limited additional votes based upon patronage. (IRS has questioned the propriety of anything other than one-member one-vote).
  - c. Specific limitation of dividends on any capital stock.
  - d. Authorization to do business with or for non-members, but limitation of such business to less than 50% of the cooperative's total volume of business. Rev. Rul. 72-602, C.B. 1972-2, page 511. But see Conway County Farmers Assn. v. U. S., 588 F2d 592 (CA8, 1978) which rejects the "more than 50%" rule.
2. As to fishery cooperatives, limitation of membership to persons engaged in fishing.

- a. Membership and right to vote of a nonproducer will disqualify the cooperative for the Capper-Volstead Act antitrust exemption. Case-Swaine Company, Inc. v. Sunkist Growers, Inc., 389 US 384 (1967); National Broiler Marketing Assn. v. U. S., 436 U.S. 816 (1978).
3. "Basic cooperative principles":
    - a. Ownership and control of the cooperative is by its members.
    - b. Operation on a nonprofit or at-cost basis.
    - c. Limited returns paid on capital.
    - d. Reference: Kelsay Gardner, American Cooperation 1971-2, page 160.
  4. Causes, grounds, and procedure for termination of membership.
    - a. Grounds for termination, as to a farmers cooperative, should include cessation of fishing activities or failure to maintain a specified level of current patronage of the cooperative. See Packel, Organization and Operation of Cooperatives (4th Ed.) page 91; and IRS Rev. Proc. 73-39, C. B. 1973-2, page 502.
    - b. The board of directors should be required to terminate the membership of any member who it finds is no longer qualified for membership under the bylaws, and should authorize termination of membership if the board finds that the member can no longer patronize or utilize the services of the cooperative or has failed to do so for a specific period of time.
    - c. The bylaws should specify whether or not or the extent to which a terminated member's capital stock must be redeemed or his membership fee refunded or his capital equities distributed to him.
    - d. "Due process" should be observed, by giving the member notice of the proposed termination and affording opportunity to be heard before the board or a committee or representative thereof.

5. Provisions relative to membership or patronage capital, capital retains from patronage net margins, per-unit retains (supply cooperative), representation thereof through written notices of allocation, and any intended revolving or base capital system.
  - a. The bylaws should clearly state whether such retains are intended as permanent capital, or are to be refunded and if so, under what circumstances (mandatory or discretionary) and in what manner.
6. A "tax consent" bylaw pursuant to IRS § 1388(c)(2) whereby each member agrees to include in his gross income for federal income tax purposes sums withheld from him as patronage retains or per-unit retains. For a suggested form of such bylaws, see USDA Farmer Cooperative Service Information Bulletin 69, Legal Phases of Farmer Cooperatives-Part II-Federal Income Taxes (1970), pages 75 and 82.
7. Method of apportionment among member patrons of any losses, including capital loss, and any capital gain.
  - a. With right of set-off against current or future patronage distributions, and a lien upon members' capital equities.
8. Authorized extent and terms of doing business with nonmember patrons.
  - a. IRS position is that to operate on cooperative method the organization must not do more than 49% of its total business with nonmembers.
  - b. Business done with nonmembers may be on a cooperative patronage basis or may be for profit.
9. A fixed rate of interest, if any, payable on capital equities.
  - a. Variable interest rate could affect the status of patronage distributions as tax excludable patronage dividends. See Union Equity Cooperative Exchange, 58 TC 397 at 415 (Aff'd 481 F2d 812 (CA10) 1973).

10. If it is desired that the cooperative be authorized to vote on behalf of its members as to any federal or state marketing order which covers any product handled by the cooperative, the bylaws should include a statement of such authority.
    - a. A provision in the federal statute for such vote by cooperatives may not be legally binding upon an objecting member of the cooperative, in the absence of such a bylaw or other binding consent by the member.
  11. The extent, terms, and conditions of the members' obligation to patronize the cooperative, and of the cooperative's obligation to receive, handle, and account for the members' products or otherwise to serve the member, may be set forth in the bylaws.
    - a. These avoid separate patronage agreements or permit short-form agreements.
    - b. An alternative is to authorize the board of directors to adopt uniform forms of patronage agreements. This provides greater flexibility than a bylaw.
  12. Order of distribution of assets upon dissolution or liquidation, if such a provision is not in the Articles of Incorporation.
- D. Bylaws have legal force of contract between cooperative and its members and among the members. Washington Cooperative Egg & Poultry Association v. Taylor, 122 Wash. 466, 210 P 806 (1922). A bylaw is binding upon a member although he opposed its adoption.
1. Bylaws are not binding upon nonmembers unless the nonmembers expressly agree to be bound.
- E. Bylaws should be carefully and clearly worded, and words or expressions which are defined in applicable statutes, government agency regulations, etc., or which have meanings established by common usage, should be used strictly in accord with such definitions or usage. See Nieman, How to Start and How to Dissolve a Cooperative, supra.



- F. Amendment of bylaws cannot repeal or impair vested or contract rights. An express reservation in bylaws of right to amend is limited to administrative and other internal matters and cannot affect members' basic rights. Lambert v. Fishermen's Dock Coop, Inc., 61 NJ 596, 297 A2d 566 (1972) Annot 61 ALR 3d 976.

V. OPERATION OF THE COOPERATIVE

- A. Methods of operation are governed by the incorporation statute, Articles of Incorporation, bylaws, and any patronage agreements.
- B. Methods will vary according to type of cooperative, i.e., marketing, supply (purchasing), bargaining, or other type of service, or a combination of types.
1. Certain types, such as bargaining associations, may be governed by statutes specially applicable thereto.
- C. Methods of operation as to relationship with patrons.
1. The patronage relationship is much closer and more personal than that between an ordinary corporation and its shareholders. Hulbert, Legal Phases of Farmer Cooperatives (1958 Ed) page 4.
    - a. Has been held to be of fiduciary character. Rhodes v. Little Falls Dairy Company, Inc., 230 App. Div. 571, 245 NYS 432, Aff'd 256 NY 559, 177 NE 140. See Farmers Cooperative Co. v. Birmingham, 86 F.Supp. 201 at 214, and Annot 50 ALR 2d 435, 443.
  2. Membership in properly operated cooperative will be an active patronage relationship; basic purpose of membership is to use the cooperative's services.
  3. Agency (technically similar to agency rather than a true principal-agent relationship).
  4. Purchase by cooperative from its patrons.
    - a. Effect of minimum purchase price requirements under federal or state marketing order.
    - b. Not a true purchase and sale in usual commercial sense.

5. In either method, the basic requirement of doing business with patrons on cooperative basis without profit to the cooperative, applies.
    - a. Thus a "price" paid to a patron is subject to adjustment according to ultimate net earnings or cost to the cooperative from that transaction.
  6. Patronage agreements may or may not be used, and may or may not require the patron to deal exclusively with the cooperative.
    - a. Recent trend in some areas away from mandatory patronage may be reversed by the difficulty of complying with IRS Rev. Proc. 73-39, CB 1973-2, page 502.
  7. Any "rules and regulations" which bylaws or patronage agreement authorize board of directors to adopt as binding on patrons should be adopted by formal resolution, codified, and copies supplied to each patron. See Sutton v. Hunziker, 75 Idaho 395, 272 P2d 1012 (1952).
  8. Members patronage, unlike that of a nonmember, is subject to pertinent bylaw provisions.
- D. Pooling practices.
1. Multiple commodity or service pools.
  2. Single pool operation.
  3. IRS "pooling" and inventory valuation rulings. Rev. Rul. 67-333, Rev. Rul. 69-67, and Rev. Rul. 69-71.
- E. Federated Cooperatives.
1. Does Clayton Act prohibition of interlocking directorates prevent director of member cooperative serving on board of federated?
- F. Operation methods are strongly influenced, but need not be controlled, by federal tax treatment of cooperatives.
1. Cooperative may elect not to be taxed as a cooperative; operation contrary to the technical requirements of IRC subchapter T (IRC §§ 1381, et seq.) does not necessarily disqualify as a cooperative.

- a. Single-tax treatment might be available outside Subchapter T, under court decisions predating that statute. Pomeroy Cooperative Grain Co. v. Commissioner, 288 F2d 326 (CA 8, 1961). Long Poultry v. Commissioner, 249 F2d 726 (CA4, 1957); Moe v. Earle, 226 F2d 583 (CA9, 1955), cert. den. 350 US 1013.
- b. This issue as to effect of Subchapter T upon earlier case law evidently has not yet arisen.

G. Nonmember business.

1. No limitation, other than for tax purposes, except as limited by the incorporation statute, Articles, or bylaws, and general principle that to be a cooperative, most of its business must be on a cooperative basis.
2. May treat nonmembers as cooperative patrons, i.e., distribute to them the net earnings attributable to their patronage of the cooperative.
  - a. Some marketing cooperatives have nonmember as well as member patronage agreements, but with different provisions.
  - b. Bylaws apply only to members unless specifically incorporated by reference in a nonmember agreement. A "tax consent" bylaw will not qualify patronage distributions to nonmembers as tax-excludable patronage dividends. An independent consent must be obtained from each nonmember. See IRC § 1388(c).
3. May a cooperative do business with nonmembers in such a way as to be operating part cooperative and part noncooperative? Probably not. Any profit on nonmember business (less tax paid thereon, if not a § 521 cooperative) should be apportioned to its members. See Packel, op cit., page 254.
  - a. IRS position [Rev. Rul. 72-602, C. B. 1972-2, page 511] that operation on cooperative basis requires that most (51%) of the business be conducted on that basis does not necessarily mean that the other 49% can be handled in a profit-corporation manner, i.e., as the corporation's profit distributable to its stockholders as such, rather than to its members on a patronage basis.

- H. Compliance with state and federal securities laws, unless firmly exempted therefrom.
  - 1. Uncertain status under the securities laws of patronage capital equities. See Shereff, Agri-cultural Cooperatives--Do They Issue Securities? Prentice-Hall 1975 Fed. Taxes, ¶ 26,030; Weiss, Application of the Securities Laws to Agricultural Cooperation, Proceedings of Second (1975) National Symposium on Cooperatives and the Law, U. of Wis. Center for Cooperatives, page 90.
- I. Patronage capital.
  - 1. A rule of thumb is that members' capital equity should finance at least one-half of the cooperative's total assets at its seasonal low point for receivables and inventories. Heitz, President, St. Louis Federal Land Bank, American Cooperation 1972-73, page 15.
  - 2. Patronage capital retains.
    - a. Are not debt obligations. Claasen v. Farmers Grain Cooperatives, 208 Kan 129, 490 P2d 376 (1971)
    - b. Transferability may be limited. 18 Am Jur2d 276; Annot. 98 ALR 423; and see Wash Rev. Code § 21.20.320(16).
    - c. Termination of membership does not create or accelerate right to redemption, absent contrary bylaw. 50 ALR 3d 435, Annot. Cooperative Associations, Rights in Equity Credits or Patronage Dividends.
    - d. Redemption or revolving: Permanent or interim capital?
      - (1) Use of term "revolving" negates any permanent capital intent.
      - (2) An integral feature of any revolving capital plan is that it will "revolve" beginning as soon as the capital reaches its needed level, through continued retains to be used to redeem the oldest outstanding retains.

(3) Any discretionary authority of board as to patronage retains, the rate or amount thereof, and time and rate of redemption, must be exercised reasonably under the current circumstances.

(i) Lake Region Packing Assn. v. Furze, 327 F2d 212 (Fla. 1976)

(ii) "It commonly is the understanding of the parties (and hence their express or implied contract) that the directors of the cooperative will make that determination in good faith and for the purposes for which the cooperative was formed and the revolving fund created \* \* \*. The directors cannot capriciously or arbitrarily refuse to return the contributions." Nieman, Revolving Capital in Stock Cooperative Corporations, Law and Contemporary Problems, Duke University School of Law, Vol. 13 (1948), page 398.

(4) Does the cooperative method of operation imply an obligation to "revolve" all patronage capital, even without express bylaw requirement?

(i) "I believe that the principle of equitable treatment not only calls for pro rata participation in equity financing by members, but also an obligation of associations to redeem equities when members no longer have need for the cooperative's services." Schaars, An In-depth Probe for Meaning of Cooperatives, American Institute of Cooperation, page 309.

(ii) For the view of a cooperative's patronage-generated capital as of a temporary or interim character, see Nieman, op. cit. page 393.

VI. LIQUIDATION

- A. Once it becomes apparent that a cooperative is unsuccessful, with no reasonable prospect or rehabilitation, it should be liquidated while solvent, rather than the current patrons bleeding the cooperative dry, leaving nothing for the equity owners. Kerr, Organization and Operation of Marketing, Purchasing and Labor Cooperatives; Agricultural Cooperatives 1979, Practicing Law Institute.

VII. REFERENCES:

Packel, Organization and Operation of Cooperatives (4th Ed.) Ch. 3, 4, 6.

Schaars, Cooperatives, Principles and Practices, U. of Wis. - Extension Pub. A 1457 (1970-71).

Nieman, Multiple Contractual Aspects of Cooperatives' Bylaws, 39 Minn. Law. Rev. (No. 2, Jan. 1955), page 135.

Hulberg, Legal Phases of Farmer Cooperatives (1958 Ed.) USDA FCS Bulletin 10.

18 Am Jur. 2d 259, Cooperative Corporations.

ANTITRUST AS IT RELATES  
TO FISHERY COOPERATIVES

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FOR DISCUSSION BEFORE THE EAST COAST FISHERIES  
LAW CONFERENCE

Portland, Maine  
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A. PERSPECTIVE

1. Legislative History of "An Act To Authorize The Association of Producers of Aquatics Products" - Fishermen's Collective Marketing Act of 1934, 15 U.S.C. § 521-522, also referred to as the Fishermen's Cooperative Marketing Act (FCMA)
2. Capper-Volstead Act (7 U.S.C. § 291-292)
3. Sherman Antitrust Act (15 U.S.C. § 1-2) Prohibits contracts, combinations or conspiracies in restraint of trade and monopolies or attempts to monopolize.

B. FCMA ANALYSIS

1. Section 521 - This section defines the "persons" and "associations" entitled to claim the limited antitrust exemption granted by the Act and describes the elements and scope of the exemption. The exemption applies to:
  - (a) "persons engaged in the fishery industry,"
  - (b) "as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on private or public beds,... and permits them to:"
  - (c) "act together in associations, corporate or otherwise, with or without capital stock,"
  - (d) "in collectively catching, producing, preparing for market, processing handling, and marketing in interstate and foreign commerce, such products of said persons so engaged."
  - (e) "Such associations may have marketing agencies in common, and"
  - (f) "such associations and their members may make the necessary contracts and agreements to effect such purposes;"
  - (g) "Provided, however, that such associations are operated for the mutual benefit of the members thereof" See Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 U.S. 384 (1967); National Broiler Marketing Assn. v. United States, 436 U.S. 816 (1978); see exception in Alexander v. National Farmer Organization, 687 F2d 1173 (8th Cir. 1982, pet. for cert. filed March 25, 1983).



(h) the association must meet the following requirements:

(i) Each member is entitled to only one vote without regard to the amount of his stock or membership capital;

or

(ii) it pays no more than eight percent per annum in the form of dividends on capital stock or interest on any form of membership capital;

and

(iii) does not deal in the products of non-members "to an amount greater in value than such as are handled by it for members."

2. Section 522 - The Secretary of Commerce [formerly the Secretary of Interior] is empowered, after notice and hearing, to issue a cease and desist order against a cooperative if he finds that it "monopolizes or restrains trade...to such an extent that the price of any commodity is duly enhanced."

(a) Rationale for this unique provision:

(i) "...before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly or not, the Secretary of Agriculture must investigate and make a finding that the cooperative is in restraint of trade or is a monopoly and is unduly enhancing prices." 62 Cong. Rec. 2049 (Capper-Volstead debate 1922).

(ii) See United States v. du Pont & Co., 351 U.S. 377, 388 (1956), where the Court observed: "It is true that Congress has made exceptions to the generality of monopoly prohibitions, exceptions that spring from the necessities or conveniences of certain industries or business organizations, or from the characteristics of the members of certain groups of citizens," [citing among other statutes, the Capper-Volstead Act].

3. Rationale for limited exemption.

(a) Individual fishermen or boat owners have no bargaining power - price-takers, non price-setters.

- (b) Major processors and distributors are frequently large concerns with significant economic and financial strength; concentration on buyer's side.
- (c) Fishing industry is unique and the economics of this industry are readily distinguished from industrial economics.
  - (i) Each individual boat owner makes his own decision when and where to fish, or has control of his own crustacean beds.
  - (ii) Actual production is subject to the vagaries of weather, runs of fish, disease, etc.
  - (iii) Market demand is inelastic.
  - (iv) Capital outlays are frozen into the particular form of fishing as well as area and not easily transferred.
  - (v) Aquatic products once harvested must be disposed of in a short period of time because of perishability. Sales take place regardless of the total quantity available in the marketplace.

#### 4. Exempt Activities.

- (a) Cooperative bargaining associations are entitled to the limited antitrust exemption. Treasure Valley Potato Bargaining Assn. v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974) cert. denied, 419 U.S. 999 (1974); Northern California Supermarkets, Inc. v. Central California Lettuce Producers, 413 F.Supp. 984 (N.D. CA. 1976), aff'd per curiam, 580 F.2d 369, 9th Cir., cert. denied, 99 S.Ct. 873 (1979).
- (b) Two or more cooperative associations may have a market agency in common to fix prices. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980); GVF Cannery, Inc. v. California Canners & Growers and Tri-Valley Growers, 511 F.Supp. 711 (N.D. CA. 1981).
- (c) It is not unlawful for cooperatives to try to acquire 100 percent of the market. Cape Cod Food Products v. National Cranberry Association, 119 F.Supp. 900 (D. Mass 1954); Fairdale Farms, Inc. v. Yankee Milk, Inc., supra; GVF Cannery, Inc. v. California Canners & Growers and Tri-Valley Growers, supra.

5. Limitation on Exemptions.

- (a) No exemption for associations that extend membership to non-producers. Case Swayne, National Broiler, Alexander cases (supra).
- (b) Agreements with "other persons" not exempt conduct. United States v. Borden Co., 308 U.S. 188 (1939), Maryland and Virginia Milk Producers Assn. v. United States, 362 U.S. 458 (1960) extended the Borden rule regarding "other persons" to §7 of the Clayton Act.
- (c) Unfair or predatory practices are not exempt. Manaka v. Monterey Sardine Industries, Inc., 41 F.Supp. 531 (D.C. Cal. 1941); Hawaii Tuna Packers Ltd. v. International Longshoremen's and Warehouseman's Union, 72 F.Supp. 562 (D.C. Haw. 1947); In the matter of Washington Crab Assn., et al., 66 F.T.C. 45; Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1 (9th Cir. 1960), rev'd on other grounds, 370 U.S. 19 (1962); Maryland and Virginia Milk Producers, supra; (Numerous other cases relating to both fishery and agriculture cooperative associations. See, for example, Gulf Coast Shrimpers and Oysterman's Assn. v. United States, 236 F.2d 658 (5th Cir. 1956).
- (d) Agreements with others not to sell to certain persons is not exempt conduct. Sunkist Growers Inc. v. Winckler & Smith Citrus Products, Co., supra.

6. Questionable Activities.

- (a) Control of production. Department of Justice view expressed in United States v. Grower-Shipper Vegetable Ass'n., Civ. No. 30561 (N.D. CA. 1951) Consent Decree; United States v. Borden, 1940-1943 CCH Trade Cas. ¶ 56062, 9 U.S. Law Week 2201, 2202 (N.D. Ill. 1940); However, see United States v. All Coast Fishermen's Marketing Ass'n., Inc., 1982 CCH Trade Cas. ¶ 50,824 (D. Ore. 1982); and Commissioner Paul Rand Dixon's decision. See the Matter of Washington Crab Ass'n., et al., supra.
- (b) Justice Department position is that "joint activities" are not permitted with other fishermen not members of the association. United States v. All Coast Fishermen's Marketing Ass'n., Inc., 47 F.R. 46908 (Oct. 21, 1982).

- (c) Exclusive Dealing and Full Supply Contracts. Tampa Electric Company v. Nashville Coal Company, 365 U.S. 320 (1961) not per se illegal; North Texas Milk Producers Ass'n. v. Metzger Dairies, 348 F.2d 189 (1965) an attempt to coerce a dealer is illegal; Berjans Farm Dairy v. Sanitary Milk Producers, 241 F.Supp. 476, affirmed, 368 F.2d 679 (1966); legally acquire monopoly power... very strictly accountable for use of that power; Manaka v. Monterey Sardine Industries, Inc., supra, refusal to "assign" Manaka's boat to the canner. Would an open-membership policy have made the full supply contracts legal; United States v. Dairymen, Inc., 660 F.2d 192 (6th Cir. 1981); Hinton, et al. v. The Columbia River Packers Ass'n. Inc., 131 F.2d 88 (9th Cir. 1942).

Sections 1 and 2, The Fishermen's Collective Marketing Act  
15 U.S.C. §§ 521 and 522

§521. Organizations authorized; aquatic products defined; marketing agencies; requirements

Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

The term "aquatic products" includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes; Provided, however, That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

and in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

§522. Monopolies or restraints of trade; cease and desist order; procedure; judicial review and enforcement

If the Secretary of Commerce shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days

after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Commerce may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Commerce shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Commerce shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceedings, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Commerce and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein, the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court shall, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer, or agent thereof, engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association and such service shall be binding upon such association, the officers and members thereof.

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Subtitle 5. Cooperatives.

§ 5-501. Definitions.

- (a) *In general.* — In this subtitle the following words have the meanings indicated.
- (b) *Cooperative.* — "Cooperative" means a corporation organized or converted under this subtitle, which operates for the mutual benefit of its members and conforms to the following requirements:
- (1) A member of the cooperative is not allowed more than one vote, regardless of the amount of stock or membership capital he may own;
  - (2) The cooperative does not pay dividends on stock or membership capital in excess of 8 percent per annum;
  - (3) The cooperative does not deal in products of nonmembers in an amount greater in value than that in which it deals for members; and
  - (4) After payment of every necessary expense and authorized deduction, the proceeds from the business of the cooperative are distributed to the members in proportion to the volume of business transacted by them with the cooperative.
- (c) *Member.* — "Member" means a person who:
- (1) Owns stock in a cooperative having capital stock; or
  - (2) Holds a certificate of membership in a cooperative not having capital stock.
- (An. Code 1957, art. 23, § 349; 1975, ch. 311, § 2.)

REVISOR'S NOTE:

This section formerly appeared as Article 23, § 349, and "corporation" or "association." However, deletion of the term "association" from subsection (b) of this section and throughout this subtitle does not in any way imply that a cooperative may not use the term "association" in its corporate name. Throughout this subtitle the term "cooperative" is substituted for the terms "cooperative association," "association," "association

A cooperative association is distinct from its stockholders. *Rutledge Cooperative Ass'n v. Baughman*, 153 Md. 297, 136 A. 29 (1927)

§ 5-502. Purposes of incorporation.

- A cooperative may be incorporated for any combination of the following purposes:
- (1) Collectively to produce, process, prepare for market, handle, store, and market the products of persons engaged in the production of agricultural or fishery products;
  - (2) To act as a selling or buying agent for its members; and
  - (3) To purchase or otherwise acquire goods or services for its members. (An. Code 1957, art. 23, § 351; 1975, ch. 311, § 2.)

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REVISOR'S NOTE

This section formerly appeared as Article 23, § 351 (b). The phrase "in interstate and foreign commerce," which formerly appeared after "marketing," is deleted as unnecessary and since it omits any reference to interstate commerce, misleading. The only other changes are in style.

§ 5-503. Who may incorporate; capital stock.

- (a) *Who may incorporate.* — A cooperative may be organized by:
- (1) Five or more adult individuals acting as incorporators, at least two of whom are residents of the State and each of whom is engaged in:
  - (i) The production of agricultural products as a farmer, planter, rancher, dairyman, bee keeper, or nut or fruit grower; or
  - (ii) The catching, taking, harvesting, cultivating, farming, propagating, processing, marketing, or distributing of fishery products, including fish, shellfish, crustacea, seaweed, and other aquatic forms of animal and vegetable life or their products or by-products; or
  - (2) Two or more cooperatives acting as incorporators.
- (b) *Incorporation permitted with or without capital stock.* — The cooperative may be organized with or without capital stock for any of the purposes enumerated in this subtitle. (An. Code 1957, art. 23, § 351; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 351 (a). It is noted that this section requires certain qualifications for an incorporator of a cooperative. Like qualifications are not required of an incorporator of an ordinary corporation. Further, it would seem that these qualifications would more properly be imposed on the members or directors of a cooperative. Clarifying legislation may be appropriate.

§ 5-504. Powers in general.

- A cooperative has the power to:
- (1) Engage in or finance any activity in connection with:
  - (i) Producing, marketing, selling, preserving, drying, catching, taking, harvesting, cultivating, propagating, processing, canning, packing, handling, storing, purchasing, or using any agricultural or fishery products of its members or goods incidentally and customarily purchased or marketed in conjunction with these products;
  - (ii) Manufacturing or marketing the by-products of these products; or
  - (iii) The purchase, hire, or use by its members of supplies, machinery, equipment, or services;
  - (2) Transport the products of its members, even if in competition with licensed common carriers;
  - (3) Borrow money, give its notes, bonds, or other obligations for the debt, and secure payment of the debt;
  - (4) Make advances to its members on their products held by the cooperative;
  - (5) Act as an agent for or representative of any member in any activity listed in items (1) through (4) of this section;

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- (6) Deposit or invest surplus funds in:
- (i) Obligations of the United States, the State, or any county or municipality of the State;
- (ii) Any Maryland banking institution, or any national bank located in a state in which the cooperative has members; and
- (iii) Shares or certificates of deposit of any insured savings and loan association permitted to do business in the State;
- (7) Buy or otherwise acquire, hold, own, and exercise all rights of ownership in and sell, transfer, or pledge shares of the capital stock or bonds of any cooperative or any corporation or association engaged in any related activity, including the financing of the activities of cooperatives;
- (8) Establish and accumulate reserves and surplus to capital and any other funds authorized by its charter or bylaws;
- (9) Buy, hold, and exercise every privilege of ownership over any real or personal property necessary or convenient for or incidental to the conduct and operation of the business of the cooperative;
- (10) Sue, be sued, complain, and defend in all courts;
- (11) Issue stock of any class authorized by its charter;
- (12) Issue certificates of indebtedness;
- (13) Provide by contract with its members or patrons that any money due from the cooperative to them may be retained as necessary;
- (i) To pay dividends on preferred stock or interest on certificates of indebtedness; and
- (ii) To be used to retire the stock or certificates of indebtedness;
- (14) Issue to each patron a certificate or other evidence of his equity in any fund, capital investment, or other assets of the cooperative, which certificate or other evidence of equity may be transferred only to the cooperative or to another purchaser approved by the board of directors, on the terms and conditions provided in its bylaws and printed on the certificate or other evidence of equity;
- (15) Do anything necessary, suitable, or proper to accomplish the purposes mentioned in this section and exercise such power, right, and privilege necessary or incidental to the purposes for which the cooperative is organized or to the activities in which it is engaged; and
- (16) Exercise any other right, power, and privilege granted by the laws of the State to corporations in general, if not inconsistent with the provisions of this subtitle. (An. Code 1957, art. 23, § 356; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 356, and to do any such thing anywhere," is consistent with law" is deleted as unnecessary. In item (15), the former phrase "and to contract accordingly" is deleted as unnecessary. The only other changes are in style.

Power to engage in activities in connection with marketing, etc., agricultural products. — Each incorporated association has power to engage in any activity in connection with marketing, selling, etc., agricultural products and it is unnecessary to amend its charter, etc.

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for this purpose. Cooperative Milk Serv., Inc. v. Hepler, 198 Md. 104, 81 A.2d 219 (1951).  
 Permit to transport freight required. — This section does not exempt cooperative associations from the requirements of statute as to obtaining permit from the Public Service Commission for the transportation of freight for hire. Parlett article 56, §§ 181-190.  
 Cooperative Tidewater Lines, 154 Md. 405, 165 A. 313 (1933). See article 56, §§ 181-190.  
 Cooperative prevented from extending its route to compete with private company. Madonna & Shawsville Cooperatives Co. v. Public Serv. Comm'n, 164 Md. 95, 176 A. 611 (1935). See article 56, §§ 181-190.

§ 5-505. Articles of incorporation — Execution: contents.

(a) Execution of articles; contents. — The incorporators of a cooperative shall sign, acknowledge, and file with the Department, articles of incorporation. The articles of incorporation shall include:

- (1) The name of the cooperative;
- (2) The name, address, and state of residence of each incorporator;
- (3) A statement of the purposes of the cooperative;
- (4) The municipal area of its principal office in the State; and
- (5) The name and address of its resident agent in the State.
- (b) Organization with capital stock. — (1) If the cooperative is organized with capital stock, the articles of incorporation shall state:
  - (i) The number of shares of stock;
  - (ii) The par value of each share of stock; and
  - (iii) The aggregate par value of all shares of stock.
- (c) A cooperative may not issue stock without par value.
- (c) Organization without capital stock. — If the cooperative is organized without capital stock, the articles of incorporation shall state whether the property rights of its members are equal or unequal and, if unequal, the rule by which the property rights of members, including members admitted after the original organization, are to be determined. (An. Code 1957, art. 23, §§ 351, 352; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, §§ 351 (c), (d), and (e), and 352.  
 In subsection (a) of this section, the word "written," which formerly appeared before "articles of incorporation," is deleted as unnecessary.  
 The term "municipal area," which appears in subsection (a) (4) of this section, is defined in § 1-10) of this article.  
 The filing requirements of former Article 23, § 352 are placed in this section. However, the requirements of that section for recording and The only other changes are in style.

§ 5-506. Same — Amendment.

The charter of a cooperative may be amended as provided in Title 2 of this article, except that:

- (1) An amendment which alters the contract or property rights of any outstanding stock or of any member is not valid unless approved in person or by mail by the affirmative vote of:
  - (i) Two thirds of all the members; or



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- (i) Two thirds of each class of members whose rights would be altered;
- (2) Notwithstanding any other provision of this article, the requirement of item (1) of this section for a two-thirds vote may not be lowered by the charter of the cooperative; and
- (3) Any objecting member whose contract or property rights are substantially adversely affected by the amendment, on compliance with the provisions of Title 3, Subtitle 2 of this article, has the same rights with respect to his contract and property rights as an objecting stockholder has with respect to his stock. (An. Code 1957, art. 23, § 353; 1975, ch. 311, § 2.)

**REVISOR'S NOTE**

This section formerly appeared as Article 23, § 353. The provisions of former Article 23, § 354 which relate to recording fees are deleted as unnecessary since they are covered in Title 1 of this article. The only other changes are in style.

**Cross references.** — As to amendment of corporate charters generally, see §§ 2-601 to 2-605 of this article.

**§ 5-507. Corporation may be converted into cooperative.**

(a) *General rule.* — Any Maryland corporation organized under the general corporation law of the State which does or intends to do business on a cooperative basis may convert itself into a cooperative by amending and restating its charter in accordance with Title 2, Subtitle 6 of this article.

(b) *Articles of amendment and restatement.* — The articles of amendment and restatement shall:

- (1) State that the corporation elects to become a cooperative under this subtitle;
- (2) Make every change in the charter necessary to become a cooperative; and
- (3) Contain a complete restatement of the charter as amended. (An. Code 1957, art. 23, § 374; 1975, ch. 311, § 2.)

**REVISOR'S NOTE**

This section formerly appeared as Article 23, § 374. The term "articles of amendment and restatement" is used in subsection (b) of this section to conform the language of this section with the language of Subtitle 6 of Title 2 dealing with the amendment and restatement of a corporate charter. The only other changes are in style.

**§ 5-508. Stock.**

- (a) *Power of cooperative over its stock and membership.* — A cooperative may:
  - (1) Limit the sale of its common stock or membership to persons designated or described in the bylaws;

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- (2) Provide that a stockholder or member who ceases to belong to the class of persons designated or described in the bylaws loses his right to vote;
- (3) Limit the number of shares of stock which a person may hold; and
- (4) Reserve to the board of directors:

- (i) The option to purchase for the cooperative the stock offered by any stockholder; and

- (ii) The right to redeem the stock of any stockholder.

(b) *Exercise of option to purchase or redeem stock.* — If a cooperative exercises an option to purchase or a right to redeem, it shall pay for the stock the greater of its book value or its par value.

(c) *Restrictions.* — A restriction on the ownership, transfer, or voting of stock authorized by this section is not valid unless the restriction is:

- (1) Set forth in the charter; and
- (2) Printed on any stock subscription document and the stock certificate. (An. Code 1957, art. 23, § 365; 1975, ch. 311, § 2.)

**REVISOR'S NOTE**

This section formerly appeared as Article 23, § 365. "right to recall" since it more closely conforms to modern usage. In subsections (a) and (b) of this section, the phrase "right to redeem" is substituted for The only other changes are in style.

**§ 5-509. Payment by subscriber before certificate of stock or membership issued.**

A stock certificate may not be issued to any subscriber until the stock is full paid. In a cooperative organized without capital stock, a certificate of membership may not be issued to any person until the membership fee is paid in full. (An. Code 1957, art. 23, § 368; 1975, ch. 311, § 2.)

**REVISOR'S NOTE**

This section formerly appeared as Article 23, § 368. The only changes are in style.

**§ 5-510. Use of term "cooperative" in corporate name.**

(a) *Compliance with subtitle required.* — Except for an electric or transportation cooperative, a person may not use the term "cooperative" as part of his corporate or business name unless he has complied with the provisions of this subtitle.

(b) *Exception as to foreign cooperatives.* — A foreign corporation organized under and complying with the cooperative law of the place where it was organized may use the term "cooperative" in this State if it:

- (1) Complies with the laws of this State applicable to foreign corporations; and
  - (2) Does business as a cooperative.
- (c) *Cooperative must use term.* — Every cooperative shall use the term "cooperative" as part of or affixed to its corporate name. (An. Code 1957, art. 23, § 377; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 377 (a) and (b).  
 Former § 377 permits only cooperatives organized under this subtitle and electric cooperatives to use the term "cooperative" in their corporate names. However, transportation cooperatives, in recognition of § 5-602 of this article, are added to the organizations referred to in this section as authorized to use "cooperative" in their corporate names. The use of the term "cooperative" is made mandatory for cooperatives by subsection (c) of this section.

However, it should be noted that this applies, by definition, only to cooperatives "organized or converted under this subtitle." The use of the term "cooperative" by transportation cooperatives is optional; see § 5-602 of this article. For provisions as to use of the term "cooperative" by electric cooperatives, see § 5-601 of this article.

The penalty provisions of former § 377 (c) and (d) are now contained in § 5-532 of this subtitle. The only other changes are in style.

§ 5-511. Bylaws.

(a) *Adoption of bylaws required.* — Within 30 days after the Department accepts for record the articles of incorporation of a cooperative or the articles of amendment and restatement of a corporation converting into a cooperative, the cooperative shall adopt bylaws not inconsistent with law or its charter for the regulation and management of its affairs.

(b) *Vote required.* — The bylaws of a cooperative may be adopted, altered, amended, or repealed only by the affirmative vote of two thirds of the members voting in person or by mail.

(c) *Copy of bylaws to be kept at principal office.* — The original or a certified copy of the bylaws and all amendments shall be kept at the principal office of the cooperative. (An. Code 1957, art. 23, § 359; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 359.  
 In subsection (b) of this section, the phrase "voting in person or by mail" is added for clarity and to conform with § 5-521 of this subtitle.

In subsection (c) of this section, the phrase "in this State" is deleted as unnecessary in light of the definition of "principal office" in § 1-101 of this article.  
 The only other changes are in style.

§ 5-512. Management by directors; number and qualifications.

(a) *Management of cooperative.* — The business and affairs of a cooperative shall be managed by its board of directors.

(b) *Number and qualifications of directors.* — Every cooperative shall have at least five directors, at least two of whom are residents of the State and each of whom is a member of the cooperative. (An. Code 1957, art. 23, § 360; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 360 (a).  
 The requirement that the directors "shall be elected by the members," now appears as § 5-513 (b) (1) of this subtitle.  
 The only other changes are in style.

§ 5-513. Original directors; election and term of successors.

(a) *Original directors.* — Until the first annual meeting of members and until successors are elected and qualify, the board of directors consists of:

(1) The individuals named as directors in the charter; or

(2) If no directors are named, the incorporators.

(b) *Election and term of directors.* — (1) The directors shall be elected by the members.

(2) Unless the bylaws provide otherwise, the directors shall be elected at the first annual meeting of members and at each subsequent annual meeting and shall hold office until the next annual meeting and until their successors are elected and qualify. (An. Code 1957, art. 23, § 360; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 360 (a) and (b).  
 The only changes are in style.

§ 5-514. Election of directors by districts.

(a) *Bylaws may provide for election by districts.* — Subject to the provisions of this section, the bylaws may provide for:

(1) The division into districts of the territory in which the cooperative has members; and

(2) The election of directors according to these districts by the members residing in them.

(b) *Number and manner of apportioning directors.* — If there is a provision for election by districts, the bylaws shall specify:

(1) The number of directors to be elected from each district; and

(2) The manner and method of apportioning or reapportioning the directors and of districting or redistricting the territory.

(c) *Primary elections.* — If there is a provision for election by districts, the bylaws shall require that:

(1) Primary elections be held in each district;

(2) The number of candidates in each district be greater than the number of directors to be elected in the district; and

(3) The result of the primary elections in each district be ratified at the next regular meeting of the cooperative by majority vote of the members voting in person or by mail. (An. Code 1957, art. 23, § 360; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 360 (c).  
 In subsection (c) (3) of this section, the word "mail" is substituted for "written ballot." This is done for uniformity and to conform with the language of § 5-521 of this subtitle.  
 The only other changes are in style.

### § 5-515. Vacancies on board of directors.

- (a) *Filling vacancies.* — If a vacancy on the board of directors occurs other than by expiration of term, the remaining members of the board shall fill the vacancy by majority vote.
- (b) *Replacement to represent district for which vacancy occurred.* — If the bylaws provide for an election of directors by districts, a replacement director shall represent the district for which the vacancy has occurred. (An. Code 1957, art. 23, § 360; 1975, ch. 311, § 2.)

#### REVISOR'S NOTE

This section formerly appeared as Article 23, § 360 (f).  
The only changes are in style.

### § 5-516. Compensation and contracts of officers and directors.

- (a) *Compensation.* — A cooperative may provide a fair remuneration for the time its officers and directors spend in its service.
- (b) *Contracting with cooperative.* — During his term of office, a director may not be a party to a contract for profit with the cooperative if the contract differs in any way from the business relations with the cooperative accorded its other members. (An. Code 1957, art. 23, § 360; 1975, ch. 311, § 2.)

#### REVISOR'S NOTE

This section formerly appeared as Article 23, minimum stock of the association" formerly § 360 (d) and (e), appearing after "members," are deleted as unnecessary. "Member" is defined in § 5-501 of this subtitle as including a stockholder. "regular," formerly appearing before "members," and the words "or holders of" The only other changes are in style.

### § 5-517. Required and permitted officers.

- (a) *Required officers.* — Each cooperative shall have the following officers:
- (1) A president;
  - (2) A vice-president;
  - (3) A secretary; and
  - (4) A treasurer.
- (b) *Permitted officers.* — In addition to the required officers, a cooperative may have any other officer provided for in the bylaws.
- (c) *Certain officers to be directors.* — The president and vice-president shall be elected from among the directors. (An. Code 1957, art. 23, § 362; 1975, ch. 311, § 2.)

#### REVISOR'S NOTE

This section formerly appeared as Article 23, § 362 (a).  
The term "elected" is substituted for "selected" in subsection (c). This conforms to the statutory scheme.  
The only other changes are in style.  
The last sentence of former § 362 (a) and all of former § 362 (b), relating to the execution of documents and terms of office of officers, are deleted as unnecessary in light of the general provisions of § 2-415 of this article.

### § 5-518. Removal of director and officer.

- (a) *Removal of director.* — (1) Any member of a cooperative may bring charges of misconduct or incompetency against a director by filing with the secretary of the cooperative a written petition signed by 10 percent of the members or 25 members, whichever is less, specifying the charges and requesting removal of the director.
- (2) The question of removal shall be voted on at the next regular or special meeting of the cooperative.
- (3) Before the meeting is held, the director against whom charges are brought shall be informed in writing of the charges, and both the director and the member bringing the charges shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses.
- (4) The removal of a director shall be by the affirmative vote of a majority of the members voting in person or by mail.
- (b) *Removal of officer.* — (1) If the board of directors in its judgment finds that the best interests of the cooperative will be served, it may remove any officer of the cooperative.
- (2) The removal of an officer does not prejudice any of his contract rights. (An. Code 1957, art. 23, § 363; 1975, ch. 311, § 2.)

#### REVISOR'S NOTE

This section formerly appeared as Article 23, § 363.  
The language of § 5-521 of this subtitle.  
The only other changes are in style.  
"mail" is substituted for "written ballot" for

### § 5-519. Meetings.

- (a) *Annual meeting.* — (1) Every cooperative shall hold an annual meeting of its members to elect directors and to transact any other business within its powers.
- (2) The meeting shall be held:
- (i) At the time provided in the bylaws; or
  - (ii) If the bylaws specify a period not exceeding 31 days during which the meeting may be held, at a time within that period set by the board of directors.
- (b) *Additional regular meetings.* — The bylaws may provide for additional regular meetings.
- (c) *Special meetings.* — (1) The board of directors may call a special meeting at any time.
- (2) Ten percent of the members may demand a special meeting at any time by filing a petition which states the specific business to be brought before the meeting, and the board of directors then shall call the meeting.
- (d) *Notice of meetings.* — Notice of each meeting shall be mailed to each member at least ten days before the meeting and, if a special meeting is called, the notice shall state the purpose of the meeting. (An. Code 1957, art. 23, § 361; 1975, ch. 311, § 2.)

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REVISOR'S NOTE

This section formerly appeared as Article 23, § 361.

The only changes are in style.

**§ 5-520. Quorum.**

- (a) *General rule.* — The bylaws of a cooperative shall state the number or percentage of the members necessary to constitute a quorum at a meeting.
- (b) *Voter by mail.* — A member who votes by mail may not be counted in computing a quorum. (An. Code 1957, art. 23, §§ 366, 370; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23,

§§ 366, 370 and 371.

The only changes are in style.

**§ 5-521. Voting.**

- (a) *Each member entitled to one vote.* — A member of a cooperative organized without capital stock and a holder of stock, whether common or preferred, is entitled to only one vote.
- (b) *Voting by proxy prohibited.* — Voting by proxy is prohibited in any cooperative. Voting by mail is not voting by proxy.
- (c) *Voting by mail.* — At any meeting of members, a signed written vote received by mail from any absent member may be read at the meeting and is equivalent to a vote of the member if:
  - (1) The member was notified in writing of the exact motion or resolution on which the vote is taken; and
  - (2) A copy of the motion or resolution is attached to the vote mailed by him. (An. Code 1957, art. 23, § 366; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23,

§ 365.

The former reference to a "regular or special meeting, legally called" has been revised to simply "meeting" since the omitted words are unnecessary. No substantive change is intended.

**§ 5-522. Contracts with members.**

- (a) *Validity of contracts with members.* — If otherwise lawful, a member may contract with his cooperative to sell his products to or through or buy goods from or through the cooperative or its facilities.
- (b) *Self-renewing contract permitted.* — The contract may be made self-renewing for periods up to five years, subject to notice to be given by either party at least 60 days before the contract expires if he desires not to renew.
- (c) *Liquidated damages permitted.* — The contract may provide for liquidated damages to be paid by the member for breach of contract.
- (d) *Injunction and specific performance.* — In the event of a breach or threatened breach of the contract by a member, the cooperative may obtain an

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injunction to prevent the breach and a decree for specific performance of the contract. (An. Code 1957, art. 23, § 364; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 364.

In subsection (a) of this section, the phrase "all or a specified part," formerly referring to the goods or products of members, is deleted as unnecessary.

**§ 5-523. Membership in another cooperative.**

A cooperative may be a member of any other cooperative. (An. Code 1957, art. 23, § 357; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23,

§ 357.

The former references to a cooperative "incorporated under this subtitle" and "organized hereunder" are deleted as unnecessary in light of the definition of "cooperative" in § 5-501.

The only other changes are in style.

**§ 5-524. Transactions with other cooperatives.**

- (a) *Agreements with other cooperatives.* — The board of directors of a cooperative by resolution may authorize the cooperative to enter into agreements for conducting its business with any other Maryland or foreign cooperative, association, or corporation formed on a cooperative basis.
- (b) *Use of same business methods.* — These cooperatives, associations, and corporations may agree to unite in using or may separately use the same methods, means, and agencies for conducting their respective business.
- (c) *Marketing agencies.* — These cooperatives, associations, and corporations may use common marketing agencies and their members may make any necessary agreements to effect these purposes. (An. Code 1957, art. 23, § 358; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 358.

In subsections (a) and (c) of this section, the former reference to "contracts" is deleted as unnecessary since the term "agreements" would include a contract.

The only other changes are in style.

**§ 5-525. Patronage distributions.**

- (a) *Required distribution of net proceeds or savings.* — At the time and in the manner which its bylaws provide, each cooperative shall apportion and distribute its net proceeds or savings to the persons entitled to receive them on the basis of their patronage.
- (b) *Bylaw provisions.* — (1) That the apportionment and distribution of the net proceeds or savings may be restricted to members or be made at the same or different rates for members and nonmember patrons;

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(2) For any reasonable apportionment and charging of net losses;  
 (3) That any distribution to a nonmember eligible for membership may be credited to him until the amount credited equals the value of a membership certificate or a share of the common stock of the cooperative;  
 (4) The minimum amount of any single patronage transaction which will be considered for the purpose of participation in an allocation or distribution of net proceeds, savings, or losses under this section.

(c) *Manner of distribution and payment.* — An apportionment and distribution of net proceeds or savings may be in cash, credits, capital stock, certificates of interest, certificates of equity, revolving fund certificates, letters of advice, or other securities or certificates issued by the cooperative or by any affiliated Maryland or foreign cooperative.

(d) *Methods of determining patronage.* — Apportionment and distribution of net proceeds, savings, or losses may be separately determined and based on:

- (1) The patronage of single or multiple pools or particular departments of the cooperative;
  - (2) The patronage as to particular commodities, supplies, or services; or
  - (3) The classification of patronage according to its type.
- (e) *Determination of net proceeds, savings, or losses.* — For purposes of this section, net proceeds, savings, or losses shall be computed in accordance with generally accepted accounting principles applicable to cooperatives, after deducting from gross proceeds or savings all costs and expenses of operation and any dividends paid on capital stock and interest paid on certificates or other evidence of equity in any fund, capital investment, or other assets of the cooperative. (An. Code 1957, art. 23, § 371; 1975, ch. 311, § 2.)

**REVISOR'S NOTE**

This section formerly appeared as Article 23, formerly used in conjunction with "apportionment" and "distributes;" the term "distribute" in subsections (a) and (c) of this section, the term "pay" is deleted as unnecessary since, as the only other changes are in style.

**§ 5-526. Operating on nonprofit basis.**

(a) *As selling agent.* — (1) A cooperative may operate as an agent to sell the products of its members on a nonprofit basis by contracting to pay the members the resale price for products sold by them to or through the cooperative, less a uniform charge to cover the expenses involved in the handling of these products.

(2) The resale price shall be:

- (i) The actual resale price; or
- (ii) A price based on the average price during any period for products of the same type and quality.

(3) The uniform charge for expenses shall be:

- (i) Specified in the contract;
  - (ii) Made otherwise ascertainable; or
  - (iii) Left for determination by the directors.
- (b) *As purchasing or servicing agent.* — A cooperative desiring to purchase goods or obtain or perform services under this subtitle may operate on a

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nonprofit basis in a manner similar to that described in this section. (An. Code 1957, art. 23, § 372; 1975, ch. 311, § 2.)

**REVISOR'S NOTE**

This section formerly appeared as Article 23, § 372.  
 The only changes are in style.

**§ 5-527. Consolidation, merger, transfer of assets, or dissolution.**

(a) *Application of Title 3.* — A cooperative may consolidate, merger (merger), transfer assets, or dissolve in the manner provided in Title 3 of this article for stock corporations in general.

(b) *Rights of objecting members.* — For purposes of this section, an objecting member has the same rights with respect to his contract and property rights as an objecting stockholder has with respect to his stock under Title 3, Subtitle 2 of this article. (An. Code 1957, art. 23, § 355; 1975, ch. 311, § 2.)

**REVISOR'S NOTE**

This section formerly appeared as Article 23, exchange "assets" in light of the definition of § 355.  
 In subsection (a) of this section, the phrase "transfer asset" in § 1-101 of this article.  
 The only other changes are in style.

**Cross reference.** — As to dissolution of corporations generally, see §§ 3-401 to 3-419 of this article.

**§ 5-528. Payment when another business is purchased.**

(a) *Payment for acquisition of business.* — If a cooperative purchases the business of another person, it may pay for the purchase in whole or in part by issuing to the seller certificates of indebtedness or shares of its capital stock in an amount which at par value would equal the fair market value of the business purchased.

(b) *Transfer equivalent to payment in cash.* — A transfer to the cooperative of the business at this valuation is equivalent to payment in cash for the stock issued.

(c) *Directors authorized to hold stock in trust.* — The directors of the purchasing cooperative may hold the stock in trust for the seller and dispose of them (it) in a manner mutually satisfactory to the parties in interest. The directors also may pay the proceeds from the stock to the seller as they are received. (An. Code 1957, art. 23, § 367; 1975, ch. 311, § 2.)

**REVISOR'S NOTE**

This section formerly appeared as Article 23, § 367.  
 In subsection (a) of this section, the former definition of "person" in § 1-101 of this article includes all these entities.  
 In subsection (c) of this section, the former reference to "corporation, association, partnership" is deleted as unnecessary since the definition of "person" in § 1-101 of this article includes all these entities.

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reference to "such persons and within such time" is deleted. This phrase was formerly used in connection with the payment of proceeds from shares held in trust by a cooperative and is unnecessary in light of the language of subsection (c) of this section. The only other changes are in style.

§ 5-529. Report to State Department of Assessments and Taxation.

- (a) *Annual report.* — Before March 15 of each year, every cooperative shall file with the Department an annual report in duplicate.
- (b) *Contents of report.* — The annual report shall contain:
  - (1) The name and principal office of the cooperative;
  - (2) A general statement as to its business, including:
    - (i) The total amount of business transacted during the year;
    - (ii) The amount of stock and membership capital paid for;
    - (iii) The authorized rate of dividends on the fully paid capital stock;
    - (iv) The number of members;
    - (v) The total expenses of operation;
    - (vi) The amount of indebtedness or liabilities; and
    - (vii) The profits and losses.
- (c) *Copy of report to be sent to Department of Agriculture.* — The Department shall transmit one copy of the report to the State Department of Agriculture. (An. Code 1957, art. 23, § 373; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 373. For comparable provisions relating to the filing of annual reports by corporations in general, see Article 81, § 251. The latter are required to be filed by April 15, vice the March 15 requirement in this section. The only other changes are in style.

§ 5-530. Cooperative and marketing agreements not in restraint of trade.

- (a) *Cooperative not combination in restraint of trade.* — A cooperative is not a combination in restraint of trade, an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily.
- (b) *Marketing agreements not in restraint of trade.* — A marketing agreement authorized by this subtitle is not illegal or in restraint of trade. (An. Code 1957, art. 23, § 376; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 376. In subsection (b) of this section, the former reference to a "contract" is deleted as unnecessary since an "agreement" would include a contract. The only other changes are in style.

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§ 5-531. Application of general corporation law.

The general corporation law of the State applies to every cooperative except to the extent that the general corporation law:

- (1) Expressly exempts cooperatives; or
- (2) Is contrary to or inconsistent with the provisions of this subtitle. (An. Code 1957, art. 23, § 375; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 375. Although its provisions are covered by § 1-102 of this article, the section is retained to emphasize the applicability of the general corporation law to cooperatives. The only changes are in style.

§ 5-532. Penalties.

- (a) *Penalty for violation of § 5-510 (a) or (b).* — (1) Any person who violates the provisions of § 5-510 (a) or (b) of this subtitle which restrict the use of the term "cooperative" is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$500 or imprisonment not exceeding six months or both.
- (2) Any corporation which violates the provisions of § 5-510 (a) or (b) of this subtitle shall have its right to do business in the State revoked in a proceeding brought in the circuit court of the county where its office is located.
- (b) *Penalty for violation of cooperative or general corporation law.* — Any cooperative which violates any provision of this subtitle or of the general corporation law applicable to cooperatives shall have its right to do business in this State revoked in a proceeding brought in the circuit court of the county where its office is located. (An. Code 1957, art. 23, § 377; 1975, ch. 311, § 2.)

REVISOR'S NOTE

This section formerly appeared as Article 23, § 377 (a) and (d). Provisions are covered by subsection (a) (2) of this section. The last clause of former § 377, "and any foreign corporation . . ." is deleted since its provisions are covered by subsection (a) (2) of this section. The only other changes are in style.

Subtitle 6. Electric and Transportation Cooperatives.

§ 5-601. Electric cooperatives.

- (a) *Purpose.* — Cooperative, nonprofit, membership corporations may be organized to supply, promote, and extend the use of electric energy.
- (b) *Organization and regulation.* — Each cooperative organized under this section shall be organized and governed by the "Electric Cooperative Act." (An. Code 1957, art. 23, § 380; 1975, ch. 311, § 2.)

REVISOR'S NOTE

Subsection (a) of this section is new language which restates, with but minor changes in style, Article 23, § 380. Subsection (b) of this section, referred to in subsection (b) of this section, are proposed for future declassification and transfer to the Session Laws. This, because there are only two Maryland electric cooperatives and two foreign electric cooperatives doing business in Maryland, and it is extremely unlikely that there will be any additional electric cooperatives organized or doing business in Maryland. With but the exception of § 402, Article 23, §§ 379 through 411 has remained unchanged since passage of the subtitle in 1941. There have been

## § 5-501

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#### 1982 CUMULATIVE SUPPLEMENT

## § 5-507

### Subtitle 5. Cooperatives.

#### § 5-501. Definitions.

(b) *Cooperative* — "Cooperative" means a corporation organized or converted under this subtitle, which operates for the mutual benefit of its members and conforms to the following requirements:

- (1) A member of the cooperative is not allowed more than one vote, regardless of the amount of stock or membership capital he may own;
  - (2) The cooperative does not pay dividends on stock or membership capital in excess of 12 percent per annum;
  - (3) The cooperative does not deal in products of nonmembers in an amount greater in value than that in which it deals for members; and
  - (4) After payment of every necessary expense and authorized deduction, the proceeds from the business of the cooperative are distributed to the members in proportion to the volume of business transacted by them with the cooperative.
- (1981, ch. 415; 1982, ch. 17, § 5.)

*Effect of amendments.* — The 1981 amendment substituted "he" for "he" near the end of paragraph (1) in subsection (b).  
As the other subsections were not affected by section (b).  
The 1982 amendment, effective July 1, 1982,

#### § 5-504. Powers in general.

A cooperative has the power to:

- (1) Engage in or finance any activity in connection with:
  - (i) Producing, marketing, selling, preserving, drying, catching, taking, harvesting, cultivating, propagating, processing, canning, packing, handling, storing, purchasing, or using any agricultural or fishery products of its members or nonmember patrons or goods incidentally and customarily purchased or marketed in conjunction with these products;
  - (ii) Manufacturing or marketing the by-products of these products; or
  - (iii) The purchase, hire, or use by its members or nonmember patrons of supplies, machinery, equipment, or services;
- (2) Transport the products of its members or nonmember patrons, even if in competition with licensed common carriers;
- (3) Borrow money, give its notes, bonds, or other obligations for the debt, and secure payment of the debt;
- (4) Make advances to its members or nonmember patrons on their products held by the cooperative;
- (5) Act as an agent for or representative of any member or nonmember patron in any activity listed in items (1) through (4) of this section;
- (6) Deposit or invest surplus funds in:
  - (i) Direct and indirect obligations of the United States, any other government, state, territory, government district, and municipality, and any instrumentality of them;

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(ii) Any Maryland banking institution, or any national bank located in a state in which the cooperative has members; and  
(iii) Shares or certificates of deposit of any insured savings and loan association permitted to do business in the State;

(7) Buy or otherwise acquire, hold, own, and exercise all rights of ownership in and sell, transfer, or pledge shares of the capital stock or bonds of any cooperative or any corporation or association engaged in any related activity, including the financing of the activities of cooperatives;

(8) Establish and accumulate reserves and surplus to capital and any other funds authorized by its charter or bylaws;

(9) Buy, hold, and exercise every privilege of ownership over any real or personal property necessary or convenient for or incidental to the conduct and operation of the business of the cooperative;

(10) Sue, be sued, complain, and defend in all courts;

(11) Issue stock of any class authorized by its charter;

(12) Issue certificates of indebtedness;

(13) Provide by contract with its members or nonmember patrons that any money due from the cooperative to them may be retained as necessary;

(i) To pay dividends on preferred stock or interest on certificates of indebtedness; and

(ii) To be used to retire the stock or certificates of indebtedness;

(14) Issue to each nonmember patron a certificate or other evidence of his equity in any fund, capital investment, or other assets of the cooperative, which certificate or other evidence of equity may be transferred only to the cooperative or to another purchaser approved by the board of directors, on the terms and conditions provided in its bylaws and printed on the certificate or other evidence of equity;

(15) Do anything necessary, suitable, or proper to accomplish the purposes mentioned in this section and exercise each power, right, and privilege necessary or incidental to the purposes for which the cooperative is organized or to the activities in which it is engaged; and

(16) Exercise any other right, power, and privilege granted by the laws of the State to corporations in general, if not inconsistent with the provisions of this subtitle. (An. Code 1957, art. 23, § 356; 1975, ch. 311, § 2; 1976, ch. 694.)

*Effect of amendment.* — The 1976 amendment, effective July 1, 1976, added (4), added "or nonmember patron" in paragraph (1), revised paragraph (1) and added "nonmember" in paragraphs (1), (3), and (14).

#### § 5-507. Corporation may be converted into cooperative.

(a) *General rule.* — Any Maryland corporation organized under the Maryland General Corporation Law which does or intends to do business on a cooperative basis may convert itself into a cooperative by amending and restating its charter in accordance with Title 2, Subtitle 6 of this article. (1976, ch. 567, § 2.)

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As to the reference to the "Maryland General Corporation Law," added by ch. 567, Acts of 1976, see § 1-103 of this article.

**Effect of amendment.** — The 1976 amendment, effective July 1, 1976, substituted "Maryland General Corporation Law" for "general corporation law of the State" in subsection (a).

As subsection (b) was not affected by the amendment, it is not set forth above.

**§ 5-512. Management of cooperative; number and qualifications of directors.**

(a) *Management of cooperative.* — The business and affairs of a cooperative shall be managed under the direction of a board of directors.

(b) *Number and qualifications of directors.* — Every cooperative shall have at least five directors, at least two of whom are residents of the State and each of whom is a member of the cooperative or of a member cooperative. (An. Code 1957, art. 23, § 360; 1975, ch. 311, § 2; 1976, ch. 567, § 2; ch. 694.)

SUPPLEMENTAL REVISOR'S NOTE

As to the changes made in this section by ch. 567, Acts of 1976, and the role of a board of directors, generally, see Comment to § 2-401 of this article.

**Effect of amendments.** — Chapter 567, Acts 1976, effective July 1, 1976, substituted "or of a member cooperative" at the end of subsection (b) for "by its" in subsection (a).

**§ 5-525. Patronage distributions.**

(b) *Bylaw provisions.* — The bylaws may provide:

(1) That the apportionment and distribution of the net proceeds or savings may be restricted to members or be made at the same or different rates for members and nonmember patrons;

(2) For any reasonable apportionment and charging of net losses;

(3) That any distribution to a nonmember eligible for membership may be credited to him until the amount credited equals the value of a membership certificate or a share of the common stock of the cooperatives; and

(4) The minimum amount of any single patronage transaction which will be considered for the purpose of participation in an allocation or distribution of net proceeds, savings, or losses under this section. (1976, ch. 567, § 2.)

**Effect of amendment.** — The 1976 amendment, effective July 1, 1976, added the introductory statement at the beginning of subsection (b) and added "and" at the end of paragraph (3) in that subsection.

As the other subsections were not affected by the amendment, they are not set forth above.

**§ 5-528. Operating on nonprofit basis.**

(a) *As selling agent.* — (1) A cooperative may operate as an agent to sell the products of its members or nonmember patrons on a nonprofit basis by contracting to pay the members or nonmember patrons the resale price for products sold by them to or through the cooperative, less a uniform charge to cover the expenses involved in the handling of these products. (1976, ch. 694.)

**Effect of amendment.** — The 1976 amendment, effective July 1, 1976, added "or nonmember patrons" twice in paragraph (1) of subsection (a) is set forth above.

As the remainder of the section was not affected by the amendment, only paragraph (1) of subsection (a) is set forth above.

**§ 5-527. Consolidation, merger, share exchange, transfer of assets, or dissolution.**

(a) *Application of Title 3.* — A cooperative may consolidate, merge, participate in a share exchange, transfer assets, or dissolve in the manner provided in Title 3 of this article for stock corporations in general. (1976, ch. 567, § 2.)

SUPPLEMENTAL REVISOR'S NOTE

As to "share exchanges," the reference to which was added by ch. 567, Acts of 1976, see Comment to § 3-102 of this article.

**Effect of amendment.** — The 1976 amendment, effective July 1, 1976, substituted "merge" for "merger" and added "participate in a share exchange" in subsection (a).

As subsection (b) was not affected by the amendment, it is not set forth above.

**§ 5-528. Payment when another business is purchased.**

(c) *Directors authorized to hold stock in trust.* — The directors of the purchasing cooperative may hold the stock in trust for the seller and dispose of it in a manner mutually satisfactory to the parties in interest. The directors also may pay the proceeds from the stock to the seller as they are received. (1976, ch. 567, § 2.)



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Effect of amendment. — The 1976 amendment, effective July 1, 1976, substituted "if" for "them" in the first sentence in subsection (c).

standard" at the end of the fifth sentence in subsection (d) and eliminated the former second paragraph in that subsection.

§ 5-529. Report to State Department of Assessments and Taxation.

- (a) Annual report. — Before the fifteenth day of the fourth month following the end of its fiscal year, every cooperative shall file with the Department an annual report in duplicate.
- (b) Contents of report. — The annual report shall contain:
  - (1) The name and principal office of the cooperative;
  - (2) A description of its business, including:
    - (i) The association's annual financial statements consisting of a balance sheet;
    - (ii) A statement of income and expenses or a statement of changes in financial position;
    - (iii) The number of members or stockholders as of the close of its fiscal year.
- (c) Copy of report to be sent to Department of Agriculture. — The Department shall transmit one copy of the report to the State Department of Agriculture.

(d) Audit of financial statement of cooperative handling raw agricultural products. — If raw agricultural products are delivered by members to a cooperative association under marketing contracts which entitle the members to net proceeds from the sale of the products in their raw or processed state and subject the members to assessments in the event of an operating loss, the financial statements included in the annual report referred to in (a) above for associations engaged in handling raw agricultural products shall be audited by the association's independent certified public accountant. The audit shall be made in accordance with generally accepted auditing standards. Copies of an annual report together with the independent certified public accountant's report on his examination of the association's financial statements shall be furnished to each member or stockholder of the association and the Maryland Secretary of Agriculture. An independent certified public accountant and legal counsel shall be appointed by the association's board of directors. The certified public accountant shall explain his report orally to the board of directors and shall also certify to the Secretary of Agriculture that the audit has been made in accordance with generally accepted auditing standards.

(e) Foreign cooperatives having Maryland members. — The requirements of this section shall be met also by all foreign cooperative associations engaged in handling raw agricultural products that have one or more Maryland residents as members or stockholders. (An. Code 1957, art. 23, § 373; 1975, ch. 311, § 2, 1976, ch. 266; 1977, ch. 736.)

Effect of amendments. — The 1976 amendment, effective July 1, 1976, substituted "the" for "an" in the first sentence of subsection (a) and added subsections (d) and (e). The 1977 amendment, effective July 1, 1977, added and shall also certify to the Secretary of Agriculture that the audit has been made in accordance with generally accepted auditing year" in subsection (a), rewrote subsection (b) in accordance with generally accepted auditing

§ 5-531. Application of Maryland General Corporation Law.

The Maryland General Corporation Law applies to every cooperative except to the extent that the Maryland General Corporation Law:

- (1) Expressly exempts cooperatives; or
- (2) Is contrary to or inconsistent with the provisions of this subtitle. (An. Code 1957, art. 23, § 375; 1975, ch. 311, § 2; 1976, ch. 567, § 2.)

SUPPLEMENTAL REVISOR'S NOTE

As to the reference to the "Maryland General Corporation Law," added by ch. 567, Acts of 1976, see § 1-103 of this article.

Effect of amendment. — The 1976 amendment, effective July 1, 1976, substituted "Maryland General Corporation Law" for "general corporation law of the State" and for "general corporation law" in the introductory paragraph.

§ 5-532. Penalties.

(b) Penalty for violation of cooperative or General Corporation Law. — Any cooperative which violates any provision of this subtitle or of the Maryland General Corporation Law applicable to cooperatives shall have its right to do business in this State revoked in a proceeding brought in the circuit court of the county where its office is located. (1976, ch. 567, § 2.)

SUPPLEMENTAL REVISOR'S NOTE

As to the reference to the "Maryland General Corporation Law," added by ch. 567, Acts of 1976, see § 1-103 of this article.

Effect of amendment. — The 1976 amendment, effective July 1, 1976, substituted "Maryland General Corporation Law" for "general corporation law" in subsection (b). As subsection (a) was not affected by the amendment, it is not set forth above.

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### ARTICLE 5. SHARES

Section

- 1691. Issuance and contents.
- 1692. Transfer of shares and membership; withdrawal.

### ARTICLE 6. DISSOLUTION

1731. Procedure.

### ARTICLE 1. GENERAL PROVISIONS

## § 1501. Definitions

In this subchapter, unless the subject matter requires otherwise:

1. **Association.** "Association" means a group enterprise legally incorporated under this subchapter and shall be deemed to be a nonprofit corporation.
2. **Cooperative basis.** "Cooperative basis" as applied to any incorporated or unincorporated group referred to in subsequent sections of this subchapter means:
  - A. That each member has one vote and only one vote, except as may be altered in the articles or bylaws by provisions for voting by member organizations;
  - B. That the maximum rate at which any return is paid on share or membership capital is limited to not more than 6%; and
  - C. That the net savings after payment, if any, of said limited return on capital and after making provision for such separate funds as may be required or specifically permitted by statute, articles or bylaws shall be allocated or distributed to member patrons, or to all patrons, in proportion to their patronage; or retained by the enterprise for the actual or potential expansion of its services or the reductions of its charges to the patrons, or for other purposes not inconsistent with its nonprofit character.
3. **Member.** "Member" means not only a member in a nonshare association but also a member in a share association.
4. **Net savings.** "Net savings" means the total income of an association minus the costs of operation.

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5. **Savings returns.** "Savings returns" means the amount returned to the patrons in proportion to their patronage or otherwise in accordance with this subchapter.  
R.S.1954, c. 56, § 1.

### Library References

Corporations ¶3.

C.J.S. Corporations § 14 et seq.

### Notes of Decisions

#### 1. Members or employees

Where cooperative was organized by homeworkers under this subchapter to deal in knitted and crocheted clothing made by homeworkers and items produced by homeworkers were the units used for measuring each homeworker's share in the cooperative net income and interest as members. *Mitchell v. Whitaker House Co-op, Inc.* (D.C.1956) 170 F. Supp. 743 affirmed 275 F.2d 362.

Members in cooperative and producers were identical, there was no employment relationship present in the production of the items and the Fair Labor Standards Act (29 U.S.C.A. § 201 et seq.) was not applicable to the cooperative. *Mitchell v. Whitaker House Co-op, Inc.* (D.C.1956) 170 F. Supp. 743 affirmed 275 F.2d 362.

## § 1502. Existing cooperative groups

Any group incorporated under the law of this State and operating on a cooperative basis or any unincorporated group operating on such a basis in this State may elect by a vote of  $\frac{2}{3}$  of the members voting to secure the benefits of and be bound by this subchapter, and shall thereupon amend such of its articles and bylaws as are not in conformity with the provisions hereof. A certified copy of the amended articles shall be filed and recorded with the Secretary of State and a fee of \$5 shall be paid.  
R.S.1954, c. 56, § 18.

### Library References

Corporations ¶40.

C.J.S. Corporations § 61.

## § 1503. Foreign corporations doing business in State

A foreign corporation or association operating on a cooperative basis and complying with the applicable laws of the State or District of Columbia wherein it is organized shall be entitled to do business in the State as a foreign cooperative corporation or association upon complying with law for foreign corporations doing business in this State.  
R.S.1954, c. 56, § 19.

### Cross References

Foreign corporations, see title 13-A, § 1201 et seq.

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Library References

Corporations ¶938. C.J.S. Corporations § 1807.

§ 1504. Laws not applicable

No law of the State conflicting or inconsistent with any part of this subchapter shall, to the extent of the conflict or inconsistency, be construed as applicable to associations formed under this subchapter; nor shall any law of the State inappropriate to the purposes of such associations be so construed. R.S.1954, c. 56, § 20.

Library References

Corporations ¶913. C.J.S. Corporations § 41 et seq.

Notes of Decisions

1. Labor laws

Members of a cooperative who performed homework, and were paid on a piece-rate basis fixed by the cooperative for manufacturing items the cooperative desired, and who were subject to expulsion for sub-standard work or for failure to obey regulations, were "employees" of the cooperative and the Fair Labor Standards Act (29 U.S.C.A. § 201 et seq.) was applicable to the cooperative. *Guldborg v. Whitaker House Cooperative Inc.*, 190 F.2d 811, 813, 304 U.S. 28, 61 L.Ed.2d 106.

Economic reality rather than technical concepts is test of employment within Fair Labor Standards Act (29 U.S.C.A. § 201 et seq.). *Id.*

Cooperative organized by homeworkers under this subchapter to deal in knitted and crocheted clothing made by homeworkers was a bona fide cooperative organized and controlled by homeworkers for their mutual benefit, and was not merely a superfluous created and utilized by officers of cooperative to protect business operations of treasurer from application of the Fair Labor Standards Act (29 U.S.C.A. § 201 et seq.). *Michell v. Whitaker House Co-op. Inc.*, 170 F.2d 743, 41-1, affirmed 273 F.2d 362.

§ 1505. Taxation

Associations formed under this subchapter and foreign corporations and associations admitted to do business in the State and entitled to the benefits of this subchapter shall pay the annual license fee required of other business corporations and foreign corporations.

R.S.1954, c. 56, § 21.

Cross References

Foreign corporations, see title 13-A, § 1201 et seq.

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Library References

Licenses ¶18. C.J.S. Licenses § 30.

§ 1506. Registration as dealers in securities

Associations organized under this subchapter shall be subject to Title 32, chapter 13. The fee charged for registration or renewal shall be \$10. R.S.1954, c. 56, § 22.

Cross References

Dealers in securities, see title 32, § 151 et seq.

Library References

Licenses ¶16½(37). C.J.S. Licenses § 73.

United States Code Annotated

Local jurisdiction not affected by federal law, see 15 U.S.C.A. § 77r.

§ 1507. Limitation on return on capital

The return upon capital shall not exceed 6% per year upon the paid-up capital and shall be noncumulative.

Total return upon capital distributed for any single period shall not exceed 50% of the net savings for that period.

R.S.1954, c. 56, § 10.

Library References

Corporations ¶150. C.J.S. Corporations §§ 217, 458.

ARTICLE 2. ORGANIZATION AND BYLAWS

§ 1551. Articles of incorporation; first meeting; fees

Articles of incorporation for the formation of an association under this subchapter shall be drawn up and filed in the same manner and under the same provisions as for organizing business corporations under the general law, except where such procedure would be inconsistent with this subchapter. The same provision shall apply under said general law to associations organized under this subchapter in respect to the first meeting of the corporation, and as to fees payable to the State.

R.S.1954, c. 56, § 23.

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### Cross References

Amendment of articles of incorporation, see title 13-A, §§ 202, 802, 810 and 1307.  
Fees payable, see title 13-A, §§ 106, 1401 et seq.  
Maine Business Corporation Act, see title 13-A.  
Use of word cooperative in business name, see § 1176 of this title.

### Library References

Corporations  $\text{C}\Rightarrow$ 18, 24. C.J.S. Corporations § 32 et seq.

## § 1552. Who may incorporate

Any 3 or more natural persons or 2 or more associations may incorporate in this State under this subchapter.

R.S.1954, c. 56, § 2.

### Cross References

Officers and directors, see title 13-A, § 701 et seq.

### Library References

Corporations  $\text{C}\Rightarrow$ 4. C.J.S. Corporations § 23 et seq.

## § 1553. Purposes

An association may be incorporated under this subchapter to engage in any one or more lawful mode or modes of acquiring, producing, building, operating, manufacturing, furnishing, exchanging or distributing any type or types of property, commodities, goods or services for the primary and mutual benefit of the patrons of the association, or their patrons, if any, as ultimate consumers.

R.S.1954, c. 56, § 3.

### Cross References

Corporate purposes, see title 13-A, § 201.  
Monopolies and contracts in restraint of trade restricted, see title 10, § 1101 et seq.

### Library References

Corporations  $\text{C}\Rightarrow$ 141 to 51. C.J.S. Corporations § 47.

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### Notes of Decisions

#### Avoidance of labor laws. 1 Employees 2

##### 1. Avoidance of labor laws

Fact that officers of cooperative organized under this subchapter actively participated in organization of the cooperative for express purpose of attempting to avoid application of the Fair Labor Standards Act (29 U.S.C.A. § 201 et seq.) to homeworkers who made knitted and crocheted clothing, was not sufficient to bring the cooperative within the scope of Fair Labor Standards Act. *Mitchell v. Whitaker House Coops., Inc.* (D.C. 1958) 170 F.Supp. 743, affirmed 273 F.2d 362.

##### 2. Employees

Members of a cooperative who performed homework, and were paid on a piece-rate basis fixed by the cooperative for manufacturing items the cooperative desired, and who were subject to expulsion for unstandard work or for failure to obey regulations, were "employees" of the cooperative and the Fair Labor Standards Act (29 U.S.C.A. § 201 et seq.) was applicable to the cooperative. *Goldberg v. Whitaker House Cooperative Inc.* (1961) 81 S.Ct. 933, 368 U.S. 28, 6 L.Ed.2d 100.

## § 1554. Powers

An association shall have the capacity to act possessed by natural persons and the authority to do anything required or permitted by this subchapter and also:

1. **Continuation.** To continue as a corporation for the time specified in its articles;
2. **Seal.** To have a corporate seal and to alter the same at pleasure;
3. **Sue and be sued.** To sue and be sued in its corporate name;
4. **Bylaws.** To make bylaws for the government and regulation of its affairs;
5. **Acquire and dispose of property.** To acquire, own, hold, sell, lease, pledge, mortgage or otherwise dispose of any property incident to its purposes and activities;
6. **Own other corporations.** To own and hold membership in and share capital of other associations and any other corporations and any types of bonds or other obligations; and while the owner thereof to exercise all the rights of ownership;
7. **Borrow money; make contracts.** To borrow money, contract debts and make contracts, including agreements of tru-

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tual aid or federation with other associations, other groups organized on a cooperative basis and other nonprofit groups;

8. Operate within and without State. To conduct its affairs within or without this State;

9. Powers of ordinary business corporations. To exercise in addition any power granted to ordinary business corporations, save those powers inconsistent with this subchapter; and

10. Other powers. To exercise all powers not inconsistent with this subchapter which may be necessary, convenient or expedient for the accomplishment of its purposes, and to that end, the powers enumerated in this section shall not be deemed exclusive.

R.S.1954, c. 56, § 4.

**Cross References**

Clerk's office, see title 13-A, § 304 et seq.  
Corporate powers, see title 13-A, § 201 et seq.  
Corporate seal, see title 1, § 72; title 13-A, §§ 107, 202.

**Library References**

Corporations C=370(1) et seq. C.J.S. Corporations § 941.

**§ 1555. Bylaws**

Bylaws shall be adopted, amended or repealed by at least a majority vote of the members voting.

R.S.1954, c. 56, § 5.

**Cross References**

Adoption and amendment of bylaws, see title 13 A, §§ 202, 603, 602.

**Library References**

Corporations C=55. C.J.S. Corporations § 196.

**Notes of Decisions**

1. Dues the contract need not be specially declared on under the express contract. Inhabitatus assumpsit lies for recovery of dues, in accordance with bylaws signed by defendant, although 130 A.2d 228. (Humphreys v. Hyer (1956) 151 Me. 415.)

**§ 1556. Meetings**

Regular meetings shall be held as prescribed in the bylaws, but shall be held at least once a year. Special meetings may be demanded by a majority vote of the directors or by written petition.

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tion of at least 1/3 of the membership, in which case it shall be the duty of the secretary to call such meeting to take place within 30 days after such demand.  
R.S.1954, c. 56, § 6.

**Cross References**

Meetings out of state, see title 13-A, § 708.  
Notice of meetings, see title 13-A, § 706.  
Time and place, see title 13-A, § 708.

**Library References**

Corporations C=193. C.J.S. Corporations § 541 et seq.

**ARTICLE 3. VOTING**

**§ 1601. One member, one vote**

Each member of an association shall have one and only one vote, except that where an association includes among its members any number of other associations or groups organized on a cooperative basis, the voting rights of such member associations or groups may be as prescribed in the articles or bylaws.

No voting agreement or other device to evade the one-member-one-vote rule shall be enforceable by a civil action.

R.S.1954, c. 56, § 7; 1963, c. 414, § 40.

**Cross References**

Voting, see title 13-A, § 607.

**Library References**

Corporations C=197. C.J.S. Corporations § 548.

**§ 1602. No proxies**

No member shall be permitted to vote by proxy.

R.S.1954, c. 56, § 8.

**Library References**

Corporations C=199(2). C.J.S. Corporations § 550.

**§ 1603. Application of provisions to voting by delegates**

If an association has provided for voting by delegates, any provision of this subchapter referring to votes cast by the members shall apply to votes cast by delegates; but this shall not permit delegates to vote by mail.

R.S.1954, c. 56, § 9.

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#### Library References

Corporations §107. C.J.S. Corporations § 548

#### ARTICLE 4. MEMBERS

### § 1641. Eligibility and admission to membership

Any natural person, association, incorporated or unincorporated group organized on a cooperative basis or any nonprofit group shall be eligible for membership in an association, if it has met the qualifications for eligibility, if any, stated in the articles or bylaws and shall be deemed a member upon payment in full for the par value of the minimum amount of share or membership capital stated in the articles as necessary to qualify for membership.

R.S.1954, c. 56, § 11.

#### Library References

Corporations §170. C.J.S. Corporations §§ 219, 475.

#### Notes of Decisions

#### 1. Members or employees

Members of a cooperative who performed homework, and were paid on a piece-rate basis fixed by the cooperative for manufacturing items the cooperative desired, and who were subject to examination for substandard work or for failure to obey requests, were "employees" of the cooperative and the Fair Labor Standards Act (29 U.S.C.A. § 201 et seq.) was applicable to the cooperative. *Goddberg v. Whitaker House Cooperative Inc.* (1964), 81 S.Ct. 833, 396 U.S. 28, 6 L.Ed.2d 100.

### § 1642. Subscribers

Any natural person or group eligible for membership and legally obligated to purchase a share or shares of, or membership in, an association shall be deemed a subscriber. The articles or bylaws may determine whether, and the conditions under which, any voting rights or other rights of membership shall be granted to subscribers.

R.S.1954, c. 56, § 12.

#### Library References

Corporations §174. C.J.S. Corporations § 286.

### § 1643. Liability of members

Members shall not be jointly or severally liable for any debts of the association, nor shall a subscriber be so liable ex-

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cept to the extent of the unpaid amount on the shares or membership certificates subscribed by him. No subscriber shall be released from such liability by reason of any assignment of his interest in the shares or membership certificate, but shall remain jointly and severally liable with the assignee until the shares or certificates are fully paid-up.

R.S.1954, c. 56, § 15.

#### Cross References

Failure to pay stock subscriptions, see title 13-A, § 505 et seq.  
Liability generally for debts of corporation, see title 13-A, § 509.  
Receiving improper distributions, shareholder's liability, see title 13-A, § 654.

#### Library References

Corporations §215. C.J.S. Corporations § 530 et seq.

### § 1644. Expulsion

A member may be expelled by the vote of a majority of the members voting at a regular or special meeting. The member against whom the charges are to be preferred shall be informed thereof in writing at least 10 days in advance of the meeting, and shall have an opportunity to be heard in person or by counsel at said meeting. On decision of the association to expel a member, the board of directors shall purchase the member's holdings at par value, if and when there are sufficient reserve funds.

R.S.1954, c. 56, § 16.

#### Library References

Corporations §173. C.J.S. Corporations § 451.

### § 1645. Allocation and distribution of net savings

At least once a year the members or the directors, or both, as the articles or bylaws may provide, shall apportion the net savings of the association in the following order.

1. Reserve fund. Not less than 10% shall be placed in a reserve fund until such time as the fund shall equal at least 50% of the paid-up capital; and such fund may be used in the general conduct of the business. The amounts apportioned to the reserve fund shall be allocated on the books of the association on a patronage basis, or in lieu thereof, the books and records of the association shall afford a means for doing so in order that upon dissolution or earlier, if deemed advisable, such reserves may be

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returned to the patrons who have contributed the same, subject to the limitations of the section on dissolution.

**2. Return upon capital.** A return upon capital, within the limitations of sections 1507, 1641 to 1644, 1691 and 1692, may be paid upon share capital; but such return upon capital may be paid only out of the surplus of the aggregate of the assets over the aggregate of the liabilities, including in the latter the amount of the capital stock, after deducting from such aggregate of the assets the amount by which such aggregate was increased by unrealized appreciation in value or revaluation of fixed assets.

**3. Educational fund.** A portion of the remainder, as determined by the articles or bylaws, shall be allocated to an educational fund to be used in teaching cooperation, and a portion may be allocated to funds for the general welfare of the members of the association.

**4. Patronage.** The remainder shall be allocated at the same uniform rate to all patrons of the association in proportion to their individual patronage.

**A.** In the case of a member patron, his proportionate amount of savings returns shall be distributed to him unless he agrees that the association should credit the amount to his account toward the purchase of an additional share or shares or additional membership capital;

**B.** In the case of a subscriber patron, his proportionate amount of savings returns may, as the articles or bylaws provide, be distributed to him or credited to his account until the amount of capital subscribed for has been fully paid;

**C.** In the case of a nonmember patron, his proportionate amount of savings returns shall be set aside in a general fund for such patrons and shall be allocated to individual nonmember patrons only upon request and presentation of evidence of the amount of their patronage. Any savings returns so allocated shall be credited to such patron toward payment of the minimum amount of share or membership capital necessary for membership, or may be paid to such patron. When a sum equal to this amount has been accumulated and so credited at any time within a period of time specified in the bylaws, such patron shall be deemed and become a member of the association if he so agrees or requests and complies with any provisions in the bylaws for

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admission to membership. The certificates of shares or membership to which he is entitled shall then be issued to him;

**D.** If within any periods of time specified in the articles or bylaws:

(1) Any subscriber has not accumulated and paid in the amount of capital subscribed for; or

(2) Any nonmember patron has not accumulated in his individual account the sum necessary for membership; or

(3) Any nonmember patron has accumulated the sum necessary for membership, but neither requests nor agrees to become a member or fails to comply with the provisions of the bylaws, if any, for admission to membership;

then the amounts so accumulated or paid in shall go to the educational fund, and thereafter no member or other patron shall have any rights in said paid-in capital or accumulated savings returns as such. Nothing in this section shall prevent an association operating under this subchapter, which is engaged in rendering services, from disposing of the net savings from the rendering of such services in such manner as to lower the fees charged for services or otherwise to further the common benefit of the members. Nothing in this section shall prevent an association from adopting a system whereby the payment of savings returns, which would otherwise be distributed, shall be deferred for a fixed period of months or years; nor from adopting a system whereby the savings returns distributed shall be partly in cash, partly in shares, such shares to be retired at a fixed future date in the order of the serial number or date of issue.

R.S.1954, c. 56, § 17.

Library References

Corporations §-151.

C.J.S. Corporations § 428 et seq.

ARTICLE 5. SHARES

**§ 1691. Issuance and contents**

No certificate for share or membership capital shall be issued until the par value thereof has been paid for in full. There

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shall be printed upon each certificate issued by an association a full or condensed statement of the requirements of sections pertaining to one-member-one-vote, no proxy and transfer of shares and membership.

R.S.1954, c. 56, § 13.

**Cross References**

Authority of directors to issue or dispose of shares, see title 13-A, §§ 503, 507. Certificates representing shares, see title 13-A, § 511.

No proxy, see § 1692 of this title.

One member, one vote, see § 1691 of this title.

Transfer of shares and membership, see § 1692 of this title.

**Library References**

Corporations  $\Rightarrow$  95, 96.

C.J.S. Corporations § 262, 289.

**§ 1692. Transfer of shares and membership; withdrawal**

If a member desires to withdraw from the association or dispose of any or all of his holdings, the directors shall have the power to purchase such holdings by paying him the par value of any or all of the holdings offered. The directors shall then issue or cancel the same. A vote of the majority of the members voting at a regular or special meeting may order the directors to exercise this power to purchase.

If the association fails, within 60 days of the original offer, to purchase all or any part of the holdings offered, the member may dispose of the unpurchased interest elsewhere, subject to the approval of the transferee by a majority vote of the directors. Any would-be transferee not approved by the directors may appeal to the members at their first regular or special meeting thereafter, and the action of the meeting shall be final. If such transferee is not approved, the directors shall exercise their power to purchase, if and when such purchase can be made without jeopardizing the solvency of the association.

R.S.1954, c. 56, § 14.

**Cross References**

Transferability of shares, see title 13-A, § 616.

**Library References**

Corporations  $\Rightarrow$  172.

C.J.S. Corporations § 496.

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**Notes of Decisions**

**1. Withdrawal of shares**

A stockholder in a corporation or, after the request for withdrawal, but prior to the time of bringing the action to deal in general merchandise, who has asked to withdraw his shares in said corporation, cannot set off his shares against an account for merchandise purchased of the corporation, where the board of directors, after the request for withdrawal, but prior to the time of bringing the action on the account, voted to allow no more withdrawals of shares, though previously the bylaws authorized such withdrawals. *Levinson v. Lewis* (1897) 51 Me. 64, 39 A. 283.

**ARTICLE 6. DISSOLUTION**

**§ 1731. Procedure**

An association may, at any regular or special meeting legally called, be directed to dissolve by a vote of  $\frac{2}{3}$  of the entire membership. By a vote of a majority of the members voting, 3 of their number shall be designated as trustees, who shall, on behalf of the association and within a time fixed in their designation or within any extension thereof, liquidate its assets and shall distribute them in the manner set forth in this section. In case of any dissolution of an association, its assets shall be distributed in the following manner and order:

- 1. Paying debts and expenses.** By paying its debts and expenses;
- 2. Amounts paid by members.** By returning to the members the par value of their shares or of their membership certificates, returning to the subscribers the amounts paid on their subscriptions and returning to the patrons the amount of savings returns credited to their accounts toward the purchase of shares or membership certificates; and
- 3. Paying patrons or giving to nonprofit associations.** By distributing any surplus in either or both of the following ways as the articles may provide:

- A.** Among those patrons who have been members or subscribers at any time during the past 6 years, on the basis of their patronage during that period; or
- B.** As a gift to any consumers' cooperatives association or other nonprofit enterprise which may be designated in the articles.

R.S.1954, c. 56, § 24.

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**Cross References**

Dissolution, generally, see title 13-A, § 1101 et seq.

**Library References**

C.J.S. Corporations §§ 1638, 1651.  
Corporations §=592.

**SUBCHAPTER II**

**AGRICULTURAL MARKETING AND BARGAINING**

*The heading for Subchapter II was amended by Laws 1973, c. 621, § 1. Previously the heading read "Agricultural Cooperatives".*

**ARTICLE 1. GENERAL PROVISIONS**

**Section.**

- 1771. Short title.
- 1772. Policy.
- 1773. Uniformity of interpretation.
- 1774. Definitions.
- 1775. Existing associations.
- 1776. Use of word "cooperative".
- 1777. Foreign associations.
- 1778. Inducing breach of contract; spreading false reports; penalty.
- 1779. License fees.
- 1780. Savings clause.

**ARTICLE 2. ORGANIZATION AND POWERS**

- 1821. Incorporators.
- 1822. Purposes.
- 1823. Articles of incorporation.
- 1824. Filing and recording certificate of incorporation.
- 1825. Amendment of articles.
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- 1827. General and special meetings.
- 1828. Powers.
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**ARTICLE 3. OFFICERS AND DIRECTORS**

- 1871. Directors.
- 1872. —removal.
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**ARTICLE 4. MEMBERS AND SHARES**

- Section**
- 1911. Members.
- 1912. Certificates; transfers; dividends; preferred stock.

**ARTICLE 5. CONSOLIDATION AND DISSOLUTION**

- 1951. Consolidation procedure.
- 1952. Voluntary dissolution.

**ARTICLE 6. MAINE AGRICULTURAL MARKETING AND BARGAINING ACT OF 1973**

- 1953. Legislative findings and purpose.
- 1954. Short title.
- 1955. Definitions.
- 1956. Maine Agricultural Bargaining Board.
- 1957. Qualification of associations of producers.
- 1958. Bargaining.
- 1958-A. Final offer arbitration for the potato industry.
- 1959. Enforcement of orders and judicial review.
- 1960. Copy evidence; oaths; subpoenas.
- 1961. Contempt.
- 1962. Service.
- 1963. Subpoena.
- 1964. Antitrust.
- 1965. Unfair practices.

**ARTICLE 1. GENERAL PROVISIONS**

**§ 1771. Short title**

This subchapter may be cited as the "Uniform Agricultural Cooperative Association Act".  
R.S.1954, c. 35, § 28.

**Historical Note**

**Uniform laws:**

The Uniform Agricultural Cooperative Association Act, was withdrawn by the Conference of Commissioners on Uniform State Laws in 1943.

Similar provisions, contained in this subchapter, were adopted by Maine in 1945.

**Cross References**

General provisions relating to agriculture, see title 7, § 1 et seq. Licenses required.

See keeping, see title 7, § 2501.

Fruit or vegetable juices manufactured or bottled, see title 32, § 1711 et seq.

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Licenses required—Continued

Livestock dealers, see title 7, § 1301.

Milk producers and sellers, see title 7, § 2902.

Nursery products, see title 32, § 1903.

Poultry sellers, see title 7, § 1301 or sup.

Promotional assistance from Commissioner of Agriculture, see title 7, § 6.

**Library References**

Agriculture—Genl.

C.S. Agriculture § 13, et seq.

C.S. Industrial Cooperative Societies §§ 2 to 13, 15, 17 to 19.

**United States Code Annotated**

Federal authorization for agricultural producers associations, see 7 U.S.C.A. § 291.

Federal license for perishable commodities, see 7 U.S.C.A. § 406c.

**§ 1772. Policy**

It is the declared policy of this State, as one means of improving the economic position of agriculture, to encourage the organization of producers of agricultural products into effective associations under the control of such producers, and to that end this subchapter should be liberally construed.

R.S.1954, c. 35, § 1.

**United States Code Annotated**

Federal policy and cooperative agricultural marketing associations, see 12 U.S.C.A. § 1141.

**§ 1773. Uniformity of interpretation**

This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

R.S.1954, c. 35, § 27.

**§ 1774. Definitions**

As used in this subchapter, unless the context otherwise indicates, the following terms shall have the following meanings.

1. **Agricultural products.** "Agricultural products" include floricultural, horticultural, viticultural, forestry, nut, dairy, live-stock, poultry, bee and any farm products.
2. **Articles.** "Articles" means the articles of incorporation.
3. **Association.** "Association" means a corporation organized under this subchapter, or a similar domestic corporation, or

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a foreign association or corporation if authorized to do business in this State, organized under any general or special act as a cooperative association for the mutual benefit of its members, as agricultural producers, and which confines its operations to purposes authorized by this subchapter and restricts the return on the stock or membership capital and the amount of its business with nonmembers to the limits placed thereon by this subchapter for associations organized hereunder. Associations shall be classified as and deemed to be nonprofit corporations, inasmuch as their primary object is not to pay dividends on invested capital, but to render service and provide means and facilities by or through which the producers of agricultural products may market those products and obtain farm supplies and other services.

4. **Board.** "Board" means the board of directors.

5. **Domestic association.** "Domestic association" means an association or corporation formed under the laws of this State.

6. **Foreign association.** "Foreign association" means an association or corporation not formed under the laws of this State.

6-A. **Independent agricultural contractor.** "Independent agricultural contractor" means a person who grows under contract as his primary activity or as part of a general agricultural activity.

6-B. **Marketing contract.** "Marketing contract" includes a contract related to the marketing of agricultural products and a contract by an independent agricultural contractor for furnishing services and facilities in raising or growing agricultural products.

7. **Member.** "Member" includes the holder of a membership in an association without capital stock and the holder of common stock in an association organized with capital stock.

8. **Person.** "Person" includes an individual, a partnership, a corporation and an association.

8-A. **Producers.** "Producers" includes independent agricultural contractors.

9. **Subchapter.** "This subchapter" means the "Uniform Agricultural Cooperative Association Act."

R.S.1954, c. 35, § 2; 1971, c. 502, eff. June 24, 1971; 1979, c. 641, § A, 133, eff. June 22, 1979.

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**Historical Note**

The 1971 amendment added "indicates, the following terms subjects, 6-A, 6-B and 8-A. shall have the following meanings", and substituted a period for a colon in the first paragraph. The 1970 amendment, a corrections bill, deleted "or subject matter requires" following "context", insert.

**Cross References**

Agricultural Marketing and Bargaining Act, applicability of definitions in subsections 6-A and 8-A of this section, see § 1955, subsec. 5 of this title.

**§ 1775. Existing associations**

Any existing association formed under any law of this State as a cooperative agricultural association may elect, by a vote of 2/3 of the members voting thereon at a legal meeting, to secure the benefits of and be bound by this subchapter, and shall thereupon amend such of its articles and bylaws as are not in conformity with this subchapter. A certificate of the action taken at such meeting shall be filed with the Secretary of State within 20 days after such meeting, and a fee of \$5 shall be paid.  
R.S.1954, c. 35, § 22.

**§ 1776. Use of word "cooperative"**

No person, firm, corporation or association, domestic or foreign, hereafter commencing business in this State shall use the word "cooperative" as a part of its corporate or business name unless it has complied with this subchapter or some other statute of this State relating to cooperative associations. A foreign association organized under and complying with the cooperative law of the state of such association's creation shall be entitled to use the term "cooperative" in this State if it has obtained the privilege of doing business in this State.  
R.S.1954, c. 35, § 24.

**§ 1777. Foreign associations**

A foreign corporation that can qualify as an association, as defined in section 1774, may be authorized to do business in this State under this subchapter by complying with the laws relating to foreign corporations doing business in the State. It shall pay the same fees and charges as domestic associations. Upon such compliance it shall have all the rights and privileges of like domestic associations.  
R.S.1954, c. 35, § 25.

**Cross References**

Laws relating to foreign corporations, see title 13-A, § 1201 et seq. License and filing fees, see §§ 1401 et seq., 1773, 1824 of this title. Statutes of limitations for foreign corporations, see title 14, § 867.

**§ 1778. Inducing breach of contract; spreading false reports; penalty**

Any person or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association to violate his marketing contract with the association, or who maliciously and knowingly spread false reports about the finances or management thereof, shall be guilty of a misdemeanor and shall be subject to a fine of not less than \$100 nor more than \$1,000 for each such offense; and shall be liable to the association aggrieved in a civil action in the penal sum of \$500 for each such offense.  
R.S.1954, c. 35, § 18; 1961, c. 417, § 103.

**Cross References**

Civil actions for penalties, see title 14, § 753. Limitations on civil actions for penalties, see title 14, § 858 et seq.

**§ 1779. License fees**

Domestic associations and foreign associations admitted to do business in this State shall pay an annual license fee of \$10, which shall be in lieu of all other corporation and franchise taxes.  
R.S.1954, c. 35, § 26.

**Cross References**

License fees, see §§ 1401 et seq., 1824 of this title.

**§ 1780. Savings clause**

This subchapter shall not impair or affect any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to July 21, 1945, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted as fully and to the same extent as if this subchapter had not been passed.  
R.S.1954, c. 35, § 23.

Cross References  
 Severability, generally, see title 3, § 71.

ARTICLE 2. ORGANIZATION AND POWERS

§ 1821. Incorporators

Five or more adult persons, engaged in agriculture as bona fide producers of agricultural products, or 2 or more associations of such producers, may form an association with or without capital stock.

R.S.1954, c. 35, § 3.

§ 1822. Purposes

Such association may be organized for the purpose of engaging in any cooperative activity for producers of agricultural products in connection with:

1. **Producing, selling, etc.** Producing, assembling, marketing, buying, or selling agricultural products, or harvesting, preserving, drying, processing, manufacturing, blending, canning, packing, ginning, grading, storing, warehousing, handling, shipping or utilizing such products, or manufacturing or marketing the by-products thereof;
  2. **Equipment, feed, fertilizer, etc.** Manufacturing, buying for or supplying to its members and other patrons, machinery, equipment, feed, fertilizer, fuel, seeds and other agricultural and household supplies;
  3. **Business or educational services.** Performing or furnishing business or educational services, on a cooperative basis, for or to its members and other patrons; or
  4. **Financing.** Financing any of the above enumerated activities for its members, subject to the limitations of Title 9-B, section 466.
- R.S.1954, c. 35, § 4; 1961, c. 385, § 14; 1977, c. 564, § 66, eff. July 23, 1977.

Historical Note

The 1977 amendment, in subsec. 4, for "Title 9, section 171, substituted "Title 9-B, section 466" 2".

§ 1823. Articles of incorporation

Articles of incorporation shall be signed by each of the incorporators and acknowledged by at least 3 of them if natural persons, and by the president and secretary if associations, before an officer authorized to take acknowledgments, and shall state:

1. **Name.** The name of the association which may or may not include the word "cooperative";
2. **Purposes.** Its purposes;
3. **Duration.** Its duration;
4. **Location of office.** The location and post-office address of its registered office in this State;

5. **Name and address of incorporators; number of shares.** The name and post-office address of the incorporators, and if organized with capital stock, a statement of the number of shares subscribed by each, which shall not be less than one, and the class of shares for which each subscribes;

6. **Names and addresses of first directors.** The names of the first directors and their post-office addresses;

7. **With or without capital stock; if with, par value shares.** Whether organized with or without capital stock; and if organized with capital stock the total authorized number of par value shares and the par value of each share, and if any of its shares have no par value, the authorized number of such shares; and if more than one class of stock is authorized, a description of the classes of shares, the number of shares in each class, the relative rights, preferences and restrictions granted to or imposed upon the shares of each class and the dividends to which each class shall be entitled;

8. **If without, rights and interests of members.** If organized without capital stock, whether the property rights and interests of each member are equal or unequal; if unequal, the rule by which such rights and interests shall be determined; and

9. **Other provisions.** The articles may contain any other provisions, consistent with law for regulating the association's business or the conduct of its affairs, the establishment of voting districts, the election of delegates to represent such districts and the members residing therein, for voting by proxy, and issuance, retirement and transfer of memberships and stock.

R.S.1954, c. 35, § 5.

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**Cross References**

Amendment of articles, see title 13-A, § 801 et seq., 1825 of this title.  
Change of location of office, see title 13-A, §§ 202, 802.  
Change of name of association, see title 13-A, §§ 301 et seq., 883 of this title.

**§ 1824. Filing and recording certificate of incorporation**

Before commencing business, the president, treasurer and a majority of the directors or trustees of every corporation organized under this subchapter shall prepare a certificate setting forth the articles of incorporation and the names and addresses of the officers, and shall sign and make oath to it. Said certificate shall be presented to the Secretary of State accompanied by a copy thereof or by a data sheet containing all of the information required. After said certificate has been examined by the Secretary of State, and been by him certified to be properly drawn and signed and to be conformable to the Constitution and laws, it shall be recorded in the registry of deeds in the county where said corporation is located, in a book kept for that purpose, and within 60 days after the day of the meeting at which such corporation is organized, a copy thereof certified by such register shall be filed in the office of the Secretary of State, who shall enter the date of filing thereon, and on the original certificate to be kept by the corporation and shall record said copy in a book kept for that purpose. A fee of \$5 shall be paid to the Secretary of State, and a fee of \$8 shall be paid to registers of deeds for recording such certificate and certifying copies thereof for filing with the Secretary of State.

R.S.1954, c. 35, § 6; 1977, c. 522, § 8.

**Historical Note**

The 1977 amendment substituted read: "A fee of \$5 shall be paid to the Secretary of State" for "Attorney General and Secretary of State" in the second sentence and "registers of State respectively, and registers of deeds shall receive for recording such certificate a fee of \$5." In the third sentence following "ex- amined by the"; and rewrote the fourth sentence, which prior thereto

**Library References**

Corporations Ⓒ=22. C.J.S. Corporations § 59, 62.

**§ 1825. Amendment of articles**

**1. Procedure.** An association may amend its articles of incorporation by the affirmative vote of  $\frac{2}{3}$  of the members voting thereon at any regular meeting, or at a special meeting

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called for the purpose, or if the association permits its members to vote on the basis of patronage, by the affirmative vote of a majority of the members representing  $\frac{2}{3}$  of the membership patronage voting thereon. A written or printed notice of the proposed amendment and of the time and place of holding such meetings shall be delivered to each member, or mailed to his last known address as shown by the books of the association, at least 30 days prior to any such meetings. No amendment affecting the preferential rights of any outstanding stock shall be adopted until the written consent of the holders of  $\frac{2}{3}$  of the outstanding preference shares has been obtained.

**2. Certificate recorded.** After an amendment has been adopted, a certificate shall be prepared setting forth the amendment and the adoption thereof, and shall be signed and sworn to by the president or vice-president and by the treasurer or secretary or assistant secretary, and filed, recorded and indorsed as in the case of original certificate of incorporation. For filing or recording an amendment to the articles, the association shall pay to the registers of deeds a fee of \$5, and a fee of \$5 shall be paid to the Secretary of State.

R.S.1954, c. 35, § 7; 1977, c. 522, § 9.

**Historical Note**

The 1977 amendment, in the second "then" and "respectively" following sentence of subsec. 2, deleted "Attorney General and" following "paid to

**Cross References**

Amendment of articles, see title 13-A, § 801 et seq. (the member, one vote, see § 1011 of this title).

**Library References**

Corporations Ⓒ=40. C.J.S. Corporations § 61.

**§ 1826. Bylaws**

The members of the association may adopt bylaws not inconsistent with law or the articles, and they may alter and amend the same from time to time. The bylaws must be adopted by a majority of the members voting thereon, or if the association permits its members to vote on the basis of patronage, then by a majority of members and a majority of the patronage voting thereon. The bylaws may provide for:

**1. Meetings; quorum.** The time, place and manner of calling and conducting meetings of the members, and the number of members that shall constitute a quorum;

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2. **Manner of voting.** The manner of voting and the condition upon which members may vote at general and special meetings and by mail or by delegates elected by district groups or other associations, and the voting power of votes based on patronage;

3. **Provisions as to directors and officers.** Subject to any provision thereon in the articles and in this subchapter, the number, qualifications, compensation, duties and terms of office of directors and officers; the time of their election and the mode and manner of giving notice thereof;

4. **Meetings of directors and executive committee; quorum.** The time, place and manner for calling and holding meetings of the directors and executive committee, and the number that shall constitute a quorum;

5. **Rules.** Rules consistent with law and the articles for the management of the association, the establishment of voting districts, the making of contracts, the issuance, retirement and transfer of stock, and the relative rights, interests and preferences of members and shareholders; and

6. **Penalties.** Penalties for violation of the bylaws.

R.S.1954, c. 35, § 8.

§ 1827. General and special meetings

An association may provide in its bylaws for one or more regular meetings each year, which may be held within or without the State at the time and place designated in the bylaws. Special meetings of the members may be called by the board of directors, and it shall be their duty to call such meetings when 10% of the members file with the secretary a petition demanding a special meeting and specifying the business to be considered at such meeting. Notice of all meetings, except as otherwise provided by law, or the articles or bylaws, shall be mailed to each member at least 10 days prior to the meeting, and in case of special meetings the notice shall state the purposes for which it is called, but the bylaws may require that all notices, except of proposed amendments to the articles, shall be given by publication in a periodical published by or for the association, to which substantially all its members are subscribers, or in a newspaper or newspapers whose combined circulation is general in the territory in which the association operates.

R.S.1954, c. 35, § 12.

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Cross References

Meetings.

Generally, see title 13, A. §§ 403 et seq., 708 et seq.  
Special, see title 13-A, § 403.

§ 1828. Powers

1. **Capacity to act.** An association formed under this subchapter, or an association which might be formed under this subchapter and which existed at the time this act took effect, shall have the capacity to act possessed by natural persons, but such association shall have authority to perform only such acts as are necessary or proper to accomplish the purposes as set forth in its articles and which are not repugnant to law.

2. **Authority.** Without limiting or enlarging the grant of authority contained in subsection 1, it is specifically provided that every such association shall have authority:

A. To act as agent, broker or attorney in fact for its members and other patrons, and for any subsidiary or affiliated association, and otherwise to assist or join with associations engaged in any one or more of the activities authorized by its articles, and to hold title for its members and other patrons and for subsidiary and affiliated associations to property handled or managed by the association on their behalf;

B. To make contracts, and to exercise by its board or duly authorized officers or agents, all such incidental powers as may be necessary, suitable or proper for the accomplishment of the purposes of the association and not inconsistent with law or its articles, and that may be conducive to or expedient for the interest or benefit of the association;

C. To make loans or advances to members or producer-partners against products delivered or to be delivered to the association, or to the members of an association which is itself a member or subsidiary thereof; to purchase, otherwise acquire, indorse, discount or sell any evidence of debt, obligation or security, but it shall not engage in banking;

D. To establish and accumulate reserves;

E. To own and hold membership in or shares of the capital stock of other associations and corporations and the bonds or other obligations thereof, engaged in any related activity; or, in producing, warehousing or marketing or purchasing any of the products handled by the association; or, in

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financing its activities, and while the owner thereof, to exercise all the rights of ownership, including the right to vote thereon;

**F.** To acquire, hold, sell, dispose of, pledge or mortgage any property which its purposes may require, subject to any limitation prescribed by law or its articles;

**G.** To borrow money and to give its notes, bonds or other obligations therefor and secure the payment thereof by mortgage or pledge;

**H.** To deal in products of, and handle machinery, equipment, supplies and perform services for nonmembers to an amount not greater in annual value than such as are dealt in, handled or performed for or on behalf of its members, but the value of the annual purchases made for persons who are neither members nor producers shall not exceed 15% of the value of all its purchases;

**I.** To have a corporate seal and to alter the same at pleasure;

**J.** To continue as a corporation for the time limited in its articles, and if no time limit is specified, then perpetually;

**K.** To sue and be sued in its corporate name;

**L.** To conduct business in this State and elsewhere as may be permitted by law; and

**M.** To dissolve and settle its affairs.

R.S.1954, c. 35, § 9.

#### Cross References

Corporate powers, see title 13-A, § 292.

Dissolution, see title 13-A, § 2101 et seq.

Marketing, grading and labeling of miscellaneous agricultural and dairy products and foods, see title 7, § 531 et seq.

Trademarks and names, see title 10, § 1521 et seq.

Weights and measures, see title 10, § 2301 et seq.

#### United States Code Annotated

Agricultural cooperatives and monopolies in restraint of trade, see 7 U.S.C.A. § 562.

### § 1829. Information and advice for members

**1. Not in restraint of trade.** No association complying with the terms hereof shall be deemed to be a conspiracy, or a

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combination in restraint of trade or an illegal monopoly; or be deemed to have been formed for the purpose of lessening competition or fixing prices arbitrarily, nor shall the contracts between the association and its members, or any agreements authorized in this subchapter, be construed as an unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose or act.

**2. Information.** An association may acquire, exchange, interpret and disseminate to its members, to other cooperative associations and otherwise, past, present and prospective crop, market, statistical, economic and other similar information relating to the business of the association, either directly or through an agent created or selected by it or by other associations acting in conjunction with it.

**3. Advice.** An association may advise its members in respect to the adjustment of their current and prospective production of agricultural commodities and its relation to the prospective volume of consumption, selling prices and existing or potential surplus, to the end that every market may be served from the most convenient productive areas under a program of orderly marketing that will assure adequate supplies without undue enhancement of prices or the accumulation of any undue surplus.

R.S.1954, c. 35, § 19.

#### Cross References

Contracts in restraint of trade and conspiracies to monopolize trade, see title 10, § 1103 et seq.

### ARTICLE 3. OFFICERS AND DIRECTORS

#### § 1871. Directors

**1. Membership; term.** The business of the association shall be managed by a board of not less than 3 directors. The directors shall be members of the association or officers, general managers, directors or members of a member association. A director shall hold office for the term for which he was named or elected and until his successor is elected and qualified.

**2. Names; successors.** The names of the first directors shall be stated in the articles. Their successors shall be elected by the members as prescribed by the articles or bylaws.

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3. **Duties, etc. prescribed by articles or bylaws.** The number, qualifications, terms of office, manner of election, time and place of meeting and the powers and duties of the directors may, subject to this subchapter, be prescribed by the articles or bylaws.

4. **District directors.** The bylaws may provide, if not restricted by the articles, that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such case, the bylaws shall specify or vest in the board of directors authority to determine the number of directors to be elected by each district and the manner and method of appointing the directors and of districting and redistricting the territory covered by the association. The bylaws may provide that primary elections shall be held in each district to nominate the directors apportioned thereto and that the result of all such primary elections may be ratified by the next regular meeting of the association or may be considered as a final election.

5. **Executive committee.** The bylaws may provide for an executive committee to be elected by the board of directors from their number and may allot to such committee all the functions and powers of the board, subject to its general direction and control.

R.S.1954, c. 35, § 13.

**Cross References**

Directors, see title 13-A, § 201 et seq.

**§ 1872. —removal**

Any member may ask for the removal of a director by filing charges with the secretary or president of the association, together with a petition signed by 5% of the members requesting the removal of the director in question. The removal shall be voted upon at the next meeting of the members, and by 2/3 of the voting power voting thereon the association may remove the director. The director whose removal is requested shall be served with a copy of the charges not less than 10 days prior to the meeting and shall have an opportunity at the meeting to be heard in person and by counsel and to present evidence. The persons requesting the removal shall have the same opportunity. In case the bylaws provide for election of directors by districts,

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then the petition for removal of a director must be signed by 20% of the members residing in the district from which he was elected. The board must call a special meeting of the members residing in that district to consider the removal of the director, and by 2/3 of the voting power of the members of that district voting thereon the director in question may be removed from office.

R.S.1954, c. 35, § 14.

**Cross References**

Removal of directors, see title 13, A, § 207.

**§ 1873. Officers**

The board shall elect a president, a secretary and a treasurer, and may elect one or more vice-presidents, and such other officers as may be authorized in the bylaws. The president and at least one of the vice-presidents must be members and directors, but a vice-president who is not a director cannot succeed to or fill the office of president. Any 2 of the offices of vice-president, secretary and treasurer may be combined in one person.

R.S.1954, c. 35, § 15.

**Cross References**

Election, qualifications and powers of officers, see title 13-A, § 714. Executive committees, see title 13-A, § 713.

**§ 1874. —removal**

Any member may bring charges of misconduct or incompetency against an officer by filing them with the secretary or president of the association, together with a petition signed by 10% of the members requesting the removal of the officer in question. The directors shall vote upon the removal of the officer at the first meeting of the board held after the hearing on the charges, and the officer may be removed by a majority vote, notwithstanding any contract the officer may have with the association, which shall terminate upon his removal, anything in the contract to the contrary notwithstanding. The officer against whom such charges are made shall be served with a copy of the charges not less than 10 days prior to the meeting, and shall have an opportunity at the meeting to be heard in person and by counsel, and to present evidence, and the persons making the charges shall have the same opportunity.

R.S.1954, c. 35, § 16.

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**§ 1875. Referendum**

The articles or bylaws may provide that upon demand of  $\frac{2}{3}$  of all the directors, any matter of policy that has been approved or passed by the board must be referred to the members for their approval before it becomes effective. No referendum shall be allowed unless it is demanded by the required number of directors at the meeting at which the matter of policy in question is adopted.

R.S.1954, c. 35, § 17.

**ARTICLE 4. MEMBERS AND SHARES**

**§ 1911. Members**

1. **Producers of agricultural products.** An association may admit as members only bona fide producers of agricultural products, including tenants and landlords receiving a share of the crop, and cooperative associations of such producers. The incorporators named in the articles are thereby made members of the association, and they shall pay for their membership or stock the same amount and in the same manner as may be required in the case of other members.

2. **Limit of common stock.** The articles may limit the amount of common stock which a member may own.

3. **Vote; liability.** Under the terms and conditions prescribed in the bylaws, a member shall lose his vote if he ceases to belong to the class eligible to membership under this section, but he shall remain subject to any liability incurred by him while a member of the association.

4. **Personal liability.** No member shall be personally liable for any debt or liability of the association.

5. **One vote.** Unless the articles otherwise provide, no member shall have more than one vote.

6. **Member defined.** In agricultural associations organized under this subchapter the term "member" in associations without capital stock may, by the bylaws, include any agricultural producer, either corporate or individual, with whom the association shall do business, either directly or through a member cooperative association, amounting to at least \$100 during any fiscal year, and may, by the bylaws, include employees.

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7. **Requirements of statute met.** Whenever under this subchapter an association is permitted to take any action, provided such action is authorized by a vote of the members or the vote of a specified proportion of the voting power based on patronage, the requirements of the statute shall be deemed to have been met by an association which has established voting districts and provided for the election of delegates, if such action is authorized by a vote of the delegates representing such members or such voting power.

R.S.1954, c. 35, § 10.

**Cross References**

Voluntary dissolution, see title 13-A, § 1111 et seq.  
Liability of stockholders, generally, see title 13-A, §§ 549, 624.

**§ 1912. Certificates; transfers; dividends; preferred stock**

1. **Certificate for membership or stock.** No certificate for membership or stock shall be issued until fully paid for, but bylaws may provide that a member may vote and hold office prior to payment in full for his membership or stock.

2. **Dividends.** Dividends in excess of 8% on the actual cash value of the consideration received by the association shall not be paid on common or preferred stock or membership capital, but dividends may be cumulative.

3. **Net income distributed.** Net income in excess of dividends and additions to reserves shall be distributed on the basis of patronage, and the books of the association shall show the interest of patrons in the reserves. The bylaws may provide that any distribution to a nonmember, eligible for membership, may be credited to such nonmember until the amount thereof equals the value of a membership certificate or a share of the association's common stock. The distribution credited to the account of a nonmember may be transferred to the reserve fund at the option of the board if, after 6 years, the amount is less than the value of the membership certificate or a share of common stock.

4. **Value of member's interest after withdrawal or termination.** The bylaws may fix a time within which a member shall receive from the association, after he has notified the association of his withdrawal, or after the adoption of a resolution by the board terminating his membership, the value in money of his membership interest in the association as appraised by the board of directors. If the board of directors approves the mem-

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ber's designation of a transferee of his membership interest, the association shall be under no obligation to pay him the value of his interest.

5. **Preferred stock.** An association may issue preferred stock to members and nonmembers. Preferred stock may be redeemed or retired by the association on such terms and conditions as may be provided in the articles and printed on the stock certificate. Preferred stockholders shall not be entitled to vote, but no change in their priority or preference rights shall be effective until the written consent of the holders of  $\frac{2}{3}$  of the preferred stock has been obtained. Payment for preferred stock may be made in cash, services or property on the basis of the fair value of the stock, services and property as determined by the board.

R.S.1954, c. 35, § 11.

#### Cross References

Stock and stockholders, generally, see title 13-A, § 501 et seq.

#### ARTICLE 5. CONSOLIDATION AND DISSOLUTION

##### § 1951. Consolidation procedure

Any 2 or more associations organized with or without capital stock and existing under this subchapter may consolidate into a single association which may be either one or any one of said associations, or a new association under this subchapter to be formed by means of such consolidation. Such a consolidation may be effected by a vote of the directors, trustees or managing board, however designated, of each of said associations at a legal meeting thereof ratifying a proposed agreement of consolidation and approved by the affirmative vote of  $\frac{2}{3}$  of the members of each of said associations voting thereon at any regular meeting or at a special meeting called for the purpose, which agreement shall then be submitted to the Secretary of State for his certification as conformable to the laws of this State and when certified by him shall then be recorded in the registry of deeds in the county where the consolidated association is located and in the county or counties where each of the constituent associations is located and a copy thereof certified by the register of deeds shall be filed in the office of the Secretary of State. When said agreement is so certified, recorded and filed, the separate existence of all of the constituent associations, or all of such constituent associations except the one into which such constituent as-

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sociations shall have been consolidated, shall cease and the constituent associations, whether consolidated into a new association or merged into one of such constituent associations, as the case may be, shall become the consolidated association by the name provided in said agreement, possessing all the rights, privileges, powers, franchises and immunities as well of a public as of a private nature, and being subject to all the liabilities, restrictions and duties of each of such associations so consolidated and all and singular the rights, privileges, powers, franchises and immunities of each of said associations, and all property, real, personal and mixed, and all debts due to any of said constituent associations on whatever account, and all other things in action or belonging to each of said associations shall be vested in the consolidated association. All property, rights, privileges, powers, franchises and immunities, and all and every other interest shall be thereafter as effectually the property of the consolidated association as they were of the several and respective constituent associations, and the title to any real estate, whether by deed or otherwise, under the laws of this State, vested in any of such constituent associations, shall not revert or be in any way impaired by reason thereof. All rights of creditors and all liens upon the property of any of said constituent associations shall be preserved unimpaired, limited to the property affected by such liens at the time of the consolidation, and all debts, liabilities and duties of the respective constituent associations shall henceforth attach to said consolidated association and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

R.S.1954, c. 35, § 20; 1977, c. 522, § 10.

#### Historical Note

The 1977 amendment substituted, "State" for "Attorney General" following in the second sentence, "Secretary of State" for "Attorney General".

#### Cross References

Dissolution, see title 13-A, § 1101 et seq.

Merger or consolidation under general law, see title 13-A, § 901 et seq.

Rights of discharging stockholders on consolidation, see title 13-A, §§ 395, 399, 1005.

#### Library References

Corporations §-381 et seq., §12 et seq. C.J.S. Corporations §§ 1645 et seq., 1658, 1651.

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**§ 1952. Voluntary dissolution**

**1. Dissolution.**

A. The members of an association may at any regular meeting, or any special meeting called for the purpose, upon 30 days' notice of the time, place and object of the meeting having been given as prescribed in the bylaws, by 2/3 of the voting power voting thereon, discontinue the operations of the association and direct that the association be dissolved and its affairs settled. The meeting shall by like vote designate a committee of 3 members who, as trustees on behalf of the association and within the time fixed in their designation or any extension thereof, shall liquidate its assets, pay its debts and divide any remainder among the members or other patrons in accordance with their respective rights and interests under their contracts with the association and the articles and bylaws. Upon final settlement by such trustees, the association shall be deemed dissolved and shall cease to exist. The trustees shall make a report, in quadruplicate, of the proceedings had under this section, which shall be signed and sworn to and filed as required for the filing of the articles of incorporation.

B. The trustees may bring and defend all actions by them deemed necessary to protect and enforce the rights of the association.

C. Any vacancies in the trusteeship may be filled by the remaining trustees.

2. **Power of courts.** In the case of an association dissolving pursuant to this section, the Superior Court, upon the petition of the trustees or a majority of them, or a proper case upon the petition of a creditor or member, or upon the petition of the Attorney General, upon notice to all of the trustees and to such other interested persons as the court may specify, from time to time may order and adjudge in respect to the following matters:

A. The giving of notice by publication or otherwise of the time and place for the presentation of all claims and demands against the association, which notice may require all creditors of and claimants against the association to present in writing and in detail at the place specified in their respective accounts and demands to the trustees by a day therein specified, which shall not be less than 40 days from the service or first publication of such notice;

B. The payment or satisfaction in whole or in part of claims and demands against the association or the retention of moneys for such purpose;

C. The presentation and filing of intermediate and final accounts of the trustees, the hearing thereon, the allowance or disallowance thereof and the discharge of the trustees, or any of them, from their duties and liabilities;

D. The administration of any trust or the disposition of any property held in trust by or for the association;

E. The sale and disposition of any remaining property of the association and the distribution or division of such property or its proceeds among the members or persons entitled thereto; and

F. Such matters as justice may require.

3. **Orders and judgments binding.** All orders and judgments shall be binding upon the association, its property and assets, its trustees, members, creditors and all claimants against it.

4. **Application of section.** This section shall apply to all associations heretofore or hereafter incorporated in this State. R.S.1954, c. 35, § 21; 1961, c. 417, § 104.

**Cross References**

Decree of dissolution, see title 13-A, § 1120.

Involuntary dissolution, see title 13-A, § 1111 et seq.

Undistributed assets, see title 13-A, § 1121.

Voluntary dissolution, see title 13-A, §§ 1101 to 1103.

**ARTICLE 6. MAINE AGRICULTURAL MARKETING AND BARGAINING ACT OF 1973**

*Article 6, Maine Agricultural Marketing and Bargaining Act of 1973, was enacted by Laws 1973, c. 621, § 1.*

**§ 1953. Legislative findings and purpose**

Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Furthermore, membership by a farmer in a cooperative organization can only be meaningful, if a handler of ag-

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ricultural products is required to bargain in good faith with an agricultural cooperative organization as the representative of the members of such organization who have had a previous course of dealing with such handler. The purpose of this Article is to provide standards for the qualification of agricultural cooperative organizations for bargaining purposes, to define the mutual obligation of handlers and agricultural cooperative organizations to bargain with respect to the production, sale and marketing of agricultural products and to provide for the enforcement of such obligation.

1973, c. 621, § 1.

**Library References**

Agriculture <sup>69</sup>—6.  
C.J.S. Agriculture § 138 et seq.  
C.J.S. Industrial Cooperative Societies §§ 2 to 13, 15, 17 to 19.

**§ 1954. Short title**

Article 6 shall be known and may be cited as the "Maine Agricultural Marketing and Bargaining Act of 1973."

1973, c. 621, § 1.

**§ 1955. Definitions**

As used in this Article, unless the context otherwise requires, the following words shall have the following meanings.

1. **Association of producers.** "Association of producers" means any association of producers of agricultural products organized and existing under this subchapter.
2. **Board.** "Board" means the Maine Agricultural Bargaining Board provided for in this Article.
3. **Handler.** "Handler," in the case of potatoes, means "processor" as defined under Title 7, section 1012, subsection 14 and in the case of other agricultural products means any person engaged in the business or practice of:
  - A. Acquiring agricultural products from producers or associations of producers for processing or sale;
  - B. Grading, packaging, handling, storing or processing agricultural products received from producers or associations of producers;
  - C. Contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or as-

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sociations of producers with respect to the production or marketing of any agricultural product; or

D. Acting as an agent or broker for a handler in the performance of any function or act specified in paragraph A, B or C.

4. **Person.** "Person" includes one or more individuals, partnerships, corporations and associations.

5. **Producer.** "Producer" means a person engaged in the production of agricultural products, excluding forest products, as a farmer, planter, rancher, poultryman, dairyman, fruit, vegetable or nut grower, or independent agricultural contractor as specified in section 1774, subsections 6-A and 8-A. If producer is also a handler, he shall be considered only a handler for the purposes of this Act.

6. **Qualified association.** "Qualified association" means an association of producers accredited in accordance with section 1957.

1973, c. 621, § 1.

**§ 1956. Maine Agricultural Bargaining Board**

1. **Board.** There is established in the Department of Agriculture a Maine Agricultural Bargaining Board, which shall administer this Article.

2. **Membership.** The board shall consist of 5 members who shall be appointed by the Governor. One member shall be appointed from a list of names submitted by agricultural producer organizations organized under this subchapter and chapter 81. One shall be appointed from a list of names submitted by processors of agricultural products. Three shall be representatives of the public.

The initial terms of office of members of the board shall be 2 years for 2 representatives of the public and 3 years for the producer and processor representative and 4 years for the remaining public member. The Governor shall designate one member to serve as chairman of the board. Thereafter all terms shall be for a period of 5 years. Each member of the board shall be eligible for reappointment and shall hold office until his successor is appointed and qualified. In the event of a vacancy, the Governor shall, within one month, appoint a successor to fill the unexpired term of his predecessor. All appointments to the board shall be made in conformity with the foregoing plan.

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Members shall take the oath of office prescribed for state officers.

**3. Removal.** Members of the board shall be removed by the Commissioner of Agriculture upon notice and hearing for neglect of duty or malfeasance in office but for no other cause.

**4. Quorum.** A vacancy in the board shall not impair the right of the remaining members to exercise all of the powers of the board. Three members of the board shall, at all times, constitute a quorum of the board, provided that reasonable notice has been given to all members of the board of the subject matter and date of any meeting at which the board is to exercise any of its powers.

**5. Expenses.** Members of the board shall be compensated at the rate of \$50 per day, in addition to their actual expenses while carrying out the functions of the board.

**6. Rules and regulations.** The board shall have authority from time to time to adopt, amend and repeal, in the manner prescribed by the Maine Administrative Procedure Act,<sup>1</sup> such rules and regulations as may be necessary or appropriate to carry out this Article.

1973, c. 621, § 1; 1977, c. 564, §§ 67, 68, eff. July 23, 1977; 1977, c. 694, § 277, eff. July 1, 1978.

<sup>1</sup>Section 1151 et seq. of title 4; § 9001 et seq. of title 5.

**Historical Note**

Laws 1977, c. 564, in subsec. 2, deleted "with the approval of the Council" following "Governor" in the first sentence of the first paragraph, and "and Council" following "Governor" in the fifth sentence of the second paragraph.

**Library References**

States 4-45.  
C.J.S. States §§ 70, 80, 82, 136.

**§ 1957. Qualification of associations of producers**

**1. Qualification.** Only those associations of producers that have been qualified in accordance with this section shall be entitled to the benefits provided by this Article.

**2. Petition.** An association of producers desiring qualification shall file with the board a petition for qualification. The petition shall contain such information and be accompanied by

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such documents as shall be required by the regulations of the board.

**3. Hearing.** The board shall provide notice and opportunity for a hearing, provided in a manner consistent with the provisions as to adjudicatory proceedings of the Maine Administrative Procedure Act.<sup>1</sup> The board shall qualify such association, if based upon the evidence at such hearing, the board finds:

**A.** That under the charter documents or the bylaws of the association, the association is directly or indirectly producer-owned and controlled;

**B.** The association has contracts with its members that are binding under state law;

**C.** The association is financially sound and has sufficient resources and management to carry out the purposes for which it was organized;

**D.** The association represents 51% of the producers and produced at least 1/2 of the volume of a particular agricultural product for the specific handler involved with those producers and that agricultural product during the previous 12 months; if the board has reasonable cause to question such representation, the board shall require a secret ballot election to certify the percentage of representation, and

**E.** The association has as one of its functions acting as principal or agent for its producer-members in negotiations with handlers for prices and other terms of contracts with respect to the production, sale and marketing of their product.

**4. Refiling of petition.** If after said hearing, the board does not deem an association qualified, it shall, in a manner consistent with the Maine Administrative Procedure Act, clearly specify the reasons for such failure to qualify in its decision and, upon the refile of said petition, shall reconsider its decision within 30 days after the date on which said petition was filed.

**5. Notice.** After the board qualifies such association, it shall give notice of such qualification to all known handlers that, in the ordinary course of business, purchase the agricultural commodities that such association represents.

**6. Annual report.** A qualified association shall file an annual report with the board in such form as shall be required by

3. **Contracts.** Nothing in this Article shall be deemed to prohibit a qualified bargaining association from entering into contracts with handlers to supply the full agricultural production requirements of such handlers.

4. —**Limitation.** It shall be unlawful for a handler to negotiate with other producers of a product with respect to the price, terms of sale, compensation for commodities produced under contract and other contract provisions relative to such product while negotiating with a qualified bargaining association able to supply all or a substantial portion of the requirements of such handler for such product.

5. —**Further limitation.** It shall be unlawful for a handler to purchase a product from other persons under terms more favorable to such persons than those terms negotiated with a qualified bargaining association for such product, unless such handler has first offered to purchase said product under said more favorable terms from the members of the qualified association of producers and said members have failed to supply the required product within a reasonable time according to said more favorable terms.

6. **Investigation.** Whenever it is charged that a qualified association or handler refuses to bargain, as that term is defined in subsection 1, the board shall investigate the charges. If, upon investigation, the board considers that there is reasonable cause to believe that the person charged has refused to bargain in violation of this Article, the board shall provide that person with notice and opportunity to be heard, in a manner consistent with the Maine Administrative Procedure Act<sup>1</sup> as to adjudicatory hearings.

7. **Hearing.** Hearings held pursuant to subsection 6 shall be held in a manner consistent with the Maine Administrative Procedure Act as to adjudicatory hearings. The board shall request that the Attorney General, or any attorney in his department designated by him, be present at these hearings and shall advise the board on procedure and on the admissibility of any evidence.

8. **Findings.** If, upon a preponderance of the evidence, the board determines that the person complained of has refused to bargain, in violation of this Article, it shall state its findings of fact and shall issue and cause to be served on such person an order requiring him to bargain as that term is defined in subsection 1 and shall order such further affirmative action, excluding

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the regulations of the board. The annual report shall contain such information as will enable the board to determine whether the association continues to meet the standards for qualification.

7. **Revocation.** If a qualified association ceases to maintain the standards for qualifications set forth in subsection 3, the board shall, in a manner consistent with the Maine Administrative Procedure Act, apply to the Administrative Court to revoke the qualification of such association.

1973, c. 621, § 1; 1977, c. 694, §§ 278 to 280, *eff.* July 1, 1978.

<sup>1</sup> Section 1181 et seq. of title 4; § 8001 et seq. of title 5.

**Historical Note**

The 1977 amendment, in the first sentence of subsec. 3, substituted "notice and opportunity for a hearing, Maine Administrative Procedure Act, provided in a manner consistent with the provisions as to adjudicatory proceedings of the Maine Administrative Procedure Act" for "for a hearing and deleted the second sentence, which prior thereto read: "Said decision upon such petition"; in subsec. 4, substituted "after" for "at" and inserted "in a manner consistent with the Maine Administrative Procedure

**§ 1958. Bargaining**

1. **Definition.** As used in this Article, "bargaining" is the mutual obligation of a handler and a qualified association to meet at reasonable times and negotiate in good faith with respect to the price, terms of sale, compensation for commodities produced or sold, or both, under contract and other contract provisions relative to the commodities that such qualified association represents and the execution of a written contract incorporating any agreement reached if requested by either party. Such obligation on the part of any handler shall extend only to a qualified association that represents producers with whom such handler has had a prior course of dealing. Such obligation does not require either party to agree to a proposal or to make a concession.

2. **Prior course of dealing.** A handler shall be deemed to have had a prior course of dealing with a producer if such handler has purchased commodities produced by such producer in any 2 of the preceding 3 years, provided that the sale by a handler of his business shall not negate any prior course of dealing that producers have had with this business.

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an award of damages, as will effectuate the policies of this Article.

9. Repealed. 1977, c. 694, § 283, eff. July 1, 1978.

10. **Modification.** Until the record in a case has been filed in a court, as provided in section 1959, the board may at any time, upon reasonable notice and in such manner as it deems proper, modify or set aside, in a whole or in part, any finding or order made or issued by it.

1973, c. 621, § 1; 1977, c. 694, §§ 281 to 283, eff. July 1, 1978.

<sup>1</sup> Section 1151 et seq. of title 4; § 8903 et seq. of title 5.

**Historical Note**

The 1977 amendment repealed and replaced subsec. 4, which prior thereto read:

"Whenever it is charged that a qualified association or handler refuses to bargain as that term is defined in subsection 1, the board shall investigate such charges. If, upon such investigation, the board considers that there is reasonable cause to believe that the person charged has refused to bargain in violation of this Article, the board shall issue upon cause to be served a complaint upon such person. A copy of the complaint shall be served on each alleged violator and said complaint shall contain a short and plain statement of the alleged violation or violations. The complaint shall summon the named person to a hearing before the board or a member thereof within 15 days of receipt of service and at the place therein fixed; repeated and repeated subsec. 7, which prior thereto read:

"The person complained of shall have the right to file an answer to the original and any amended complaint and to appear in person with legal counsel if so desired or to be represented by legal counsel at the hearing and give testimony. In the discretion of the board, any person may be allowed to intervene in person testimony. At such hearings a record of all proceedings shall be maintained and common law or statutory rules of evidence shall apply insofar as practicable, and the board shall request that the Attorney General, or any attorney in his department designated by him, be present at such hearings and shall advise the board on procedure and on the admissibility of any evidence."

and repeated subsec. 9, which, prior thereto read:

"Dismissal. If, upon a preponderance of the evidence, the board is of the opinion that the person complained of has not refused to bargain, in violation of this Article, it shall make its findings of fact and issue an order dismissing the complaint."

2. **Application; definition.** This section applies only to bargaining for potatoes, subject to this article, by a handler and a qualified association. For purposes of this section, the term "party" means either a handler or a qualified association.

3. **Notice; final negotiation; final offer.**

A. Anytime after March 1st and before March 15th either party may notify the commissioner that it believes a contract will not be signed by both parties by March 15th.

B. All bargaining for potatoes subject to this article to be grown during the current year shall cease at midnight, March 15th.

C. Not later than March 20th, each party to bargaining terminated pursuant to paragraph B shall submit in writing to the commissioner their final offer, consisting at a minimum, of the following:

- (1) Identification of all items for a contract on which the parties agree, with a draft of that part of the contract setting forth this agreement;
- (2) Identification of all items on which there is disagreement, with each party's final offer, with a draft of that part of the contract setting forth this offer; and
- (3) Any other material the party wishes to submit.

The commissioner shall immediately give copies of the written final offer to the arbitrator selected pursuant to subsection 4.

4. **Selection of arbitrator.** Not later than March 15th, the commissioner or his representative shall meet with the parties. He shall present a list with the names of 5 proposed neutral arbitrators. Each party may strike from the list one name for cause and one name peremptorily. The parties shall strike names alternately and the party entitled to strike the first name shall be chosen by lot. The one name remaining after each party has struck 2 names shall be the arbitrator.

5. **Powers of the arbitrator.** The powers of the arbitrator are as follows.

A. The arbitrator may hold hearings and administer oaths, examine witnesses and documents, take testimony and receive evidence and issue subpoenas to compel the attendance of witnesses and the production of records. The

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arbitrator may petition a District Court to enforce its order compelling the attendance of witnesses and the production of records.

**B.** The arbitrator shall at no time engage in an effort to mediate or otherwise settle the dispute in any manner other than that prescribed in this section.

**C.** Not later than April 1st, the arbitrator shall choose the final offer of one party. The contractual language for that offer, submitted pursuant to subsection 3, paragraph C, subparagraph (2), plus the language of subsection 3, paragraph C, subparagraph (1) shall be combined into a written proposed contract which shall be presented to the parties.

**6. Effect of contract.** The contract presented to the parties pursuant to subsection 5 shall not be binding on the parties. The parties may sign the contract prior to April 7th, after which they may not sign any contract subject to this article or bargain for potatoes subject to this article before June 15th.

1981, c. 274.

#### Library References

Labor Relations 6-178. C.J.S. Labor Relations §§ 152 to 156.

### § 1959. Enforcement of orders and judicial review

**1. Complaint.** The board shall have power to complain to the Superior Court for the enforcement of its orders made under section 1958 and for appropriate temporary relief or restraining order, and shall file in the court the original or certified copy of the entire record in the proceeding, and shall cause notice of such complaint to be served upon such person, and said court shall thereupon have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a judgment enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. No objection that has not been urged before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If either party shall apply to the court for leave to adduce additional

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evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, the court may order such additional evidence to be taken before the board and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

**2. Repealed.** 1977, c. 694, § 284, eff. July 1, 1978.

**3. Stay.** The commencement of proceedings for judicial review shall not stay enforcement of the board's decision, but the reviewing court may order a stay upon such terms as it deems proper.

**4. Repealed.** 1977, c. 694, § 286, eff. July 1, 1978.  
1973, c. 621, § 1; 1973, c. 788, § 54, eff. April 1, 1974; 1977, c. 694, §§ 284 to 286, eff. July 1, 1978.

#### Historical Note

1. and shall have the same jurisdiction to grant to the aggrieved such temporary relief or restraining order as it deems just and proper and in like manner to make and enter a judgment enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; and the findings of the board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall in like manner be conclusive.

The 1973 amendment, in the third sentence of subsec. 2, substituted "aggravated" for "board".  
The 1977 amendment substituted "for judicial review" for "under subsection 1 or 2" in subsec. 3, and repealed subsecs. 2 and 4, which prior thereto read:

"2. **Appeal.** Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may appeal such order to the Superior Court. The aggrieved party shall file in the court the record in the proceeding, certified by the board. Upon the filing of such appeal, the court shall proceed in the same manner as in the case of complaint by the board under subsection

"4. **Procedure.** The procedure upon judicial review shall be in accordance with rule 80B of the Maine Rules of Civil Procedure, except as otherwise indicated in this section."

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**§ 1960. Copy evidence; oaths; subpoenas**

The board shall at all reasonable times have access to and the right to copy evidence relating to any person or action under investigation by it in connection with any refusal to bargain. The board is empowered to administer oaths and to issue subpoenas requiring the attendance of witnesses or the production of evidence.

1973, c. 621, § 1.

**§ 1961. Contempt**

In case of contumacy or refusal to obey a subpoena issued to any person, the Superior Court, upon application by the board, shall have jurisdiction to order such person to appear before the board to produce evidence or to give testimony touching the matter under investigation and any failure to obey such order may be punished by the court as a contempt thereof.

1973, c. 621, § 2.

**§ 1962. Service**

Complaints, orders and other papers of the board shall be served in accordance with the methods provided by the Maine Rules of Civil Procedure.

1973, c. 621, § 1.

**§ 1963. Subpoena**

In any proceeding before the board under this Act, the board may issue subpoenas for the attendance of witnesses, or for the production of documents and may examine witnesses under oath provided that:

1. Upon written application of a party to a proceeding, the board shall issue subpoenas for the attendance of witnesses or for the production of documents;
2. A person who fails to obey the subpoena of the board may be punished as for contempt of court on application by the board to the Superior Court for the county in which such failure occurs;
3. Witnesses who are summoned before the board or its agents shall be entitled to the same witness and mileage fees as

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are paid to witnesses subpoenaed in the District Courts of the State.

1973, c. 621, § 1.

**Cross References**

Subpoena for witnesses, see title 16, § 103.

**§ 1964. Antitrust**

The activities of qualified associations and handlers in bargaining with respect to the price, terms of sale, compensation for commodities produced under contract or other contract terms relative to agricultural commodities produced by the members of such qualified associations shall be deemed not to violate any antitrust law of this State. Nothing in this Article shall be construed to permit handler to contract, combine or conspire with one another in bargaining with qualified associations.

1973, c. 621, § 1.

**Cross References**

Monopolies and profiteering, see title 10, § 1101 et seq.

**§ 1965. Unfair practices**

1. Producers of agricultural commodities are free to join together voluntarily in associations as authorized by law without interference by handlers. A handler shall not engage nor permit an employee or agent to engage in any of the following practices, defined as unfair practices:

- A. To coerce a producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association or to refuse to deal with a producer because of the exercise of his right to join and belong to an association except as provided in section 1958, subsections 4 and 5;
- B. To discriminate against a producer with respect to price, quantity, quality or other terms of purchase, acquisition or other handling of agricultural products because of his membership in or contract with an association;
- C. To coerce or intimidate a producer to breach, cancel or terminate a membership agreement or marketing contract with an association or a contract with a handler;

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**D.** To pay or loan money, give anything of value or offer any other inducement or regard to a producer for refusing or ceasing to belong to an association;

**E.** To make or circulate unsubstantiated reports about the finances, management or activities of associations or handlers;

**F.** To conspire, combine, agree or arrange with any other person to do or aid or abet the doing of any practice which is in violation of this Act;

**G.** To refuse to bargain with an accredited association with whom the handler has had prior dealings or with an accredited association whose producers in the bargaining units have had substantial dealing with the handler prior to the accreditation of the association; or

**H.** To negotiate with a producer included in the bargaining unit after an association is accredited.

2. An association shall not engage or permit an employee or agent to engage in the following practices, defined as unfair practices:

**A.** To act in a manner contrary to the bylaws of the association;

**B.** To refuse to bargain with a handler with whom the accredited association has had prior dealing or with whom its producers have had substantial dealing prior to the accreditation of the association;

**C.** To coerce or intimidate a handler to breach, cancel or terminate a membership agreement or marketing contract with an association or a contract with a producer;

**D.** To make or circulate unsubstantiated reports about the finances, management or activities of other associations or handlers;

**E.** To conspire, combine, agree or arrange with any other person to do or aid or abet the doing of any practice which is in violation of this Act;

**F.** To hinder or prevent, by picketing, threats, intimidations, force or coercion of any kind, the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to ob-

struct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports or other ways of travel or conveyance;

**G.** To exercise coercive pressure by picketing, patrolling or otherwise business establishments other than the premises owned or controlled by the handler in order to cause such parties to cease doing business with such handler.

1973, c. 621, § 1.

CHAPTER 157

CO-OPERATIVE CORPORATIONS

CO-OPERATIVE BUSINESS CORPORATIONS

Sec.

- 1. Method of organization.
- 2. Distribution of earnings or profits; sinking fund; limitation upon shares held.

CO-OPERATIVE AGRICULTURAL, DAIRY OR  
MERCANTILE ASSOCIATIONS

- 3. Organization; name.
- 3A. Housing business; powers; name.
- 4. Capital stock; powers; by-laws; meetings.
- 5. Investment of reserve fund.
- 6. Apportionment of earnings.
- 7. Acceptance of provisions relating to agricultural, dairy or mercantile associations; approval.
- 8. Use of word co-operative in connection with other businesses; penalty.
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AGRICULTURAL AND OTHER CO-OPERATIVE CORPO-  
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- 10. Organization without capital stock; method of organization; rights and powers of members.
- 11. Powers.
- 12. First meeting; selection of directors.
- 13. Scope of by-laws; amendment or repeal of by-law.
- 14. Membership.
- 15. Amendment or alteration of agreement of association or articles of organization.
- 16. Marketing contracts between corporation and members.
- 17. Marketing contracts; provisions for liquidated damages; injunction for breach.
- 18. Taxation; filing fees.

CO-OPERATIVE BUSINESS CORPORATIONS

Cross References

Business corporation law, application, see c. 156B, § 3.  
 Urban redevelopment co-operative corporation, see c. 121A, § 3.

### § 1. Method of organization

A corporation may be organized under chapters one hundred and fifty-five and one hundred and fifty-six, with shares having par value, for the purpose of co-operation in carrying on any business and of co-operative trade.

#### Historical Note

St.1866 c. 200 §§ 1, 5.

St.1870 c. 224 § 3.

St.1878 c. 210.

P.S.1882 c. 106 § 9.

R.L.1902 c. 110 § 7.

St.1903 c. 437 §§ 93, 95.

St.1920 c. 349 § 10.

St.1956, c. 303, approved April 30, 1956, read as follows: "Any co-operative bank, the Massachusetts Co-operative Bank League and the Co-operative Central Bank which is or may become a member of the Co-operative Banks Employees Retirement Association, established under section fifty-one of chapter one hundred and seventy of the General Laws, or any such bank which maintains a pension plan approved by the commissioner of banks under chapter two hundred and eighty-three of the acts of nineteen hundred and forty-eight, may pay to any officer or employee retired by such bank between November first, nineteen hundred and fifty-four and December thirty-first, nineteen hundred and sixty-five, after attaining sixty-five years of age, and who, at the time of his retirement, shall have been in the employ of such bank for a period of fifteen years or more, a retirement benefit, in monthly or other peri-

odic instalments, at an annual rate not exceeding in any one year the difference obtained by subtracting (a) the aggregate total for such year of his social security benefits and of his annuity or pension provided by contributions paid by such bank into said retirement association or under any such pension plan, from (b) an amount equal to two per cent of his average salary for the five years preceding the date of retirement for each year of service not exceeding twenty-five years; provided, that the combined total of such difference, and of such annuity or pension referred to in clause (a) above, received in any one year by any such officer or employee shall not exceed the annual rate of seven thousand five hundred dollars. No payment under this act shall be retroactive and no retirement benefit shall be paid hereunder to any person retiring after December thirty-first, nineteen hundred and sixty-five."

#### Library References

Corporations ⇨3.

C.J.S. Corporations § 22.

Comment.

Cooperative corporations, see M.P.S. vol. 13, Peairs, § 384.

Co-operative corporations and associations, see M.P.S. vol. 15, Everberg, § 851 et seq.

### § 2. Distribution of earnings or profits; sinking fund; limitation upon shares held

Such corporation shall distribute its earnings or profits among its workmen, purchasers and stockholders at such times and in such manner as its by-laws prescribe, but at least once in every twelve months. No distribution shall be made, unless at least ten per cent of

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the net profits have been appropriated for a contingent or sinking fund, until an amount has accumulated equal to thirty per cent of its capital stock issued and outstanding. No person shall hold shares in any such corporation to an amount exceeding one thousand dollars at their par value, nor shall a stockholder be entitled to more than one vote upon any subject.

### Historical Note

St.1866 c. 290 § 12.  
St.1870 c. 224 § 51.

P.S.1882 c. 106 § 72.  
R.L.1902 c. 110 § 70.

St.1903 c. 437 § 93.

### Library References

Corporations ⇐382.

C.J.S. Corporations § 949.

## CO-OPERATIVE AGRICULTURAL, DAIRY OR MERCANTILE ASSOCIATIONS

### § 3. Organization; name

Seven or more persons, residents of the commonwealth, may associate themselves as a corporation, association, society, company or exchange, to conduct within the commonwealth any agricultural, dairy or mercantile business on the co-operative plan. The word "co-operative" shall form a part of the name of the corporation, and, for the purposes of this and sections three A to nine, inclusive, the words "association", "company", "exchange", "society" and "union", shall have the same signification and shall import a corporation. The corporation shall be formed as provided in chapters one hundred and fifty-five and one hundred and fifty-six, with shares having par value, and shall be subject to the provisions thereof so far as consistent with said sections.

Amended by St.1949, c. 378, § 1.

### Historical Note

St.1870 c. 224 § 8.  
P.S.1882 c. 106 § 17.

R.L.1902 c. 110 § 16.  
St.1913 c. 447 §§ 1, 2.

St.1920 c. 349 § 10.  
St.1923 c. 438 § 2.

The 1949 amendment substituted in nine, inclusive" for "the six following the second sentence "sections three A to sections."

### Cross References

Fee for filing articles of organization, see section 9 of this chapter.

## Law Review Commentaries

Cooperative marketing associations as combinations in restraint of trade. (Nov. 1924) 38 Harvard L.Rev. 87.

## Library References

Agriculture ⇐6.  
Corporations ⇐4.  
C.J.S. Agriculture § 12.  
C.J.S. Corporations § 23.

Forms. Statement of purpose, see M. P.S. vol. 15, Everberg, §§ 883, 884.

## Notes of Decisions

## 1. In general

A co-operative corporation, which was organized by officers and stockholders of pre-existing corporation engaged in handling milk, and which took over business of such pre-existing corporation, and took title to cattle from farmers, giving them mortgages back and stock, without taking possession of cattle and without substantial change in farmers' status, could not avoid making larger payments into equalization pool under milk marketing order on ground that it was a "producer". Elm Spring Farm v. U. S., (C.C.A.1942) 127 F.2d 920.

Where officers and stockholders of corporation engaged in handling milk organized co-operative corporation which took over business of pre-existing corporation, and took title to cattle from farmers, giving them mortgages back and stock, without taking possession of cattle and without substantial change in farmers' status, stockholder and officer of pre-existing corporation was improperly made a party, individually, to judgment requiring compliance with milk marketing order, which required larger payments into equalization pool than had been made by co-operative corporation. Id.

## § 3A. Housing business; powers; name

Seven or more persons, residents of the commonwealth, may associate themselves as a corporation, association, society or company to conduct within the commonwealth a housing business on the co-operative plan, including the buying, selling, leasing, construction or rehabilitation of dwellings, together with appurtenant facilities, for the members of such co-operative corporation. Such facilities appurtenant to the provision of dwellings shall include use of land and buildings for business, commercial, cultural or recreational purposes related to such dwellings. The words "co-operative" and "housing" shall form a part of the name of the corporation, and, for the purposes of this and sections four to nine, inclusive, the words "association", "company", "society" and "union", shall have the same signification and shall import a corporation. The corporation shall be formed as provided in chapters one hundred and fifty-five and one hundred and

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fifty-six, with shares having par value, and shall be subject to the provisions thereof so far as consistent with said sections.

Added by St.1949, c. 378, § 2.

### Cross References

Fee for filing articles of organization, see section 9 of this chapter.

### Library References

Corporations ⇐3.

C.J.S. Corporations § 22.

### § 4. Capital stock; powers; by-laws; meetings

The capital stock of a co-operative corporation formed under section three or section three A shall not be less than one hundred dollars nor more than five million dollars. No stockholder shall own shares of a greater par value than one tenth of the total par value of the capital stock issued and outstanding, nor shall any member be entitled to more than one vote on any subject arising in the management of the corporation.

In addition to the powers granted by section thirteen of chapter one hundred and fifty-six, any corporation organized under section three or section three A may provide in its by-laws for the election of directors and other officials by unit or district or by mail ballot; for a method of membership representation by annual election of delegates to represent proportionately the members of such units or districts in the membership meeting of the corporation, and shall hear reports of and instruct the delegates on the policy and business of the corporation. The agreement of association or the articles of organization shall be altered or amended, and the by-laws shall be altered, amended or repealed, if the delegate type of membership meeting is adopted by any such corporation, only after notice of the proposed action is given in the call for the annual meetings of the units or districts at which the delegates are to be elected to the membership meeting of the corporation, or in the call for the annual election of such delegates if the vote is to be taken by mail ballot, and only upon vote of two thirds of the delegates eligible to vote at such membership meeting. Special meetings of the units or districts may be demanded by written petition of at least one tenth of the membership of any such unit or district for the purpose of instructing its delegate or delegates on questions concerning the operation and business of the corporation, in which case it shall be the duty of the clerk or secretary of the corporation to call such unit or district meeting or

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meetings to take place within thirty days after such demand. The minutes of such unit or district meeting shall be forwarded by the clerk or secretary of such meeting to the clerk or secretary of the corporation and be kept at the principal place of business in the commonwealth.

Amended by St.1949, c. 378, § 3; St.1958, c. 26.

Historical Note

St.1866 c. 290 § 7. St.1877 c. 230 § 3. St.1913 c. 447 § 1.
St.1870 c. 224 § 52. P.S.1882 c. 106 §§ 35, 73. St.1915 c. 118 § 1.
St.1871 c. 109. R.L.1902 c. 110 §§ 35, 70. St.1921 c. 297.

Prior to the 1949 amendment, this section read as follows: "The capital stock of a co-operative corporation formed under section three shall not be less than one hundred dollars nor more than two hundred thousand dollars. No stockholder shall own shares of a greater par value than one tenth of the total par value of the capital stock, nor shall any member be entitled to more than one vote on any subject arising in the management of the corporation."
The 1958 amendment, approved Feb. 3, 1958, changed first sentence of first paragraph to increase authorized capital stock from "six hundred thousand" to "five million" dollars.

Library References

Corporations C-61. Stock subscription, see M.P.S. vol. 15, Everberg, § 882.
C.J.S. Corporations § 197.
Forms. Stock certificate, see M.P.S. vol. 15, Everberg, § 885.

Notes of Decisions

I. In general
Purchase of shares in cooperative association, incorporated under Pub.St. c. 106, is, in effect, loan upon interest, and shareholder may withdraw his money under by-laws, and, if corporation refuses, he can maintain action to recover it. Lindsay v. Arlington Co-op. Ass'n (1904) 71 N.E. 797, 186 Mass. 371.

§ 5. Investment of reserve fund

At any regular meeting, or at any duly called special meeting, at which a majority of its stockholders are present, a corporation formed under section three may authorize the investment of its reserve fund or any part thereof, first, in the building where it is doing business, or, second, in a first mortgage of real estate owned and occupied as a dwelling by any of its stockholders.

Historical Note

St.1913 c. 447 § 4.



## Library References

Agriculture ⇄8.  
Corporations ⇄457.

C.J.S. Industrial Co-operative So-  
cieties § 1 et seq.  
C.J.S. Corporations § 1002.

## § 6. Apportionment of earnings

The directors of every corporation formed under section three or under section three A shall apportion its earnings in the following manner:

1. They shall set aside annually not less than ten per cent of its net profits for a reserve fund until there is accumulated in said reserve fund an amount not less than thirty per cent of its paid-up capital stock.

2. They shall declare and pay dividends on the paid-up capital stock not exceeding seven per cent per annum.

3. From the balance of its annual net earnings the directors may appropriate a sum not exceeding five per cent thereof to be used in teaching co-operation.

4. The directors shall distribute the remainder of such earnings or any part thereof by a uniform dividend upon the amount of purchases or rents or sales of shareholders, through the corporation, and, if the directors so vote, upon the amount of wages earned and paid to employees, except that in the case of a purchaser not a shareholder, who desires to become such, a dividend of one half the uniform dividend may be declared upon such non-shareholder's purchases, or rents or sales and credited to him on account of the purchase of stock for which he may subscribe. In productive corporations, including creameries, canneries, storages, factories and the like dividends shall be calculated on raw materials delivered to the corporation instead of on goods purchased. If the corporation be both a purchasing and a selling, or a productive concern, the dividends may be on both raw material and on goods purchased. The profits or net earnings of such corporation shall be distributed to those entitled thereto at such times as the by-laws prescribe, but at least once in every twelve months.

Amended by St.1949, c. 378, §§ 4, 5; St.1964, c. 290.

## Historical Note

St.1866 c. 290 § 12.  
St.1870 c. 224 § 51.  
P.S.1882 c. 106 § 72.

R.L.1902 c. 110 § 69.  
St.1903 c. 437 §§ 93, 95.

St.1913 c. 447 §§ 5, 6.  
St.1915 c. 118 § 3.

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The reference to "section three A" was inserted in the preliminary paragraph by St.1949, c. 378, § 4.

St.1949, c. 378, § 5 inserted in the first sentence of paragraph 4 the reference to "rents" in each instance.

The 1964 amendment, approved April 21, 1964, increased amount of dividends on paid-up capital stock from 5% to 7%.

### Library References

Agriculture ⇐6,  
Corporations ⇐150 et seq.

C.J.S. Industrial Co-operative Societies § 1 et seq.  
C.J.S. Corporations §§ 217, 458.

### Notes of Decisions

#### 1. In general

Corporation officers are not liable under R.L.1902, c. 110, § 58, for declaring and paying dividend, where corporation is not then insolvent, nor actually rendered insolvent thereby, though dividend be one of several causes of subsequent

insolvency, nor are they liable for declaring and paying dividend in good faith and without fraud, though in violation of § 69. *Ellis v. French-Canadian Co-op. Ass'n* (1905) 76 N.E. 207, 189 Mass. 566.

#### § 7. Acceptance of provisions relating to agricultural, dairy or mercantile associations; approval

Any co-operative association now organized by law in the commonwealth for any of the purposes mentioned in section three, and qualified so to do, may by a majority vote of the stockholders at a meeting called therefor vote to accept sections three to seven, inclusive, and shall thereupon present to the state secretary a certificate, signed and sworn to by its clerk or secretary, setting forth a copy of said vote, the date when passed, and such further evidence as the secretary may require of its legal existence and of its intention to accept said sections. The secretary shall examine the certificate and evidence of organization, and, if it appears that the law has been complied with, shall so certify, and shall approve the certificate by his endorsement thereon, and thereupon such corporation shall have the powers and privileges and be subject to the duties and liabilities of corporations formed under section three. Upon the payment of five dollars, said certificate shall be filed in the office of the state secretary.

Amended by St.1957, c. 698, § 5; St.1962, c. 750, § 31.

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### Historical Note

St.1913 c. 447 § 7.

St.1931 c. 394 § 169.

The filing fee under the section was increased from "one" to "five" dollars by the 1957 amendment, approved Aug. 28, 1957.

The 1962 amendment, approved July 25, 1962, effective Jan. 1, 1963, made

changes necessitated by transfer of duties of bureau of corporate organization and registration in department of corporations and taxation to corporation division in department of state secretary.

### Cross References

Secretary empowered to examine certificates and endorse them, see c. 155, § 2.

### Library References

Agriculture ⇐6.  
Corporations ⇐21, 22.

C.J.S. Industrial Co-operative Societies § 1 et seq.  
C.J.S. Corporations §§ 50, 62.

## § 8. Use of word co-operative in connection with other businesses; penalty

Any person, partnership, association or corporation, domestic or foreign, except co-operative banks and corporations organized under section ten, transacting business for profit in the commonwealth under any name or title containing the word "co-operative", unless the net earnings thereof are distributed in a manner permitted for a co-operative corporation by this chapter, shall forfeit to the commonwealth not more than ten dollars for every day or part thereof during which such name or title is so used. Such forfeiture may be recovered by an information brought in the supreme judicial or superior court by the attorney general, at the relation of the state secretary. Upon such information, the court may issue a temporary or permanent injunction restraining such person, partnership, association or corporation from doing business in the commonwealth, or from so using such name or title, and may make such other orders and decrees as justice and equity may require.

Amended by St.1962, c. 750, § 32.

### Historical Note

SL1915 c. 118 § 2.  
SL1918 c. 257 § 302.

St.1919 c. 5.  
SL1920 c. 2.

St.1923 c. 438 § 3.

The 1962 amendment, approved July 25, 1962, effective Jan. 1, 1963, made changes necessitated by transfer of duties of bureau of corporate organization

and registration in department of corporations and taxation to corporation division in department of state secretary.



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rations so organized shall have the rights and powers and be subject to the duties and liabilities of stockholders of corporations having capital stock, under the provisions of said chapters, so far as is consistent with this and the eight following sections.

#### Historical Note

St.1923 c. 438 § 4.

#### Cross References

Domestic corporation defined, see c. 63C, § 1.  
Fee for filing articles of organization; tax liability, see section 18 of this chapter.  
Use of word "co-operative" in name or title, see section 8 of this chapter.

#### Library References

Agriculture ⇨6.

C.J.S. Agriculture § 12.

## § 11. Powers

Any corporation organized under the preceding section shall have power to mortgage or pledge its real or personal property and to issue promissory notes or other evidences of indebtedness. Such corporation shall also have power to establish reserves and invest the funds thereof in such manner as it may deem advisable or as may be provided in its by-laws; and to exercise all other powers, rights and privileges necessary or incidental to the purposes for which said corporation was organized or to the activities in which it is engaged; provided, however, that no such corporation shall handle the products of any non-member, except for storage.

#### Historical Note

St.1923 c. 438 § 4.

#### Library References

Agriculture ⇨6.

C.J.S. Industrial Co-operative Societies  
§ 1 et seq.

## § 12. First meeting; selection of directors

The first meeting of the corporation shall be held within six months after the execution of the agreement of association. If the directors of the corporation have been previously chosen in anticipation of its organization, or in connection with a plan for preliminary organization, or in accordance with contracts made in anticipation of such organization, such choice of directors shall be ratified at said

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meeting. Elections of directors shall thereafter be governed by section twenty-two of chapter one hundred and fifty-six, except as provided in the following section.

**Historical Note**

St.1923 c. 438 § 4.

**Library References**

Agriculture ⇐6.

C.I.S. Industrial Co-operative Societies  
§ 1 et seq.

**§ 13. Scope of by-laws; amendment or repeal of by-law**

In addition to the powers granted by section thirteen of chapter one hundred and fifty-six, any corporation organized under section ten may provide in its by-laws for the election of directors by districts; for the election of advisory directors who are not members, the number of whom shall not be greater than one fifth the total number of directors; for voting of members by proxy, and the mode thereof, within such limitations and restrictions as may be specified therein; for voting of members by mail in elections and on questions concerning the operation and business of the corporation; for the admission, withdrawal, suspension or expulsion of members; for dues and assessments to be paid by members and the conditions under which such dues and assessments shall be imposed and collected; for determining the rights and interests of members in the property of the corporation, whether equal or unequal; for establishing the basis of voting by the members, especially whether the votes of all members shall be equal, or in proportion to the land area leased or used by each member for production of the products handled by the corporation, or in proportion to the quantity of such products delivered by each member to the corporation during the preceding year; for an approved or established form of marketing contract; and for fines or other penalties for violation of its by-laws or marketing contract. No by-law shall be amended or repealed nor any new by-law adopted, unless notice of the proposed action is given in the call for the meeting at which the proposal is to be considered, or in the call for the vote if the vote is to be taken by mail.

Amended by St.1954, c. 23.

**Historical Note**

St.1923 c. 438 § 4.

The words "for voting of members by proxy, and the mode thereof, within such limitations and restrictions as may be specified therein" were inserted by the 1954 amendment.

## Library References

Agriculture ¶6.

C.J.S. Industrial Co-operative Societies § 1 et seq.

Forms. By-laws, see M.P.S. vol. 15. Everberg, § 886.

## Notes of Decisions

## i. in general

The office of "by-laws" of a corporation is to regulate the conduct and define the duties of the members towards the corporation and between themselves, and in effect they constitute a contract between the different members and the corporation. *Kubilius v. Hawes Unitarian Congregational Church* (1948) 79 N.E.2d 5, 322 Mass. 638.

A corporate by-law may regulate the exercise of corporate power, but it cannot enlarge or alter the power conferred by charter or by statute. *Assessors of Boston v. World Wide Broadcasting Foundation of Mass.* (1945) 59 N.E.2d 188, 317 Mass. 598.

The term "by-laws" has a peculiar and limited signification, being used to

designate the orders and regulations which a corporation as one of its legal incidents has a right to make and which is usually exercised to regulate its own actions and concerns, and the rights and duties of its own members among themselves. *Town of North Reading v. Drinkwater* (1941) 34 N.E.2d 631, 300 Mass. 200.

By-laws of corporation constitute contract between different members and corporation, and stockholders may resist infractions of by-laws. *Bushway Ice Cream Co. v. Fred H. Bean Co.* (1933) 187 N.E. 537, 264 Mass. 239.

A by-law of a corporation is not binding on persons having no notice thereof. *Worcester v. Essex Merrimac Bridge Corp.* (1856) 73 Mass. 457, 7 Gray 457.

## § 14. Membership

Membership in such corporations shall be limited to persons engaged in the production of products which are handled or to be handled by the corporation, as specified in its articles of organization, including the lessees or tenants of land used for the production of such products and lessors or landlords to whom are due all or any part of such products produced on leased or rented premises in payment for the use of such premises. If a member is a corporation, it may be represented by any officer thereof, duly authorized in writing.

## Historical Note

St.1923 c. 438 § 4.

## Library References

Agriculture ¶6.

C.J.S. Agriculture § 12.

**§ 15. Amendment or alteration of agreement of association or articles of organization**

Any such corporation may amend or alter its agreement of association or articles of organization in the manner provided by sections forty-one to forty-three, inclusive, of chapter one hundred and fifty-six, so far as applicable; provided, that such amendment or alteration shall require a vote of three fourths of the members present and voting at a meeting of the corporation called to consider such amendment or alteration, or if the vote upon such amendment or alteration is taken by mail, by vote of three fourths of the members who return votes. A vote by mail upon such amendment or alteration shall not be valid unless votes are returned by at least three fifths of the members of the corporation.

**Historical Note**

St.1923 c. 438 § 4.

**Library References**

Agriculture ⇨6.

C.J.S. Industrial Co-operative Societies § 1 et seq.

**§ 16. Marketing contracts between corporation and members**

Any such corporation may enter into marketing contracts with its members by which the members shall agree to sell, for any period of time not exceeding ten years, all or any specified part of their products or of certain specified products exclusively to or through the corporation or any agency designated by it. If such contract provides for a sale to the corporation, title to the products covered thereby shall pass to the corporation absolutely, except for recorded liens, upon delivery or at any other time specified in said contract, if expressly so agreed therein. Any such contract may, however, provide for sale by the corporation of the products of its members with or without acquisition of title to such products by the corporation and may further provide that the corporation shall pay over to the members the resale price after deducting all necessary expenses including any allowances, contributions or deductions authorized by its by-laws or by the contract itself. Such contract shall not be construed as a violation of any provision of sections one to seven, inclusive, of chapter ninety-three, unless it results in an undue enhancement of the price of the product to which the contract applies, nor shall any corporation organized under section ten be liable to prosecution for any



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## CORPORATIONS

action reasonable and proper in the exercise of the rights and powers conferred by sections ten to eighteen, inclusive.

Amended by St.1932, c. 180, § 31.

### Historical Note

St.1923 c. 438 § 4.

### Law Review Commentaries

Specific performance of cooperative marketing agreements: Mutuality. (Nov. 1923) 37 Harvard L.Rev. 145.

### Library References

Agriculture ⇐0.  
C.J.S. Agriculture § 12.

Forms. Poultry producer's membership and marketing agreement, see M.P.S. vol. 15, Everberg, § 887.

## § 17. Marketing contracts; provisions for liquidated damages; injunction for breach

The marketing contract may fix as liquidated damages specific sums to be paid by a member upon breach of the provisions of said contract requiring sale or delivery of products by the member exclusively to or through the corporation or any agency designated by it, and such provision shall be valid and enforceable in the courts of the commonwealth. Any such corporation may be granted a temporary or permanent injunction against a member for breach or threatened breach of such contract with reference to the said provisions for sale or delivery of products.

### Historical Note

St.1923 c. 438 § 4.

### Library References

Damages ⇐85.

C.J.S. Damages § 114.

## § 18. Taxation; filing fees

A corporation organized under the provisions of section ten, and any corporation, association or organization now or hereafter established, organized or chartered without capital stock for a similar purpose under laws other than those of this commonwealth, shall not be liable to taxation under the provisions of chapter sixty-three, but shall be taxable under the provisions of chapter fifty-nine, in the same

## CO-OPERATIVE CORPORATIONS 157 § 18

manner and to the same extent as an individual or partnership. The fee for filing the articles of organization required by section ten, including the issuing by the state secretary of the certificate of incorporation, shall be fifty dollars.

### Historical Note

St.1923 c. 438 § 4.

St.1931 c. 304 § 171.

### Cross References

Foreign corporation defined, see c. 63C, § 1.

Property eligible to be taxed, see c. 59, § 2.

### Library References

Taxation ⇨115.

C.J.S. Taxation § 129.

### Notes of Decisions

#### I. In general

Delaware corporation, which qualified as a farmers' cooperative for federal income tax purposes under Internal Revenue Code as in effect during taxable years ending on May 31, 1961, 1962, and 1963, was entitled to deduct, in computing its net income for Massachusetts excise tax, nonpatronage dividends paid during those years on the corporations' capital stock. *Ocean Spray Cranberries, Inc. v. State Tax Commission* (1969) 246 N.E.2d 654, 1969 Adv.Sh. 553.

Where domestic life insurance companies leased electric bookkeeping and accounting devices from foreign corporations which filed excise tax returns including leased property and paid all corporate excise taxes and all other taxes due to commonwealth, leased property

constituted lessors' "stock in trade" within statutory exemption and were not subject to local tax of city. *New England Mut. Life Ins. Co. v. City of Boston* (1947) 75 N.E.2d 505, 321 Mass. 683.

Foreign corporation organized as cooperative agricultural society for mutual help, without capital stock and registered within commonwealth, under G. L.1921, c. 181, having no corporate excess or net income subject to excise under c. 63, § 39, was liable under c. 59, § 2, in view of c. 156, § 1, for tax imposed on its tobacco within the commonwealth where it maintained its usual place of business. *Connecticut Valley Tobacco Ass'n v. Inhabitants of Town of Agawam* (1927) 158 N.E. 506, 261 Mass. 110.

## CO-OPERATIVE BUSINESS CORPORATIONS

**Cross References**

Trust companies, savings banks or co-operative banks, loans secured by security interests in shares of stock issued by co-operative housing corporations established under provisions of this chapter, see c. 167, § 51D.

**§ 1. Method of organization**

A corporation may be organized under chapter one hundred and fifty-six B, with shares having par value, for the purpose of co-operation in carrying on any business or of co-operative trade.

Amended by St.1981, c. 273, § 1.

1981 Amendment. St.1981, c. 273, § 1, approved June 22, 1981, substituted "chapter one hundred and fifty-six B" for "chapters one hundred and fifty-five and one hundred and fifty-six".

## CO-OPERATIVE AGRICULTURAL, DAIRY OR MERCANTILE ASSOCIATIONS

**§ 3. Organization; name**

Seven or more persons, residents of the commonwealth, may associate themselves as a corporation, association, society, company or exchange, to conduct within the commonwealth any agricultural, dairy or mercantile business on the co-operative plan. The word "co-operative" shall form a part of the name of the corporation, and, for the purposes of this and sections three A to nine, inclusive, the words "association", "company", "exchange", "society" and "union", shall have the same signification and shall import a corporation. The corporation shall be formed as provided in chapter one hundred and fifty-six B, with shares having par value, and shall be subject to the provisions thereof so far as consistent with said sections.

Amended by St.1981, c. 273, § 2.

1981 Amendment. St.1981, c. 273, § 2, approved June 22, 1981, substituted "chapter one hundred and fifty-six B" for "chapters one hundred and fifty-five and one hundred and fifty-six" in the third sentence.

**§ 3A. Housing business; powers; name**

Seven or more persons, residents of the commonwealth, may associate themselves as a corporation, association, society or company to conduct within the commonwealth a housing business on the co-operative plan, including the buying, selling, leasing, construction or rehabilitation of dwellings, together with appurtenant facilities, for the members of such co-operative corporation. Such facilities appurtenant to the provision of dwellings shall include use of land and buildings for business, commercial, cultural or recreational purposes related to such dwellings. The words "co-operative" and "housing" shall form a part of the name of the corporation, and, for the purposes of this and sections four to nine, inclusive, the words "association", "company", "society" and "union", shall have the same signification and shall import a corporation. The corporation shall be formed as provided in chapter one hundred and fifty-six B, with shares having par value, and shall be subject to the provisions thereof so far as consistent with said sections.

Amended by St.1981, c. 273, § 3.

## CORPORATIONS

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1981 Amendment. St.1981, c. 273, § 3, approved June 22, 1981, substituted "chapter one

hundred and fifty-six B" for "chapters one hundred and fifty-five and one hundred and fifty-six" in the fourth sentence.

### § 3B. Direct-charge cooperatives

Seven or more persons, residents of the commonwealth, may associate themselves as a corporation, association, society or company engaging in cooperative purchasing of goods for the personal use and consumption of the stockholders thereof, members of their families and their guests. A corporation organized under this section shall, in pricing its goods, make no provision for earnings, the accumulation of capital, or operating costs, and shall provide for its operating costs by levying upon its shareholders a direct-charge therefor, on a pro rata basis. The words "direct charge" and the word "cooperative" shall form a part of the name of the corporation, and for the purposes of this section and sections four to nine, inclusive, the words "association", "company", "society" and "union" shall have the same signification and shall import a corporation. The corporation shall be formed as provided in chapter one hundred and fifty-six B, with shares having par value, and shall be subject to the provisions thereof so far as consistent with said sections.

Added by St.1971, c. 317, § 1.

1971 Enactment. St.1971, c. 317, § 1, was approved May 20, 1971.

#### Library References

Corporations ¶14(2).

C.J.S. Corporations § 47.

### § 4. Capital stock; powers; by-laws; meetings

The capital stock of a co-operative corporation formed under section three, three A or three B shall not be less than one hundred dollars nor more than five million dollars. No stockholder shall own shares of a greater par value than one tenth of the total par value of the capital stock issued and outstanding, nor shall any member be entitled to more than one vote on any subject arising in the management of the corporation.

In addition to the powers granted by section sixteen of chapter one hundred and fifty-six B, any corporation organized under section three, three A or three B may provide in its by-laws for the election of directors and other officials by unit or district or by mail ballot; for a method of membership representation by annual election of delegates to represent proportionately the members of such units or districts in the membership meeting of the corporation, and shall hear reports of and instruct the delegates on the policy and business of the corporation. The articles of organization shall be altered or amended, and the by-laws shall be altered, amended or repealed, if the delegate type of membership meeting is adopted by any such corporation, only after notice of the proposed action is given in the call for the annual meetings of the units or districts at which the delegates are to be elected to the membership meeting of the corporation, or in the call for the annual election of such delegates if the vote is to be taken by mail ballot, and only upon vote of two-thirds of the delegates eligible to vote at such membership meeting. Special meetings of the units or districts may be demanded by written petition of at least one-tenth of the membership of any such unit or district for the purpose of instructing its delegate or delegates on questions concerning the operation and business of the corporation, in which case it shall be the duty of the clerk or secretary of the corporation to call such unit or district meeting or meetings to take place within thirty days after such demand. The minutes of such unit or district meeting shall be forwarded by the clerk or secretary of such meeting to the clerk or secretary of the corporation and be kept at the principal place of business in the commonwealth.

Amended by St.1971, c. 317, §§ 2, 2A; St.1981, c. 273, § 4.

1971 Amendment. St.1971, c. 317, §§ 2, 2A, approved May 20, 1971, inserted the reference to section "three B" in the first sentences of the first and second paragraphs, respectively.

1981 Amendment. St.1981, c. 273, § 3, approved June 22, 1981, in the second paragraph, substituted "sixteen of chapter one hundred and fifty-six B" for "thirteen of chapter one hundred and fifty-six" in the first sentence, and deleted "The agreement of association or" preceding "The articles" in the second sentence.

**§ 7. Acceptance of provisions relating to agricultural, dairy or mercantile associations; approval**

Any co-operative association now organized by law in the commonwealth for any of the purposes mentioned in section three, and qualified so to do, may by a majority vote of the stockholders at a meeting called therefor vote to accept sections three to seven, inclusive, and shall thereupon present to the state secretary a certificate, signed and sworn to by its clerk or secretary, setting forth a copy of said vote, the date when passed, and such further evidence as the secretary may require of its legal existence and of its intention to accept said sections. The secretary shall examine the certificate and evidence of organization, and, if it appears that the law has been complied with, shall so certify, and shall approve the certificate by his endorsement thereon, and thereupon such corporation shall have the powers and privileges and be subject to the duties and liabilities of corporations formed under section three. Upon the payment of a fee to be determined annually by the commissioner of administration under the provision of section three B of chapter seven, said certificate shall be filed in the office of the state secretary.

Amended by St.1972, c. 684, § 97; St.1980, c. 572, § 323.

**Expiration of St.1980, c. 572**

St.1980, c. 572, § 417, as amended by St.1982, c. 602, § 2, provided:

"This act shall expire on December thirty-first, nineteen hundred and eighty-three."

St.1982, c. 602, was approved December 23, 1982. Emergency declaration by the Governor was filed December 29, 1982.

1972 Amendment. St.1972, c. 684, § 97, an emergency act, approved July 13, 1972, and by § 436 made effective July 31, 1972, substituted "ten" dollars for "five" dollars in the last sentence.

1980 Amendment. St. 1980, c. 572, § 323, approved July 16, 1980, substituted "a fee to be determined annually by the commissioner of administration under the provision of section three B of chapter seven" for "ten dollars" in the last sentence.

Section 416 of St.1980, c. 572 provided:

"Notwithstanding any general or special law to the contrary, for the period beginning July first, nineteen hundred and eighty, and ending December thirty-first, nineteen hundred and eighty-two, the secretary of administration shall determine the amount to be charged for any service, registration, regulation, license, fee, permit or public function which is not provided for by any other section of this act provided, however, that said secretary shall not determine the rates of tuition at state

colleges, state community colleges, state universities, and the Massachusetts Maritime Academy or any fees or charges relative to the administration and operation of the trial court, appeals court, supreme judicial court or any other department of the judiciary of the commonwealth."

Section 417 of St.1980, c. 572, as amended by St.1982, c. 602, § 2, provided:

"This act shall expire on December thirty-first, nineteen hundred and eighty-three."

Section 417A of St.1980, c. 572, as added by St.1982, c. 602, § 3, provided:

"Sixty days prior to the increase of any fee, the secretary of administration and finance shall submit information relative to the purpose for a fee increase with the senate and house committees on ways and means; provided however, that no such notification shall be effective prior to March first, nineteen hundred and eighty-three."

St.1982, c. 602, was approved Dec. 23, 1982. Emergency declaration by the Governor was filed Dec. 29, 1982.

**§ 8. Use of word co-operative in connection with other businesses; penalty**

Any person, partnership, association or corporation, domestic or foreign, except employee cooperatives organized under chapter one hundred and fifty-seven A and co-operative banks and corporations organized under section ten, transacting business for profit in the commonwealth under any name or title containing the word "co-operative", unless the net earnings thereof are distributed in a manner permitted for a co-operative corporation by this chapter, shall forfeit to the commonwealth not more than ten dollars for every day or part thereof during which such name or title is so used. Such forfeiture may be recovered by an information brought in the supreme judicial or superior court by the attorney general, at the relation of the state secretary. Upon such information, the court may issue a temporary or permanent injunction restraining such person, partnership, association or corporation from doing business in the commonwealth, or from so using such name or title, and may make such other orders and decrees as justice and equity may require.

Amended by St.1982, c. 104, § 2.

1982 Amendment. St.1982, c. 104, § 2, approved May 26, 1982, in the first sentence, insert-

ed "employee cooperatives organized under chapter one hundred and fifty-seven A and".

**Cross References**

Injunctions, see Mass.R.Gv.P. Rule 65.

**§ 9. Fee for filing articles of organization**

The fee for filing the articles of organization required by section three or three A or three B, including the issuing by the state secretary of the certificate of incorporation, shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven.

Amended by St.1971, c. 317, § 3; St.1972, c. 684, § 98; St.1980, c. 572, § 324.

**Expiration of St.1980, c. 572**

St.1980, c. 572, § 417, as amended by St.1982, c. 602, § 2, provided:

"This act shall expire on December thirty-first, nineteen hundred and eighty-three."

St.1982, c. 602, was approved December 23, 1982. Emergency declaration by the Governor was filed December 29, 1982.

1971 Amendment. St.1971, c. 317, § 3, approved May 20, 1971, inserted the reference to section "three B".

1972 Amendment. St.1972, c. 684, § 98, an emergency act, approved July 13, 1972, and by § 136 made effective July 31, 1972, substituted "one hundred" dollars for "fifty" dollars.

1980 Amendment. St. 1980, c. 572, § 324, approved July 16, 1980, inserted "or" preceding "three A" and substituted "determined annually by the commissioner of administration under the provision of section three B of chapter seven" for "one twentieth of one per cent of the total amount of the authorized capital stock as fixed by the articles of organization, but in no case less than one hundred dollars".

Section 416 of St.1980, c. 572 provided;

"Notwithstanding any general or special law to the contrary, for the period beginning July first, nineteen hundred and eighty, and ending December thirty-first, nineteen hundred and eighty-two, the secretary of administration shall determine the amount to be charged for any service, registration, regulation, license, fee, permit or public function which is not provided for by any other section of this act provided, however, that said secretary shall not determine the rates of tuition at state colleges, state community colleges, state universities, and the Massachusetts Maritime Academy or any fees or charges relative to the administration and operation of the trial court, appeals court, supreme judicial court or any other department of the judiciary of the commonwealth;"

Section 417 of St.1980, c. 572, as amended by St.1982, c. 602, § 2, provided:

"This act shall expire on December thirty-first, nineteen hundred and eighty-three."

Section 417A of St.1980, c. 572, as added by St.1982, c. 602, § 3, provided:

"Sixty days prior to the increase of any fee, the secretary of administration and finance shall submit information relative to the purpose for a fee

increase with the senate and house committees on ways and means; provided however, that no such notification shall be effective prior to March first, nineteen hundred and eighty-three."

St.1982, c. 602, was approved Dec. 23, 1982. Emergency declaration by the Governor was filed Dec. 29, 1982.

#### AGRICULTURAL AND OTHER CO-OPERATIVE CORPORATIONS WITHOUT CAPITAL STOCK

##### § 10. Organization without capital stock; method of organization; rights and powers of members

Agricultural and horticultural associations engaged in any branch of agriculture, horticulture, viticulture, forestry, dairying, the raising of livestock or poultry and any other farming activity or business, if instituted for the mutual benefit of their members and formed for the purpose of doing business without profit to the association itself may be incorporated without capital stock. Such corporations shall be formed in the manner provided by chapter one hundred and fifty-six B and shall be subject to the provisions of said chapter, so far as applicable. Members of corporations so organized shall have the rights and powers and be subject to the duties and liabilities of stockholders of corporations having capital stock, under the provisions of said chapters, so far as is consistent with this and the eight following sections.

Amended by St.1981, c. 273, § 5.

1981 Amendment. St.1981, c. 273, § 5, approved June 22, 1981, substituted "chapter one hundred and fifty-six B" for "chapters one hun-

dred and fifty-five and one hundred and fifty-six" and "chapter" for "chapters" in the second sentence.

##### § 12. First meeting; selection of directors

The first meeting of the corporation shall be held within six months after the execution of the articles of organization. If the directors of the corporation have been previously chosen in anticipation of its organization, or in connection with a plan for preliminary organization, or in accordance with contracts made in anticipation of such organization, such choice of directors shall be ratified at said meeting. Elections of directors shall thereafter be governed by section forty-seven of chapter one hundred and fifty-six B, except as provided in the following section.

Amended by St.1981, c. 273, § 6.

1981 Amendment. St.1981, c. 273, § 6, approved June 22, 1981, substituted "articles of organization" for "agreement of association" in the

first sentence, and "forty-seven of chapter one hundred and fifty-six B" for "twenty-two of chapter one hundred and fifty-six" in the third sentence.

##### § 13. Scope of by-laws; amendment or repeal of by-law

In addition to the powers granted by section sixteen of chapter one hundred and fifty-six B, any corporation organized under section ten may provide in its by-laws for the election of directors by districts; for the election of advisory directors who are not members, the number of whom shall not be greater than one fifth the total number of directors; for

voting of members by proxy, and the mode thereof, within such limitations and restrictions as may be specified therein; for voting of members by mail in elections and on questions concerning the operation and business of the corporation; for the admission, withdrawal, suspension or expulsion of members; for dues and assessments to be paid by members and the conditions under which such dues and assessments shall be imposed and collected; for determining the rights and interests of members in the property of the corporation, whether equal or unequal; for establishing the basis of voting by the members, especially whether the votes of all members shall be equal, or in proportion to the land area leased or used by each member for production of the products handled by the corporation, or in proportion to the quantity of such products delivered by each member to the corporation during the preceding year; for an approved or established form of marketing contract; and for fines or other penalties for violation of its by-laws or marketing contract. No by-law shall be amended or repealed nor any new by-law adopted, unless notice of the proposed action is given in the call for the meeting at which the proposal is to be considered, or in the call for the vote if the vote is to be taken by mail.

Amended by St.1981, c. 273, § 7.

1981 Amendment. St.1981, c. 273, § 7, approved June 22, 1981, substituted "sixteen of chapter one hundred and fifty-six B" for "thirteen of chapter one hundred and fifty-six" in the first sentence.

§ 16. Amendment or alteration of agreement of association or articles of organization

Any such corporation may amend or alter its articles of organization in the manner provided by sections seventy to seventy-two, inclusive, of chapter one hundred and fifty-six B, so far as applicable; provided, that such amendment or alteration shall require a vote of three-fourths of the members present and voting at a meeting of the corporation called to consider such amendment or alteration, or if the vote upon such amendment or alteration is taken by mail, by vote of three-fourths of the members who return votes. A vote by mail upon such amendment or alteration shall not be valid unless votes are returned by at least three fifths of the members of the corporation.

Amended St.1981, c. 273, § 8.

1981 Amendment. St.1981, c. 273, § 8, approved June 22, 1981, deleted "agreement of association or" preceding "articles of organization", and substituted "seventy to seventy-two" for "forty-one to forty-three" and "one hundred and fifty-six B" for "one hundred and fifty-six" in the first sentence.

§ 17. Marketing contracts; provisions for liquidated damages; injunction for breach

Cross References

Injunctions, see Mass.R.Civ.P. Rule 65.

Law Review Commentaries

Limiting buyer's market damages to lost profits. David Simon and Gerald A. Novack (1979) 92 Harvard L.Rev. 1395.

§ 18. Taxation; filing fees

A corporation organized under the provisions of section ten, and any corporation, association or organization now or hereafter established, organized or chartered without capital stock for a similar purpose under laws other than those of this commonwealth, shall not be liable to taxation under the provisions of chapter sixty-three, but shall be taxable under the provisions of chapter fifty-nine, in the same manner and to the same extent as



an individual or partnership. The fee for filing the articles of organization required by section ten, including the issuing by the state secretary of the certificate of incorporation, shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven.

Amended by St.1980, c. 572, § 325.

Expiration of St.1980, c. 572

St.1980, c. 572, § 417, as amended by St.1982, c. 602, § 2, provided:

"This act shall expire on December thirty-first, nineteen hundred and eighty-three."

St.1982, c. 602, was approved December 23, 1982. Emergency declaration by the Governor was filed December 29, 1982.

1980 Amendment. St. 1980, c. 572, § 325, approved July 16, 1980, substituted "determined annually by the commissioner of administration under the provision of section three B of chapter seven" for "fifty dollars" in the second sentence.

Section 416 of St.1980, c. 572 provided:

"Notwithstanding any general or special law to the contrary, for the period beginning July first, nineteen hundred and eighty, and ending December thirty-first, nineteen hundred and eighty-two, the secretary of administration shall determine the amount to be charged for any service, registration, regulation, license, fee, permit or public function which is not provided for by any other section of this act provided, however, that said secretary shall not determine the rates of tuition at state colleges, state community colleges, state universities, and the Massachusetts Maritime Academy or any fees or charges relative to the administration and operation of the trial court, appeals court,

supreme judicial court or any other department of the judiciary of the commonwealth."

Section 417 of St.1980, c. 572, as amended by St.1982, c. 602, § 2, provided:

"This act shall expire on December thirty-first, nineteen hundred and eighty-three."

Section 417A of St.1980, c. 572, as added by St.1982, c. 602, § 3, provided:

"Sixty days prior to the increase of any fee, the secretary of administration and finance shall submit information relative to the purpose for a fee increase with the senate and house committees on ways and means; provided however, that no such notification shall be effective prior to March first, nineteen hundred and eighty-three."

St.1982, c. 602, was approved Dec. 23, 1982. Emergency declaration by the Governor was filed Dec. 29, 1982.

CHAPTER 157A. EMPLOYEE COOPERATIVE CORPORATIONS [NEW]

Sec. 1. Short title.

2. Definitions.

3. Corporations organized under chapter 156B; election to be governed as employee cooperative.

4. Revocation of election.

5. Corporate name.

6. Members; membership shares; fees; rights and responsibilities.

7. Voting shares; by-laws; amendment of articles of organization.

8. Net earnings or losses; apportionment, distribution and payment.

9. Internal capital accounts; recall or redemption of shares; interest; collective reserve account.

10. Internal capital account cooperatives.

11. Conversion of membership shares and internal capital accounts upon revocation of election; consolidation or merger.

"AT SEA JOINT VENTURES"

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Talk Prepared For  
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University of Maine, School of Law  
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A TOPIC OUTLINE

More than 500 fishery joint ventures have been identified around the world (Kaczynski and LeVieil, 1980). These joint ventures range greatly in complexity depending upon contractual relationships, countries and species involved, and scope of operations.

The material discussed in this presentation will be limited to consideration of the so-called "at-sea joint ventures", i.e. delivery at-sea, (or possibly in a port or roadstead) of U.S. harvested fish to foreign processing vessels. Emphasis will be given to those arrangements which have occurred subsequent to the passage of the Magnuson Fisheries Conservation and Management Act of 1976, involving so-called underutilized species.

1. Definition of joint ventures and types thereof

- . Over-the-side sales
  - ..foreign "cash buyer"
  - ..U.S. subsidiary of foreign corporation arranges sale
  - ..U.S. company arranges fish sale
- . U.S. leased foreign processor
- . U.S. owned foreign processor
- . Foreign processor / U.S. processor arrangements

2. Operational considerations

- . Selecting the proper processing vessels
- . Selecting the proper catching vessels
- . Integration of joint venture and directed fishing operations
  - ..reserve processors

- . Organizational aspects
  - ..fleet concept (pooling) vs. independent operators
  - ..at-sea reps
  - ..captain meetings
  - ..at-sea decision-making process
- . Fish delivery systems
  - ..contact vs. no contact methods
  - ..methods of estimating composition and weight of delivered catches
    - gravimetric
    - volumetric
    - back calculation from product produced
- . Catch reporting requirements
  - ..to fishermen
  - ..to processors
  - ..to NMFS
  - ..to operations base
- . Transshipment of product
  - ..impact of Nicholson Act
- 3. Visual glimpse of an at-sea joint venture fishing operation  
(10 minute slide show and/or MRC story - video tape)
- 4. Contractual considerations
  - A. With U.S. fishermen
    - . Harvesting vessel requirements
    - . Processing vessel commitments
    - . At-sea representatives
    - . Fleet operational requirements
    - . Fuel and fishing gear repairs
    - . Lost codend dispute settlement provisions
    - . Minimum and maximum delivery/acceptance provisions
    - . Fish species and quality
    - . Weight determination
    - . Price and payment provisions
    - . Dispute settlement

B. With processors

- . Processing vessel characteristics, capabilities, etc.
- . Lease arrangements
- . At-sea representatives
- . Joint venture vs. independent fishing
- . Areas, timing, species and quantities of fish
- . Size and quality of fish
- . Processing standards and responsibilities
- . Ownership of product
- . Fuel and fishing gear
- . Dispute settlement

5. Financial considerations

- . Letter of Credit guarantees
- . Fishermen payment schedules
- . Hold-back
- . Cash flow

6. The future for joint ventures

- . "Americanization" of the fishery resources within the U.S. 200 mile zone
- . Exclusionary zones (see Exhibit F)
- . Legislative changes to existing regulations
  - ..Jones Act
  - ..Nicholson Act
  - ..Inspection/manning requirements

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Washington, D. C. 20235

Re: Foreign phase-out and joint venture  
fishing

Dear Bill:

Recently certain processor groups (Pacific Seafood Processors Association, Northwest Fisheries Association and National Fisheries Institute) have called for the phase-out of foreign fishing and joint ventures involving foreign processing vessels. I would like to offer, for your consideration, some observations on this subject as it relates to the long term development of the U.S. fishing industry.

For a variety of reasons I do not feel that a phase-out of foreign fishing at this time is in the national interest or the interest of our fishing industry unless it is accompanied by a commensurate increase in domestic harvests. Such a phase-out would completely emasculate our "fish and chips" policy which we all worked very hard to put in place. As we have witnessed, TALFF can be used as a very creative "carrot" to get foreign nations to increase their purchases of U.S. products and fish. For this reason we should retain TALFF as an option for our negotiators to use in bringing about economic health in our industry.

With regard to joint ventures I think you know my strong feelings on this issue. I would not have championed the joint venture cause so strongly these past years if I did not honestly believe that J.V.s were, and still are, in the best interests of both U.S. fishermen and processors to say nothing of our nation. The record speaks for itself --- joint ventures have been a very positive force in moving our industry into underutilized species in a big way. I think it is fair to say that not much would be happening today if Mr. Furia, NEFCO and others had had their way back in the late 70's and killed joint ventures in their infancy.

Instead of trying to impede and restrict joint ventures, we should

be doing everything possible to support and expand them. If those who want to eliminate foreign fishing would put as much effort into facilitating joint ventures as they do in eliminating them, they would have their foreign phase-out, together with the U.S. having one of the largest groundfish fisheries in the world.

As one looks back over the past five years, you can't help but be impressed with the positive changes which have occurred in the U.S. groundfish industry. These changes have not just benefited the harvesting sector as some would try and lead you to believe, but also international fish marketing concerns such as ourselves as well as some of our domestic processing interests.

For example, we now have several major shoreside facilities in Alaska dedicated to groundfish. Three new catcher/processors are in various phases of construction and several others are on the drawing board. The "Golden Alaska" is pioneering a U.S. flag joint venture mode which is going to be followed by others in due time. I understand domestic processing of squid has increased substantially on the East Coast.

Since the Processor Preference Amendment to the MFCMA gives domestic processing operations the highest priority in the allocation scheme, the division of quota will be inexorably moved in the direction of greater and greater U.S. dominance of our fishery resources. To meddle with this process now would not be in the long-term interests of our industry as it would lead to a much weaker industry with a reduced capacity to be competitive on the world market.

They say that competition is the mother of invention. Additionally, it goes without saying that our industry needs continuing invention to prosper and remain healthy. For this reason, it doesn't appear to me that the elimination of competition or the favoring of one segment of our industry over another would be in our long-term interests. The Congressional Record speaking to the several amendments to the MFCMA over the past several years certainly indicates that Congress did not intend for government to lessen competition in the marketplace or reduce opportunity for change in our industry. To the contrary, Congress intended for the market place to decide what should be the form and substance of our industry, not vice versa.

At long last our fishing industry is on a positive track. Development is occurring at a rapid pace. With "fish and chips", EEZ legislation, 50 percent holdback, and the joint venture and processor preference amendments, we now have the fishery policies needed as a basis for insuring the long-term development of the fishing industry by the fishing industry. Certain fine tuning of the process may be needed from time-to-time but certainly not a major overhaul in our fishery policies. Rather than trying to change policies which are obviously working, government should be putting more effort into aggressively applying the policies and laws we have on the books. Unbridling our fishery policy from

June 13, 1983

other national interest issues would do more for fostering the expansion and profitability of the U.S. fishing industry than any other measure I can think of at this time.

Finally, Bert Lance once offered a sage comment which I feel has merit in our situation...."If it ain't broke, don't try to fix it".

Yours truly,



Walter T. Peñeyra  
Vice President and General Manager

WTP:kb

cc: Senator Henry Jackson  
Senator Slade Gorton  
Senator Bob Packwood  
Senator Mark Hatfield  
Senator Ted Stevens  
Senator Frank Murkowski  
Congressman John Breaux  
Congressman Joel Pritchard  
Congressman Don Young  
Congressman Les AuCoin  
Congressman Don Bonker  
Congressman James Weaver  
Congressman Rod Chandler  
Congressman Al Swift  
Ted Kronmiller  
Lucy Sloan  
Lee Weddig



## Some Preliminary Results Of A U.S.-Soviet Joint Fishing Venture

*A Seattle company is the nation's largest  
buyer of bottom fish through a joint  
agreement with a Soviet fishing enterprise.*

Walter T. Pereyra  
Marine Resources Co., Seattle

The extension of fisheries jurisdiction by the United States to 200 miles in 1976 set the stage for radical changes in traditional fishing patterns off our shores. One of these changes was the emergence of a new harvesting/processing arrangement known as an over-the-side-sales or joint venture fishing in which United States fishermen catch and deliver fish on the fishing grounds to foreign processing vessels. Although such "joint venture" arrangements are new to the United States, they have been carried out widely off other countries for years (Kaczynski and LeVieil, 1980).

The first nation to become involved in such a joint venture scheme in United States waters was the Soviet Union. They choose to effect such an arrangement through the auspices of a jointly-owned United States corporation, U.S.-USSR Marine Resources Company.

In this paper I will describe the structure and operation of our joint U.S.-Soviet fishing company and in particular the way in which our joint fishing arrangements are organized and implemented. Some attention will also be given to the negative impact on our joint fishing activities due to certain administration directives or industry initiatives which by design can severely impact our joint fishing arrangements.

### **U.S.-USSR Marine Resources Company**

The U.S.-USSR Marine Resources Company, which does business as Marine Resources Company (MRC) was incorporated in Washington in July, 1976. We are a 50-50 equity joint venture between Bellingham Cold Storage of Bellingham, Washington and Sovrybflot, a fishing enterprise of the Soviet Ministry of Fisheries located in Moscow. Our main office is in Seattle. We also have a branch office in Nakhodka, USSR, in the Soviet Far East. Our Nakhodka office represents the only commercial office permanently maintained by a Western corporation in the Soviet Far East and as such is a significant breakthrough in its own right. We have one Soviet citizen permanently residing in Seattle in exchange for which we have been allowed to place an American permanently in our Nakhodka office.

To the best of our knowledge, we are the only joint venture in the United States with equity participation by a Soviet enterprise. Being a joint American-Soviet company, our business activities are largely confined to business and trading activities between our two countries and in particular the fishing industry involving the Soviet Far East, the North Pacific and Bering Sea, and the Pacific Northwest and Alaska—the Seattle-Nakhodka connection becomes obvious. In a sense it could be said that we are dedicated to expanding trade and business between the Soviet Far East and the Pacific Northwest and Alaska as a means of building bridges of economic dependency between our two countries.

Last year our business volume was around \$15 million and involved, among other things, resupply of the Soviet fishing fleet with perishables, joint venture fishing arrangements with American fishermen for under-utilized species, and the brokering of Soviet fish products on the world market. This year we are projecting that our total sales should increase to around \$20 million. As will be discussed below, in terms of volume we are now the largest buyer of United States-caught bottom-fish in the country.

As our level of business volume has expanded, so have our areas of business activity. For example, we are presently exploring the possibility of designing, financing, constructing and operating a cold storage facility in Nakhodka. We also would like to expand our product base into such commodities as wood chips, logs, coal and other resources in the Soviet Far East. In the Seattle area we have been exploring the possibility of repairing Soviet ships in an effort to develop some much-needed new shipyard business for the area. Recently we formed a subsidiary company, Troika Travel Company, to organize specialized counterpart tours of the Soviet Union for American businessmen.

### **"Joint Venture" Fishing Arrangements**

Of the various business activities in which we are presently involved, the so-called "joint venture" fishing arrangements constitute the business backbone of our company. For this reason I will describe in greater detail how they operate and give you some idea of their importance to the development of United States fisheries on non-traditional resources within our 200-mile fishing zone. These resources include species such as Pacific whiting (hake) and pollock which must be caught in large volumes, sold at moderate prices and processed rapidly if they are to be competitive in the international market.

The Soviet Union is the second largest fishing nation in the world (Japan is first) with landings of around nine million metric tons (MT) annually. More importantly, though, from the standpoint of developing joint venture fishing arrangements with United States fishermen, the Soviet Union has by far the largest fleet of large motherships and fish factory vessels in the world. This fact is clearly underscored in a companion article in this volume by Kaczynski (1981) where he shows that considering the world fleet of factory-ships greater than 6000 GRT, some 85 percent fly the Soviet flag.

Besides having a large fleet of factory-ships, the Soviet Union is a natural partner for joint fishing ventures with American fishermen because these fleets are based at ports in the Soviet Far East, Sakhalin and Kamchatka that are relatively close to the North Pacific and Bering Sea. This means that processing ships can be brought on-line expeditiously and processing capacity varied with the seasonal requirements of the United States fishermen. Other nations, with the possible exception of Japan and Korea, do not have this flexibility. You must keep in mind that in the Pacific Northwest and Alaska the majority of our fishing vessels are combination boats which move from fishery to fishery depending upon their relative strengths. For this reason, if new ventures on non-traditional species are going to be successful, they must be organized and prosecuted with flexibility in an environment of uncertainty.

### **Organizational Aspects**

The manner in which our joint ventures are organized is actually quite simple. Our company leases certain Soviet factory-ships to process fish to our specifications. We then contract with American fishermen to deliver individual catches of fish by means of a detachable bag (codend) to these factory-ships. (See Fisher 1980 for details of our catch delivery methods.) We have representatives on-board the factory-ships who coordinate fish deliveries, account for the quantities and kinds of fish delivered, and make certain that the finished products meet our

specifications. Our company then markets the finished products in the international market.

The important point to keep in mind is that we are not a brokering agent to arrange the transfer of fish to the Soviet Union as is sometimes mistakenly assumed. We, of course, are more than willing to sell or barter our fish to the Soviets if they can be competitive on the international market. Interestingly, due to the way in which we operate, the value added from Soviet labor accrues to the United States through our U.S. corporation.

Our actual joint venture fishing arrangements began in 1978 off the Oregon coast when two Oregon midwater trawlers, *The Lady of Good Voyage* and *Last Straw*, delivered Pacific whiting (hake) during September and October to two Soviet freezer-trawlers. Although the deliveries in this experimental venture were not great (less than 1000 metric tons), we did prove that American fishermen could economically catch and deliver large volumes of Pacific whiting and that our company could successfully sell the finished products in international markets.

Based on our initial success, we expanded the joint venture whiting fishery in 1979 to include 11 U.S. trawlers and up to six processing vessels with the operation running from June to October. Our catch target was 30,000 MT but due to an unusual oceanographic regime that existed along the coast (warm water and little up-welling); certain area restrictions on the joint operation (no deliveries allowed inside nine miles nor north of 47° 30' N); and the fact that most of the trawlers experienced "birth pangs" in this new midwater trawl fishery, the catch was only about 9,000 MT. Nevertheless, the significance of this effort becomes apparent when one realizes that in our second year of operation we purchased about 85 percent of the Pacific whiting delivered by American fishermen along the coast that year.

Last year we expanded further and had 16 United States catchers delivering to seven Soviet processing vessels. With a more normal fishing environment and stable export markets, we took about 27,000 MT. Moreover, since it was recognized that some of the area restrictions imposed on our operations in 1979 were not based on a conservation need and did in fact severely impact this developing domestic fishery, permit conditions were finally promulgated last year that facilitated deliveries by American fishermen, rather than impeding them.

#### **A Gulf of Alaska Fishery**

Besides the whiting fishery, in 1979 we initiated an experimental fishery in the Gulf of Alaska on a variety of under-utilized groundfish species. One American trawler, *California Horizon*, operated with a Soviet

freezer-trawler for about 50 days. Pollock was the principal species taken but we were unable to economically market it due primarily to import restrictions in Korea and Japan, coupled with the type of processing facilities we had available. Consequently we terminated the operation prematurely.

In 1980 we leased different classes of processing vessels including the 18,000 ton mothership *Sulak* which has fillet processing facilities and shifted our operation to the Bering Sea and Aleutian Island area. We started up in mid-January with seven large American trawlers including the 160-foot *American No. 1*. Our principal target species was Pacific cod. As in the Gulf, pollock was the dominant species taken in the Bering Sea when the fishery terminated in late May. Total deliveries of all species was about 11,300 MT, which represents about a ten-fold increase over the total United States groundfish landings for the Bering Sea/Aleutian Island region in 1979.

In 1980 we initiated a fishery for yellowfin sole in the Central Bering Sea from June–September. We used three processing vessels and five medium-sized American trawlers. This fishery which was the first American fishery on the large Bering Sea yellowfin sole resource (total allowable catch of about 120,000 MT), had a catch target of 7,500 MT. Due to the excellent performance of the U.S. trawlers, though, we had taken 13,150 MT by the time the fishery wound down in late September. If we had had "reserve processors," as will be described later, total deliveries would have been closer to 16,000 MT. Fisher (1980) provides a complete discussion of this exploratory fishing venture.

To summarize our joint venture fishery arrangements last year, we contracted with 27 United States trawlers, ranging in size from 60 to 160 feet and valued at between \$450,000 and \$7,500,000 each for a combined value of about \$35 million. These trawlers delivered to 14 different Soviet processing vessels ranging in length from 270 to 573 feet, with an estimated value of \$116 million. Total deliveries were around 51,500 MT with an average ex-vessel value of about \$120 per MT or \$6.2 million. In terms of relative volume last year, our company accounted for a two-thirds increase in total groundfish deliveries by U.S. fishermen on the West Coast over the preceding year.

#### **Some Benefits to the U.S. Fishing Industry From Joint Venture Arrangements**

One of the principal benefits of our joint venture fisheries to the harvesting and processing sectors of the U.S. fishing industry has been the learning of new skills, the transfer of technology and the demonstration of what can be done with under-utilized species. For example, Soviet trawl skippers and master fishermen have freely given of their time and

skills when requested by the American fishermen. We have had United States processors aboard our leased Soviet processing vessels to witness first-hand how our fish are processed for the international market. We have demonstrated that our fishermen can catch and deliver large volumes of non-traditional species and that these species can be successfully processed and marketed by a U.S. corporation.

In effect, through our joint venture arrangements involving leased Soviet processing vessels teamed up with American fishermen, we have considerably reduced the uncertainties and risk associated with the sea-based processing mode of handling under-utilized resources. We are doing something more than just talking about developing U.S. fisheries on under-utilized species. We are successfully catching, processing and marketing them. We and the American fishermen working for us have demonstrated conclusively that all that is required for the fishing industry to take advantage of the opportunities Congress envisioned when they enacted the Magnuson Fishery Conservation and Management Act (MFCMA) of 1976 is a *viable economic market*.

It should be noted that this development activity has been done entirely within the private sector at *no cost to the U.S. taxpayer*. If you tried to duplicate our experiences through one of the Fisheries Development Foundations, you would find that the costs would run into the tens of millions of dollars.

Besides the obvious direct benefits, it should be kept in mind that other related industries benefit substantially from the joint venture fisheries, particularly since species such as Pacific whiting and pollock are harvested by a fishing method new to the Pacific Northwest—midwater trawling. Shipyards have been busy converting vessels and even building some new ones while equipment manufacturers have had to supply new winches, electronics, nets and other related fishing equipment.

Another benefit which is now being realized from our joint venture is the fact that other nations fishing in the North Pacific have had to change their attitudes about participating with the U.S. industry in the utilization of non-traditional resources. This is in part due to the recent establishment of a U.S. "fish and chips" policy whereby our government will reward those nations helping to develop the U.S. fishing industry by allocations of surplus resources. We now see joint ventures involving Japan, Korea, Poland, Bulgaria, Greece and West Germany in part due to this policy and our successes.

The MFCMA and its recent amendments established a three-tiered allocation system with U.S.-caught and processed fish having the highest priority, U.S.-caught and foreign processed next priority, and foreign-

caught and processed lowest priority. Clearly, as domestic harvests go up, foreign quotas are going to drop. It is now apparent that Japan with some 70 percent of the foreign quotas in the Gulf of Alaska and Bering Sea, plus major control of the seafood processing industry in Alaska, is aware that the joint fishing ventures are capable of drastically reducing their dominant position in the North Pacific. In effect, our company is a viable competitive alternative to the Japanese dominance of the North Pacific fisheries.

Obviously, as can be seen, the joint ventures we have arranged involving American fishermen delivering under-utilized species to Soviet processors are significant and important in the overall development of our domestic fisheries, particularly on the West Coast. In this regard, they are totally consistent with one of the stated purposes of the MFCMA, for example, "To encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottomfish off Alaska." The benefits to be derived to the United States are substantial and long-lasting.

#### **The Impact of the Withdrawal of Soviet Quota On Fishermen Participating in Joint Ventures**

One of the Carter Administration's responses to the Soviet-Afghanistan situation was the withdrawal of fish allocations that had been earmarked for the Soviet Union in 1980. Considering that these quota withdrawals represented less than five percent of the Soviets' annual fish catch, the withholding of quotas probably had a limited impact on them.

On the other hand, withholding the Soviet quotas has had a negative impact on our company and the U.S. fishermen who operate with us in our joint venture fisheries. In the past when the Soviets had a directed fishery operating in the same general area as our joint fishery, we had considerable flexibility in the amount of processing and carrier capacity we could have "on-line" at any one time. For example, when the American fishermen were having good catching success, we could bring on extra processors. On the other hand, when fishing was slow, we could release processors to fish on the Soviet quota.

With the elimination of the Soviet quota, this flexibility was gone. Consequently, we have been forced to operate with a fixed processing capacity and no "reserve processors." Thus, when fishing is slow, we have unused capacity that we have to cover. Conversely, when fishing is good, we have to put the fishermen on limits. In either case it increases costs, lowers productivity in the fishery, and in general

**Table 1**  
**Unrealized Deliveries Due to Lack**  
**Of Reserve Processing Ships on Fishing Grounds**

Fishing Area	FISHERY (Target species)			Total
	Pollock	Yellowfin Sole	Pacific Whiting	
	Bering Sea	Bering Sea	Pacific Coast	
Time Period	Jan-May	June-Sept.	May-Sept.	
Max. No. Primary Processors Used	4	3	7	14
No. Reserve Processors Needed	1	1	2	4
No. Processor-Days Short in Fishery	45 days	70 days	107 days	222 days
Avg. Expected Deliveries Per Processor Day	50 MT	45 MT	50 MT	
Total Quantity of Unrealized Deliveries	2,250 MT	3,150 MT	5,350 MT	10,750 MT
As % of Total Deliveries	20%	24%	22.5%	22.3%
Avg. Value/MT	\$100	\$130	\$120	
Lost Revenue to Fishermen	\$225,000	\$409,500	\$642,000	\$1,276,500

makes it more difficult for our company and the United States fishermen to compete in the international market.

For each of the three joint fisheries we operated last year we have made an accounting of the estimated unrealized deliveries and their value as a consequence of our inability to maintain "reserve processors" on the fishing grounds.

From the above analysis it would appear that the U.S. fishermen operating in our joint fisheries last year were deprived of about \$1.25 million or 20 percent in earnings due to our inability to maintain reserve processors on the grounds. Our inability to bring extra processing capacity on-line commensurate with the U.S. fishermen's level of fish deliveries was due in turn to the lack of any available quota in these areas on which the processors (freezer-trawlers) could fish during periods of reduced production by the American fishermen. It would have been prohibitively expensive for us to have "reserve processors" lying idle while they waited for the periodic surges in domestic production.

#### **The Solution: Special Quota for Processors**

The solution to this dilemma is to allocate sufficient Soviet quota in each fishery so that we can keep enough "reserve processors" on the grounds to match our on-line processing capacity with the actual production by the U.S. trawlers. Obviously the amount of quota required will vary by fishery, depending upon the size of the fishery, variability in fish availability, weather patterns and other factors. Based on our experience to date, though, and the data presented in Table 1, it would appear that an allocation of 20 percent of the projected deliveries by U.S. fishermen should be sufficient to allow us to maintain adequate processing capacity on the grounds.



In 1981 we have made plans to purchase about 86,000 metric tons of bottomfish from fishermen, making us the largest buyer of American-caught bottomfish in the country. If we use the above 20 percent quota criteria, then it appears we would need about 17,200 tons of various species to support enough "reserve processing capacity" to permit the American fishermen to maximize their deliveries.

Table 2  
1981 Expected Deliveries and Quota Needs  
By Fishery and Species

	Expected Deliveries by U.S. fishermen	20% of Processor TALFF Requirement
<u>Washington, Oregon</u>		
<u>California</u>		
Pacific Whiting	40,000 MT	8,000 MT
Incidental Species	<u>as allowed</u>	<u>as allowed</u>
Subtotal	40,000 MT	8,000 MT
<u>Bering Sea</u>		
<u>Spring Pollock Fishery</u>		
Pollock	12,000	2,400
Other Species	<u>4,000</u>	<u>800</u>
Subtotal	16,000	3,200
<u>Yellowfin Sole Fishery</u>		
Yellowfin Sole	20,000	4,000
Cod	6,000	1,200
Other Species	<u>4,000</u>	<u>800</u>
Subtotal	30,000	6,000
Total	86,000 MT	17,200 MT

#### Potential Losses to American Fishermen

Prior to the MFCMA, the U.S. fishery conservation zone extended to 12 miles from shore. Off the Pacific coast states no foreign fishing was allowed inside this 12 miles fishery zone.

With the passage of the MFCMA this 12-mile zone was replaced with a 200-mile fishery conservation zone. Although the 12-mile limit line was eliminated, foreign fishing was still not allowed inside 12 miles. Harvesting by United States flag vessels was not affected by this measure.

When our joint venture fishing activities began on Pacific whiting, attempts were made by certain hostile factions within the processing sector of the fishing industry to also prevent the foreign processors from coming inside 12 miles to accept catches from American fishermen. It was argued that these processors would cause crowding on the

inside grounds, create "visibility" problems from shore and represented unfair competition to shoreside domestic processors. By and large these allegations were emotional in nature and had no basis in fact.

On the other hand, forcing the U.S. fishermen to tow bags (codends) of whiting which were caught inside 12 miles out to the processors, would have an adverse impact on the fishermen by substantially reducing their earnings. This earnings reduction would be due to the added fuel costs of towing codends of fish out to the processors and returning to the grounds, lost fishing time and reduced fish quality (increased percentage of fish going into lower valued fish meal production). This last factor is a consequence of the necessity to process and freeze Pacific whiting within four hours of capture to be assured of a high quality product.

An estimation of the lost revenues to be expected from the imposition of a 12-mile fishing limit on our foreign processors is detailed in Table 3. This table was generated based on the following assumptions:

- Trawler tows codends at 4 knots and has running speed of 10 knots,
- fuel consumption of 25 gallons an hour
- fuel cost of \$1.10/gal and
- 56% of catches made inside 12 miles at average distance of 8.7 miles from shore.

In addition it is assumed that:

- Average number of hauls/day = 2 hauls,
- average catch size of 12 MT,
- trawler requires ½ hour to return to grounds and find fish when working inside 12 miles.

Finally,

- 12 percent more fish going to meal when operating with 12-mile limit (25 percent versus 13 percent),
- ex-vessel price of food grade whiting \$132/MT and meal grade whiting \$33/MT which yields an average per ton value of \$107.25 with a 12-mile limit and \$119.13 without 12-mile limit,
- average fishing day of 16 hours.<sup>1</sup>

The earnings reduction from a 12-mile limit restriction would probably amount to about 20 percent of the gross revenues. Although one might

Table 3  
 Expected Losses to U.S. Fishermen if Joint Venture Processors Prevented  
 From Receiving Pacific Whiting Within 12 Miles of Shore

	Size of JV Fishery (MT)			
	25,000	50,000	100,000	150,000
<b>A. Expected Gross Revenues with No 12-Mile Limit</b>				
Expected gross revenues	2,978.	5,957.	11,913.	17,870.
<b>Gross Revenues (1000's dollars)</b>				
	297.	594.	1,188.	1,782.
<b>B. Losses with 12-Mile Limit</b>				
Reduction in Fish Quality (loss to fish meal)				
Quantity $\times 0.12 \times (\$132. - \$33.)$	297.	594.	1,188.	1,782.
Loss from Reduced Fishing Time				
Added time for average haul resulting from towing codend and returning to fishing area = $0.56 \times 1.325 \text{ hrs} = 0.74 \text{ hr.}$				
Percent loss of fishing time in 14-hr. fishing day = $1.48/14 = 10.6\%$				
Lost earnings = quantity $\times 0.106 \times \$107.25$	284.	568.	1,137.	1,705.
Added Fuel Costs				
No. of hauls = quantity/12 MT				
Added fuel cost = no. hauls $\times 0.74 \text{ hrs.} \times 25 \text{ gal/hr} \times \$1.10$	42.	85.	170.	254.
<b>TOTAL LOSSES (\$1000's)</b>	<b>623.</b>	<b>1,247.</b>	<b>2,495.</b>	<b>3,741.</b>
<b>PERCENT LOSS</b>	<b>20.9%</b>			

have expected higher fuel costs to be the major contributing factor, it is obvious that the losses in fishing time and reduced product quality are far more significant.

After considerable debate over a several-year period, regulations have now been promulgated which allow our leased-processors to come within six miles of shore to receive catches from fishermen. This "compromise" has permitted our joint fleets to operate with a reasonable level of operating efficiency and has substantially reduced losses associated with towing codends out to the processors.

## CONCLUSION

Our joint venture business and fishing relationship with the Soviet Union has been a positive and rewarding experience, and has contributed greatly to the development of the U.S. fishing industry. By joining the extensive at-sea processing capacity of the Soviet Union, the harvesting capabilities of the American fishermen and the marketing resources of a U.S. company, we have managed single-handedly to increase the domestic harvest of Pacific coast groundfish by two-thirds. As a result, Marine Resources Company is now the largest U.S. buyer of domestically-caught bottomfish. Moreover, because of the economics-of-scale involved and efficiencies of our high-volume operation, we have become competitive on the international market and are helping to reduce our balance of payments deficit in fishery trade.

On the negative side, our joint fishing venture and the American fishermen involved with us this year were significantly impacted by the withdrawal of Soviet fish quotas last January. This impact must be properly weighed when evaluating the Administration's response to the Soviet-Afghanistan situation. On the balance we believe the benefits to be derived by the U.S. fishermen from a small quota to support our joint venture processors far outweigh any perceived cost in terms of U.S. posture with regard to the Soviet Union. For this reason we feel a quota for the joint venture processors of 20 percent of the expected U.S. deliveries is reasonable and justifiable.

Looking at the whole question of support for our joint fishing activities in its broadest sense, our joint fishing operations are one of the few bright spots in U.S.-Soviet relations today. Rather than pursuing a course which hinders our highly successful joint Soviet-American fishing venture, one in which the benefits appear to be more on the side of the United States than the Soviet Union, the Administration should be trying to find ways to protect and strengthen this important binational business venture. In fact, after experiencing the spirit of cooperation and understanding, which has grown between American and Soviet fishermen, we strongly recommend that our joint fishing scheme be

looked on as a model of change for improving U.S.-Soviet relations in the future.

#### FOOTNOTE

<sup>1</sup> From draft of master's thesis at University of Alaska by Margaret Dawson, entitled "Operational Aspects of 1980 Hake Joint Venture."

#### REFERENCES

Captain Barry Fisher, "The Joint Venture Fishery for Yellowfin Sole; the Bering Sea. Summer 1980; A Case Study in Fishery Development," Alaska Fishery Development Foundation, November 1980.

Vladimir Kaczynski, "Factory Motherships and Fish Carriers," Journal of Contemporary Business, Vol. 10, No. 1, pp. 59.

# The Future of JOINT VENTURES

**Although it is only a matter of time before domestic operations replace foreign fishing and processing operations, joint ventures will continue to play a key role in the development of the U.S. bottomfish industry for the foreseeable future.**



*by Walter T. Pereyra  
Vice-President and General Manager  
Marine Resources Company*

**T**he extension of fisheries jurisdiction by the United States to 200 miles in 1976 set the stage for radical changes in traditional fishing patterns off our shores. One of these changes was the emergence of a new harvesting/processing arrangement known as over-the-side sales or joint venture fishing in which United States fishermen catch

and deliver fish on the fishing grounds to foreign processing vessels. Although such joint venture arrangements are new to the United States, they have been widely carried out off other countries for years.

The first nation to become involved in such a joint venture scheme in U.S. waters was the Soviet Union. They did so through the formation of our jointly owned company, Marine Resources Company.

The growth of our joint fishing activities together with changes in U.S. laws designed to foster cooperative joint fishing ventures (the so-called "fish-and-chips policy"), have brought other entrants into the joint fishing game. Besides the Soviet Union, in the North Pacific and Bering Sea we now have processors from Japan, Republic of Korea, Taiwan, West Germany, Bulgaria and Poland, all competing to buy fish over-the-side from North American fishermen. In 1983 these joint operations should be responsible for more than 400,000 tons of fish deliveries from American fishermen in the North Pacific and Bering Sea.

The catches represent a significant and growing proportion of the Optimum Yield available from the North Pacific and Bering Sea groundfish resource.

What does the future hold for at-sea joint ventures? Will they increase in number and size? Are at-sea joint ventures going to be with us for a long time or are they only a temporary business juncture in the continuing evolution of the U.S. groundfish industry? Will the existing joint ventures be replaced by

other joint venture structures?

One can make good arguments for all of the above depending upon how one views the competing forces trying to shape the North Pacific fishery picture in the 1980s and beyond—from distant-water fishing nations that want to preserve their historical fishing rights, and retain access to the rich North Pacific fishery resources by means of joint fishing arrangements, to U.S. nationals who want to catch, process and market all the fishery resources within our 200-mile Fishery Conservation Zone.

In looking at the long-term picture, I feel the direction is quite clear—the fishery resources within the U.S. 200-mile FCZ will become increasingly "Americanized" to the maximum extent possible within the realities of the economics of our fishing industry.

Americans are going to catch, process and market the fishery resources within our FCZ.

Our Congress has assisted in this process through the passage of the Magnuson Fishery Conservation and Management Act and its various amendments that, among other things, have given U.S. fishermen and processors a preferential right over foreign fishermen to the fishery resources in our 200-mile zone.

Also our government now pursues a fish-and-chips policy whereby those nations helping to develop the U.S. fishing industry will be rewarded with allocations of surplus resources.

The recent upsurge in at-sea joint ventures between American fishermen and foreign processing vessels is in large measure a direct consequence of

these laws and policies. The rapidity with which these events are occurring is best exemplified in the central Gulf of Alaska where only a couple of years ago practically the entire groundfish catch was taken by foreign fleets. This winter, with the prospect of a dozen or so joint ventures operating in the Shelikof Straits pollock fishery, it is probable that the entire available quota of 140,000 tons will be taken by U.S. fishermen in less than two months' time.

As I look to the future I see the joint venture picture unfolding in the following manner:

1) The United States will continue to press forward with the process of Americanization of the fishery resources within our 200-mile zone. It doesn't appear to me that the political forces in this country would allow this process to be subverted. The recent introduction of legislation in our Congress to declare exclusive U.S. sovereignty over the fishery resources in our 200-mile zone is a testimonial to this point. The American fishing industry is now and will continue to be given every opportunity to grow and prosper.

2) The coastal states of the United States will increase their efforts to bring the at-sea joint ventures on-shore in various forms to provide employment, in-

come and tax revenues to these states.

3) Investments in U.S. processing facilities, both at-sea and in-shore, will increase in response to a lowering of the risks and uncertainties associated with obtaining consistent supplies of high-quality bottomfish from American fishermen at competitive prices and changes in world markets. As the U.S. processing sector becomes more competitive, it will begin to displace existing joint ventures on the higher-valued species such as cod in the near-term and the lower-valued pollock and flounders later.

4) The recent demise of the North Pacific king crab resources and the reduction of certain traditional bottomfish stocks will, through economic necessity, force these affected American fishermen to pressure the U.S. government for an immediate solution to the economic problems: more joint ventures.

5) Some foreign nations may try to stall this Americanization of our fishery resources so as to maintain their existing distant-water fishing operations. This might be accomplished:

- by keeping fish prices to the fishermen as low as possible and conducting the joint ventures in such a way as to dampen the enthusiasm of



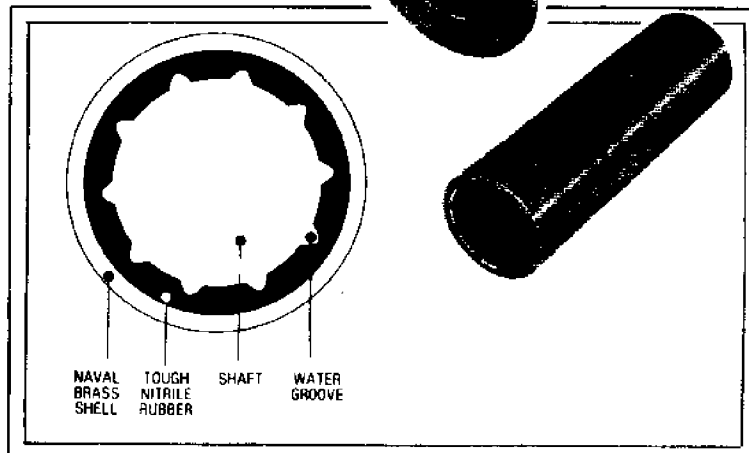
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*A Russian worker handles American-caught bottomfish on a Russian mother-ship's processing line. The U.S. fishing industry is anxious for an American worker to replace the Russian and for the processing line to be on a U.S. vessel.*

American fishermen for joint fishing arrangements.

- by lobbying before the fishery management councils and in Washington, D.C., to prevent Optimum Yields from being reduced for social and economic reasons and to retain as large a portion of the foreign quota as possible for themselves.

- by maintaining tariff and non-tariff trade barriers on products produced from those fishery resources in which the foreign nations themselves have a vested interest, and thereby prevent non-national competitors from displacing the existing foreign operators in their own markets.

Regardless of the above possibilities, I feel joint ventures are going to continue to play a key role in the development of the U.S. fishing industry in the foreseeable future. Products from joint venture operations will increase in value and diversity in response to the need to expand market opportunities so as to bypass existing market barriers and improve the profitability of the joint



ventures themselves.

The U.S. fish-and-chips policy will be a stimulus for new joint ventures appearing on the scene, some involving nations which heretofore have not had a presence in the North Pacific. This in turn should pressure those already involved to evaluate and perhaps expand their own joint venture activities in an effort to maintain access to these resources.

Depending upon the economic and political forces which are brought to bear, it is conceivable that this developmental process will result in all foreign directed fishing being displaced from the U.S. 200-mile zone within five years.

The U.S. harvesting sector presently has the capacity to take the majority of the North Pacific OY in the Bering Sea and in fact should harvest more than 25 percent of it next year. Certainly the cod resource, which is projected to begin a decline next year and is of increasing value to the U.S. industry, should not be available as a directed foreign fishery after 1984.

In my mind it is not a question of whether or not foreign fishing will be replaced by domestic operations; it is just a matter of time.

The character and composition of joint ventures themselves should become increasingly more American as the management councils and the U.S. government begin to give greater support to those joint ventures which make the greatest contribution to the U.S. economy. In this regard we should see strictly over-the-side sales arrangements to foreign cash buyers being replaced by operations where U.S. interests control the processing and marketing of the finished products, such as in the case of Marine Resources Company.

The final phase of this process will be the replacement of the joint ventures with truly integrated U.S. processing and marketing operations. We are already seeing the first stages of this development with U.S.-flag processors and catch/processors and several new shore-based facilities in Alaska.

For economic reasons, though, these U.S. operations are directed at the higher-valued cod resource. No U.S. operator has yet to make a major commitment to the much larger pollock, hake and sole resources. For this reason it will be some time before the major foreign joint ventures with U.S. fishermen are replaced by U.S. processing operations.

But just as I am sure that the foreign catching operations will be largely replaced in the not-too-distant future by U.S. fishermen, in the long-term foreign at-sea processing arrangements with

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American fishermen are going to be replaced by U.S. processing operations. **60**

### Marine Resources Company

Marine Resources Company (MRC) was incorporated six years ago in the state of Washington. We are a 50-50 equity joint venture between Bellingham Cold Storage of Bellingham, Washington, and Sovrybflot, a fishing enterprise of the Soviet Ministry of Fisheries located in Moscow. Our main office is in Seattle. We also have a branch office in Nakhodka, USSR, in the Soviet Far East.

Our actual joint venture fishing arrangements began in 1978 off the Oregon coast when two Oregon midwater trawlers delivered Pacific whiting (hake) to two Soviet processing vessels. Although the deliveries were not great (less than 1,000 mt), we did prove that American fishermen could economically catch and deliver large volumes of Pacific whiting at a reasonable price and that our U.S. company could successfully sell the finished products in international markets.

Based on our initial success, we expanded the joint venture whiting fishery in 1979 to include 11 U.S. trawlers and up to 6 processing vessels. Although we had variable fishing success, the catch was about 9,000 mt and ac-

counted for about 85 percent of the Pacific whiting delivered by American fishermen along the coast that year.

In 1980 we expanded our operations further to the Bering Sea and Aleutian Islands. We started up in mid-July with 7 large American trawlers, though our principal target species was Pacific cod, pollock was the second species taken when the fishery opened in late May. Total deliveries of species was more than 14,000 mt, which at that time represented a tenfold increase over the 1979 groundfish landings for the Bering Sea/Aleutian Islands region.

Also in 1980, we initiated a joint fishery for yellowfin sole in the central Bering Sea from June-September. This fishery, which was the first American fishery on the large Bering Sea yellowfin sole resource, was quite successful, and we took 13,500 mt by the time the fishery wound down in September.

In total, our three joint venture fisheries in 1980 resulted in deliveries of around 51,500 mt. In terms of relative volume, these operations were responsible for a two-thirds increase in total groundfish deliveries by U.S. fishermen

Joint ventures will continue to play a vital role in the development of the U.S. bottomfish industry, says Walter T. Pereyra. Here, the 160-foot *American No. 1* comes alongside a Russian mothership.



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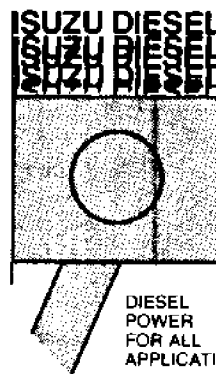
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on the West Coast over the preceding year.

In 1981 and 1982, our existing operations on Pacific whiting off the Pacific coast and yellowfin sole and cod in the Bering Sea were expanded. We also commenced new operations in the Aleutian Islands on Atka mackerel and cod; off central California on shortbelly rockfish; and Pacific hake with Canadian fishermen off British Columbia. In the aggregate, with our five joint fishing operations we purchased some 86,000 metric tons of groundfish from American and Canadian fishermen in 1981 and 115,000 metric tons in 1982.

Our operations in 1982, which were by far our largest and most successful, involved some 45 U.S. and Canadian fishing vessels delivering to 19 processing vessels. The ex-vessel value of the deliveries from these fisheries amounted to some \$17 million for the fishermen involved.

So in five short years, MRC's fishing operations have grown more than 100-fold, from less than 1,000 tons in 1978 to 115,000 tons in 1982 (see Figure 1); and our projections for this year suggest that we should expand our joint fishing operations another 20 percent to about 140,000 tons with the resumption of our joint fishery on Alaska pollock in the Bering Sea. These joint fishing arrangements with Soviet fishing companies have now made Marine Resources Company the single largest buyer of bottomfish in the United States.

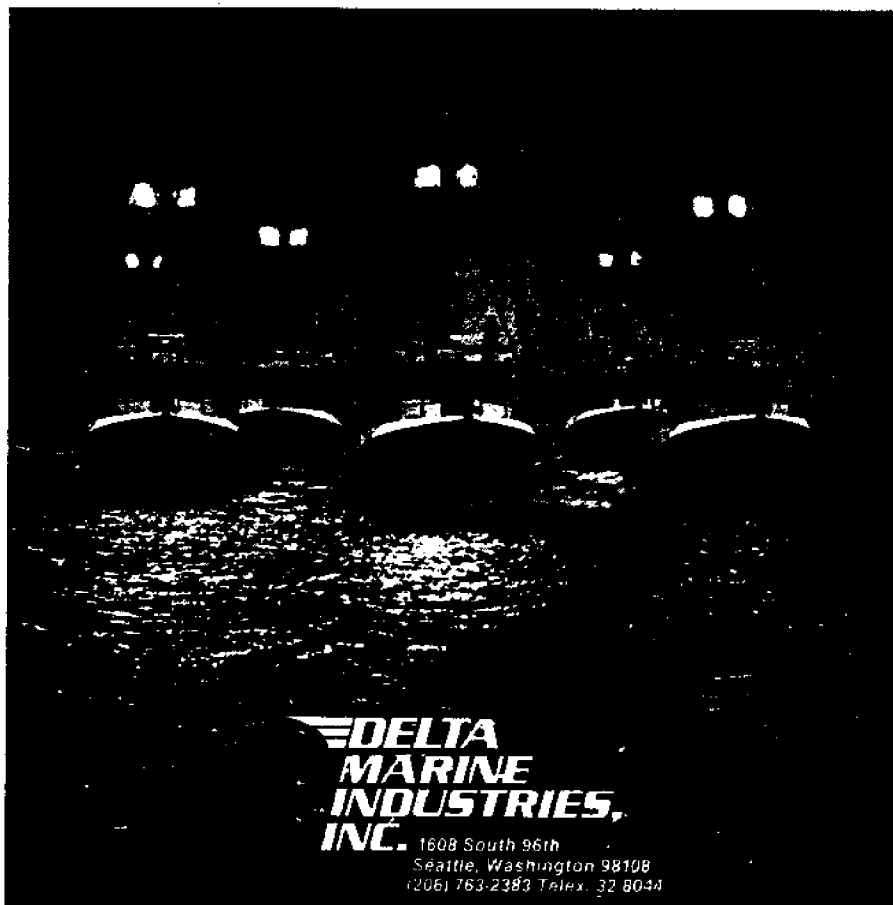
## MRC Marketing Activities

Besides developing over-the-side fishing arrangements, Marine Resources Company has been actively involved in marketing a wide range of at-sea, fresh-frozen products from our joint fishing operations. These frozen products range from round pollock, flatfish and Atka mackerel to headless gutted cod and hake to standard boneless fillet blocks, IQF fillets, and fishmeal. We also market a cross-section of fishery products produced by Soviet fishing companies including pollock roe, whole herring with roe, herring roe, blue crab and tanner crab legs and Antarctic krill. Our marketing activities presently take place in 17 countries throughout the world. This year our sales volume will be around \$30 million. Although not particularly large by international standards, we are now the largest bottomfish processing company in the United States.

Delta Marine Industries is building vessels for the fishing cooperatives of Ensenada to be used in the medium range fisheries of Baja California, Mexico. Being selected for their low-maintenance, sturdiness, seaworthiness and combination fishing capabilities, they are equipped for such fisheries as tuna-jigging, lobster-trapping, gill-netting, long-lining and trolling. These first ten vessels represent the latest technology in boat-building and fishing.

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GOVERNMENTAL AND REGULATORY ASPECTS  
UNDER THE MAGNUSON ACT  
OF AT-SEA TRANSFERS OF U.S. HARVESTED FISH  
TO FOREIGN VESSELS  
(Otherwise Referred to as "Joint Ventures")

Conference on East Coast Fisheries Law

Portland, Maine

June 25, 1983

Outline of Presentation

Prepared By: John H. Dunnigan

1. History of the Issue

- Early Alaskan issues: could OY be modified to protect shoreside processors?
- NMFS Response: proposed policy and rescission
- Congressional Response: "Joint Venture" amendments

2. Basic Statutory Pattern

- Findings, Policies and Definitions
- Permit Criteria: Magnuson Act, §204(b)(6)(B):

(i) In the case of any application which specifies that one or more foreign fishing vessels propose to receive at sea United States

harvested fish from vessels of the United States, the Secretary may approve the application unless the Secretary determines, on the basis of the views, recommendations, and comments referred to in subparagraph (A) and other pertinent information, that United States fish processors have adequate capacity, and will utilize such capacity, to process all United States harvested fish from the fishery concerned.

(ii) The amount or tonnage of United States harvested fish which may be received at sea during any year by foreign fishing vessels under permits approved under this paragraph may not exceed that portion of the optimum yield of the fishery concerned which will not be utilized by United States fish processors.

(iii) In deciding whether to approve any application under this subparagraph, the Secretary may take into account, with respect to the foreign nation concerned, such other matters as the Secretary deems appropriate.

-Required Provisions of Fishery Management Plans:

Magnuson Act, §303(a)(4):

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States...

3. Issues

- "The U.S. industry's processing capability has been dictated by its marketing strategy."

- Capacity: "will utilize"

- What role does price play?

- Where does the information come from?

- Is DAP constraining?

4. Policy Considerations for Permit Review

- Role of the Regional Fishery Management Councils

- "Guidelines for Council Consideration of Joint Venture Applications"

## GUIDELINES FOR COUNCIL CONSIDERATION OF JOINT VENTURE APPLICATIONS

### New England and Mid-Atlantic Fishery Management Councils

#### Introduction

As the potential for substantial joint venture activity developed in the North Atlantic, it became increasingly obvious that the statutory and regulatory language, and the governing policies, had largely addressed joint ventures from West Coast perspectives. Because the experience of the West Coast was not necessarily applicable in the Northwest Atlantic, where the processing industry has a longer tradition, handles a broader range of product, and is capable of delivering fish for export with a reasonable amount of effort and new investment, the New England and Mid-Atlantic Fishery Management Councils, along with the Northeast Region, NMFS, have therefore addressed joint venture policy questions from the perspective of East Coast fisheries with the intent of establishing a policy and a set of guidelines with respect to the treatment of joint venture applications for the Northwest Atlantic.

#### General Statement of Policy

Joint ventures potentially offer a wide range of benefits to the entire fishing industry in a region in which they take place; and, at the same time, carry some potential costs. They can provide an opportunity for the fishing industry to harvest underutilized species, develop new technologies and markets, and thereby derive greater benefits from the resources of the Fishery Conservation Zone. On the other hand, to the extent that they allow continuing foreign involvement in the fisheries, they may also contribute to continuing US dependence on foreign companies and allow foreign fisheries to exploit markets which might otherwise turn toward the United States. While these issues weigh differently in different fisheries and with different applications, the one action which would be of greatest immediate benefit to the entire industry would be to end foreign harvesting within the FCZ.

In fisheries where there is a Total Allowable Level of Foreign Fishing (TALFF), joint ventures should be encouraged. To the extent that a joint venture allows U.S. fishermen to harvest fish which would otherwise be available for TALFF, the entire industry and the Nation benefits.

In fisheries where domestic harvesting capability and intent exceeds domestic processing capability and intent, joint ventures should also be allowed. However, if the Councils and NMFS find that specific domestic processing interests would be economically precluded from processing the species involved, the permit may be denied.

Some fisheries under the jurisdiction of the United States are clearly fully utilized by the U.S. industry, such as groundfish (cod, haddock and yellowtail flounder), Atlantic sea scallops, American lobster and surf clams. For such fisheries joint ventures should be allowed only in exceptional or unusual circumstances.

Individual joint ventures should be authorized for specific amounts of fish. Because of the relatively small, total amounts of fish available for joint ventures on the East Coast, guaranteed quantities are probably necessary to make joint ventures attractive. Approving individual joint ventures for specific amounts of fish may encourage development of the types of ventures which involve all segments of the U.S. industry (see the preference category listing below). Joint ventures

without specified amounts might attract new, specialized vessels into the fisheries, rather than provide an alternative or new opportunities to existing vessels. In the Northwest Atlantic, it would be counterproductive to encourage development of a separate "joint venture industry." Approving ventures for specific amounts of fish would also give NMFS greater ability to monitor an individual venture's operations to make sure it is in conformance with its permit and operating in the best interest of the U.S. industry.

### Conditions

Joint ventures should operate in the best interests of the U.S. fishing industry. Close monitoring of a joint venture's activities and the ability to terminate a joint venture are necessary. A joint venture permit should contain conditions which will allow termination of the venture if, upon review by the Councils and the Regional Director, NMFS determines that the venture's operations are inconsistent with its permit. Recent conditions included in joint venture permits requiring periodic review of joint venture operations and reauthorization by NMFS every 45 days are examples of the type of restrictions necessary, and are supported by the Councils.

Potential impacts on harvesters and others will be considered in the joint venture application review process and in recommending conditions for joint venture permits.

### Preferences

Approval of joint ventures should be used to promote the domestic industry by encouraging greater participation in the fishery on the part of the whole industry. In the event that there are more joint venture applications for a particular species than there are fish available, those joint ventures are preferred which provide for the greatest involvement by the U.S. industry in the entire process of utilizing the fish, i.e., harvesting, processing and marketing.

Joint ventures can be categorized as follows:

Category A: The US partner is the main participant in all phases of the operation: harvesting, processing and marketing; and the foreign partner will also purchase some quantity of U.S. processed product.

Category B: The U.S. partner is the main participant in the harvesting and marketing of the product, with the foreign partner the main participant in the processing.

Category C: The U.S. partner is the main participant in the harvesting and processing of the product, with the foreign partner the main participant in the marketing.

Category D: The U.S. partner harvests and sells over the side, while the foreign partner is the main participant in the processing and marketing.

The above categories, which are intended to assist the Council in formulating its recommendations on joint venture applications, are stated in order of preference, with Category A being the most preferred. Within each category, an application which involves technical or scientific assistance to the United States or written commitments to purchase additional US processed product will be preferred.



Preference will also be given to JV applicants who have previously participated in successful joint ventures. On the other hand, within each category, an application which involves some element of additional allocation, exemption from the foreign fishing regulations, or vessels which have serious or extensive violations records, will be considered less favorably.

Procedures and Information

In order to assess appropriate conditions for joint venture permits and to establish preferences, the Councils and Secretary need to be able to consider and compare applications one against the other. Therefore, uniform dates for submitting applications should be established. The application date for any fishery should be four months prior to the beginning of the fishing year for that fishery. Untimely applications will be considered if fish remain available for joint ventures.

In their consideration of the relative merits of joint venture applications, the Councils will pay particular attention to the attached information.

I Information Available from Council and NMFS Files:

1. MSY, OY, DAH, DAP, TALFF, JVP, Reserve - Fishing year dates.
2. Time of usual domestic harvest.
3. Usual incidental catch (type and approximate percentage of total catch).
4. Allocations from TALFF to country applying for JV.
5. Prior participation in joint ventures by vessels of the foreign nation.
6. Other JVs for same species.
7. Violation record by all vessels of the nation applying for the JV permit.
8. Violation records of the specific foreign vessels to be engaged in the JV.

II Information Requested from the Foreign Partner

1. Amount applied for to be purchased over-the-side from US harvesting vessels.
2. Minimum amount necessary to engage in the JV.
3. Name and address of US partner in the JV arrangement.
4. Time JV is proposed for.
5. Planned method for disposition of incidental catch.
6. Foreign vessels to be involved. Specify name, company or owner, length, hold capacity in tons, processing capacity, type of gear and other equipment.
7. Describe in detail any prior participation in joint ventures by the foreign company or its vessels and the success of each.
8. Is the applicant committed to purchase any US processed fishery products in connection with this joint venture? If yes, specify species and quantity in either weight or dollar value.
9. Is this joint venture contingent upon an additional allocation for a directed fishery?
10. Are any exemptions from the foreign fishing regulations being requested?
11. Is the foreign partner willing to extend the venture if it is successful?

**BASIC INFORMATION ON OVER-THE-SIDE  
JOINT VENTURES: THE TRANSFER OF U.S. CAUGHT  
FISH TO FOREIGN FLAG PROCESSING VESSELS**

Prepared by DOC/NOAA/NMFS, F/CM7  
October, 1982

INTRODUCTION

This pamphlet answers the questions most frequently asked about an over-the-side joint venture (JV), when raw, U.S.-caught fish are transferred to foreign flag processing vessels under the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1801 *et seq.* JVs are subject to laws administered by the National Marine Fisheries Service (NMFS), United States Coast Guard (USCG), and United States Customs Service. While NMFS believes the information in this pamphlet to be accurate, NMFS is not responsible for actions taken in reliance on this pamphlet which may prove to be at variance with specific regulations, procedures, or determinations of this or other agencies, which are subject to change. Persons interested in engaging in an over-the-side JV should contact all three agencies so that each one can evaluate the venture's compliance on a case-by-case basis. For further information, write:

National Marine Fisheries  
Service  
Permits and Regulations  
Division  
Office of Resource  
Conservation and  
Management  
3300 Whitehaven St., NW  
Washington, D. C. 20235

United States Coast Guard  
Commandant (G-MVD/13)  
2100 2nd Street, SW  
Washington, D. C. 20593

Allen E. Peterson, Jr.  
Director, Northeast Region  
NOAA/NMFS  
14 Elm Street, Federal Bldg.  
Gloucester, Massachusetts 01930

Jack T. Brawner  
Director, Southeast Region  
NOAA/NMFS  
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NOAA/NMFS  
7600 Sandpoint Way, NE  
Bin C15700  
Seattle, Washington 98115

Alan W. Ford  
Director, Southwest Region  
NOAA/NMFS  
300 S. Ferry Street  
Room 2016  
Terminal Island, California 90731

Persons are encouraged to contact the State, local, and port authorities involved, as well.

## I. APPLICATIONS AND PERMITS

### 1. Who may apply to receive fish?

The owner or operator of a vessel registered under the flag of a country with a Governing International Fisheries Agreement (GIFA) may apply for a foreign fishing permit to receive fish in the U.S. fishery conservation zone (FCZ), which is generally between 3 and 200 nautical miles off the United States. If the country of registry does not have a GIFA, an application will not be accepted. Over-the-side transfers carried out at a dock are not restricted to vessels of a GIFA country, but other restrictions may apply.

### 2. What is a GIFA?

A GIFA is a Governing International Fisheries Agreement negotiated between the government of a foreign country and the government of the United States. Basically, the foreign country recognizes the United States' sovereign rights over all fish (except tuna) within 200 miles. As of this printing the United States has GIFAs with: Bulgaria, the European Economic Community, Denmark (for the Faroe Islands), East Germany (GDR), Japan, Republic of Korea, Norway, Poland, Portugal, Spain, Taiwan, and the USSR. There are no GIFAs with Canada or countries whose vessels are commonly used as flags of convenience, e.g., Panama and Liberia.

### 3. How is an application submitted?

The NMFS provides an application to an applicant through a United States embassy or a foreign embassy in Washington, D.C. (an application is attached). The application consists of a vessel identification form (VIF) and a list of questions. The application should reply to the VIF as well as all of the questions. The completed application is then transmitted to the U.S. Department of State, OES/OFA, Room 5806, Washington, D.C. 20520. Telephone (202) 632-2335. A copy of the application and a fee of U.S. \$60 should be provided to the NMFS, Permits and Regulations Division. Checks should be made payable to "NOAA, Department of Commerce." The \$60 covers the costs of processing the permit application. (This fee will be at least \$73 for applications for JVs during 1983.)

### 4. How is a permit application processed? How long does it take?

The review period for each application is 45 days. The NMFS considers comments by the appropriate Regional Fishery Management Council(s), the public, United States Coast Guard (USCG), the Department of State,

and the United States Congress, and decides whether or not to issue the permit. If a permit is denied, the application fee is refunded. Both the application and refund process takes approximately four months. If the application is for fisheries in which joint ventures have already been approved, the process may be shortened to two months. Each applicant or joint venture representative is encouraged to discuss the proposal with the appropriate Council(s) during the review period.

5. What happens when the permit application is granted?

Before the permit is issued, an official representative of the foreign government must accept on behalf of his government, "conditions and restrictions" attached to the permit. The conditions and restrictions may limit receiving U.S. caught fish to certain times, geographical areas, or fish species. Permits may also specify the amounts of the authorized target species and by-catch which may be retained by the foreign vessel. When the conditions and restrictions are accepted, the NMFS sends the permit to the Department of State and notifies the vessel's designated agent, who must be located in the United States. The Department of State sends the permit to the foreign government.

6. Can a vessel permit be exchanged?

The NMFS will allow a vessel permit to be transferred to a different vessel if the original vessel is disabled or decommissioned. A replacement may not be made to adjust to changes in fishing strategy. In such cases, new applications must be submitted and additional fees paid.

7. Is the fish a foreign flag vessel receives from U.S. vessels counted against the allocation to the flag nation of the vessel?

No. The fish received by a foreign flag vessel from U.S. vessels are part of the U.S. domestic annual harvest (DAH).

8. Must the U.S. catching vessel also have a permit to sell its catch to the foreign vessel?

No permit is required of U.S. vessels for the sale of fish to a foreign buyer; however, the U.S. vessel must be documented by the USCG for fishing or, if the vessel is under five net tons, it must be numbered in accordance with the Federal Boat Safety Act of 1971. It may also require Federal or State fishing permits or licenses under a fishery management plan. Before transferring any U.S. catch to a foreign vessel, the U.S. vessel owner or operator must be sure that the foreign vessel holds a permit which allows that vessel to receive U.S.-harvested fish in the fishery conservation zone (FCZ).

## II. AVAILABLE SPECIES

### 9. Can all fish in the FCZ be sold to foreign ships?

No. As the result of the determinations described in item 10, only certain species can be sold by U.S. fishermen to foreign vessels. Permit applications for many species will not be granted. Applications for species underutilized by U.S. fishermen and processors have the greatest likelihood of being approved.

### 10. How are species approved?

Approving a species for sale by U.S. fishermen to a foreign vessel can take as long as two years. First, a fishery management plan (FMP) for the species must be developed and approved by the Secretary of Commerce. When the FMP is approved, the NMFS assesses the ability of U.S. fishermen to catch the species and the ability and willingness of U.S. processors to process that species. If U.S. fishermen will catch more fish than U.S. processors will handle, a special amount for joint ventures is established, and applications to receive U.S. harvested fish may be approved. In 1982, amounts for joint ventures are likely to be established for: Loligo squid, Illex illecebrosus squid, silver hake (Merluccius bilinearis), red hake (Urophycis chuss), Pacific whiting (Merluccius productus), Pacific cod (Gadus macrocephalus), Alaska pollock (Theragra chalcogramma), yellowfin sole (Limanada aspera), Atka mackerel (Pleurogrammus monopterygius), and Atlantic mackerel (Scomber scombrus). Contact the applicable NMFS Regional Director for further information on eligible species.

## III. TRANSFER OF FISH

Transfers of U.S. caught fish to foreign flag vessels may take place: (A) at a dock; (B) in the internal waters of the United States; and (C) in the U.S. fishery conservation zone (generally 3-200 miles from shore).

No JVs are possible from 0 to 3 nautical miles from shore off most States and from 0 to 9 nautical miles off Texas, Puerto Rico and the west coast of Florida. JVs off U.S. territories and possessions (which are not as strictly regulated as JVs off the 50 states), are not discussed here; interested parties should contract the agencies listed on the first page.

A joint venture which incorporates under the laws of the United States and meets all applicable requirements for vessel documentation, including citizenship requirements, may document a foreign-built vessel under the laws of the United States. The vessel will be prohibited from catching fish and from engaging in the coastwise trade. Such a vessel

may land in the United States fish or fish products received from United States fishing vessels beyond territorial waters.

(A) JVs at a dock.

11. May a foreign flag processing vessel receive U.S.-caught fish at a dock, at a port, or place in the United States?

Yes. No GIFA is required, so a Canadian, Panamanian, or other flag vessel could be used. However, permits may be required by the state, county, or city where the dock is located, or by the Environmental Protection Agency, the U.S. Department of Labor, the U.S. Immigration and Naturalization Service, or the U.S. Army Corps of Engineers. The vessel operator would have to obtain a permit to land merchandise (Customs Form 3171) from the local District Director of Customs. The vessel must also comply with the navigation laws including the laws on the entry and clearance of vessels.

12. May a foreign flag processing vessel receive foreign-caught fish at a dock, at a port, or place in the United States?

Yes, but only if the fish are transshipped from the foreign-flag catching or transporting vessel to a U.S.-flag vessel on the high seas, and the fish will be transferred to the processing vessel at the dock by U.S. vessel. (The Nicholson Act, 46 U.S.C. 251, prohibits foreign vessels from directly landing their catch in U.S. ports.) These fish would be considered to be imported when they are transshipped to the foreign processing vessel at dockside. Their dutiable status would be determined by U.S. Customs at that time. An entry permit for the fish must be filed within five working days after the entry of the U.S. vessel delivering the fish.

13. If the processed fish are taken to a foreign port, is the product a United States export?

Yes, but only if the processed fish are kept separate from non-U.S. cargo and are identified by the carrier as being products of United States origin.

14. Can the processed fish be offloaded into the United States?

Yes, if the processed fish are offloaded at the exact point at which the fish were laden. (The Customs Service interpretation of "exact point" is so strict that it is advised that the vessel not be moved during the time between receipt of U.S.-harvested fish and off-loading of the processed product.)

15. May a JV operate in a foreign-trade zone?

Yes. The foreign flag processing vessel may be docked or at anchor

within the foreign-trade zone. Only fish delivered by a U.S. vessel may be taken aboard the processing vessel for processing. These processed fish may be unloaded at the exact point which the fish were laden, (a) directly onto a dock if the vessel is at dockside, (b) to a U.S.-flag, coastwise-qualified vessel for transportation to another place in the United States outside the foreign-trade zone, or (c) to any vessel for export.

(B) JVs in the internal waters of the United States.

The Magnuson Fishery Conservation and Management Act was amended on June 1, 1982 to allow State Governors to authorize JVs in the internal waters of the State (that is, waters shoreward of the baseline used to measure the territorial sea, such as Chesapeake Bay, San Francisco Bay, or Kotzebue Sound). Only vessels of a country with a GIFA may apply to the Governor for a permit.

16. May a foreign flag vessel process fish in the internal waters of the United States, such as the Chesapeake Bay, San Francisco Bay, or the Great Lakes?

Yes, under the same circumstances described in the answer to item 15.

17. Must the fish be delivered to the processing vessel while it is in internal waters?

Yes, otherwise the delivery would be subject to the Magnuson Act provisions prohibiting such activities within the territorial sea.

18. Can the processed fish be offloaded for landing in the United States?

Yes, but only at the exact point where the fish were laden. The vessel may not go to a foreign port, for example in Canada, and then return the fish to the United States for landing.

19. If a U.S. vessel lands the foreign processed product, would the product be designated as an "import"?

U.S. caught fish processed on a foreign vessel in internal waters and then landed by a U.S. vessel could be subject to import quotas and tariffs, depending on the degree of processing.

(C) JVs in the U.S. fishery conservation zone (FCZ).

20. From what flags may a foreign flag vessel in the FCZ receive fish for processing?

A foreign flag vessel may receive and process approved species



(see item 9) caught and delivered by U.S. fishermen, as well as fish speices with a designated foreign surplus (TALFF) caught in or beyond the FCZ by foreign vessels with a permit to operate in the FCZ.

#### IV. DISPOSITION OF PROCESSED FISH

21. May U.S.-caught fish be processed onboard a foreign flag vessel and then be landed by a foreign vessel in the United States?

No. The fish products must be transshipped to a U.S. vessel for landing.

22. May U.S.-caught fish processed onboard a foreign flag vessel and then landed by a U.S. vessel be free of duty?

No, unless the foreign flag processing vessel is under the requisite control of an American master or owner. In the latter case, products of an American fishery, as defined in Schedule 1, Part 15, Subpart A, head-note 1 of the Tariff Schedule of the United States would be eligible for duty-free treatment. To receive this treatment, a special certification must be filed with the U.S. Customs Service. Any fish processed aboard a foreign-flag processing vessel for which the required certification may not be made, may be considered products of the country whose flag the processing vessel flies.

23. If U.S.-caught fish are sorted on the foreign processing vessel and all or a fraction of the fish are transferred back to a U.S. vessel for landing in the United States, are such fish products of the American fisheries?

Yes, for purposes of classification or country of origin.

24. Can U.S.-caught and foreign-processed fish be landed in a foreign trade zone?

Yes, but only if the fish are landed by a United States-flag vessel which received the fish from the foreign-flag processing vessel outside the boundaries of any State (9 nautical miles for Texas, Puerto Rico, and the west coast of Florida, 3 nautical miles for all other States).

#### V. MISCELLANEOUS MATTERS.

25. May the foreign flag processor scout for fish to be caught by the U.S. catchers?

Yes. Note that such activity is "fishing" within the meaning of the Magnuson Act and requires a permit.

26. Must a U.S. observer be onboard a foreign flag processor engaged in a joint venture in the FCZ?

Not in every case, although there is a good probability that one will be assigned to the vessel. There is no U.S. observer placed on JVs at a dock.

27. Is the foreign flag processor able to purchase fish otherwise prohibited by the permit from a U.S. vessel for consumption onboard?

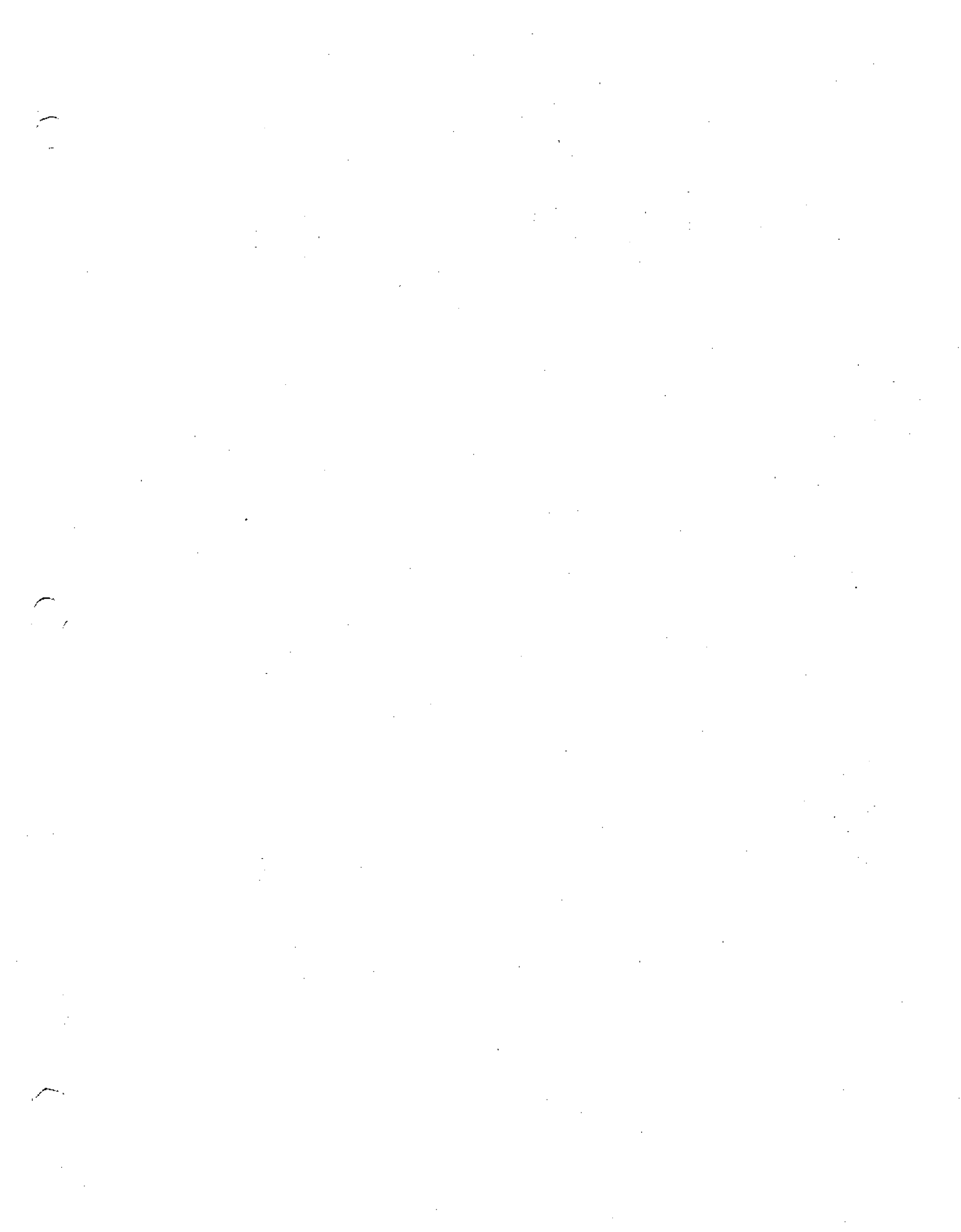
No, because it would be retaining prohibited species in violation of the foreign fishing regulations (50 CFR 611.13).

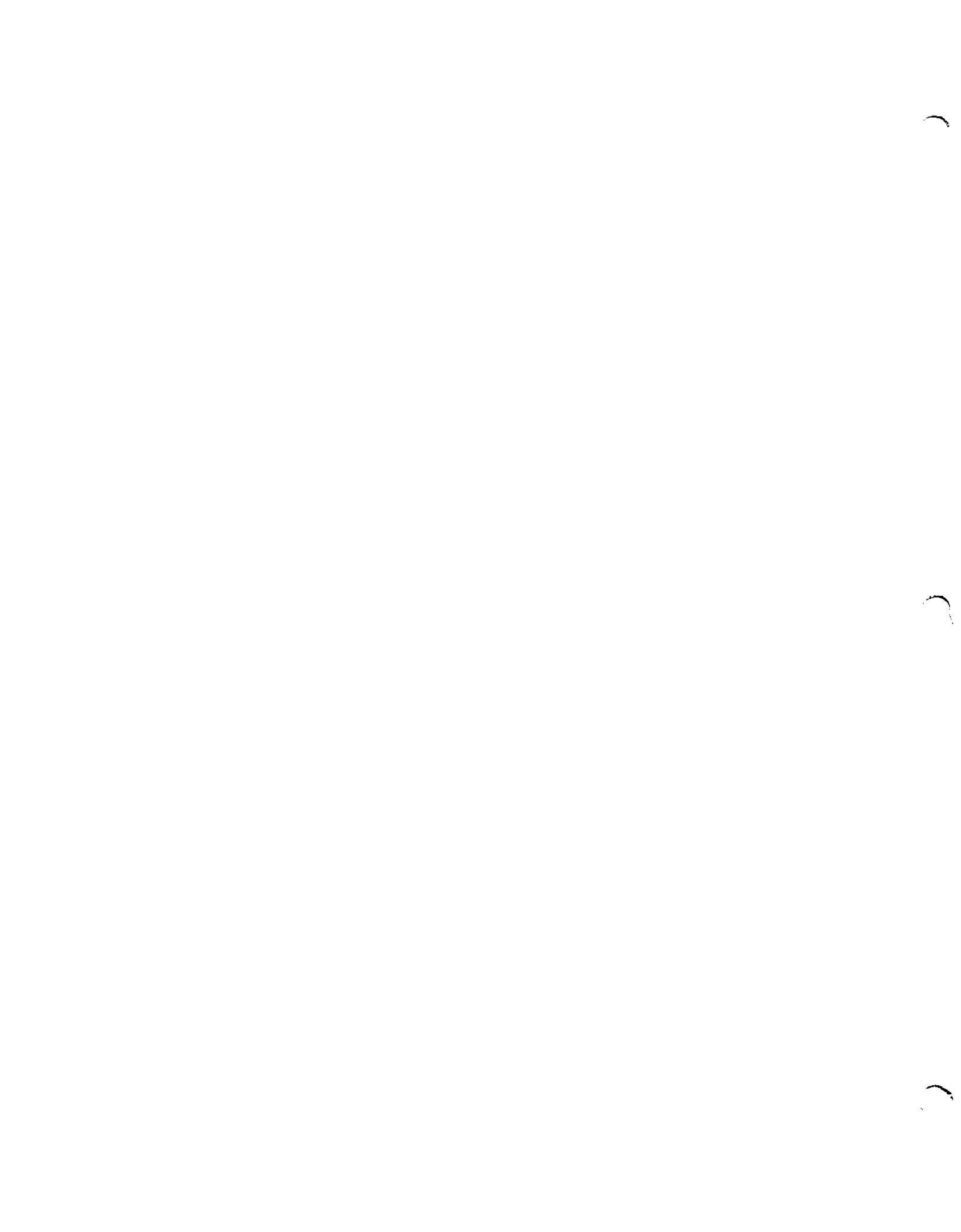
28. Is the foreign vessel liable for infractions of domestic fishing regulations by U.S. vessels during the JV?

No.

29. Can a JV operate in areas closed to foreign harvesting vessels, such as fixed gear areas?

Yes, so long as these areas are not prohibited in the foreign vessel's JV permit or by applicable regulations.





Outline of Comments By  
Paul MacGregor

Conference on East Coast Fisheries Law  
June 24-25, 1983

Joint Venture Processing in Internal Waters

- I. BACKGROUND OF INTERNAL WATER PROCESSING (IWP) LEGISLATION
  - A. FCMA's Regulation of Joint Ventures.
    1. In the FCZ
    2. "At sea" in territorial waters
    3. Inside the baseline, or in internal waters
  - B. State Laws
    1. Prior to 1981
    2. After Bristol Bay Herring Marketing Co-operative v. Skoog
- II. PUBLIC LAW 97-191, JUNE 1, 1982
  - A. State permit required for IWP operations
  - B. Findings required by governor
  - C. Factors to be considered in reviewing permit applications
  - D. Vessels eligible to participate in IWP operations
    1. GIFA nations
    2. Compliance with all applicable State and Federal laws
- III. IWP OPERATIONS IN ALASKA
  - A. Types of operations conducted to date
    1. Experimental--for unutilized species
    2. Where no market for certain gear types exist
    3. Where no capacity to produce end product exists

- B. Kodiak Pacific Cod Operations - A case study
  - 1. Existing harvesting capacity - shrimp fleet
  - 2. Existing market - Portugese salt cod market
  - 3. Excess resource
  - 4. Inadequate domestic processing capacity for salt cod in the area

IV. LEGAL ISSUES

- A. Capacity and intent of domestic processing industry
- B. Price
- C. Geographical proximity
- D. Market considerations

Internal Water Processing Act

PUBLIC LAW 97-191—JUNE 1, 1982

96 STAT. 70

Public Law 97-191  
97th Congress

An Act

To regulate the operation of foreign fish processing vessels within State waters.

June 1, 1982

[S. 2585]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 806 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1856) is amended by adding at the end thereof the following new subsection:

Foreign fish processing vessels within State waters, regulation.

"(c) EXCEPTION REGARDING FOREIGN FISH PROCESSING IN INTERNAL WATERS.—(1) A foreign fishing vessel may engage in fish processing within the internal waters of a State if, and only if—

"(A) the vessel is qualified for purposes of this paragraph pursuant to paragraph (4)(C); and

"(B) the owner or operator of the vessel applies to the Governor of the State for, and (subject to paragraph (2)) is granted, permission for the vessel to engage in such processing.

"(2) The Governor of a State may not grant permission for a foreign fishing vessel to engage in fish processing under paragraph (1)(B) if he determines that fish processors within the State have adequate capacity, and will utilize such capacity, to process all of the United States harvested fish from the fishery concerned that are landed in the State.

"(3) Nothing in this subsection may be construed as relieving a foreign fishing vessel from the duty to comply with all applicable Federal and State laws while operating within the internal waters of a State incident to permission obtained under paragraph (1)(B).

"(4) For purposes of this subsection—

"(A) The term 'fish processing' includes, in addition to processing, the performance of any other activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, or transportation.

"(B) The phrase 'internal waters of a State' means all waters within the boundaries of a State except those seaward of the baseline from which the territorial sea is measured.

"(C) A foreign fishing vessel shall be treated as qualified for purposes of paragraph (1) if the foreign nation under which it is flagged will be a party to (i) a governing international fishery agreement or (ii) a treaty described in section 201(b) of this Act (16 U.S.C. 1821(b)) during the time the vessel will engage in the fish processing for which permission is sought under paragraph (1)(B)."

Sec. 2. Section 307(2) of such Act of 1976 (16 U.S.C. 1857(2)) is amended—

(1) by striking out "in fishing—" and inserting in lieu thereof a hyphen;

(2) by amending subparagraph (A) by inserting "in fishing" immediately after "(A)", and by striking out "or";

Definitions.

(8) by amending subparagraph (B) by inserting "in fishing" immediately after "(B)", and by striking out "and" after the semicolon and inserting in lieu thereof "or"; and

(4) by adding at the end thereof the following new subparagraph:

"(C) except as permitted under section 306(c), in fish processing (as defined in paragraph (4)(A) of such section) within the internal waters of a State (as defined in paragraph (4)(B) of such section); and"

SEC. 8. This Act shall take effect on June 1, 1982.

Approved June 1, 1982.

Effective  
date.  
16 USC 1856  
note.

LEGISLATIVE HISTORY—S. 2535:

CONGRESSIONAL RECORD, Vol. 128 (1982):

May 17, considered and passed Senate.

May 25, considered and passed House, amended.

May 27, Senate concurred in House amendments.

○



MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT  
16 U.S.C. 1801-1882  
P.L. 94-265

SUBCHAPTER I

§1801 [§2]. FINDINGS, PURPOSES AND POLICY

§1801  
[§2]

(a) Findings. The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources, at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside any such regulation on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

(e) Emergency Actions. If the Secretary finds that an emergency involving any fishery resources exists, he may:

(1) promulgate emergency regulations, without regard to subsections (a) and (c) of this section, to implement any fishery management plan, if such emergency so requires; or

(2) promulgate emergency regulations to amend any regulation which implements any existing fishery management plan, to the extent required by such emergency.

Any emergency regulation which changes any existing fishery management plan shall be treated as an amendment to such plan for the period in which such regulation is in effect. Any emergency regulation promulgated under this subsection (A) shall be published in the Federal Register together with the reasons therefor; (B) shall remain in effect for not more than 45 days after the date of such publication, except that any such regulation may be repromulgated for one additional period of not more than 45 days; and (C) may be terminated by the Secretary at any earlier date by publication in the Federal Register of a notice of termination.

(f) Annual Report. The Secretary shall report to the Congress and the President, not later than March 1 of each year, on all activities of the Councils and the Secretary with respect to fishery management plans, regulations to implement such plans, and all other activities relating to the conservation and management of fishery resources that were undertaken under this chapter during the preceding calendar year.

(g) Responsibility of the Secretary. The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter. The Secretary may promulgate such regulations, in accordance with section 553 of Title 5, as may be necessary to discharge such responsibility or to carry out any other provision of this chapter.

§1856 [§306]. STATE JURISDICTION

(a) In General. Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) Exception.

(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that:

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

(c) Exception Regarding Foreign Fish Processing in Internal Waters.

(1) A foreign fishing vessel may engage in fish processing within the internal waters of a State if, and only if:

(A) the vessel is qualified for purposes of this paragraph pursuant to paragraph (4)(C); and

(B) the owner or operator of the vessel applies to the Governor of the State for, and (subject to paragraph (2)) is granted, permission for the vessel to engage in such processing.

(2) The Governor of a State may not grant permission for a foreign fishing vessel to engage in fish processing under paragraph (1)(B) if he determines that fish processors within the State have adequate capacity, and will utilize such capacity, to process all of the United States harvested fish from the fishery concerned that are landed in the State.

(3) Nothing in this subsection may be construed as relieving a foreign fishing vessel from the duty to comply with all applicable Federal and State laws while operating within the internal waters of a State incident to permission obtained under paragraph (1)(B).

(4) For purposes of this subsection:

(A) The term 'fish processing' includes, in addition to processing, the performance of any other activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, or transportation.

(B) The phrase 'internal waters of a State' means all waters within the boundaries of a State except those seaward of the baseline from which the territorial sea is measured.

(C) A foreign fishing vessel shall be treated as qualified for purposes of paragraph (1) if the foreign nation under which it is flagged will be a party to (i) a governing international fishery agreement or (ii) a treaty described in section 201(b) of this Act (16 U.S.C. 1821(b)) during the time the vessel will engage in the fish processing for which permission is sought under paragraph (1)(B).

State of Alaska Internal Water Processing Regulations

5 AAC 39.198. COMMERCIAL FISHING AND RELATED OPERATIONS BY ALIENS NOT LAWFULLY ADMITTED TO THE UNITED STATES. (a) Foreign vessels and aliens are prohibited from commercial fishing in the waters of Alaska.

(b) Unless otherwise permitted in this section, foreign vessels and aliens are prohibited while in the waters of Alaska from transporting unprocessed fish, processing fish, or performing any other activity in assistance of or related to commercial fishing, including, but not limited to, preparation, supply, storage, and refrigeration.

(c) Foreign vessels and aliens are not prohibited from transporting fish resources outside the state or engaging in other business activities respecting fish resources after processing has been completed.

(d) The governor will not grant exceptions to (b) of this section if he determines that domestic fish processors within the state have adequate capacity, and will use that capacity, to process all of the United States harvested fish from the fishery concerned that are landed in the state. When evaluating domestic processing capacity and the extent to which that capacity will be used, the governor will consider past performance and current plans of the processing industry, market conditions, and other appropriate matters.

(e) The governor will, under conditions and limitations determined by him, grant specific exceptions to (b) of this section with respect to a particular fishery and permit foreign vessels or aliens or both to process fish resources at locations designated by him, or to transport unprocessed fish resources outside the state from locations designated by him, if he determines after investigation that

(1) the volume of fish resources expected to be taken in the fishery, under current regulations, exceeds the anticipated processing capability of facilities operated by United States processors;

(2) there is no practical opportunity for United States processors to make arrangements to handle the volume of fish in excess of spawning escapement needs;

(3) anticipated marketing conditions may limit United States processors' capability of processing the projected harvestable surplus;

(4) there is a likelihood of substantial wastage of fish resources taken in the fishery if foreign processing or transportation capacity is not used; and

(5) there is no significant likelihood of clandestine foreign fishing operations if the exception is granted.

(f) The governor will terminate the permission granted under (e) of this section when he determines that United States processors can adequately process the harvestable surplus of the fishery resource.

(g) When evaluating an application for a foreign processing or tendering permit, the governor will consider whether and to what extent the applicant and the applicant's nation has been, is, or will be contributing to the conservation, use, management, development, and enforcement of domestic fisheries programs.

(h) The governor will, in his discretion, recognize and designate a location for foreign processing or tendering if

(1) the location is within the internal waters of the state;

(2) the location is within a reasonable running time from the fishery; and

(3) there is no significant likelihood for clandestine violations of (a) of this section or evasion of other applicable state and federal laws.

(i) In order for a foreign vessel to qualify to participate in an activity allowed under (e) of this section, the foreign nation under which that vessel is flagged must be party to a treaty or governing international fishery agreement with the United States described in sections 201(b) and (c) of the Magnuson Fishery Conservation and Management Act 16 U.S.C. sec. 1821(b) and (c).

(j) This section applies to foreign vessels and aliens in the waters of Alaska as defined in 5 AAC 39.975.

(k) Any vessel used under this section, whether domestic or foreign, must be in compliance with applicable state and federal laws.

(l) As used in this section:

(1) "aliens" means persons not admitted to the United States with immigrant or other resident alien status under the immigration and naturalization laws of the United States;

(2) "foreign vessel" means a vessel not documented under the laws of the United States or registered under the laws of a state; and

(3) "foreign vessels and aliens" includes foreign vessels staffed with aliens, foreign vessels staffed with United States citizens, and United States vessels staffed with aliens. (In effect before 1982)

Authority: AS 44.14.010  
Art. III, Alaska Constitution  
16 U.S.C. 1801 et seq.

FOREIGN PROCESSING APPLICATION \*

Internal Waters Processing

STATE OF ALASKA

1. Vessel name: \_\_\_\_\_
2. Vessel identification:
  - a. documentation
    1. country: \_\_\_\_\_
    2. official number: \_\_\_\_\_
  - b. hull number: \_\_\_\_\_
  - c. other identifying marks: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
3. Vessel description:
  - a. vessel type: \_\_\_\_\_
  - b. length: \_\_\_\_\_
  - c. tonnage:
    - gross: \_\_\_\_\_
    - net: \_\_\_\_\_
  - d. draft:
    1. loaded: \_\_\_\_\_
    2. unloaded: \_\_\_\_\_
  - e. maximum speed: \_\_\_\_\_

\* Use additional paper and attachments if necessary.  
This application is subject to public disclosure.

4. Radio information:

- a. call sign: \_\_\_\_\_
- b. call number: \_\_\_\_\_
- c. frequencies: \_\_\_\_\_

5. Date and T.I.A.S. Number of International Governing Fishery Agreement or fishing treaty of flag state with the United States of America: \_\_\_\_\_

6. Name of person on board vessel who is fluent in the English language and who will provide purchasing and processing information to the State of Alaska: \_\_\_\_\_

7. Titles and names of ship's officers:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. Number and nationalities of crewmen:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

9. Names and addresses of owners and charterers of vessel:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Name and address of local agent. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

11. Description of Fishery:

a. Names of U.S. fishermen and fishermen's organizations from whom purchases will be made:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

b. Names and description of U.S. fishing vessels that will be harvesting and delivering the catch:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

c. location of the U.S. fishery supplying the harvest and the status or condition of the fishery as undeveloped, developing or established (give reasons for your classification):



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12. Processing information:

a. Type of processing equipment to be used and daily capacities:

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b. Hold capacity (in cubic meters for each hold)

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_

c. Description of processing operations:

1. location within internal waters: \_\_\_\_\_

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2. dates of processing in each area: \_\_\_\_\_

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3. target species and quantity of each species to be processed in each area: \_\_\_\_\_

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13. Has this vessel ever received a permit to process fish within the U.S. FCZ? \_\_\_\_\_ If yes, list permit number(s), target species, location and dates of operation. \_\_\_\_\_

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14. Have the vessel owners, any of its operators or any members of the crew been involved in or charged with a violation of U.S. fish laws or treaties? \_\_\_\_\_ If so, describe the violation including dates, location of the fishery, target species, nature of charge and disposition: \_\_\_\_\_

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15. Does any owner or operator have a financial interest in any other processing vessel or processing plant that currently operates or has operated in the past in Alaska? \_\_\_\_\_ If so, state the name of the vessel or plant, location of the processing activity and the dates it was operated by an owner or operator. \_\_\_\_\_

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16. For what immediate, intermediate and ultimate markets is each species destined? \_\_\_\_\_

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17. State what import restrictions, if any, apply to all imports of this species and product delivered to any foreign markets that are mentioned in your answer to question 16.

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18. What financial arrangements have been made to assure payment to U.S. fishermen?

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19. State why you believe the governor should not determine that fish processors within the state have adequate capacity, and will utilize such capacity, to process all of the United States harvested fish from the fishery concerned that are landed in the state.

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- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
20. Specify any immediate and future benefits to the U.S. fishery industry that you believe will result from approval of this application: \_\_\_\_\_

- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
21. Can a state fishery observer be provided room and board on the vessel at no cost to the state while the vessel is in waters of Alaska? \_\_\_\_\_

22. Name and address of person preparing the application:

a. Name: \_\_\_\_\_

b. Address: \_\_\_\_\_

c. City and State: \_\_\_\_\_

d. Phone number: \_\_\_\_\_

I certify that the information given in this application is true to the best of my knowledge and I will provide corrections and supplemental information to the State of Alaska whenever such information is known to me.

DATED this \_\_\_\_\_ day of \_\_\_\_\_,  
198\_\_\_\_, at \_\_\_\_\_,

Name: \_\_\_\_\_

Title: \_\_\_\_\_

SUBSCRIBED and SWORN to before me this \_\_\_\_\_ day of  
\_\_\_\_\_, 198\_\_\_\_, at \_\_\_\_\_,  
\_\_\_\_\_.

\_\_\_\_\_  
Notary Public, State of Alaska  
My commission expires: \_\_\_\_\_

STATE AND FEDERAL AGENCY REQUIREMENTS  
FOR FOREIGN PROCESSING AND/OR TENDERING

Persons interested in becoming involved in foreign processing and/or tendering activities should be aware that they may be required to obtain some or all of the following "permits." This list is not intended to be all inclusive, however, it should serve as a basic guideline for directing persons to the major agencies which regulate fish processing and transporting.

STATE AGENCIES

I. OFFICE OF THE GOVERNOR

1. Assistance in coordinating with State agencies.

CONTACT: Alaska State Asian Office  
1-40 4-Chome, Toranomon  
Minato-ku, Tokyo 105  
Japan  
436-5285, Mr. Peter Hocson

II. DEPARTMENT OF FISH AND GAME

1. Obtain a foreign processing or tendering permit.

CONTACT: Alaska Department of Fish and Game  
Division of Commercial Fisheries  
Capital Office Park  
P.O. Box 3-2000  
Juneau, Alaska 99802  
(907) 465-4210 Mr. Robert Clasby, Mr. Al Didier,  
or Mr. Kenneth Parker

2. Complete a Fish Processor's Intent to Operate form and obtain fish tickets.

CONTACT: Alaska Department of Fish and Game  
Division of Commercial Fisheries  
Capitol Office Park  
P.O. Box 3-2000  
Juneau, Alaska 99802  
(907) 465-4150, Mr. Bill Schouten

III. DEPARTMENT OF REVENUE

1. Obtain an Alaska Business License.
2. Obtain a Fisheries Business License, \$25 fee, file a Fisheries Business Tax return and pay Fisheries Business Tax.

3. Post an export bond of \$50,000 for export of salmon in the round unless the foreign company owns lienable real property located within the State of a value of not less than \$50,000.
4. Prepay or post a bond for estimated other State taxes.
5. Obtain an affidavit of nonresidency.

CONTACT: Alaska Department of Revenue  
Pouch SA  
Juneau, Alaska 99811  
(907) 465-2329, Ms. Pat Beedle, Ms. Terri Whitehead, or  
Mr. Dan Anderson

#### IV. DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

1. File an application for Certificate of Authority with the Corporations Section.
2. Obtain a weight or measure Certificate of Accuracy from the Weights and Measures Section. It is the responsibility of the owner to contact Weights and Measures Section before the scale is used for commercial purposes (preferably 30 days in advance) to arrange for sealing.
3. Employ a marine pilot licensed to operate in the waters of intended operation. A ship's agent can make this arrangement along with others regarding customs, immigration, documentation, etc.

CONTACT: Alaska Department of Commerce and Economic Development  
Pouch D  
Juneau, Alaska 99811  
Corporations Section (907) 465-2530, Ms. Jan Clemetson

Alaska Department of Commerce and Economic Development  
Post Office Box 10-1686  
Anchorage, Alaska 99511  
Weights and Measures Section (907) 345-3886, Mr. Joe Swanson or  
Mr. Don Tandy

#### V. DEPARTMENT OF LABOR

1. Obtain from the Labor Standards and Safety Division a Fish Processor and Buyer's Surety bond for \$10,000.

CONTACT: Alaska Department of Labor  
Labor Standards and Safety Division  
Post Office Box 630  
Juneau, Alaska 99811  
(907) 465-4839, Mr. Jim O'Conner

VI. DEPARTMENT OF ENVIRONMENTAL CONSERVATION

1. Obtain a National Pollutant Discharge Elimination Systems Permit. This is obtained in conjunction with the U.S. Environmental Protection Agency.
2. Obtain certificate and permit to operate a seafood processing plant.

CONTACT: State of Alaska  
Department of Environmental Conservation  
Seafood & Animal Industries  
Post Office Box 10-4240  
Anchorage, Alaska 99510-4240  
Phone: (907) 272-1561, Mr. Manuel Soares

FEDERAL AGENCIES

I. U.S. COAST GUARD

1. Vessels from non-communist nations must notify the Coast Guard at least 24 hours prior to entering a U.S. port.
2. Communist bloc nations must provide government-to-government notice 14 days in advance of entering U.S. waters.

CONTACT: Commander, 17th Coast Guard District (M)  
Federal Building  
Post Office Box 3-5000  
Juneau, Alaska 99802  
(907) 586-7786, CDR Asbury  
(907) 586-7788, LT(JG) Rasmus

II. U.S. CUSTOMS SERVICE

1. Indicate where a U.S. Customs Port of Convenience is required.
2. Determine where out-of-port service will be provided.
3. Obtain a Customs Bond and complete a Form 3171 application. The ship's agent can handle this matter.
4. Upon arrival report to Customs and file an entry and clearance report.

CONTACT: U.S. Customs Service  
620 East Tenth  
Anchorage, Alaska 99501  
(907) 271-4043, Mr. James Hipsher  
(907) 248-3373, Mr. Keith Rulison



III. U.S. ENVIRONMENTAL PROTECTION AGENCY

Permit to discharge into water--National Pollutant Discharge Elimination System Permit.

CONTACT: U.S. Environmental Protection Agency  
701 C Street Box 19  
Anchorage, Alaska 99513  
(907) 271-5083, Ms. Dianne Soderlund



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

GOVERNOR'S DETERMINATION

INTERNAL WATERS PROCESSING REQUEST  
PACIFIC COD - KODIAK/CHIGNIK DISTRICTS  
(1983)

I. Introduction

Pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1856(c) as amended by Pub. L. 97-191 (1982), the governor of a state may permit a foreign vessel to engage in fish processing within the state's internal waters unless he determines that fish processors within the state have adequate capacity, and will utilize such capacity, to process all of the United States harvested fish from the fishery concerned that are landed in the state.

Under this authority, I have determined that U.S. processors do not have the capacity and present intent to salt process for market up to 3,000 metric tons of Pacific cod available for harvest by U.S. vessels in the Kodiak and Chignik areas beginning in March 1983.

Therefore, this quantity may be delivered to the Portuguese salt cod processing vessel S. GABRIEL under terms and conditions specified in the accompanying foreign processing permit.

## II. Stock Status

The allowable harvest of Pacific cod in the central Gulf of Alaska for 1983 is 33,540 metric tons. At present, up to 20,782 metric tons may be taken and processed by foreign fishing vessels. Another 1,370 metric tons are assigned to joint ventures in the Fishery Conservation Zone. Approximately 4,680 metric tons are expected to be harvested by domestic vessels and processed locally. In addition, 6,708 metric tons are reserved for domestic use if domestic harvests exceed original estimates. If this reserve is not utilized by the domestic industry it can be reallocated to foreign catches.

The Pacific cod to be harvested by local Kodiak vessels and processed on the Portuguese processing vessel S. GABRIEL will help reduce the amount to be granted to foreign operations in waters off Alaska.

## III. Capacity of Alaska Processors

Local processors in the Kodiak and Chignik areas do process Pacific cod by freezing. In 1982, monthly production for the first eleven months totaled 1712.3 metric tons and ranged from 58.2 metric tons in April to 502.5 metric tons in June.

However, salt cod production is presently limited to the Dutch Harbor area where fresh cod is bled and gutted immediately prior to salting. This application gives Kodiak fishermen a chance to gain essential experience on harvesting procedures and quality control for the salt cod market because, unlike other joint ventures, which involve transfer of cod ends, the Portuguese application requires the local boats to land and maintain the high quality of the catch in preparation for daily deliveries. This process avoids the financial burden and necessity of requiring local fishermen to purchase additional cod ends to their nets just to facilitate cod end transfers. In addition, the proximity of the operation to onshore areas helps hold down costs to fishermen.

#### IV. Market Considerations

Salt cod production in Kodiak has been limited by the concentration of markets in Europe and some other Atlantic Ocean countries. Not only do the great distances discourage purchases of Alaska fish, but protective tariffs establish a substantial competitive advantage for Portuguese harvested cod. However, Alaska Salt Cod, Inc. is benefitting from the success of its parent company, Channel Fish Company, Ltd of Massachusetts, which is one of the companies that successfully exported salt cod to

Portugal in 1982. Part of the salt cod exported to Portugal by Channel Fish Company, Ltd included product from the Dutch Harbor area.

Interest by the Portuguese in obtaining cod in Alaska provides an opportunity to demonstrate the quality of Pacific cod from Alaska to the Portuguese marketplace. The 3,000 metric tons destined for the Portuguese market should also evidence the desirability of relying on Pacific cod and prove that such imports will improve and not undermine the Portuguese industry. While in the internal waters of the state, local processors are invited to visit the S. GABRIEL and observe actual salt cod processing procedures. Portuguese experts will also tour Kodiak plants and meet with U.S. processors. The applicants have also expressed an interest in developing long-term supply arrangements in Alaska.

Prices offered do not exceed existing Alaska prices for cod but Pascoal and Filhos, Ltd is able to accompany their offer with a guarantee to purchase the fish harvested by the local fishermen.

The company's American associate, Channel Fish Company, Inc., has already initiated exports of wet salted Atlantic pollock to Caribbean and North European markets and is interested

in evaluating opportunities for Alaska pollock in this area, as well.

V. Economic Factors

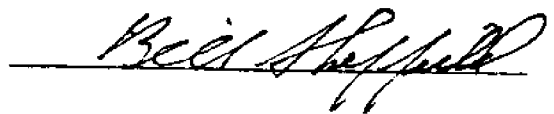
The harvesting vessels represent draggers whose harvests have been curtailed by sharp reductions in shrimp resources in the Kodiak area. The foreign processing assistance offered by the S. GABRIEL will not only help to further develop a salt cod industry in Alaska, but will also provide needed economic activity during an otherwise difficult time for the dragger fleet operating in Alaska. Further, the local draggers can enter this fishery with existing gear and extra expenditures are unnecessary.

VI. Benefits to U.S. Industry

Accordingly, I determine that in addition to the capacity considerations noted above, the Portuguese processing venture will promote the full development of this presently underutilized Pacific cod fishery and maximize the actual and potential benefits that can be realized from our fisheries resources through employment of local fishermen, utilization of this food source and increasing revenues from its development. The operation is

to be conducted in such a way that results in reliance on local processors as quickly as possible.

DATED this 15th day of March, 1983 at Juneau, Alaska.

A handwritten signature in cursive script, reading "Bill Sheffield", is written over a horizontal line.

Bill Sheffield  
Governor of Alaska



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

INTERNAL WATERS PROCESSING PERMIT

No. 83-01

Vessel name: S. GABRIEL

Owner: Pascoal Filhos and Son, Ltd.  
Apartado 308  
Gafanha - 3800  
Averio, Portugal

Local Agents: Alaska Salt Cod, Inc.  
c/o 880 H Street, Suite 200  
Anchorage, Alaska 99501

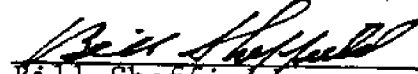
Fishery: Pacific Cod taken in Kodiak and Chignik Districts (as defined by Alaska Department of Fish and Game)

Location: Internal waters in Kodiak and Chignik Districts.

Dates: March 15, 1983 - May 31, 1983 until 3,000 metric tons of Pacific Cod have been delivered to the S. GABRIEL.

Conditions and specifications: See attachment.

DATED this 15th day of March, 1983 at Juneau, Alaska.

  
Bill Sheffield  
Governor, State of Alaska  
Pouch A  
Juneau, Alaska 99811

P O S T I N W H E E L H O U S E



Mr. Dickson to  
sign and return

| Conditions and Specifications  
INTERNAL WATERS PROCESSING PERMIT  
S. GABRIEL

1. Operations are permitted as follows:
  - a. In March, April and May, 1983, within the internal waters of Alaska in the Kodiak and Chignik districts until 3,000 metric tons of Pacific cod have been delivered to the S. GABRIEL.
  - b. An interpreter fluent in Portuguese and English shall be on board at all times.
  - c. There must be daily radio communications with the Alaska Department of Fish and Game office in Kodiak on radio frequencies monitored and specified by the Alaska Department of Fish and Game. Daily reports must be made to the Alaska Department of Fish and Game regarding the quantity of fish delivered and processed as well as the location of the Alaska Department of Fish and Game statistical areas in which the fish were taken by the U.S. fishing vessels.
  - d. Maintenance and completion of a Department of Fish and Game log book regarding deliveries and processing information.
2. No operation shall be conducted until
  - a. Evidence of ability to pay for all expected deliveries has been submitted to and approved by the Governor's Office.
  - b. The applicant certifies the ability to comply with all applicable federal and state laws, regulations and permits, including the conditions of this permit (see e.g., partial list of laws and applications for foreign processing in Alaska waters).
  - c. An Department of Fish and Game observer has been provided room and board at no cost to the state on the vessel during the processing operations.

3. Processing operations shall terminate as follows:

a. on or before May 31, 1983, or whenever 3,000 metric tons of Pacific cod have been delivered and processed;

b. upon a determination by the governor of any failure to comply with applicable U.S. and state laws, permit requirements, including this permit, or the governor's determination of a material misrepresentation in the vessel's foreign processing application;

c. prior to termination of operations and departure from the state, all reports and information required by the Alaska Department of Fish and Game regarding processing operations shall be completed and filed with the Alaska Department of Fish and Game observer on board and all other required reports shall be completed and delivered to the observer.

4. Miscellaneous:

a. Applicant shall meet state officials and local processors in Kodiak to describe salt cod processing and marketing in Portugal and to tour local processing facilities.

b. Applicant shall host state officials and local processors on board the S. GABRIEL during actual processing operations and explain in full detail salt cod processing for the Portuguese market.

I acknowledge and understand, the necessity of complying with these permit conditions and I certify that the vessel can and will comply with the conditions and specifications of this permit and with all applicable U.S. and state laws and regulations.

DATED this \_\_\_\_ day of \_\_\_\_\_, 198\_\_, at

\_\_\_\_\_, \_\_\_\_\_ by:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

SUBSCRIBED and SWORN to before me this \_\_\_\_\_ day of

\_\_\_\_\_, 198\_\_, at \_\_\_\_\_.

\_\_\_\_\_  
Notary Public, State of Alaska

My commission expires: \_\_\_\_\_

INTERNAL WATERS JOINT VENTURES:  
STATE PROCEDURES AND REQUIREMENTS

I. The Magnuson Act.

- A. Section 306(c) authorizes foreign vessels to enter the internal waters of a state and purchase in an "over the side sale" fish harvested by domestic fishing vessels for purposes of processing, preparation, supply, storage, refrigeration or transportation.
- B. Section 306(c) requires as a condition precedent that:
1. the foreign nation under which the foreign vessel is flagged will, at the time of the joint venture, be a party to a governing international fishery agreement with the United States (section 201(b)), and
  2. the foreign vessel is granted permission by the Governor of the state to engage in the joint venture within the state's internal waters.
- C. Section 306(c)(2) sets forth the standards by which the Governor may not grant permission. No standards are provided by which the Governor is required to grant such permission. The Governor may not grant permission if:
1. domestic processors within the state have adequate capacity to process all of the fish from the fishery concerned that is landed in the state, and
  2. domestic processors within the state will utilize this capacity to process such fish.
- D. Note that internal waters joint ventures are not subject to any relevant management measures of a fishery management plan that may exist (e.g. quotas), and appear to

operate outside the scope of any applicable federal fishery management measures.

## II. State Procedures.

A. Generally, the applicant is required to notify the state marine fishery agency by letter requesting to conduct a joint venture within the internal waters of the state. The letter of notification should include the following information:

1. the name, identifying number and ownership of the foreign vessel;
2. the fishery which will be the subject of the joint venture;
3. the processing activity contemplated (e.g. salting, freezing, filleting);
4. the quantity of fish requested;
5. identification of the domestic fishing vessels that will do the harvesting;
6. the intended location of the joint venture operation;
7. the expected duration of the joint venture operation;  
and
8. a copy of the governing international fishery agreement or evidence to show that one will be in place at the time of the joint venture.

B. The state will investigate the domestic processing capacity and the intent to process the species of fish which is the subject of the joint venture through:

1. public hearings;

2. questionnaires;
3. correspondence by letter and telephone communication;
4. analysis of federal and state statistics on the landings from the fishery concerned in the state; and
5. any reliable information submitted by the joint venture applicant (appendix A).

C. Data submitted by a processor will in most states be held strictly confidential (appendix B). However, most states have general provisions imposing penalties for the falsification of applications or the submission of false data (appendix C).

### III. State Requirements.

A. In addition to the Governor's permission, most states require the following permits:

1. commercial permit for the possession of fish for sale;
2. dealer permit for the handling, processing or transporting of fish for sale; and
  - a. this permit generally involves a sanitary inspection of the foreign vessel for health purposes (appendix D).

B. Some states (Massachusetts) may require the foreign vessel owner to file a certificate of doing business with the appropriate official (State Secretary) if certain factors exist (appendix E).

C. Some states may require a discharge permit for large processing vessels operating within the boundaries of the state and the applicant is advised to check with the water pollution control agency of the state.

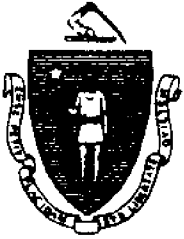
D. Generally, if within the harbor of a state, the foreign

vessel must comply with applicable requirements or orders of the local harbor master (appendix F).

- E. Most states require larger vessels to take on a pilot when navigating within local harbors and the applicant is advised to research the local pilotage requirements. In Massachusetts, fishing vessels are exempt but larger foreign vessels may be required to take on a pilot if requested to do so (appendix G).
- F. Some states provide for fire and safety requirements on vessels when in local harbors and the applicant is advised to check with the Fire Department having jurisdiction over the harbor. In Massachusetts, broad regulations are applicable for vessels within local harbors and govern fire extinguishers and flammable substances (appendix H).

IV. Governor's Permission

- A. Normally, the Governor's permission will be evidenced by a permit or letter of authorization issued by the Governor's Office, or if this authority is delegated, by the marine fishery agency of the state.
- B. Such permit or letter of authorization will generally include the following provisions:
  1. expiration of the permit or authorization after a specified time, or after the the authorized catch is reached, or for violations of federal law, state law or the permit conditions;
  2. require the taking on of a state observer;
  3. require radio communication at a specified time and on a specified basis with the state marine enforcement agency; and
  4. require relevant statistical reporting.



PHILIP G. COATES  
DIRECTOR

# The Commonwealth of Massachusetts

Division of Marine Fisheries

Leverett Saltonstall State Office Building

100 Cambridge Street

Boston, Massachusetts 02202

727-3193

TO: Massachusetts Processors

FROM: Philip G. Coates, Director *Phil Coates*

DATE: April 21, 1983

RE: Internal Waters Over-The-Side-Sales

The Magnuson Fishery Conservation and Management Act was recently amended with addition of a new section which gives states greater control over foreign vessels purchasing and processing fish products within states' internal waters. Prior to this Amendment, states' internal waters were largely unregulated, and here in Massachusetts any vessel could tie up to a dock or anchor within internal waters and buy fish from domestic fishing vessels subject only to minimal State licensing and sanitary inspection requirements.

Now, under the Amended Act, a qualified foreign vessel can only process or purchase fish products in Massachusetts internal waters subject to gubernatorial authority. The act states, "The Governor may not grant permission for a foreign fishing vessel to engage in fish processing if he determines that fish processors within the State have adequate capacity, and will utilize such capacity, to process all of the United States harvested fish from the fishery concerned that are landed in the State."

Governor Dukakis has decided that the Marine Fisheries Advisory Commission is the appropriate Administrative body to recommend to his office whether or not he should authorize foreign vessels to process United States caught fish within the internal waters of the Commonwealth. Consequently, the Commission with the assistance of the Division of Marine Fisheries must obtain estimates of Massachusetts processing capacity for species currently or expected to be involved in over-the-side-sales.

Please answer the questions below. All answers will be strictly confidential. I must emphasize the importance of providing us with this information. We must have, as soon as possible, an accurate picture of your processing capacities and your intentions to utilize those capacities in 1983. Please return the attached form to me by no later than May 6.



INFORMATION CONTAINED HEREIN SHALL BE CONFIDENTIAL AND EXEMPT FROM PROVISIONS OF MASS. GENERAL LAWS CHAPTER 66 MEANING THAT BY LAW INFORMATION CONTAINED HEREIN SHALL NOT BE DISCLOSED TO THE PUBLIC PURSUANT TO A PUBLIC RECORDS REQUEST

Long-finned Squid (Loligo)	Short-finned Squid (Illex)	Mackerel	Butterfish	Sea Herring
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What is your present capacity to process U.S. harvested squid, mackerel, butterfish, and sea herring? Please provide amounts in spaces to the right.

Do you intend to utilize these capacities this year? Yes or No

If not, how much do you intend to process in 1983?

Have you processed these species in past years? Yes or No

If yes, how much did you process in 1981? in 1982?

BEING \_\_\_\_\_ OF \_\_\_\_\_ (name) (title) (company)

I have read the information of this form and attest that it is true and accurate to the best of my knowledge.

**"Public records".** Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, unless such materials or data fall within the following exemptions in that they are:

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subparagraph shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

**§ 1A. Statements containing declaration relative to penalties of perjury; verification; false statements**

No written statement required by law shall be required to be verified by oath or affirmation before a magistrate if it contains or is verified by a written declaration that it is made under the penalties of perjury. Whoever signs and issues such a written statement containing or verified by such a written declaration shall be guilty of perjury and subject to the penalties thereof if such statement is wilfully false in a material matter.

Amended by St.1947, c. 106.

REQUEST FOR PUBLIC HEALTH INSPECTION CERTIFICATION

TYPE OF OPERATION: (check appropriate blocks)

- Retail Dealer
- Wholesale Dealer
- Truck Operation
- Bay Scallop Shucking
- Interstate Shellfish Trade

PRODUCT: (check products you will sell)

- |  |  |
|--|--|
| <input type="checkbox"/> Finfish           | <input type="checkbox"/> Lobster Crab Meat |
| <input type="checkbox"/> Scallops          | <input type="checkbox"/> Live Lobster      |
| <input type="checkbox"/> Live Shellfish    | <input type="checkbox"/> Live Bait         |
| <input type="checkbox"/> Shucked Shellfish | <input type="checkbox"/> Frozen Bait       |

ACTIVITIES: (check activities you will engage in)

- |   |  |
|---|--|
| <input type="checkbox"/> Bay Scallop Shucking   | <input type="checkbox"/> Packing Shellfish     |
| <input type="checkbox"/> Shucking General       | <input type="checkbox"/> Repacking Shellfish   |
| <input type="checkbox"/> Removing Lobster Meat  | <input type="checkbox"/> Reship Shellfish      |
| <input type="checkbox"/> Repacking Lobster Meat | <input type="checkbox"/> Wet Storage-Shellfish |

Business Name \_\_\_\_\_ Tel. No. \_\_\_\_\_

Business Address \_\_\_\_\_

Street

City/town

State

zip

Signature of Applicant \_\_\_\_\_

Residential Address \_\_\_\_\_

Street

City/Town

State

zip

Return Application to:

Department of Public Health  
 Division of Food & Drug  
 Seafood Section,  
 305 South Street  
 Jamaica Plain, MA. Q2130

Statistics  
Division of Marine Fisheries  
Cat Cove Marine Laboratory  
92 Fort Avenue  
Salem, MA 01970

1983 MASSACHUSETTS SEAFOOD DEALERS QUESTIONNAIRE

**\*IMPORTANT: NO DEALER LICENSE FOR 1983 SHALL BE ISSUED UNLESS ACCOMPANIED BY A COMPLETED DEALER QUESTIONNAIRE FORM.**

**PLEASE TYPE OR PRINT IN INK**

Company or Dealership Name \_\_\_\_\_

Business Address \_\_\_\_\_  
(street) (city/town) (zip code)

Business Telephone Number \_\_\_\_\_ License Number \_\_\_\_\_

If you do business under other company names at the above address, please list these names \_\_\_\_\_ License Number \_\_\_\_\_

Name of person to contact regarding statistical information \_\_\_\_\_

1. Do you buy any of your seafood products directly from fishermen? Yes No
2. Do you provide any of your seafood products by fishing yourself (acting as your own supplier)? Yes No

If you have answered yes to questions one or two, please indicate below those species that you purchase or catch:

Striped bass \_\_\_\_\_ Eels \_\_\_\_\_

Bluefish \_\_\_\_\_ Lobster \_\_\_\_\_

Sea bass \_\_\_\_\_ \_\_\_\_\_

\_\_\_\_\_

(If additional room is needed use reverse side.)

3. Do you intend to sell your sea products primarily as bait or food? (please circle)
4. Do you operate year-round (12 months)? Yes No

If no, please indicate the approximate months that you operate \_\_\_\_\_

The Division of Marine Fisheries Statistics Program is designed to collect, evaluate, and disseminate the Commercial Fisheries Statistics for Massachusetts. Feel free to use the space below for any comments you may have on our program or contact us at any time during the year.

105 CMR 533.000: RULES AND REGULATIONS RELATIVE TO FISH AND FISH PRODUCTS

Section

- (533.001 through 533.009: Reserved)
- 533.010 Vessels
- (533.011 through 533.019: Reserved)
- 533.020 Fish Processing Establishments
- (533.021 through 533.029: Reserved)
- 533.030 Lobster and Crabmeat Picking Establishment
- (533.031 through 533.039: Reserved)
- 533.040 Harvesting and Handling Shell Stock
- 533.041 Shucking and Packing Shellfish
- (533.042 through 533.049: Reserved)
- 533.050 Scallops

533.010: Vessels

(A) Holds. The holds of all fishing boats and vessels used for the taking or transportation of fish for food purposes, shall at all times be maintained in a sanitary condition. Pen boards shall be thoroughly washed with chlorinated water containing at least twenty parts per million, or a detergent having equivalent sanitizing capabilities, and shall be scrubbed immediately after coming out of the hold. Pen boards which are cracked, splintered or otherwise punctured, so as to be unsanitary, shall not be used. Holds shall be thoroughly washed and scrubbed with chlorinated water or water containing a suitable detergent.

Holds and pen boards of all vessels, excepting those engaged in lobster dragging operations, shall be thoroughly cleaned, dried and painted at least once a year or oftener, if necessary, with a lead-free paint.

(B) Shelves. In all vessels transporting food fish, horizontal shelves shall be employed in each pen at intervals of not more than four feet, or less, if the structure of the fish does not permit this depth, Ocean Perch excepted, Ocean Perch shall be shelved at least once.

(C) Handling and Storage. All fish of the following species shall be eviscerated, as they are caught, and before being packed: Haddock, Cod, Pollock, Hake, Cusk and Catfish.

The gutting of fish at sea shall be thorough and complete with the removal of all the matter from the body cavity. Fish shall be thoroughly washed before being iced. Ice shall be used so that all fish are kept apart in the center of the pens. Ice must be in actual and continuous contact with the fish. It shall effectively separate all fish from bulkheads, sheathing, shelves and pen boards, and must be sufficient in quantity to last for the duration of the storage period.

Gills must be removed on all fish mentioned above; from April 1 to November 1.

Forks shall not be used for the transferring of fish from one receptacle to another or from the holds of vessels to unloading receptacles.

(D) Toilets. Ships personnel must use the facilities provided aboard vessels for personal cleanliness; signs requiring employees to wash their hands before returning to work after any absence shall be conspicuously posted in such facilities.

533.020: Fish Processing Establishments

(A) Sanitary Conditions. For the purpose of these regulations the phrase "sanitary condition" or "sanitary conditions" shall mean cleanliness and freedom from infectious and deleterious substances and influence conducive of insanitation.

(B) Establishments and Surroundings. Establishments and surroundings shall be kept in a sanitary condition at all times when in use.

(C) Floors, Construction and Drainage. Floors shall be constructed of a suitable impervious material in such a way, that they may be easily and thoroughly cleaned and drainage of all water therefrom shall be complete and rapid.

(D) Walls and Ceilings. Walls and ceilings shall be smooth, washable, kept clean and shall be kept covered with a light colored paint or some other suitable impervious material.

(E) Lighting and Ventilation. Lighting and ventilation shall be adequate in all parts of the building in use. Windows shall be kept clean and in repair.

(F) Pest Control. Establishments shall be kept free of flies, screens shall be used as necessary and when practical, and the entire premises shall be free of rodents, insects and all other vermin.

Insecticides and rodenticides shall be used only by trained employees or contractors and in such a manner, that they will not contaminate the food or food handling equipment.

Only nontoxic cleansing agents shall be used.

(G) Toilets, Location of and Operation. Establishments shall be provided with conveniently located sanitary toilets and lavatories, adequate supplies of soap and towels with running hot and cold water, effectively separated from any packing or filleting room. Such facilities shall be constructed according to State and local requirements and shall be properly operated and maintained, so that they are inaccessible to flies and do not pollute the surface soil and do not contaminate any water supply. Soap and paper towels shall be provided; common towels are prohibited.

(H) Water Supplies and Cross Connections. Establishments shall be provided with an adequate supply of hot and cold water under pressure for washing and cleansing purposes. All water and ice used for washing, refrigerating, cleaning, cooking or other processing purpose shall be from an approved source. Brine used for washing fish or fillets shall be changed every two hours when in use, so that it is at all times clean and cannot contaminate the food products. No cross or back flow connections with unapproved water supplies or other possible sources of contamination shall be permitted.

(I) Equipment, Sanitary Condition of. All equipment, whatever kind of description, whether within or without the establishment used in the transportation, processing, storing or packaging of fish shall be kept in a sanitary condition at all times.

(J) Construction and Sterilization. All dippers, pans, pails, colanders, ladles, tin or other utensils or receptacles used in the processing, storing or packaging of fish shall be constructed of a noncorrodible, smooth impervious material in such a manner as to eliminate grooves, seams and cracks; all utensils and other equipment shall be sterilized daily by one of the following methods:

(1) Exposure to steam for at least 15 minutes at a temperature of at least 170°F., or for at least 5 minutes at a temperature of at

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least 200°F., in a steam cabinet equipped with an indicating thermometer located in the coldest zone.

(2) Complete immersion in hot water of at least 170°F., for at least 2 minutes.

(3) Exposure to air at a temperature of at least 180°F., for at least 20 minutes, in a properly desigated hot air cabinet equipped with an indicating thermometer located in the coldest zone.

(4) Complete immersion for at least 2 minutes or exposure for at least 2 minutes to a flow of solution containing at least 50 parts per million of free chlorine. All product-contact surfaces must be wetted by the bactericidal solution.

(K) Knives, Cleavers. Knives, cleavers and other tools or implements shall be maintained in a sanitary condition.

(L) Equipment Sanitation. Scales, Filleting tables, scale tables, packing tables, benches and all other equipment of similar nature shall, where it is practicable, be made of non-corrodible material or kept painted. Cutting boards shall be removeable and should be kept in a reasonably smooth condition; badly split board are prohibited. Rubber base composition boards should be used when possible. Conveyors and all other equipment shall be of a design that permits easy and thorough cleaning.

(M) Containers, Sanitation and Labeling of. Only new previously unused containers with tight fitting covers, bearing the packer's or distributor's name and address shall be used to pack fillets. Barrels, boxes or other containers used for packaging or shipping fish, dressed or in the round, shall be new or reclaimed from a use that is clean, nontoxic or noncorrodible. All such barrels, boxes or other containers shall be maintained in a sanitary condition and shall be inspected prior to their return to wholesalers. All labels or marks not applicable to the article being packed shall be removed when reusable containers are employed.

(N) Clothing and Hair Nets. Employees in filleting or packing rooms shall wear clean outer garments. Smoking or other use of tobacco is prohibited, and all persons entering such rooms shall wear a cap or hair net confining the hair, so that no loose hair will fall.

(O) Communicable Disease and Lesion. A person who has any communicable disease is a carrier thereof or who has any open lesion on the exposed portions of the body shall not be permitted on the premises. An owner or manager who has reason to suspect that any employee has contracted a communicable disease shall immediately notify the proper health officials. All employees shall obtain a chest X-ray annually.

(P) Gurry, Handling of. Barrels or any other receptacles for waste or gurry shall be watertight, kept covered, and shall be thoroughly cleaned after each emptying. All gurry shall be removed from the premises at least one a day.

(Q) Transit and Storage of Fish on Floors and Other Places. All fish or fishery products whether inside or outside of any establishment or in transit shall at all times be kept iced or otherwise properly cooled and kept in containers or display cases which are sanitary and protected from the direct rays of the sun and other elements conducive to spoilage or contamination by some sanitary covering. To prevent spillage, trucks, boxes, containers, receptacles and mechanical conveyors shall not be overloaded.

(R) Open Air Processing. Fish shall be processed only within the enclosure of an establishment maintained as provided in these regulations.



533.030: Lobster and Crabmeat Picking Establishment

(A) Picking Area. In lobster and crabmeat establishments, the room used for the picking of lobster or crabmeat shall be separated from other rooms or space in the building by a suitable full partition or walls. Doors to such rooms must be equipped with self-closing devices.

(B) Equipment. All equipment of whatever kind, nature or description, whether within or without the establishment, used in the transportation, processing, storing or packaging of crabs, lobster, crabmeat or lobster meat shall be kept in a sanitary condition at all times.

(C) Table Tops. The surface of tables or benches used for picking out lobster or crabmeat shall be of smooth noncorrodible material with round corners to permit proper cleaning. Opening on tables and benches for the disposition of shells shall be constructed with a rim or collar of the same material as the top. Breaking blocks shall be removeable, smooth and free of cracks.

(D) Construction and Sterilization of Equipment. All dippers, pans, pails, colanders, ladles, tins or other utensils or receptacles used in the processing, storing or packaging of lobster or crabmeat shall be constructed of a noncorrodible, smooth, impervious material, in such a manner as to eliminate grooves, seams and cracks. All utensils and other equipment shall be sterilized daily by one of the following methods:

(1) Exposure to steam for at least 15 minutes at a temperature of at least 170°F., or for at least 5 minutes at a temperature of at least 200°F., in a steam cabinet equipped with an indicating thermometer located in the coldest zone.

(2) Complete immersion in hot water of at least 170°F., for at least 2 minutes.

(3) Exposure to air at a temperature of at least 180°F., for at least 20 minutes in a properly designated hot air cabinet equipped with an indicating thermometer located in the coldest zone.

(4) Complete immersion for at least 2 minutes or exposure for at least 2 minutes to a flow of a solution containing at least 50 parts per million of free chlorine. All product-contact surfaces must be wetted by the bactericidal solution.

(E) Knives, Cleavers and Picks. Knives, cleavers, picks, forks and other tools or implements shall be maintained in a sanitary condition.

(F) Dead Lobsters. Dead lobsters or parts thereof shall not be boiled or otherwise processed for human consumption as food. Detached claws or parts thereof shall not be cooked.

(G) Refrigeration of Lobster and Crabs. Meat from lobsters, crabs or parts thereof not immediately removed from the shells after cooking shall not be sold, given away or used for food purposes unless such lobsters, crabs or parts thereof have been kept in sanitary containers and refrigerated at less than 50°F.

(H) Containers to Picking Rooms. Containers used to take lobsters, crabs into picking rooms shall not be placed on tables or benches therein. Uncovered containers of cooked lobsters, crabs or the meat therefrom shall not be stacked.

(I) Picking of Lobsters and Crabs. Meat from lobsters or crabs shall be picked into containers or onto surfaces which have been properly sanitized with a chlorine solution of not less than 50 p.p.m. of free chlorine.

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(J) Refrigeration. Shucked lobster or crabmeat shall be cooled to a temperature of 45°F., or less within two hours after picking. Containers of such products shall be packed in cracked ice or otherwise suitably refrigerated at a temperature of 45°F. or below until sold.

533.040: Harvesting and Handling Shell Stock

(A) Boats and Trucks. All boats used in tonging, raking, dredging or transporting shellfish shall be so constructed, operated and maintained as to prevent contamination or deterioration of the shellfish, and shall be kept clean.

Decks and storage bins shall be so constructed and located as to prevent bilge water or contaminated overboard water from coming in contact with the shellfish. Removable false bottoms must be installed in all small craft, including row boats, skiffs, and power boats, when they are being used to transport shellstock.

Bilge pumps shall be so located that bilge water will not come in contact with the shellfish.

Containers used for the storage of shellfish shall be maintained in a sanitary condition.

Boat decks and storage bins shall be cleaned with water only from a clean area, or from an approved source ashore.

Decks and storage bins of boats used for transporting shellfish from a contaminated area shall be cleaned, sanitized with a chlorine solution of not less than 20 parts per million of free chlorine, before they are used for the transport of shellfish from clean areas.

Trucks used for the transport of bulk shell stock shall be so constructed as to protect the shell fish from contamination, and shall be kept clean.

(B) Washing of Shell Stock. Shell stock shall be washed reasonably free of bottoms sediments and detritus, as soon after harvesting as is feasible.

Shell stock taken from a clean area may be washed only with water from that area or its equivalent.

Shell stock taken under authority of a master digger's permit may be washed only with water from the area from which it was taken, or its equivalent.

(1) All shell stock shall be protected from the sun during warm weather to the extent necessary to prevent spoilage. Prolonged storage of shell stock shall be refrigerated to 45°F.

(C) Disposal of Body Excretions. No body excretions shall be discharged overboard from a boat used in harvesting shellfish while in an area from which shellfish are being harvested.

Any boat which is away from shore toilet facilities more than three hours shall have thereon a watertight container made of heavy gauge metal, with a tightfitting cover, of sufficient capacity to provide for the crew, but in no case less than 2-gallon capacity. Mechanical sewage disposal devices approved for this purpose by the Department of Public Health may be used in lieu of soil containers. Soil cans, where used, shall be so secured and located as to prevent contamination of the shellfish.

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The contents of soil cans shall be disposed of by discharge into an approved sewage-disposal system, and soil cans shall be cleaned before being returned to the boat. Such cans shall not be cleaned by any facilities used for cleaning food processing equipment.

533.041: Shucking and Packing Shellfish

(A) Wet Storage. No shell stock shall be placed or maintained in wet storage without the approval of the Department. Such approval shall include a sketch, drawn to scale on the reverse side of the certificate issued to the dealer, showing the approval of the location of the storage area, floats or the water intake for the wet storage tanks, and all potential hazards to which the stored shellfish may be exposed; and a statement describing the measures taken to protect the shellfish from the above potential hazards.

Such approval shall expire on December 31 next succeeding the date of granting, unless sooner canceled by the Department.

(B) Plant Arrangement. Establishments shall be so located, that they will not be subject to flooding by high tides. If the floors of any establishment become flooded, the processing of shellfish shall be discontinued until after the waters have receded and the building has been thoroughly cleaned.

Shucking and packing operations shall be conducted in separate rooms, separated from each other and from other rooms or spaces in the building by suitable full partitions or walls. Doors to such shucking or packing rooms shall be equipped with self-closing devices, and shall be tight-fitting.

A shucked shellfish delivery window shall be installed in the partition or wall between the shucking room and the packing room. The delivery window shall be equipped with a corrosion-resistant shelf of metal, concrete or tile, and shall drain toward the shucking room.

The packing room shall be large enough to permit the sanitary handling of shellfish and the thorough cleaning of equipment.

Rooms or lockers shall be provided which have adequate capacity for storing clothing, aprons, gloves and other personal articles of the employees.

(C) Dry Storage of Shell Stock. The storage area floor shall be constructed of material impervious to water, free from cracks and uneven surfaces that interfere with proper cleaning or draining, and graded to assure complete and rapid drainage of water away from the shellfish.

Walls of storage rooms shall be smooth and constructed of material which will not deteriorate under repeated washing.

If storage areas are liable to receive floor drainage water from other sections of the plant, the shell stock shall be stored on racks not less than four inches in height.

Storage areas shall not serve as an entry way to other sections of the plant.

Shell stock in dry storage shall be protected from contamination. Rooms, benches or hoppers shall be provided for the storage of shell stock. Floor waste from shell stock storage areas shall be discharged preferably through a separate drainage system, and if discharged into a general drainage system carrying sanitary wastes, an air gap shall be provided.

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Conveyance and devices used in the transport of shell stock shall be so constructed that they may be easily cleaned, and shall be kept clean.

(D) Floors. The floors of all rooms in which shellfish are processed, or in which utensils used in such processing are washed, shall be constructed of concrete or other material impervious to water, shall be graded to drain quickly, shall be free from cracks and uneven surfaces that interfere with proper cleaning or drainage, and shall be maintained in good repair. The junctions between floors and walls shall be so constructed and maintained, as to be impervious to water.

(E) Walls and Ceilings. The interior surfaces of all rooms which shellfish are processed, or in which utensils used in such processing are washed, shall be smooth washable, light colored and maintained, clean, and in good repair.

(F) Fly Control Measure. All outer openings to rooms where shellfish are processed, or where utensils are cleaned, to toilets, wash rooms, storage rooms and locker rooms shall be effectively screened when flies are present, unless other effective means are provided for preventing the entrance of flies. All doors to such openings shall open outward and shall be equipped with self-closing devices.

Internal fly control measures which have been approved by the Department of Public Health shall be used to kill or capture flies which may enter the plant despite the screening.

(G) Lighting. Ample light shall be provided in all rooms, where shellfish are processed and where utensils are cleaned, and in storage rooms, including cold storage rooms and shall not be of less than the intensity indicated below:

Table 1.

<u>Type of Area</u>	<u>Foot Candles of Illumination</u>
Working surface in packing rooms	25
Other processing and utensil washing areas	15
Storage areas (measured 30 inches above the floor)	5
Windows shall be kept in clean and in good repair.	

(H) Heating and Ventilation. A comfortable working temperature shall be maintained in all rooms, where shellfish are being processed.

No heating fuels shall be stored in any room where shellfish are processed or stored. No heating device or the piping connected thereto shall be cleaned or have the residue of fuels removed therefrom while shellfish are being processed in the establishment.

Rooms where shellfish are processed shall be so ventilated, as to provide for the elimination of odors and excessive condensation.

(I) Water Supply. Establishments shall be provided with a water supply approved by the Department of Public Health. Such water supply shall be under pressure, and shall be sufficient for all needs of the establishment.

All shell stock storage rooms, shucking and packing rooms and utensil washrooms shall be provided with water outlets.

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Establishments shall be provided with an automatically regulated hot water system which has sufficient capacity to furnish water with a temperature of at least 130°F. during operations.

Hot and cold water outlets shall be provided at each sink compartment.

In shucking, packing and utensil washing rooms, all hose connections shall be below the level of any bench, table or sink.

(J) Plumbing and Related Facilities. Establishments shall be provided with sanitary toilets, effectively separated from any room where shellfish are processed or stored. Such toilets shall be constructed according to State and local requirements, and shall be kept clean and in good repair.

Toilets shall be equipped with tight-fitting, self closing doors, an adequate supply of toilet paper, and signs, conspicuously posted, directing employees to wash their hands after each work interruption.

Lavatories shall be provided with hot and cold water under pressure from a hot-and-cold mixing or combination valve, adequate supplies of soap, individual towels or other sanitary drying device, and signs, conspicuously posted directing employees to wash their hands after each work interruption.

The following are prohibited:

- (1) Cross-connections between the approved pressure water supply and water from a nonapproved source.
- (2) Fixtures or connections through which the approved pressure water supply might be contaminated by back siphonage;
- (3) Drainpipes or wastepipes located over areas where shellfish are processed or stored, or over areas in which containers or utensils are washed or stored.

(K) Sewage Disposal. Sewage shall be disposed of into public sewers wherever possible. Where private sewage disposal systems must be utilized, they shall be constructed according to State and local requirements.

(L) Rodent Control. Establishments shall be so constructed as to prevent the ready entrance of rodents.

Rodenticides which are highly toxic to humans shall not be stored in establishments, and shall not be used except under the supervision of a licensed pest control operator or other qualified specialist.

(M) Shucking Benches, Tables and Stools. The tops of shucking benches and tables shall be made of smooth, noncorrosive, nonabsorbent material, free from cracks, and so constructed that drainage is complete and rapid and is directed away from any shellfish stored thereon. The corners of such benches or tables shall be rounded to permit thorough cleaning. Openings for drainage or for the disposition of shells shall be constructed with a rim or collar of the same material as the top, and such rim or collar shall extend not less than four inches below the top surface of the bench or table.

If the top of any bench or table is constructed of metal or fiberglass, such material shall completely overlap the edges, and all seams and fastening holes shall be filled and smooth.

Shucking or breaking blocks shall be of one-piece construction, free from cracks, and easily removable. The use of blocks made from toxic material is prohibited.

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Stools shall be of painted, finished material, with no attached padding, and so constructed as to be easily cleaned.

(N) Construction of Equipment and Utensils. The parts of equipment and utensils which may come in contact with shellfish being processed shall be constructed of corrosion-resistant, nonabsorbent, nontoxic smooth material which will not readily crack or disintegrate. All seams shall be welded or soldered flush and shall have a smooth surface.

Knives used in the shucking of shellfish shall be constructed in one piece, of corrosion-resistant metal, and shall not have any previous or absorbent material attached thereto.

Storage containers of shucked shellfish shall be so located, that their top rim is at least two feet above the floor.

Blower drains shall not be directly connected with a sewer.

Air pump intakes shall be located in a protected place.

All parts of equipment and utensils shall be so constructed, that they can be kept in a clean, sanitary condition, and they shall be so kept.

(O) General Cleanliness. Establishments shall be kept clean and free of litter and rubbish. Material and equipment not in routine use shall not be stored in rooms where shellfish are processed, shell stock storage rooms or container storage rooms.

The shell stock storage, shucking, and packing rooms shall not be used for other operations while shellfish are being processed. No animals, rodents or fowl shall be permitted in the establishment.

Only persons engaged in processing the shellfish, authorized inspectors, or other persons specifically authorized by the manager shall be allowed in the shell stock storage or processing rooms, while operations are being conducted. Shuckers shall not go into or through the packing room for any purpose.

(P) Cleaning of Buildings and Equipment. Rooms where shellfish are processed shall be cleaned within two hours after operations have ceased.

Windows, skylights and refrigerators shall be kept clean.

All utensils, equipment and work surfaces, including the external and internal blower air lines below the tank's liquid level, shall be cleaned by scrubbing with water and detergent and rinsed with potable water within two hours after operations have ceased.

Cleaned benches, tables and blocks shall be flushed or sprayed at least once a week with a solution containing not less than one hundred parts per million of available chlorine, or other disinfecting agents in effective concentrations as approved by the Department of Public Health.

Wash tanks, blowers and containers for shucked shellfish shall be flushed or spray rinsed with tap water after each emptying.

Adequate cleaning facilities, including sinks, detergents and brushes shall be available within the establishment.

Wash sinks shall be made of impervious, nontoxic material, and shall be large enough to permit the complete immersion of the largest utensil

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to be washed therein. Additional sink compartments or spray rinses for clean water rinsing prior to bactericidal treatment (105 CMR 533.041(Q)) shall be provided as follows:

Table 2.

## NUMBER OF COMPARTS REQUIRED IN SINK

<u>Method of Bactericidal Treatment</u>	<u>Method of Rinse</u>	
	<u>Immersion</u>	<u>Spray</u>
Steam cabinet	2	1
Hot water (170°F.)	2	
Bactericidal solution	3	2

(Q) Bactericidal Treatment of Equipment and Utensils. All equipment and utensils which come into contact with shucked shellfish shall be cleaned, rinsed with potable water, and subjected to an effective bactericidal process at the end of each day's operations. Such bactericidal treatment shall be by one of the following methods:

(1) Exposure for at least 15 minutes at a temperature of at least 170°F., or for at least 5 minutes at a temperature of at least 200°F. in a steam cabinet equipped with an indicating thermometer located in the coldest zone.

If steam is used in the bactericidal treatment of blowers, a suitable cover and indicating thermometer shall be provided. A vent or valve shall be installed at the bottom of any large steam cabinet, to permit the discharge of cold air when steam is admitted.

(2) Immersion in hot water of at least 170°F. for at least 2 minutes. In the bactericidal treatment of blowers by this method, the 2-minute contact period will be measured after the indicating thermometer has recorded a temperature of at least 170°F.

(3) Immersion for at least 2 minutes in, or exposure for at least 2 minutes to, a flow of a solution containing not less than 50 parts per million of free chlorine. All surfaces in contact with shucked shellfish must be wetted with the bactericidal solution, and all piping so treated must be filled. Bactericidal sprays containing not less than 100 parts per million of free chlorine shall be used for large equipment, both prior to and following each day's operation.

(R) Storage of Equipment. Equipment and utensils which have been cleaned and given bactericidal treatment shall be stored in a special cabinet or in the packing room on clean shelves, tables or racks, at least 2 feet above the floor.

(S) Refrigeration of Shell Stock. Shell stock shall be stored at a temperature between 32°F. and 50°F. When being transferred, shell stock shall not be allowed to remain unrefrigerated for prolonged periods.

(1) All shucked shellfish fresh or frozen shall be deemed satisfactory, if it meets the following bacteriological standards:

- (a) E. Coli m.p.n. not greater than 230/100 mls. of sample.
- (b) Standard plate count not in excess of 500,000 per ml.

(T) Shucking of Shellfish. No water from a contaminated area or that is not from a source approved by the Department of Public Health shall be used to wash shell stock.

Only live shellfish, reasonably free of mud shall be shucked.

No containers, other than those into which shellfish is being shucked, shall be placed on any shucking bench or table.

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The use of buckets for rinsing the individual shucker's hands and knife is prohibited.

Shucked shellfish shall not be allowed to remain on the shucking bench, unless the internal temperature of such shellfish is 50°F., or less.

(U) Shell Disposal. Shells and other gurry shall be removed from the establishment when containers have been filled, and as soon as operations have ceased.

(V) Single-Service Containers. Single-service shall be kept dry and clean in the original cartons until used. Containers which have become contaminated shall be cleaned and given bactericidal treatment before being used, or shall be discarded.

Container storage rooms shall be kept clean, and shall not be used for the storage of other materials.

Containers in packing rooms shall be protected from contamination, and shall be kept on racks or tables at least 2 feet above the floor.

(W) Packing of Shucked Shellfish. Shucked shellfish shall be packed and shipped in clean, single-service containers made of impervious materials, and so sealed that tampering can be detected.

Each individual container or package of fresh or frozen shucked shellfish sold at wholesale or for shipment outside the State shall have permanently recorded on the container, package or label, so as to be easily visible, the packer's, repacker's or distributor's name and address, and the packer's or repacker's certificate number, preceded by the abbreviated name of the State. Containers holding one gallon or more shall have the identification on the side wall.

The use of any containers bearing certification numbers of any plant other than that in which they are used is prohibited.

The date of packing shall be placed on each package of frozen shellfish.

(X) Refrigeration of Shucked Shellfish. Shucked shellfish shall be cooled to an internal temperature of 50°F., or less within 2 hours after being packed, and shall be stored and shipped under similar temperature conditions.

Shellfish which will not be packed within 1 hour after delivery to the packing room shall be cooled to an internal temperature of 50°F., or less within 2 hours.

Packaged shellfish to be frozen shall be properly stacked to insure rapid freezing, and shall be frozen at an ambient air temperature of 0°F., or less, with packages frozen solid within 12 hours after the start of such freezing.

Frozen shellfish shall be handled in such a manner as to remain frozen solid, and shall be held at a temperature of 0°F., or less.

The containers of shucked shellfish shall be covered as soon as filled.

No containers of shucked shellfish shall be placed or stored in any refrigerator unless they are covered, and are protected from dripping or condensation within the refrigerator.



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(Y) Ice. Ice shall be obtained from a source approved by the Department of Public Health, and shall be stored and handled in a clean manner. Ice, other than that manufactured in the shellfish processing plant, shall be washed before use.

(Z) Health of Personnel. A person who has a communicable disease or is a carrier thereof, or who has any open lesion on the exposed portions of his body shall not be permitted in the establishment. An owner or manager who has reason to suspect that any employee has contracted a communicable disease shall immediately notify the proper health officials.

All employees shall obtain a chest X-ray annually.

(AA) Cleanliness of Employees. Employees shall wash their hands with soap and water before beginning work, and after each work interruption.

The use of tobacco or smoking is prohibited in rooms where shellfish is being processed.

Clean aprons or coats shall be worn by all persons processing shellfish. All persons entering rooms where shellfish are being processed shall wear a cap or hair net confining the hair, so that no loose hairs will fall.

Finger cots, gloves, or shields, if worn by shuckers, shall be sanitized at least twice daily.

Sanitized rubber gloves shall be worn during, or the hands shall be washed and disinfected immediately before, any manual handling of shucked shellfish.

(AB) Supervision. The management shall designate a reliable individual to be accountable for compliance with these rules and regulations pertaining to plant and personnel cleanliness.

533.050: Scallops

(A) Holds of Vessels. The holds of all fishing boats and vessels used for the taking or transportation of scallops for food purposes, shall at all times be maintained in a sanitary condition.

Pen boards and fish holds will be considered in a sanitary condition, when they have been thoroughly scrubbed with a disinfectant, then sanitized with a chlorinated water containing not less than 20 p.p.m. of free chlorine or its equivalent. Dusting with a powdered sanitizer or the use of a hand sprayer is permissible. Pen boards which are cracked, splintered or otherwise punctured, so as to be unsanitary, shall not be used.

(1) Holds and pen boards of all vessels, excepting those engaged in lobster dragging operations, shall be thoroughly dried and painted at least once each year with a lead-free paint. Vessels engaged in lobster dragging shall obtain a special permit from the Department of Public Health exempting them from this regulation. All pen boards, if not of a non-corrodible nature, shall be painted yearly and more often, if there is any noticeable peeling, cracking or weathering, with a waterproof lead-free paint.

(B) Ice. Ice shall be used, so that all bags of scallops are kept apart in the center of the pens. Ice must be in actual and continuous contact with the container. It shall effectively separate all scallop bags from bulkheads, sheathing, shelves and pen boards, and must be sufficient in quantity to last for the duration of the storage period.

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(1) All shell stock shall be protected from the sun during warm weather to the extent necessary to prevent spoilage. Prolonged storage of shell stock shall be refrigerated to 45°F.

(C) Toilets. Toilets shall be provided on vessels engaged in the sea scallop fishery. Ship personnel must use the facilities provided aboard these vessels for personal cleanliness. Signs requiring personnel to wash their hands before returning to work after any absence shall be conspicuously posted in each of such facilities. Nothing in 105 CMR 533.050(C) shall be deemed to allow for the adulteration by absorbed water.

(D) Equipment, Sanitary Condition of. All equipment of whatever kind, nature or description, whether within or without the establishment, fishing boat or vessel, used in the production, transportation, processing, storing or packaging of sea scallops shall be kept in a sanitary condition at all times.

(1) Stainless steel wash boxes shall be provided.

(2) Pails made of stainless steel or other material approved by the Director shall be provided.

(3) Construction and sterilization of equipment -- All knives, dippers, pans, pails, colanders, ladles, tins or other utensils or receptacles used in processing, storing or packaging of sea scallops shall be constructed of a noncorrosive, smooth, impervious material in such a manner as to eliminate grooves, seams and cracks.

(4) Wash boxes, pails, knives and other tools or implements shall be maintained and stored in a sanitary condition.

(E) Containers. Only new and previously unused bags which have been stored in a sanitary manner and protected so as to keep them free from contamination shall be used for sea scallops. Barrels, boxes or other containers used for packaging or shipping bags of sea scallops shall be new or reclaimed from a use that is clean, nontoxic and noncorrosive. The inspectors empowered to enforce these regulations shall decide as to the satisfactory sanitary condition of any container. All such barrels, boxes or other containers shall be maintained and stored in a sanitary condition, free from contamination and shall be inspected prior to their reuse. All labels or marks not applicable to the article being packed, shall be removed when reusable containers are employed. Labeling of approved type containers shall be by a method approved by the Department. Each container shall bear the permit number of the producer.

(F) Void or Unconstitutional Provisions. If any of the regulations herein before made and promulgated should be declared void or unconstitutional for any reason, such declaration or ruling shall not affect the remaining provisions of these regulations.

REGULATORY AUTHORITY

105 CMR 533.000: M. G. L. c. 94, s. 88C; c. 111, s. 3.

## FOREIGN CORPORATIONS

181 § 2

School, Inc. v. Board of Assessors of Seekonk (1975) 331 N.E.2d 888, 368 Mass. 344.

Inasmuch as regulatory scheme [c. 12, §§ 8 et seq.] permitting foreign charities to operate in state subjected them to supervision and control substantially similar to that imposed on domestic corporations, inability of state to revoke charter of foreign charitable corporation was not ground for denying foreign charitable corporation the exemption from real estate taxes granted domestic charities, and denial of exemption to foreign charitable

corporation denied equal protection of the law. *Id.*

A foreign corporation whose business was the brokerage of hides and which solicited orders in Massachusetts and the other New England states for a group of sellers all located outside of Massachusetts was not engaged in intrastate business and was not subject to foreign corporation excise tax, where there was no handling of hides in Massachusetts. *M. A. Delph Brokerage Co. of New England v. State Tax Commission* (1964) 196 N.E.2d 628, 347 Mass. 64.

## § 2. Prohibited businesses

A foreign corporation shall not do business of any kind in the commonwealth the doing of which by a domestic corporation is prohibited by the laws of the commonwealth.

Added by St.1973, c. 844, § 1.

1973 Enactment. See the italicized note and the table preceding § 1 of this chapter and the note thereunder.

This section was derived from § 2 and § 5 as amended by St.1962, c. 750, § 60, of former Chapter 181.

Cross References. Foreign insurance companies, classes of business permitted, see c. 175, § 152.

## § 3. Doing business within commonwealth; exceptions

Every foreign corporation which does business in the commonwealth or which has a usual place of business in the commonwealth, or which owns or leases real estate therein without having such a usual place of business, or which is engaged therein, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, or in the construction or repair of roads, highways or waterways, or in any other activity requiring the performance of labor, shall be considered to be doing business in the commonwealth for the purposes of this chapter unless its activities within the commonwealth consist of no more than one or more of the following: (a) maintaining bank accounts; (b) maintaining or appointing trustees, depositories, or agencies for the holding, transfer, exchange or registration of its securities; (c) holding meetings of its directors or shareholders; (d) participating or appearing in any action or suit or any administrative or arbitration proceeding, or in the settlement thereof or the settlement of claims or disputes; or (e) performing activities subject to regulations under chapter one hundred and sixty-seven or chapter one hundred and seventy-five, if the foreign corporation has complied with the provisions of the applicable chapter or chapters.

Added by St.1973, c. 844, § 1. Amended by St.1973, c. 1209, § 1; St.1981, c. 455.

1973 Enactment. See the italicized note and the table preceding § 1 of this chapter and the note thereunder.

This section was derived, in part, from § 3 of former Chapter 181, as amended by St.1962, c. 750, § 56.

1973 Amendment. St.1973, c. 1209, § 1, an emergency act, approved Dec. 12, 1973, and by § 2 made effective Jan. 1, 1974, substituted "or

leases real estate or tangible personal property" for "assets of any kind".

1981 Amendment. St.1981, c. 455, approved Oct. 9, 1981, deleted "or tangible personal property" following "leases real estate".

Cross References. Foreign electric utilities owning or operating electric power facilities in commonwealth, see c. 164A, § 10.

950 CMR 107.00: FOREIGN CORPORATIONS

Section

- 107.01 Purpose
- 107.02 Definitions
- 107.03 Foreign Corporation Certificate
- 107.04 Amendments
- 107.05 Certificate of Condition
- 107.06 Extensions for Filing Certificate of Condition
- 107.07 Reservation of Name
- 107.08 Protest of Name; Hearing Procedure
- 107.09 Certificate of Withdrawal
- 107.10 Penalties for Failure to File; False Statements
- 107.11 Forms and Fees
- 107.12 Public Inspection of Records

107.01: Purpose

The regulations in 950 CMR 107.00 implement the responsibilities of the Secretary of the Commonwealth under Massachusetts General Laws, Chapter 181, concerning foreign corporations.

107.02: Definitions

For the purposes of 950 CMR 107.00 and the forms issued to implement it, unless the context otherwise indicates: "foreign corporation" means a corporation that has been established, organized, or chartered under laws other than those of the Commonwealth.

107.03: Foreign Corporation Certificate

Every foreign corporation within ten days after it commences doing business in the Commonwealth shall file with the Division, a Foreign Corporation Certificate. The clerks of the Division in their examination of the Foreign Corporation Certificate have been directed to check for the following information:

- (a) Exact name of the foreign corporation;
- (b) Location of its principal office;
- (c) Brief description of its activities within the Commonwealth;
- (d) Location of its local office, if any;
- (e) Name and address of its resident agent, if any;
- (f) Names and addresses of its president, treasurer, clerk or secretary, and directors;
- (g) Date of its fiscal year;
- (h) Date of its organization;
- (i) Jurisdiction under the laws of which it is organized;
- (j) Statement of the fees imposed by the laws of the State wherein it is incorporated upon Massachusetts corporations doing business in that State.

The Foreign Corporation Certificate shall be signed under penalties of perjury by the president or vice-president and clerk or assistant clerk, or secretary or an assistant secretary. In addition, through the Foreign Corporation Certificate the foreign corporation shall appoint the Secretary to be its attorney upon whom the services of legal process may be made in certain matters (See 950 CMR 112.00).

107.04: Amendments

Every foreign corporation shall file with the Division an Amended Foreign Corporation Certificate within sixty days of the effective date of any of the following changes in the Foreign Corporation Certificate:

- (a) Change of name;
- (b) Change of principal office;
- (c) Change in description of corporate activities.

**107.04: continued**

All certificates of condition must be filed up-to-date before any amendments will be accepted for filing with the Division. The Amended Foreign Corporation Certificate shall be signed under penalties of perjury by the president or a vice-president and a clerk or an assistant clerk, or a secretary or an assistant secretary of the foreign corporation.

**107.05: Certificate of Condition**

Every foreign corporation doing business in the Commonwealth shall annually file with the Division, within six months of the close of its fiscal year, a certificate of condition. The clerks of the Division in their examination of the certificate of condition have been directed to check for the following information:

- (a) Exact name of the foreign corporation;
- (b) Location of its principal office;
- (c) Location of its local office, if any;
- (d) Name and address of its resident agent, if any;
- (e) Names and addresses of its president, treasurer, and clerk or secretary and all the directors and date upon which the term of office of each expires;
- (f) Amount of capital stock authorized and issued, including the number and par value, if any, of its shares, and the amount paid thereon;

The certificate of condition of a foreign corporation shall be signed under penalties of perjury by a responsible officer of the corporation.

Photocopies of certificates of condition are acceptable for filing with the Division; however, photocopied signatures are NOT acceptable. All information on the certificate of condition may be copied, and that copy filed, but the signatures must be original.

The Division shall accept for filing with certificate of condition only the section or sections of the foreign corporation's Annual Report that deal with the requirements of the certificate of condition. The foreign corporation should NOT send its entire Annual Report to the Division for filing with the certificate of condition.

**107.06: Extensions For Filing Certificates of Condition**

Extensions for the filing of certificates of condition of foreign corporations may be granted by the Division upon receipt of a written request and only for good and adequate cause. Extensions may only be granted for a maximum of sixty days.

**107.07: Reservation of Name**

The name of a foreign corporation, available for corporate use under the laws of the Commonwealth, may be reserved for a period of thirty days by the filing of a written application or request to reserve a specific name signed by the applicant. The fee shall be two dollars (\$2.00) for such a reservation. The reservation may be extended by the Division for an additional thirty days upon the written request of the applicant and the payment of an additional two dollar (\$2.00) fee.

A name may be checked relative to its availability for use by telephone but a name may NOT be reserved by a telephone request, and any such attempted reservation shall be considered INVALID by the Division. The reservation of a name becomes effective only upon the receipt by the Division of a written request and the payment of the proper fee.

107.08: Protest of Name; Hearing Procedure

In the event of a controversy arising over the use of a particular name by a foreign corporation, all the parties involved have a right to a hearing before the Division pursuant to Chapter 181, Section 5.

The protest must be in writing and must be filed with the Division within thirty days after the date when an initial certificate, or an amended certificate effecting change of name, of the foreign corporation has been filed with the Division. The regulations governing the hearing procedures followed by the Division are established by 950 CMR 101.00 ("Rules for Adjudicatory Proceedings Conducted by the Corporations Division" which were adopted July 22, 1975). These Rules are available from the Division upon request and payment of a sixty cents (60¢) fee.

107.09: Certificate of Withdrawal

A foreign corporation no longer doing business in the Commonwealth may withdraw from the Commonwealth by filing with the Division a Certificate of Withdrawal. The clerks of the Division in their examination of the Certificate of Withdrawal have been directed to check for the following information:

- (a) Exact name of the foreign corporation;
- (b) Location of its principal office;
- (c) Names and addresses of its president, treasurer, clerk or secretary and directors;
- (d) Date of its fiscal year;
- (e) Statement that the foreign corporation is not doing business in the Commonwealth.

The Certificate of Withdrawal shall be signed under penalties of perjury by the president or a vice-president, and the clerk or an assistant clerk or the secretary or an assistant secretary or, if the foreign corporation is in the hands of a receiver or trustee, by such receiver or trustee. The Certificate of Withdrawal shall be accompanied by a certificate from the Commissioner of Corporations and Taxation that all taxes due and payable to the Commonwealth have been paid. In addition, all certificates of condition must be filed up-to-date with the Division before the Certificate of Withdrawal may be accepted by the Division.

107.10: Penalties For Failure To File; False Statements

Every foreign corporation which fails to file a Foreign Corporation Certificate as required by Chapter 181, Section 4, and 950 CMR 107.03, or an Amended Foreign Corporation Certificate as required by Chapter 181, Section 4, and 950 CMR 107.04, shall be fined not more than five hundred dollars (\$500.00) for each such failure and for each year that such failure shall continue.

Every foreign corporation which fails to file an annual report of condition as required by Chapter 181, Section 4, and 950 CMR 107.05, and then fails to file after proper notice is served in accordance with Chapter 182, Section 9, shall be fined not more than ten dollars (\$10.00) for each day for fifteen days after the expiration of the thirty-day grace period granted by Chapter 182, Section 9, and not more than two hundred dollars (\$200.00) for each day thereafter during which such default continues, or any lesser sum that the court may deem just and equitable.

The Supreme Judicial Court in Suffolk County may issue an injunction restraining further prosecution of the business of the foreign corporation, and further exercise of any corporate rights, privileges or franchises in the Commonwealth, until such penalties, as described above, with interest and cost have been paid and until the foreign corporation has filed the required certificates or reports.

107.10: continued

Whoever knowingly makes, executes, files or publishes any report or statement required by law of the Commonwealth or of another state or country to be made, executed, filed, or published by a foreign corporation, which report or statement is false in any material representation shall be punished by a fine of not more than five thousand dollars (\$5,000.00) or by imprisonment for not more than three (3) years, or both, pursuant to Chapter 181, Sections 13 and 14.

107.11: Forms and Fees

All fees for filing the particular forms to which they pertain shall be paid, prior to filing, by cash, check, draft, or money order made payable to the "Commonwealth of Massachusetts" in accordance with the following:

Table 1

(a) Foreign Corporation Certificate (See Chapter 181, Section 8)	\$200.00 Minimum
(b) Amended Foreign Corporation Certificate	\$ 35.00
(c) Certificate of Withdrawal	No Fee
(d) Reservation of Name	\$ 2.00

The Division also issues certain certificates relative to foreign corporations in accordance with the following:

Table 2

(a) One (1) Item Certificates ex: Certificate of Legal Existence (short form)	\$ 2.00
(b) Two (2) to Ten (10) Item Certificates	\$ 5.00
(c) Certificate of Good Standing	\$ 5.00
(d) Certificate of Withdrawal	\$ 5.00
(e) Over Ten (10) Item Certificates	\$ 10.00
(f) Certificate of Merger	\$ 10.00

For purposes of this fee schedule, "Item" is defined as any single unit of information listed on a certificate, for example, a change of name or a date of amendment.

107.12: Public Inspection of Records

The records of the Division pertaining to foreign corporations shall be available for public inspection during regular business hours.

REGULATORY AUTHORITY

950 CMR 107.00: M.G.L. c. 181.

**§ 19. Harbor masters; assistant harbor masters; appointment; compensation**

The mayor of a city, except Boston, or the selectmen of a town where a harbor is situated, unless otherwise specially provided, may, and for all harbors that have been improved by the expenditure of money by the commonwealth shall, appoint a harbor master and assistant harbor masters and fix their compensation, to be paid by their respective cities or towns. The harbor master shall continue in office until the appointment of his successor, and the assistants, until the appointment of their successors or until their appointments have been revoked.

**Historical Note**

St.1881 c. 8 § 1.  
P.S.1882 c. 69 § 25.

St.1882 c. 216 § 1.  
R.L.1902 c. 66 § 10.

St.1900 c. 270.



## 102 § 19

## REGULATION OF TRADE

### Cross References

Indemnification for damages arising within scope of employment, see c. 41, § 100F.  
Penalties for violation of section, see section 28 of this chapter.

### Law Review Commentaries

Powers of harbor masters. Richard G. Huber, 6 Annual Survey of Mass. Law, Boston College, p. 126 (1959).

### Notes of Decisions

#### 1. In general

The Legislature used the term "vessel", in sections 19 to 26, of this chapter, in its ordinary sense of a ship, boat, or barge, and gave harbor masters no power to control structures, even if they consist in part of floats, and harbor mas-

ter was without power to remove "marina", consisting of an arrangement of floats in the form of an "L" or a "T", moored in the water and so arranged that boats could be tied up thereto. *Town of Scituate v. Maxwell* (1959) 159 N.E.2d 344, 339 Mass. 436.

## § 20. Powers and duties of assistants

Such assistants shall be subject to the direction and control of the harbor master of their town, and shall have all the powers given to, and be subject to all the duties required of, harbor masters by law.

### Historical Note

St.1882 c. 216 § 2.

R.L.1902 c. 66 § 20.

### Cross References

Penalties for violation of section, see section 28 of this chapter.

## § 21. Powers of harbor masters

The master of a vessel within a harbor for which a harbor master is appointed shall anchor his vessel according to the regulations of the harbor master, and shall move to such place as he directs. The master of a towboat having a vessel in tow and a pilot having a vessel in charge shall allow such vessel to anchor only in such place as the regulations of the harbor master provide for anchorage.

### Historical Note

C.L. c. 157 § 2.  
St.1881 c. 8 § 2.

P.S.1882 c. 69 § 26.  
St.1884 c. 173.

R.L.1902 c. 66 § 21.

### Cross References

Penalties for violation of section, see section 28 of this chapter.

## HARBORS AND HARBOR MASTERS 102 § 23

### Notes of Decisions

#### 1. In general

A regulation adopted by the harbor master of the harbor of Boston, declaring that all vessels anchoring in the upper harbor shall anchor within a defined area off Bird Island flats, and that the upper corner of the area known as area A shall be reserved for steamers exclusively, merely provides that a vessel must anchor so that at all times it will lie wholly within the area defined for vessels of its class, and when so construed is reasonable and valid. *Com. v. Perkins* (1916) 111 N.E. 682, 223 Mass. 84.

### § 22. Permit to unload lumber in stream or channel

The master of a vessel, before unloading lumber in the stream or channel of a harbor having a harbor master, shall obtain from him a permit, designating where such lumber may be rafted.

#### Historical Note

St.1881 c. 8 § 3. P.S.1882 c. 60 § 27. R.L.1902 c. 66 § 22.

#### Cross References

Penalties for violation of section, see section 28 of this chapter.

#### Library References

Navigable Waters ⇐17. C.J.S. Navigable Waters § 20.

### § 23. Order to vessel to brace topsail yards, etc.

A vessel lying in a harbor or at a wharf or pier in a harbor shall, if so directed by the harbor master, cockbill the lower yards, brace the topsail yards fore and aft and rig in the jib-boom.

#### Historical Note

St.1881 c. 8 § 4. P.S.1882 c. 60 § 28. R.L.1902 c. 66 § 23.

#### Cross References

Penalties for violation of section, see section 28 of this chapter.

### Notes of Decisions

In general 2  
Prior law 1

#### 1. Prior law

Act 1847, c. 234, § 2, requiring vessels in Boston harbor to rig in their jib-booms when lying at the end of a wharf, is valid, and binds all persons navigating that harbor. *The Clover* (D.C.1847) Fed.Cas.No.2,908, 1 Low. 342.

#### 2. In general

The Legislature used the term "vessel", in sections 19-23 of this chapter, in its ordinary sense of a ship, boat, or barge, and gave harbor masters no power to control structures, even if they consist in part of floats, and harbor master was without power to remove "marina", consisting of an arrangement of floats in the form of an "L" or a "T", moored in the water and so arranged that boats could be tied up thereto. *Town of Scituate v. Maxwell* (1939) 130 N.E.2d 344, 339 Mass. 436.

## 102 § 24

## REGULATION OF TRADE

### § 24. Removal of vessel lying in harbor

A harbor master may, at the expense of the master or owners thereof, cause the removal of any vessel which lies in his harbor and is not moved when directed by him, and upon the neglect or refusal of such master or owners on demand to pay such expense, he may recover the same from them in contract, to the use of the town where the harbor is situated.

#### Historical Note

St.1881 c. 8 § 5.  
P.S.1882 c. 69 § 29.

St.1884 c. 173.

R.L.1902 c. 66 § 24.

#### Cross References

Penalties for violation of section, see section 28 of this chapter.

#### Library References

Navigable Waters ↔23.

C.J.S. Navigable Waters § 44.

#### Notes of Decisions

##### i. In general

The Legislature used the term "vessel", in sections 19-26 of this chapter, in its ordinary sense of a ship, boat, or barge, and gave harbor masters no power to control structures, even if they consist in part of floats, and harbor mas-

ter was without power to remove "marina", consisting of an arrangement of floats in the form of an "L" or a "T", moored in the water and so arranged that boats could be tied up thereto. *Town of Scituate v. Maxwell* (1959) 159 N.E.2d 344, 339 Mass. 436.

### § 25. Removal of vessel lying at wharf

If the master or other person in charge of a vessel occupying a berth at a wharf or pier fails, after notice from the wharfinger thereof or his agent, to remove his vessel from such berth within such time as the harbor master adjudges reasonable, the harbor master shall cause such vessel to be moved to some other berth or anchored in the stream, and may recover the expense thereof in contract from the master or owners thereof, to the use of the town where the harbor is situated.

#### Historical Note

St.1881 c. 8 § 8.

P.S.1882 c. 60 § 30.

R.L.1902 c. 66 § 25.

#### Cross References

Penalties for violation of section, see section 28 of this chapter.

#### Library References

Wharves ↔13.

C.J.S. Wharves § 9.

**§ 26. Stationing of vessels**

A harbor master may regulate and station all vessels in the streams or channels of his harbor, and may remove such as he determines are not fairly and actually employed in receiving or discharging their cargoes, to make room for such others as require to be more immediately accommodated for such purposes.

**Historical Note**

St.1881 c. 8 § 9.

P.S.1882 c. 69 § 31.

R.L.1902 c. 66 § 20.

**Cross References**

Penalties for violation of section, see section 28 of this chapter.

**§ 27. Report of violations**

Harbor masters shall report to the department of public works any violation of section seventeen or of any law relating to tide water in their respective harbors, and of all shipwrecks in the tide waters of their respective harbors and of any obstructions therein.

**Historical Note**

St.1881 c. 8 § 11.

P.S.1882 c. 69 § 32.

St.1883 c. 260 § 8.

R.L.1902 c. 66 § 27.

St.1916 c. 288 § 1.

St.1919 c. 350 § 111.

**Cross References**

Penalties for violation of section, see section 28 of this chapter.

**Notes of Decisions**

**1. In general**

The Legislature used the term "vessel", in sections 19 to 28 of this chapter, in its ordinary sense of a ship, boat, or barge, and gave harbor masters no power to control structures, even if they consist in part of floats, and harbor

master was without power to remove "marina", consisting of an arrangement of floats in the form of an "L" or a "T", moored in the water and so arranged that boats could be tied up there-to. *Town of Scituate v. Maxwell* (1909) 159 N.E.2d 344, 339 Mass. 436.

**§ 28. Penalties**

Whoever violates any of the provisions of the ten preceding sections or refuses or neglects to obey the lawful orders of a harbor master, or resists him in the execution of his duties, shall be punished by a fine of not more than fifty dollars, and shall be liable in tort to any person suffering damage thereby.

**Historical Note**

St.1881 c. 8 §§ 10, 12.

P.S.1882 c. 69 §§ 33, 34.

St.1884 c. 173.

R.L.1902 c. 66 § 28.

## CHAPTER 103

## PILOTS

## Sec.

1. Pilot districts.
2. Commissioners and deputy commissioners of pilots; appointment.
3. Powers and duties of commissioners.
4. Secretary to commissioners of district one; appointment; duties.
5. Accounts of pilots; payment of pilotage fees to commissioners; compensation of commissioners.
6. Bonds of pilots.
- 7 to 14. Repealed.
15. Discharge of surety on bond; notice.
16. New bonds of pilots.
17. Lien of pilots for fees.
18. Liability of pilots.
19. Exhibition of commission.
20. Suspension or removal of pilots exceeding commission authority.
21. Boarding vessels showing signal; refusal of services.
22. Offer of pilotage service.
23. Taking first pilot offering service; inward bound vessels.
24. Paying of fees by outward vessel to inward pilot.
25. Taking charge of vessels; compulsory pilotage.
26. Vessels liable for one half fees.
27. Fees of vessels taking steam towage.
28. Exemption of vessels from compulsory pilotage.
29. Repealed.
30. Additional fees for detention.
31. Rates of pilotage.
32. Pilots carried to sea; pay for detention.
33. Failure of pilot to anchor vessels with alien passengers.
34. Controversies between pilots.
35. Persons acting as pilots.

*The section headings for Massachusetts General Laws Annotated have been editorially supplied.*

## Library References

Pilots  $\Leftrightarrow$  1 et seq.

C.J.S. Pilots § 1 et seq.

## § 1. Pilot districts

For the purposes of this chapter the shore line of the commonwealth shall be divided into four districts.

District one shall be the harbor of Boston and shall include all places or landings accessible to vessels from the sea within the limits

**PILOTS**

**§ 103 § 2**

of Egg Rock, now or formerly known as Nahant Rock or Nahant Head, on the north, and Point Allerton on the south.

District two shall include all landing places accessible to vessels from the sea situated between the New Hampshire state line on the north and Egg Rock on the south, including rivers, bays and sounds adjacent thereto.

District three shall include all landing places accessible to vessels from the sea situated between Point Allerton on the north and the Rhode Island state line on the west, with all such landing places on the Elizabeth Islands and in the counties of Nantucket and Dukes, including rivers, bays and sounds adjacent thereto, and the Cape Cod canal.

District four shall include all landing places on Mount Hope bay and the Taunton river situated within the commonwealth.

**Historical Note**

St.1857 c. 139 § 7.  
G.S.1860 c. 52 § 28.  
St.1862 c. 176 § 7.

P.S.1882 c. 70 § 7.  
R.L.1902 c. 67 § 6.

G.L.1921 c. 103 § 6.  
St.1923 c. 330 § 1.

**Notes of Decisions**

**In general 1**  
**Refusal of services 2**

**2. Refusal of services**

Pilot who was licensed under Massachusetts law and whose services were refused by master of vessel had lien against vessel under Massachusetts law. *Blair v. M/V Blue Spruce* (D.C.1970) 315 F.Supp. 555, supplemented 329 F.Supp. 178.

A Massachusetts pilot, whose offer of services to a vessel bound for Fall River was refused, was entitled to recover pilotage fees under G.L.1921, c. 103, though the offer was made when the vessel was 24 miles from port, in Narragansett Bay, in waters of Rhode Island. *The Swift Arrow* (D.C.1923) 292 F. 651.

**1. In general**

By R.S.1836, c. 32, the pilotage district, which includes the harbor of Boston, extends from Nahant Rock on the north to the highlands of Marshfield on the south; and the words "port of Boston," or "harbor of Boston," as used in reference to the regulation of pilotage, include all the ports which use the several channels leading to the city of Boston, and the mouths of the rivers which enter into that harbor. *Young v. The Orpheus* (1875) 119 Mass. 185; *Martin v. Hilton* (1845) 50 Mass. 371, 9 Metc. 371.

**§ 2. Commissioners and deputy commissioners of pilots; appointment**

There shall be two commissioners of pilots for district one and one deputy commissioner of pilots for each of the other three districts. On or before December first in any year when their terms of office expire, their successors shall be appointed by the governor, with the advice and consent of the council, for terms of three years.

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A deputy commissioner of pilots for any district shall be a resident of a town having a landing place accessible to vessels from the sea situated within that district. In this chapter, the word "commissioners" shall be held to mean, as to district one, the commissioners of pilots for said district and, as to each other district mentioned in section one, the deputy commissioner of pilots for such district. They shall have experience in maritime and nautical affairs. Appointments of commissioners for district one shall be made upon the recommendation of the trustees of the Boston Marine Society provided such recommendation is made. Appointments of commissioners for districts other than district one may be made upon the recommendation of said trustees. No commissioner for any district shall be such a trustee.

#### Historical Note

St.1753-4 c. 16.	St.1855 c. 421.	R.J.1902 c. 67 § 1.
St.1808 c. 37.	G.S.1860 c. 52 § 1.	G.L.1921 c. 103 § 1.
St.1835 c. 149 §§ 1, 7.	St.1862 c. 170 § 3.	St.1923 c. 390 § 1.
R.S.1836 c. 32 § 15.	P.S.1882 c. 70 § 2.	St.1931 c. 423 § 50.

#### Library References

Pilots  $\Leftarrow$  4.

C.J.S. Pilots § 3.

#### Notes of Decisions

##### I. Prior law

Under P.S.1882, c. 70, § 2, which provided that commissioners of pilots for the harbor of Boston be appointed by the governor, with the advice and consent of the council, "and shall first be recommended by the trustees of the Boston Marine Society" unless they "refuse, decline, or are unable to make the recom-

mendation," where, five days before the expiration of the term of a commissioner, another person was recommended by the trustees, the reappointment of the commissioner previously made by the governor and council was unauthorized. Opinion of the Justices (1891) 31 N.E. 634, 154 Mass. 603.

### § 3. Powers and duties of commissioners

The commissioners, subject to the approval of the trustees of said society, shall formulate rules and regulations for pilotage and establish rates within their respective districts, which, for district one shall be the rates established in section thirty-one, and which for the other three districts shall not exceed the rates established by said section. The commissioners also, in accordance with such rules and regulations, shall grant commissions as pilots for their districts or for special locations therein, to such persons as they consider competent; provided that for district one such persons shall first be approved by said trustees. The commissioners may, upon satisfactory evidence of his misconduct, carelessness or neglect of duty, suspend any such pilot until the next meeting of said trustees and may there-

after continue such suspension until the close of the next stated meeting of said trustees, but no longer for the same offense. If said trustees decide at either of said meetings that the commission of such pilot ought to be revoked, the commissioners may revoke it at any time after said decision is rendered and before it is reversed. The commissioners shall cause the laws and regulations for pilotage within their district to be duly observed and executed, and shall receive, hear and determine complaints by and against pilots for said district.

Historical Note

- |                        |                            |                             |
|------------------------|----------------------------|-----------------------------|
| St.1783 c. 13 §§ 1, 2. | St.1835 c. 149 § 2.        | St.1882 c. 174.             |
| St.1785 c. 29 § 3.     | R.S.1836 c. 32 §§ 5, 16,   | P.S.1882 c. 70 §§ 3, 8-16.  |
| St.1796 c. 85 § 4.     | 25, 26, 29, 33.            | St.1887 c. 298 § 1.         |
| St.1813 c. 164.        | St.1855 c. 421 § 2.        | St.1890 c. 300.             |
| St.1826 c. 88.         | G.S.1860 c. 52 § 2.        | R.L.1902 c. 67 §§ 2, 7-13.  |
| St.1826 c. 104.        | St.1862 c. 176 §§ 4, 8-16. | G.L.1921 c. 103 §§ 2, 7-13. |
| St.1826 c. 114.        | St.1878 c. 30 §§ 1, 2.     | St.1923 c. 390 § 1.         |
| St.1829 c. 2 § 2.      |                            |                             |

Cross References

- Licenses for pilots of steam vessels, see 46 U.S.C.A. § 214.
- Penalty for acting as pilot without commission, see section 35 of this chapter.
- State regulation of pilots, see 46 U.S.C.A. § 211.
- State regulations as to licenses of pilots of steam vessels and pilot charges, see 46 U.S.C.A. § 215.

Library References

- Pilots  $\Rightarrow$  4.
- C.J.S. Pilots § 3.

Notes of Decisions

- In general 1
- Suspension of pilots 2

1. In general

The regulations made by the pilot commissioners pursuant to R.S.1836, c. 32, §§ 15 to 22, were of the same force as if they had been incorporated into it. *The Thebes* (D.C.1844) Fed.Cas.No.10,022, 12 Hunt Mer.Mag. 82.

The pilot commissioners have no authority, under the provisions of R.L.1902, c. 67, § 2, to require that, when in charge of heavy vessels, pilots shall enter and leave the port of Boston by a specific channel, in the absence of regulations to that effect imposed by the Congress of the United States. 2 Op.Atty.Gen. 1903, p. 446.

2. Suspension of pilots

The determination by the pilot commissioners, under St.1862, c. 176, § 4, of the sufficiency of evidence of misconduct of a pilot in Boston Harbor to warrant his suspension from office till the next meeting of the trustees of the Boston Marine Society, is not subject to revision on mandamus. *Lunt v. Davison* (1870) 104 Masa. 498.

If a pilot charged with misconduct in Boston Harbor is notified of his suspension by the board of trustees of the Boston Marine Society, and has opportunity to appear before the board, and it is then decided that his commission should be revoked, and the commissioners accordingly revoke it, the revocation is final. *Id.*

Commissioner's power is limited to suspending in the first instance a pilot



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whom he finds guilty of misconduct, carelessness or neglect of duty and has no power to suspend the pilot except upon such a finding. 7 Op. Atty. Gen. 1924, p. 389.

#### § 4. Secretary to commissioners of district one; appointment; duties

The commissioners of district one shall appoint a secretary who shall keep an office and attend the same during the day to receive complaints by and against the pilots for said district, and who shall keep a fair record of his doings which shall be open at all times for examination.

##### Historical Note

St. 1835 c. 149 § 3.  
R. S. 1836 c. 32 § 19.  
St. 1855 c. 421 § 4.

G. S. 1860 c. 52 § 11.  
St. 1862 c. 176 § 5.  
P. S. 1882 c. 70 § 4.

R. L. 1902 c. 67 § 3.  
G. L. 1921 c. 103 § 3.  
St. 1923 c. 390 § 1.

##### Library References

Pilots C-4.

C. J. S. Pilots § 3.

#### § 5. Accounts of pilots; payment of pilotage fees to commissioners; compensation of commissioners

Once in every three months each pilot shall render to the commissioners for his district an accurate account of all vessels piloted by him and of all money received for pilotage by him or by any person for him, and shall pay to the said commissioners four per cent of the amount thereof, except in district one, wherein each pilot or any person for him, shall pay to said commissioners two per cent of the amount thereof, and if he makes a false return of money received he shall pay to them not more than fifty dollars. The trustees of the Boston Marine Society shall fix the compensation of the commissioners and their allowances for office rent, clerk hire and incidental expenses, which shall be paid out of the amounts so paid to the commissioners, and the surplus, if any, shall be paid to said society.

Amended by St. 1961, c. 215.

##### Historical Note

St. 1835 c. 140 § 6.  
R. S. 1836 c. 32 § 20.  
St. 1855 c. 421 § 5.  
G. S. 1860 c. 52 § 12.

St. 1862 c. 176 § 6.  
St. 1863 c. 75.  
St. 1871 c. 351 § 2.  
P. S. 1882 c. 70 §§ 5, 6.

R. L. 1902 c. 67 §§ 4, 5.  
G. L. 1921 c. 103 §§ 4, 5.  
St. 1923 c. 390 § 1.

#### § 6. Bonds of pilots

No person shall receive a commission or exercise the office of pilot until he has given to the state treasurer a bond with two sureties, approved by the commissioners, or a surety bond of a surety

company authorized to transact business in the commonwealth, in the penal sum of one thousand dollars, conditioned on the faithful performance of the duties of his office and the payment of all damages accruing from his negligence, unskillfulness or unfaithfulness.

**Historical Note**

St.1783 c. 13 § 2.	R.S.1836 c. 32 §§ 6, 17,	St.1862 c. 176, reg. 8.
St.1785 c. 29 § 4.	30, 35.	P.S.1882 c. 70 § 17.
St.1796 c. 85 § 5.	St.1855 c. 421 § 3.	R.L.1902 c. 67 § 14.
St.1826 c. 88 § 4.	G.S.1860 c. 52 § 8.	G.L.1921 c. 103 § 14.
St.1835 c. 149 § 5.	St.1862 c. 176 § 19.	St.1923 c. 390 § 1.

**Library References**

Pilots ⇐5. C.J.S. Pilots §§ 4, 5.

**Notes of Decisions**

**I. In general**

The provision of P.S.1882, c. 70, § 17, that "no person shall receive a commission or exercise the office of pilot until he has given to the Treasurer of the Commonwealth a bond with two sureties in the penal sum of one thousand dollars," requires a bond for that sum with two sureties, each bound for the whole

sum; and a person whose bond recites that the two sureties are bound in the sum of \$500 each, and to whom the commissioners of pilots issue a commission, under which he acts, is a pilot de facto only, and cannot maintain an action against the owner of a vessel for compulsory pilotage fees. *Dolliver v. Parks* (1884) 136 Mass. 499.

**§§ 7 to 14. Repealed by St.1923, c. 390, § 1**

**Historical Note**

The repealed sections were derived from:

St.1783 c. 13 §§ 1, 2, 9.	St.1878 c. 39 §§ 1, 2.
St.1785 c. 29 §§ 3, 4.	P.S.1882 c. 70 §§ 8 to 17.
St.1796 c. 85 § 5.	St.1887 c. 208 § 1.
St.1813 c. 164.	St.1890 c. 300.
St.1826 c. 114.	St.1882 c. 174.
St.1826 c. 88 § 4.	R.L.1902 c. 67 §§ 7 to 14.
R.S.1836 c. 32 §§ 5, 6, 17, 25, 26, 29, 30,	
33, 35.	
St.1855 c. 421 §§ 2, 3.	
G.S.1860 c. 52 §§ 2, 8.	
St.1862 c. 176 §§ 8 to 16, 19.	

The sections related to pilots for Salem, Beverly, Newburyport, Cohasset and for other ports and places, to port wardens and to the suspension and removal and bonds of pilots.

**§ 15. Discharge of surety on bond; notice**

A surety upon the bond of a pilot desiring to be discharged from liability thereon shall give notice thereof to the commissioners, and shall also give written notice to such pilot, which may be served by a constable, and shall, with the return of the constable thereon, be filed with the state treasurer, and at the expiration of thirty days therefrom, the liability of such surety for the subsequent acts of said

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pilot shall cease. If a pilot so notified fails to furnish a new bond before the expiration of said thirty days, his commission shall be void.

#### Historical Note

St.1835 c. 149 § 5.  
R.S.1836 c. 32 § 18.  
St.1844 c. 168.

G.S.1860 c. 52 § 9.  
St.1862 c. 170 § 20.  
P.S.1882 c. 70 § 18.

R.L.1902 c. 67 § 15.  
St.1923 c. 390 § 2.

## § 16. New bonds of pilots

A pilot, in case of the decease, insolvency or bankruptcy of a surety upon his bond, shall give notice thereof to the commissioners. In such a case, or whenever a pilot's bond appears to the commissioners to be insufficient, he shall give a new bond.

#### Historical Note

St.1862 c. 170 § 21.  
St.1862 c. 170 reg. 2.

P.S.1882 c. 70 §§ 19, 20.  
R.L.1902 c. 67 § 16.

St.1923 c. 390 § 3.

## § 17. Lien of pilots for fees

A pilot shall have a lien for his pilotage fees upon the hull and appurtenances of every vessel liable to him therefor under this chapter for sixty days after the completion of his services; but the lien shall not be enforced until approved by the commissioners.

#### Historical Note

St.1798 c. 85 § 12.  
G.S.1860 c. 52 § 7.  
St.1862 c. 176 reg. 10.

St.1871 c. 351 § 3.  
P.S.1882 c. 70 § 21.

R.L.1902 c. 67 § 17.  
St.1923 c. 390 § 4.

#### Notes of Decisions

In general 1  
Refusal of services 2

the master for the same. *Perkins v. O'Mahoney* (1881) 131 Mass. 546.

#### 1. In general

The provision of G.S.1860, c. 52, § 7, and of St.1862, c. 170, that a pilot shall have a lien for his fees upon a vessel liable to him therefor, did not take away his right of action against

#### 2. Refusal of services

Pilot who was licensed under Massachusetts law and whose services were refused by master of vessel had lien against vessel under Massachusetts law. *Blair v. M/V Blue Spruce* (D.C.1870) 315 F.Supp. 555, supplemented 320 F.Supp. 178.

## § 18. Liability of pilots

A pilot shall be liable for all damages accruing from his negligence, unskilfulness or unfaithfulness.

Historical Note

St.1783 c. 13 § 8.  
St.1798 c. 85 § 10.  
R.S.1836 c. 32 § 11.

St.1855 c. 421 § 3.  
G.S.1860 c. 52 § 8.  
St.1862 c. 176 reg. 8.

P.S.1882 c. 70 § 22.  
R.L.1902 c. 67 § 13.

Library References

Pilots ⇐10.

C.J.S. Pilots § 14.

Notes of Decisions

In general 1  
Employer's liability 2  
Negligence 3

1. In general

A local pilot is charged by this section and section 35 of this chapter for all damages due to negligence and unskillfulness, and unlicensed persons acting as pilots are criminally liable. *Essex County Elec. Co. v. The Godafoss* (D.C.1953) 129 F.Supp. 657.

Under this section, skillfulness required of a pilot requires a high degree of knowledge predicated on special training and inquiry, and not casual competence. *Id.*

2. Employer's liability

A licensed pilot of a canal company, which furnished such pilots to vessels passing through the canal under its charter authority to assist vessels in their approach to and from the canal, is acting within the scope of his employment by the canal company while piloting a vessel through the dredged approach to the canal in Buzzard's Bay, so as to render the canal company liable for his negligence. *Boston, Cape Cod & New York Canal Co. v. C. W. Chadwick & Co.* (C.C.A.1920) 266 F. 775, certiorari denied 41 S.Ct. 216, 254 U.S. 654, 65 L.Ed. 450.

Where a canal pilot furnished by the canal company assumed to pilot a vessel through the dredged approach to the canal, the canal company is liable for his negligence, regardless of whether the vessel was required to take the pilot for its passage through such approach. *Id.*

Where company owning the Cape Cod Canal notified the shipping trade that

it would not furnish pilots and tugs as it had in the past, such company is not responsible for any negligence on the part of a pilot and tug employed by a steamer to assist it in navigating the canal, even though it was required by the canal company to take a pilot. *Id.*

Evidence did not warrant submission to trier of fact of issue of whether stranding of barge was due to negligence or unworkmanlike performance by owner of the towing vessel. *Joseph Amara & Sons, Inc. v. Providence Steamboat Co.* (1971) 274 N.E.2d 344.

Where trial court found that owner of towing vessel was neither negligent nor unworkmanlike in performance of its tow of plaintiff's barge, plaintiff was not prejudiced by denial of his request for ruling that plaintiff could recover on breach of implied warranty to render workmanlike service, despite possible negligent failure on his part to detect flaw or leak in the barge. *Id.*

Barge owner had burden to prove that owner of towing vessel was negligent or that vessel owner performed tow in unworkmanlike manner. *Id.*

Evidence supported trial court's finding that owner of towing vessel was not guilty of negligence nor guilty of breach of implied obligation to tow properly and safely and to render workmanlike services during the tow. *Id.*

A pilot, while he has charge of a vessel, is so far the servant of the owner as to make the latter liable for injuries done to third persons by his default or negligence. *Yates v. Brown* (1820) 25 Mass. 23, 8 Pick. 23.

3. Negligence

Where pilot of ship that caught and broke cable with anchor, had made no

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inquiry to determine if there were any underwater cables in harbor not marked on chart and location of cable was on record with district engineers, pilot was negligent. *Essex County Elec. Co. v. The Godafoss* (D.C.1935) 129 F.Supp. 657.

Pilot of ship which caught and broke underwater electric cable with anchor was not guilty of such gross negligence in not obtaining knowledge of location of cable so as to obviate divided damages rule in electric company's action to recover damages for cable, location of which electric company had negligently failed to mark. *Id.*

Stranding of a foreign steamship, entering New Bedford harbor for the first time, was due to negligence of the pilot in charge, who, though uncertain as

to the channel, kept on at full speed until in the shoals, when he could have determined his proper course from shore ranges. *Transportes Maritimos de Estados v. Rotch* (D.C.1923) 289 F. 115.

Doctrine of *res ipsa loquitur* would permit trier of fact to draw inference that defendant was negligent in tow of plaintiff's barge or that it performed tow in unworkmanlike manner, but doctrine would not require trier of fact to so find. *Joseph Amara & Sons, Inc. v. Providence Steamboat Co.* (1971) 274 N. E.2d 344.

An action on the case will lie in favor of any person injured by the negligence of a pilot. *Heridia v. Ayres* (1832) 29 Mass. 334, 12 Pick. 334.

## § 19. Exhibition of commission

A pilot shall, if so required, exhibit his commission to the master of any vessel of which he may take charge.

#### Historical Note

St.1783 c. 13 § 2.  
St.1796 c. 85 § 5.

St.1862 c. 176 reg. 6.  
P.S.1882 c. 70 § 23.

R.L.1902 c. 67 § 19.

#### Library References

Pilots ⇐5.

C.J.S. Pilots §§ 4, 5.

#### Notes of Decisions

##### 1. In general

In the case of *Com. v. Ricketson* (1843) 46 Mass. 412, 5 Metc. 412, the court said: "The next objection is, that the regular pilot, who offered his services, should have proved affirmatively, that he had his warrant with him. The provision of Rev.St. c. 32, § 7, which authorizes the regular pilot to take charge of every inward bound vessel, of a certain description, adds, 'the said pilot first showing his warrant to the

master, if required.' The first act, imposing on him the duty of exhibiting his warrant, was to be done by the master in requiring it; and until that was done, he was in no default in not showing it; and the master had no right, on that pretence, to reject his services and employ an authorized person. Proof that he had it with him, therefore, was not necessary, to prove the act of the defendant unlawful, and charge him with the penalty."

## § 20. Suspension or removal of pilots exceeding commission authority

A pilot taking charge of a vessel drawing more water than his commission authorizes shall be suspended or removed.

#### Historical Note

St.1862 c. 176 reg. 7.

P.S.1882 c. 70 § 24.

R.L.1902 c. 67 § 20.

## Library References

Pilots  $\Leftrightarrow$  5.

C.J.S. Pilots §§ 4, 5.

**§ 21. Boarding vessels showing signal; refusal of services**

Pilots shall first board such vessels, irrespective of size, as may have signals set for a pilot. If there are no such signals to be seen, pilots shall offer their services to the first vessel which they can board; and if a vessel liable to pilotage refuses to take a pilot, a pilot offering his services shall inform the officers of such vessel that she will be held to pay the regular fees for pilotage, whether such services are accepted or not.

## Historical Note

St.1862 c. 170 reg. 5.

P.S.1862 c. 70 § 25.

R.L.1902 c. 67 § 21.

## Library References

Pilots  $\Leftrightarrow$  8.

C.J.S. Pilots § 9.

## Notes of Decisions

In general 1  
Refusal of services 2

## 1. In general

The commissioners of pilots cannot, under St.1862, c. 176, combine the pilot boats and earnings so that all pilots will receive the same amount. 2 Op. Atty.Gen.1899, p. 47.

## 2. Refusal of services

Pilot who was licensed under Massachusetts law and whose services were refused by master of vessel had lien against vessel under Massachusetts law. Blair v. M/V Blue Spruce (D.C.1870) 315 F.Supp. 555, supplemented 329 F.Supp. 178.

Under the pilotage regulation annexed to St.1862, c. 176, that in case any vessel liable to pilotage should refuse to take the first pilot offering, etc., "it shall be the duty of the pilot to inform said vessel that she will be holden to pay the regular fees for pilotage, whether his services are accepted or not," the giving of the information by the pilot to the refusing vessel is in every case a condition precedent to his right to hold her liable for fees and what her master has learned thereon from other sources is immaterial. Chandler v. Doody (1869) 101 Mass. 237.

**§ 22. Offer of pilotage service**

A pilot boat, being on its station and displaying the signals required by law, shall constitute an offer of pilotage service, and shall constitute on the part of the pilot such compliance with sections twenty-one and twenty-three as is necessary to entitle him to the regular fees for pilotage from vessels otherwise liable therefor.

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### Historical Note

St.1018 c. 56 § 2.

### Library References

Pilots ⇐8.

C.J.S. Pilots § 8.

### Notes of Decisions

#### I. In general

Pilot who was licensed under Massachusetts law and whose services were refused by master of vessel had lien against vessel under Massachusetts law.

Blair v. M/V Blue Spruce (D.C.1970) 315 F.Supp. 555, supplemented 329 F.Supp. 178.

## § 23. Taking first pilot offering service; inward bound vessels

Every inward bound vessel shall, except as provided in sections twenty-five and twenty-eight, receive the first pilot holding a commission for her port of destination offering his services, and such vessels shall, except as provided in sections twenty-six and twenty-seven, be held to pay such pilot the regular fees for pilotage, whether his services are accepted or not.

### Historical Note

St.1783 c. 18 §§ 2, 6, 10.

St.1796 c. 85 § 8.

St.1819 c. 45.

R.S.1836 c. 32 §§ 7, 12.

St.1841 c. 45 § 1.

St.1847 c. 279 § 4.

G.S.1860 c. 52 § 6.

St.1862 c. 176 reg. 4.

P.S.1882 c. 70 § 26.

R.L.1902 c. 67 § 22.

### Library References

Pilots ⇐7, 10.

C.J.S. Pilots §§ 7, 8 et seq.

### Notes of Decisions

#### Offer of services 1

#### Refusal of services 2

#### I. Offer of services

It was no defense to an action for compulsory pilotage fees, under St.1862, c. 176, that the services of the pilot were offered on Sunday. *Perkins v. O'Mahoney* (1881) 131 Mass. 546.

A pilot offering his services to an inward bound vessel, though boarded from a tug, is entitled to pilotage fees under St.1862, c. 176, if he has received the consent of the master of the station boat, although such boat is not then in sight. *Josselyn v. Gleason* (1869) 103 Mass. 237.

A pilot who offers his services to a vessel bound into a port where pilotage is not compulsory has no claim for services when they are declined in favor of a person forbidden under penalty to act as pilot, or when another authorized pilot subsequently offering himself is secured. 1 Op.Atty.Gen.1894, p. 180.

#### 2. Refusal of services

Vessels are not positively bound, by the laws of Massachusetts, to employ a pilot, whether going in or coming out of a harbor, although if, when inward bound, a pilot seasonably offers his services and is ready to enter on his duty, they must pay pilotage, even if his services are refused. *The Marcellus* (C.C. 1860) Fed.Cas.No.2,347, 1 Cliff. 481, af-

firm 68 U.S. 414, 1 Black. 414, 17 L.Ed. 217.

Pilot who was licensed under Massachusetts law and whose services were refused by master of vessel had lien against vessel under Massachusetts law. *Blair v. M/V Blue Spruce* (D.C.1870) 315 F.Supp. 555, supplemented 329 F.Supp. 178.

Under Act 1862, c. 176, § 24, regulation 5, allowing compulsory pilotage fees from signaling vessels, pilots' services may be refused without liability, where they were not offered before the vessel had passed within the harbor lines of

Salem and Beverly, and had taken down her signal. *Perkins v. Buckley* (1876) 120 Mass. 3.

It is the duty of the pilots for the harbor of Boston to take charge of a vessel which is subject to the pilotage laws, as well when such vessel is bound to Weymouth, Dorchester, Cambridge, or Charlestown, as when bound to Boston and that they are entitled to their fees when they seasonably offer their services to such vessels and their offer is refused. *Martin v. Hilton* (1845) 50 Mass. 371, 0 Metc. 371.

**§ 24. Paying of fees by outward vessel to inward pilot**

Every outward bound vessel, except vessels under three hundred and fifty tons register bound out of the port of Boston and whaling vessels outward bound from the port of New Bedford, which is liable to pilotage if inward bound, shall, whether the services of a pilot are accepted or not, be held to pay the regular fees to the pilot who brought her into port or to some other pilot of the same boat, if he offers his services before she gets under way; or if such pilot does not so offer, or if such vessel was not piloted into port, then to the pilot who first offers his services.

**Historical Note**

St.1862 c. 176 § 17.  
St.1862 c. 176 reg. 4.

P.S.1882 c. 70 § 27.  
St.1884 c. 213.

R.L.1902 c. 67 § 23.  
St.1915 c. 17.

**Library References**

Pilots ⇔ 10.

C.J.S. Pilots § 8 et seq.

**Notes of Decisions**

**1. Prior law**

Under St.1862, c. 176, § 17, an order of the governor and council, providing that an outward-bound vessel, liable to pilotage if inward bound, shall be held to

pay pilotage to the pilot offering his services, whether such services are accepted or not, was valid. *Martin v. Witherspoon* (1883) 133 Mass. 173.

**§ 25. Taking charge of vessels; compulsory pilotage**

Every pilot shall take charge, within the limits of his commission, of any vessels, not exempt from compulsory pilotage by section twenty-eight, and of vessels not bound from one port to another within the commonwealth, unless they are in the completion of a voyage from a port out of the commonwealth.



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### Historical Note

St.1783 c. 13 §§ 2, 6, 10.  
R.S.1836 c. 32 §§ 7, 12.  
St.1841 c. 45 § 1.

St.1847 c. 279 § 1.  
G.S.1860 c. 52 § 5.  
St.1862 c. 178 reg. 17.

P.S.1882 c. 70 § 29.  
R.L.1902 c. 67 § 25.  
U.S.Rev.Sts. §§ 4401, 4444.

### Library References

Pilots ⇨7.

C.J.S. Pilots § 7.

### Notes of Decisions

#### 1. Federal law

This section and section 27 of this chapter, so far as they relate to coastwise steam vessels, are inconsistent with and annulled by the applicable United States statutes and hence a Boston pilot

must in addition to his state commission carry a federal license in order legally to pilot coastwise steam vessels not sailing under register. 4 Op.Atty.Gen. 1915, p. 385.

## § 26. Vessels liable for one half fees

Vessels of not more than two hundred tons burden, or vessels under three hundred and fifty tons register bound into the port of Boston, which decline the services of a pilot, shall, if otherwise liable under this chapter to the payment of pilotage fees, be liable to one half of the regular fees; but if they request and receive such services, they shall pay the regular rates.

### Historical Note

St.1857 c. 221 § 1.  
G.S.1860 c. 52 § 15.

St.1862 c. 178 reg. 18.  
P.S.1882 c. 70 § 30.

St.1884 c. 252 § 2.  
R.L.1902 c. 67 § 26.

### Library References

Pilots ⇨10 et seq.

C.J.S. Pilots § 8 et seq.

### Notes of Decisions

In general 1  
Admiralty jurisdiction 3  
Refusal of services 2

refused by master of vessel had lien against vessel under Massachusetts law. Blair v. M/V Blue Spruce (D.C.1970) 315 F.Supp. 555, supplemented 329 F. Supp. 178.

#### 1. In general

The rule that a vessel declining a pilot's services must pay half pilotage does not apply where the vessel is so disabled that she is in need of salvage service to bring her in. Flanders v. Tripp (D.C.1871) Fed.Cas.No.4,854, 2 Low. 15.

#### 3. Admiralty Jurisdiction

Admiralty has jurisdiction of a claim under a state law for half pilotage on a tender and refusal of services. The America (D.C.1837) Fed.Cas.No.289, 1 Low. 176, 2 Am.Law Rep. 458.

A claim to half fees given by a state law to a pilot for a tender and refusal of services creates no lien upon the vessel enforceable in rem in admiralty. The Robert J. Mercer (D.C.1855) Fed. Cas.No.11,891, 1 Spr. 284.

#### 2. Refusal of services

Pilot who was licensed under Massachusetts law and whose services were

Supreme court in determining vessel tonnage for purposes of St.1960, c. 701, § 5, was not bound by federal law, under which tonnage of particular vessel had been certified by federal authorities for federal purposes. *Woods Hole, Martha's Vineyard and Nantucket S. S. Authority v. Baxter* (1965) 208 N.E.2d 218, 349 Mass. 288.

Though Supreme Judicial Court was not bound by federal law under which tonnage of vessel was certified, St.1960, c. 701, § 5, was intended to adopt, as Massachusetts law, federal method of calculation and to make conclusive the tonnage figures shown on federal certificate. *Id.*

### § 27. Fees of vessels taking steam towage

If steam towage is taken by the desire of the master, the vessel shall pay full pilotage fees; but if taken by direction of the pilot in charge, such vessel shall pay to the pilot seventy-five per cent of the regular fees.

#### Historical Note

St.1857 c. 221 § 3.  
G.S.1860 c. 52 § 17.

St.1862 c. 176 reg. 18.  
P.S.1882 c. 70 § 31.

R.L.1902 c. 67 § 27.

#### Library References

Pilots ⇨ 10 et seq.

C.J.S. Pilots § 8 et seq.

#### Notes of Decisions

##### 1. In general

This section and section 25 of this chapter, so far as they relate to coastwise steam vessels, are inconsistent with and annulled by the applicable United States statutes and hence a Boston pilot

must in addition to his state commission carry a federal license in order legally to pilot coastwise steam vessels not sailing under register. 4 Op.Atty. Gen.1915, p. 365.

### § 28. Exemption of vessels from compulsory pilotage

All coastwise steam vessels not sailing under register, national vessels, vessels bound in or out of any port other than their ports of departure and destination, vessels regularly employed in the coasting trade, fishing vessels other than whalers, vessels of less than seven feet draught of water, vessels otherwise liable to pilotage bound into the harbor of Boston and arriving within a line drawn from Harding's Ledge to the Graves and thence to Nahant Head before the services of a pilot have been offered, and vessels under three hundred and fifty tons register bound out of the port of Boston, shall be exempt from compulsory payment of pilotage, but if any such vessel requests the aid of a pilot, he shall, when permitted by the laws of the United States, serve the same in like manner as vessels not exempt, and shall be entitled to the regular compensation therefor, except as provided in the preceding section.

3. Prior law

Under St.1829, c. 2, which exempted American vessels engaged in the plaster trade between Boston and the province of Nova Scotia from the penalty imposed for not taking a pilot and the federal treaty with Great Britain, which provided that British vessels coming from British colonial possessions, and their cargoes, shall be subject to no other duty of tonnage or impost or charge of any description whatever then would be levied on vessels of the United States arriving from the British possessions, British vessels engaged in the plaster trade between Nova Scotia and Boston were also exempt from the penalty. *Hunt v. Card* (1833) 31 Mass. 135, 14 Pick. 135.

the depot of the charterer in one port to his depot in another port, for sale at the latter port, and which has been engaged for several years in carrying coal for him and others between various ports along the coast, was "regularly employed in the coasting trade," within P.S.1882, c. 70, § 32, and exempt from compulsory pilotage. *Chase v. Philadelphia & R. R. Co.* (1833) 135 Mass. 347.

The words "regularly employed," in St.1873, c. 284, § 1, exempting a vessel "regularly employed in the coasting trade" from compulsory pilotage, included the case of a vessel actually and legally so employed at the time the services of a pilot were tendered, even though the vessel was sailing under a register, and was not continuously so employed. *Wilson v. Gray* (1879) 127 Mass. 96.

4. "Regularly employed"

A vessel sailing under a coasting license, engaged in transporting coal from

§ 29. Repealed by St.1923, c. 390, § 5

Historical Note

The repealed section was derived from:  
St.1862, c. 176.  
P.S.1882, c. 70, § 34.  
St.1887, c. 204.

St.1887, c. 296, § 2.  
R.L.1902, c. 67, § 30.

It related to the period for winter and summer rates for pilotage.

§ 30. Additional fees for detention

If a vessel is anchored for twelve hours or more under any regulation relative to quarantine or to alien passengers, the pilot in charge, upon piloting such vessel to her port of destination, shall be entitled to an addition of twenty-five per cent to the regular fees.

Historical Note

St.1862 c. 176 reg. 13.

P.S.1882 c. 70 § 35.

R.L.1902 c. 67 § 31.

Library References

Pilots 6-10 et seq.

C.J.S. Pilots § 8 et seq.

§ 31. Rates of pilotage

Rates of pilotage outward and inward for the port of Boston, calculated per foot of draught shall be as follows:—

For vessels 3500 Gross Tons or under—\$23.50 per Draft Foot.

For vessels over 3500 to 7000 Gross Tons—\$24.60 per Draft Foot.

For vessels over 7000 to 15000 Gross Tons—\$26.90 per Draft Foot.

For vessels over 15000 to 25000 Gross Tons—\$28.00 per Draft Foot.

- For vessels over 25000 to 35000 Gross Tons—\$29.10 per Draft Foot.
- For vessels over 35000 to 45000 Gross Tons—\$30.10 per Draft Foot.
- For vessels over 45000 Gross Tons—\$31.40 per Draft Foot.

*Text of first paragraph effective July 1, 1983*

Rates of pilotage outward and inward for the port of Boston, calculated per foot of draught shall be as follows:—

- For vessels 3500 Gross Tons or under—\$25.70 per Draft Foot.
- For vessels over 3500 to 7000 Gross Tons—\$26.90 per Draft Foot.
- For vessels over 7000 to 15000 Gross Tons—\$29.30 per Draft Foot.
- For vessels over 15000 to 25000 Gross Tons—\$30.90 per Draft Foot.
- For vessels over 25000 to 35000 Gross Tons—\$31.70 per Draft Foot.
- For vessels over 35000 to 45000 Gross Tons—\$32.50 per Draft Foot.
- For vessels over 45000 Gross Tons—\$34.30 per Draft Foot.

The following charges shall be made for shifting vessels:—

1. Between docks in Boston, fifty dollars;
2. Between any dock in Boston and anchorage number one, fifty dollars;
3. Between any dock in Boston and anchorage number two, one-half pilotage;
4. Any inbound vessel that anchors in anchorage number two in excess of eighteen hours and thereafter shifts to Boston, one-half pilotage;
5. Between Boston and Quincy, full pilotage;
6. Between anchorage number two and Quincy, full pilotage;
7. Between sea and Quincy, full pilotage; if a vessel proceeds to anchorage number two at the request of the master or agent, before moving to Quincy, an additional full pilotage;
8. Any inbound vessel that anchors in anchorage number one, and a pilot is requested to move the vessel to a dock, fifty dollars;

Other charges shall be:—

1. Any inbound vessel subject to pilotage that anchors in anchorage number two, or in the area outside Deer Island light and inside the demarcation line for Federal Inland Waters for more than six hours, shall pay fifty dollars, plus ten dollars for each additional hour, or portion thereof, with a maximum anchoring fee of one hundred dollars;
2. For detention of a pilot aboard a vessel, there shall be a two hour free period, followed by a twenty-five dollar charge for the third hour, or any portion thereof; for each additional hour or portion thereof, there shall be a charge of ten dollars, up to a maximum of seventy-five dollars. Detention on a vessel at the dock shall begin at the ordered sailing time;
3. The fee for anchoring any outbound vessel shall be based on detention except that if a vessel is anchored for more than eighteen hours, said vessel shall be charged at the regular shifting rate in lieu of detention, plus any additional regular charges. Detention time shall be based upon the period the ship is at anchor;
4. A pilot shall be considered to be ordered to a vessel, if not notified one hour before the sailing time of said vessel from Boston and two hours before the sailing time from Quincy or anchorage number two;
5. No charge shall be made for any vessel detained because of fog or state of weather;
6. When a pilot swings a vessel during adjustment of compass or calibration of electronic equipment, the vessel shall pay a charge of fifty dollars for each operation;
7. If a pilot is carried away aboard a ship, the vessel shall pay a charge of fifty dollars per day, plus the expenses of return transportation to Boston;
8. For notifying a vessel of her diversion orders, one hundred dollars may be charged in addition to any regular charges;
9. When a pilot is ordered and dispatched for an arriving vessel and his services are not employed, the vessel shall pay a charge of one hundred dollars;
10. All inbound vessels shall notify the pilot office eight hours before arrival time if that time varies more than two hours from their latest-estimated arrival report;
11. When a pilot is ordered for a vessel and said vessel does not sail or his services are not required, the vessel shall pay a cancellation charge of twenty-five dollars.

## PILOTS

103 § 33

fifteen hundred tons; seven dollars for vessels over fifteen hundred tons and not over two thousand tons; seven dollars and fifty cents for vessels over two thousand tons. The tonnage herein specified shall mean the net registered tonnage.

"Vessels inward bound from the sea or outward bound from the port, which are detained over twenty-four hours in the vicinity of President Roads, shall pay, in addition to the rates herein

specified, fifty per cent thereof, unless such vessel is so detained by fog or stress of weather.

"For shifting a vessel from one dock to another in the upper harbor, the pilotage rate shall be twenty-five dollars."

St.1070, c. 176, § 1, approved April 7, 1870, and by section 2 made effective upon its passage, increased rates of pilotage for port of Boston from \$9.25 to \$12.

### Cross References

Discrimination in pilotage rates prohibited, see 46 U.S.C.A. § 213.

### Library References

Pilots ⇨10 et seq.

C.J.S. Pilots § 8 et seq.

### Notes of Decisions

#### I. In general

Supreme court in determining vessel tonnage for purposes of St.1960, c. 701, § 5, was not bound by federal law, under which tonnage of particular vessel had been certified by federal authorities for federal purposes. *Woods Hole, Martha's Vineyard and Nantucket S. S. Authority v. Baxter* (1965) 208 N.E.2d 218, 340 Mass. 288.

Though Supreme Judicial Court was not bound by federal law under which tonnage of vessel was certified, St.1960, c. 701, § 5, was intended to adopt, as Massachusetts law, federal method of calculation and to make conclusive the tonnage figures shown on federal certificate. *Id.*

## § 32. Pilots carried to sea; pay for detention

If a pilot, without fault or negligence of his own or of his associates, is unable to leave the vessel under his charge and is carried to sea, he shall be entitled to five dollars for each day while necessarily detained from home.

### Historical Note

St.1862 c. 176 reg. 14  
P.S.1882 c. 70 § 30.

R.L.1902 c. 67 § 32.

St.1918 c. 56 § 3.

### Library References

Pilots ⇨10 et seq.

C.J.S. Pilots § 8 et seq.

## § 33. Failure of pilot to anchor vessels with alien passengers

A pilot failing to anchor a vessel carrying alien passengers or a vessel subject to quarantine at the place assigned by the proper authorities shall be suspended or removed.

**103 § 33****REGULATION OF TRADE****Historical Note**

St.1862 c. 176 reg. 11.

P.S.1882 c. 70 § 37.

R.L.1902 c. 67 § 33.

**Library References**

Pilots §=5.

C.J.S. Pilots §§ 4, 5.

**§ 34. Controversies between pilots**

All controversies between pilots relative to their mutual rights, privileges and duties shall be referred to and settled by three master pilots, to be chosen by the parties for the purpose.

**Historical Note**

St.1862 c. 176 reg. 12.

P.S.1882 c. 70 § 38.

R.L.1902 c. 67 § 34.

**§ 35. Persons acting as pilots**

No person unless he holds a commission as a pilot shall, if a commissioned pilot offers his services or can be obtained within a reasonable time, assume or continue to act as pilot in the charge or conduct of any vessel within the waters of this commonwealth, unless he is actually employed on such vessel for the voyage. Whoever violates the provisions of this section shall be punished by a fine of not less than twenty nor more than fifty dollars.

**Historical Note**

St.1796 c. 85 §§ 2, 3.

St.1857 c. 221 § 4.

P.S.1882 c. 70 § 39.

St.1829 c. 2 § 1.

G.S.1860 c. 52 § 10.

St.1884 c. 252 § 6.

R.S.1836 c. 32 § 23.

St.1862 c. 176 reg. 1.

R.L.1902 c. 67 § 33.

St.1855 c. 421 § 8.

**Notes of Decisions****1. In general**

A local pilot is charged by this section and section 18 of this chapter for all damages due to negligence and unskillfulness, and unlicensed persons acting as pilots are criminally liable. *Essex County Elec. Co. v. The Godafoss* (D.C. 1855) 129 F.Supp. 657.

Where a Boston pilot seasonably offered his services to the master of a vessel bound into Boston Harbor, and the master did not accept the services, but employed a person who was not authorized as a pilot for said harbor to

pilot his vessel in, the master thereby incurred no penalty; but such person, by undertaking to pilot the vessel in, incurred the penalty imposed by R.S. 1836, c. 32, § 23. *Com. v. Ricketson* (1843) 46 Mass. 412, 5 Metc. 412.

The penalty imposed by St.1796, c. 85, § 3, which provided for recovery of a penalty against a pilot undertaking to pilot a vessel outside of his own particular branch, did not extend to one who piloted a public vessel of war for the United States. *Ayers v. Knox* (1811) 7 Mass. 306.

## 527 CMR: BOARD OF FIRE PREVENTION REGULATIONS

## 527 CMR 10.00: PREVENTION OF FIRE IN BUILDINGS AND IN OR ON SHIPS

## Section

- 10.01 Definitions
- 10.02 Fire Extinguishers
- 10.03 General Provisions
- 10.04 Containers
- 10.05 Safety Cans
- 10.06 Storage and Fumigation
- 10.07 Smoking
- 10.08 Hospitals
- 10.09 Schools
- 10.10 Theatres
- 10.11 General Use Buildings
- 10.12 Miscellaneous Provisions

10.01: Definitions

- (1) Approved. Approved by the State Fire Marshal.
- (2) Hospital. A building used as a hospital or sanatorium, a convalescent or nursing home, or an infirmary, as such terms are defined in G. L. (Ter. Ed. as amended), c. 111, s. 71, and licensed as such.
- (3) School. Any building or premises in which a regular course of public or private instruction is afforded to not less than ten (10) pupils at one time, or to kindergartens, preprimary or nursery schools where ten or more children are enrolled for instruction or care.
- (4) Low Hazard Occupancies. Low hazard occupancies shall be classified as those having contents of such low combustibility that no self propagating fire therein can occur and that consequently the only probable danger will be from panic, fumes or smoke, or fire from some external source.
- (5) Ordinary Hazard Occupancies. Ordinary hazard occupancies shall be classified as those having contents which are liable to burn with moderate rapidity and to give off a considerable volume of smoke, but from which neither poisonous fumes nor explosions are to be feared in case of fire.
- (6) High Hazard Occupancies. High hazard occupancies shall be classified as those having contents which are liable to burn with extreme rapidity or from which poisonous fumes or explosions are to be feared in the event of fire.
- (7) Refuse Room. Any room or area utilized for the storage of flammable refuse in any building used for habitation shall be equipped with a storage facility as follows:
  - (a) The refuse room in a building used for the storage of the equivalent of six (6) or less fifty gallon containers may be considered as any segregated part of the cellar or first floor of such building provided that such area shall be within twenty-five (25) feet of an exit door and shall be kept orderly at all times.
  - (b) Refuse room in any building used for the storage of the equivalent of between seven (7) and fifteen (15) fifty gallon containers shall be an enclosed area in cellar or first floor of such building, such enclosure to be of one hour fire resistant construction and to be equipped with a self-closing, self-latching one hour fire resisting door.
  - (c) The refuse room in any building used for the storage of refuse in quantities in excess of the equivalent of more than fifteen (15) fifty gallon containers shall be of sufficient size to contain the volume of rubbish kept in the building at any time and shall be a separate enclosed room of one hour fire resistant construction.

## 10.01: continued

Such room shall be located on the first floor or basement of the building and shall be equipped with a self-closing, self-latching door. Such room shall be equipped with a system of automatic sprinklers and sprinkler alarm or heat activating devices and alarm to be in sufficient number to give adequate protection to the room as directed by the head of the fire department.

10.02: Fire Extinguishers

(1) Any building or other premises, which, due to its location, construction, character or occupancy, or the manner of conducting business therein or thereupon is such that it is considered necessary by the head of the fire department, shall be provided with portable fire extinguishers or other fire extinguishing devices by the occupant thereof who shall maintain them in proper condition at all times so that they shall be available for immediate use. The head of the fire department shall prescribe the number and situation of such devices.

(a) Marking of locations. Extinguishers and first aid standpipes shall not be obstructed or obscured from view. In any given area and in certain locations where visual obstructions cannot be completely avoided or where such extinguishers or standpipes are located in recessed cabinets, a means shall be provided to indicate the location of the devices conspicuously. Such means shall include a sign with the words "FIRE EXTINGUISHER" or "FIRE HOSE" on a distinctive red and white sign at least seven (7) inches by ten (10) inches or not less than seventy (70) square inches, which sign shall also include an arrow pointing to such devices. The lettering required by this rule shall be in proportion to the dimensions of the sign and readable to a person with normal vision from a distance of fifty (50) feet. Any extinguisher shall be so mounted that no portion of it shall exceed sixty (60) inches above floor level.

(b) Effective as of September 1, 1975, every school chemistry laboratory classroom, or any room used for similar purposes wherein flammable liquids are handled and open-flame devices are used by students, shall be equipped with one or more permanently installed cold water spray heads or deluge showers. Each permanent spray head shall be connected to a hose of sufficient length such that it will reach five (5) feet beyond the point of the experiment being conducted. The permanent position of any spray head on the coiled hose shall be within twenty (20) feet of the experiment, and the hose shall be long enough to encompass the experiment area even though it may go around fixed impediments such as laboratory benches. The other end of the hose shall be connected to a separate cold water supply so arranged that the water may be turned on by a spring or lever control valve at the head without turning on any other valve. The spray head shall be of the approved type and shall be installed in accordance with Article 17 of the State Building Code (State Plumbing Code) requirements. If permanent deluge showers are provided in lieu of spray heads, at least one such deluge shower shall be located within fifty (50) feet of the experiment being conducted and shall be capable of discharging a continuous spray at the rate of thirty (30) gallons per minute.

Each laboratory referred to above shall also be equipped with at least one fire blanket of approved type to be located within thirty (30) feet of the experiment area. The location of the permanent spray heads or deluge showers and the fire blankets shall be clearly indicated by red and white signs of at least seventy (70) square inches in area bearing the words "EMERGENCY WATER SPRAY" and "FIRE BLANKET." Every student shall be advised of the location and proper use of the spray heads or deluge showers and fire blankets by the teacher, instructor, or person in charge of the class before the first experiment is conducted. Each student shall also be instructed in the proper procedure for the extinguishment of clothing fires at least twice during each course as directed by



## 10.02: continued

the head of the fire department. The water spray and fire blanket units required by this regulation shall be installed and in operating condition prior to the commencement of any class conducting laboratory experiments utilizing flammable liquids and open-flame devices on or after the effective date.

(2) Each extinguisher or device shall be inspected by weighing, recharging, etc., at least once each year or immediately after its use by a responsible person who shall note such inspection by his initials and the date.

10.03: General Provisions

(1) Any obstacle which may interfere with the means of egress or escape from any building or other premises, or with the access to any part of said building or premises by the fire department, in case of fire, shall be removed from aisles, floors, halls, stairways and fire escapes. Doors and windows designated as exits shall be kept clear at all times.

(2) Such aisles, floors, halls, stairways, fire escapes, doors and windows shall be kept in good repair and ready for use, and shall be kept properly lighted as required by lawful authority.

(3) Any vessel moored to or anchored near any dock or pier, which vessel is in danger of catching fire, or is by reason of its condition or the nature of its cargo a menace to shipping or other property, shall be removed.

(4) Chimney flues smoke or vent pipes connected to a permanent heating device or incinerator shall be inspected, and cleaned when required, by the owner or his designate at least once each year. Such person shall inspect, maintain and clean, when necessary, each incinerator at least once each six months.

(5) Suitable spark arresters shall be installed and maintained in incinerators and in chimneys connected with permanent wood-burning furnaces.

(6) On complaint of a violation of the above two rules, the head of the fire department shall investigate and report same to the proper authorities.

(7) Combustible construction within five (5) feet of and directly over a boiler or furnace shall be protected with non-combustible material of at least one (1) hour fire-resistive rating. Such overhead protection shall extend four (4) feet in all directions from the top center of the boiler or furnace but in no case less than two (2) feet beyond the perimeter of said boiler or furnaces.

This rule shall apply only to new installations of boilers or furnaces or replacement of existing boilers or furnaces.

10.04: Containers

(1) Except as hereinafter provided, no containers other than covered metal containers shall be used as receptacles for waste paper, oily rags, flammable metal turnings, oily waste, other flammable or combustible waste materials, or any material subject to spontaneous ignition. Metal containers shall be provided for ashes. The location, number and capacity of such metal containers shall be designated by the head of the fire department.

10.04: continued

(2) Rigid, molded, nonmetallic containers in capacities not exceeding ten (10) gallons may be used for the disposal of ordinary waste paper and combustible rubbish in low and ordinary hazard occupancies.

(3) Rigid, molded, nonmetallic containers having a capacity of less than fifty (50) gallons shall be considered the equivalent of covered metal containers provided that such nonmetallic containers are equipped with a tight fitting cover which is kept in position except during the filling and emptying operations. Such container may be used only for the storage of ordinary waste paper and combustible rubbish in low and ordinary hazard occupancies.

(4) All other types of nonmetallic containers including plastic bags and cardboard cartons shall be considered the equivalent of an uncovered nonmetallic or metallic container. Such containers shall be kept at all times in a refuse room as defined in this regulation.

(5) Self-closing covered metal containers or self-closing rigid, molded, non-metallic containers shall be used in any washroom frequented by the public.

10.05: Safety Cans

(1) They may be of various designs provided they are substantially constructed to avoid the danger of leakage and designed to minimize the likelihood of spillage.

(2) In quantities less than 55 gallons, portable tanks may be used in a building already approved for handling flammable liquids. Such tanks shall have openings only in the top, and shall be provided with an approved pump for withdrawing liquid.

(3) Typical safety cans of 5 gallons capacity or less shall be provided with pouring outlets with tight-fitting caps or valves normally closed by springs, except when held open by hand so that the contents will not be spilled if the can is tipped over. The caps shall be so designed as to provide an emergency vent when the cans are exposed to fire or heat source.

(4) The gauge thickness of safety cans shall be of an approved thickness for capacity of said container.

10.06: Storage and Fumigation

(1) Crating, storage, piling, etc., of empty packing boxes, cases, or barrels of a combustible nature shall be restricted to segregated areas in separate buildings or separate fire areas.

(2) Areas for outdoor storage shall be approved where the following are available: adequate municipal fire and police protection; access roads for use by fire apparatus; adequate water supply; and, no exposure hazard.

(3) Entire storage site shall be kept free from unnecessary accumulation of combustible materials. Weeds or grass and dry vegetation shall be kept down and a regular procedure provided for the periodic cleanup of the entire area.

(4) Tarpaulins used for the protection of storage against the weather shall be flameproofed.

(5) The entire premises shall be approved by the head of the fire department.

10.06: continued

(6) No warehouse, factory or commercial building shall be fumigated by the use of any volatile flammable liquid, toxic substance, or any material requiring flame, unless a permit has been obtained therefor from the head of the fire department. Any building being so fumigated shall be conspicuously posted to give warning of the fumigant hazard at all entrances during the entire fumigating operation.

10.07: Smoking

(1) Smoking shall be defined as smoking or possessing a lighted cigarette, cigar, pipe, or other smoking article.

(2) Smoking shall be prohibited in factories, workshops, mercantile establishments or warehouses, where the material being handled in and about such structure is of a flammable nature of where such structures are of a combustible construction which may, in the opinion of the head of the fire department, constitute a fire hazard. Such structures shall be provided with a smoking area or areas for employees, to be approved by the head of the fire department.

(3) Smoking shall be prohibited in every assembly theatre classified in USE GROUP F-1-A or in USE GROUP F-1-B in the State Building Code.

Such structures shall be provided with a room or area to be designated as a "Smoking Area." Such room or area shall be of a size suitable to accommodate the number of smokers requiring such facility. The head of the fire department shall approve such areas.

(4) Smoking shall be prohibited in schools, colleges, universities, public buildings and institutions except that smoking shall be permitted in designated areas. Such areas shall be approved by the head of the fire department. Such room or area shall be of a size suitable to accommodate the number of smokers requiring such facility.

(5) Smoking shall be prohibited on all docks, wharves and waterfront areas, except that smoking may be permitted in smoking areas so designated and approved by the head of the fire department.

(6) Smoking may be permitted in "No Smoking Areas" of public halls and special halls only when they are not being used as auditoriums requiring fixed seats and aisles, if the head of the fire department so approves.

(7) Each smoking area shall be equipped with at least the following items: a bucket of sand or other suitable receptacles for the disposal of smoking articles; a fire extinguisher for Class A fires; a fire blanket for the extinguishment of clothing fires. The head of the fire department may require an increase in the number of the above items or additional safety appliances before approving such smoking areas.

(8) Durable red and white signs with the words "NO SMOKING" in letters not less than three inches in height, shall be conspicuously posted in and about the "no smoking areas" referred to in 527 CMR 10.07(2) through 10.07(4).

(9) Durable green and white signs with the words "SMOKING AREA" in letters not less than three inches in height, shall be conspicuously posted in and about the smoking areas designated in 527 CMR 10.07(2) through 10.07(5).

10.08: Hospitals

All hospitals shall conform to the following fire drill regulations:

10.08: continued

(1) Each hospital shall formulate a plan for the protection and evacuation of all persons in event of fire; such plan to be presented to and approved by the head of the fire department. All employees shall be kept informed of their duties under such plan.

(2) The head of the fire department shall visit each hospital at least four times each year for the purpose of ascertaining whether the supervisors, attendants and other personnel are familiar with the approved plan of evacuation.

10.09: Schools

All schools shall conform to the following fire drill regulations:

(1) The responsible school official in charge of the school or the school system shall formulate a plan for the protection and evacuation of all persons in the event of fire, and shall include alternate means of egress for all persons involved; such plan to be presented to and approved by the head of the fire department.

(2) The headmaster or person in charge of each school shall see that each class instructor or supervisor shall receive proper instructions on the fire drill procedure specified for the room or area in which that person carries out his duties before he assumes such duties.

(3) Every student in all schools shall be advised of the fire drill procedure or shall take part in a fire drill within three days after entering such school.

(4) The head of the fire department, or person designated by him, shall visit each school at least four times each year for the purpose of conducting fire drills and questioning the teachers and supervisors. These drills shall be conducted without advance warning to the school personnel other than the person in charge of the school at the time.

10.10: Theatres

(1) Each theatre shall formulate a plan for the protection and evacuation of all persons in event of fire; such plan to be presented to and approved by the head of the fire department. All employees shall be kept informed of their duties under such plan.

(2) The head of the fire department shall visit each theatre at least four times each year for the purpose of ascertaining whether the manager and other personnel are familiar with the approved plan of evacuation.

10.11: General Use Buildings

(1) Any inner court not protected by a roof which will support a load of 40 lbs. per square foot shall have a substantial parapet or barrier at least 30 inches high. A skylight shall be constructed to support 40 lbs. per square foot or shall have a substantial parapet or barrier at least 30 inches high.

(2) Deleted by emergency regulation filed and therefore effective February 18, 1976. See 527 CMR 21.00 for regulations on flammable decorations.

(3) The head of the fire department shall, when he has knowledge, or that in his opinion any electrical wiring or equipment in or about any building or other structure is defective or improper, report the same in writing to the proper authority or authorities for enforcement of the laws relative thereto.

## 10.11: continued

(4) The basement and each story of a building which is subject to Section 21, Chapter 143 of the General Laws, as amended, shall be supplied with means of extinguishing fire, consisting of a hose attached to a suitable water supply and capable of reaching any part of such basement or story, unless the building has otherwise been provided with such portable apparatus as the inspector shall direct. Such appliances shall be kept at all times ready for use and in good condition.

Note: In this rule "Inspector" means an Inspector of the Division of Inspection of the Department of Public Safety.

(5)(a) Any person, firm, corporation, society, association or partnership who keeps an unregistered motor vehicle in running condition which is equipped with a gasoline tank shall make certain that the vehicle is garaged or kept under surveillance in the same manner as a registered vehicle.

(b) Any person, firm, corporation, society, association or partnership who keeps a motor vehicle outside of a garage for a period in excess of thirty (30) days, which, in the opinion of the head of the fire department or an inspector designated by him, is in such repair that it cannot be used or that it appears to him that it is not intended to be used, said person, firm, corporation, society, association or partnership shall be responsible for draining the gasoline from the fuel tank and immediately filling said tank with water or with a volume of trichloroethylene or other non-flammable volatile liquid equal to at least 5% of the volume of the tank within twenty-four (24) hours after written notification by the head of the fire department or inspector so designated.

(c) Any person, firm, corporation, society, association or partnership who removes a fuel tank from a motor vehicle shall make certain that such tank has been drained prior to removal from said vehicle.

(d) Any person, firm, corporation, society, association or partnership who keeps or disposes of a fuel tank which has been detached from a motor vehicle, shall immediately make certain that such tank is drained and filled with water or a non-flammable volatile liquid equal to at least five per cent (5%) of the volume of the tank.

10.12: Miscellaneous Provisions

(1) Any person having control of a mercantile, commercial or industrial establishment wherein canine guards are maintained shall notify the head of the fire department of the district, city or town within which such establishment is located that such canine guard is maintained therein. The head of the fire department and the person giving such notification shall cooperate in determining the procedure to be taken for the safety of authorized persons entering such mercantile, commercial or industrial establishment.

(2) The holder of any license issued for the underground storage of any liquid shall notify the local licensing authority and the head of the fire department whenever the provisions of said license cease to be exercised.

Upon such notification, the head of the fire department shall prescribe one of the following rules to eliminate hazardous conditions incident to such cessation:

(a) For temporary cessation: remove the product from tank, fill the tank with water or an inert gas, secure all openings to the tank by means of a screw plug or cap maintained wrench tight.

Temporary cessation shall mean not more than six (6) months from the date that a service station is closed.

10.12: continued

(b) For permanent cessation: remove the product from tank, secure all openings to the tank by means of a screw plug or cap maintained wrench tight, remove tank. The removal of the tank shall be in accordance with the provisions of Chapter 148, Section 38A, G. L.

Permanent cessation shall mean when such service station is closed for a period in excess of six (6) months.

(c) For the purpose of this regulation, a gasoline dispensing station shall be considered closed during a period in excess of seven (7) days during which the vending equipment and storage facilities remain in operating condition and the sale or dispensing of gasoline is discontinued as the voluntary or involuntary act of the owner or lessee thereof.

(d) The removal of the product from tanks shall be done by a competent person using approved equipment under such terms and conditions as the head of the fire department may prescribe. All such products shall be disposed of as directed by the head of the fire department.

(3) Any person removing a fuel oil tank from inside a building for a purpose other than replacement or repair, shall remove or securely cap both ends of all fill and vent pipes previously connected to said tank.

REGULATORY AUTHORITY

527 CMR 10.00: M. G. L. c. 148, s. 28.

## JAPANESE JOINT VENTURE FISHERIES

Presentation by

Jay D. Hastings

East Coast Fisheries Law Conference  
June 24-25, 1983  
Portland, Maine

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### DOING BUSINESS WITH THE JAPANESE FISHING INDUSTRY

The purpose of this presentation is to provide a better understanding of the Japanese fishing industry and the history of its joint venture fishing operations. Although I do not profess to be an expert in Japanese business practices, I have developed some basic guidelines for developing and maintaining business relationships with Japanese partners. These guidelines are based only upon my personal experience in working with the Japanese people and should be supplemented with additional study materials by other experts in the field.

A. Getting to Know the Japanese People, their Land, Culture, Customs, and Language.

1. Suggested readings.

- a. Reischauer, E.O. The Japanese. Cambridge, London: The Belknap Press of the Harvard University Press, 1977.
- b. Benedict, R. The Chrysanthemum and the Sword: Patterns of Japanese Culture. New York: Meridian Books, 1946.

2. Brief review.

B. Understanding the Japanese Industrial Structure.

1. See FIGURE I.

2. The major Japanese fishing companies.

C. The Organization of a Japanese Fishing Company.

1. Typical organizational structure. See FIGURE II.
2. Personnel identification within the organizational structure.
  - a. Ranks within a Japanese firm. See FIGURE III.
  - b. Ranks within the organizational structure. See FIGURE IV.
  - c. Identification of rank within a typical office layout. See FIGURE V.
  - d. Identification of personal rank. See FIGURE VI.

D. The Decision Making Process.

1. Group orientation.
2. Identification of the decision makers.

E. Meeting the Japanese.

1. Preparation for the meeting.
2. Personal v. impersonal contact and communication.
3. Formality and importance of avoiding confrontation.
4. The importance of follow-up contact and social communication.

F. Japanese Joint Ventures in the North Pacific.

1. Historical interest in JV operations and U.S. investment.
2. Avoiding confrontation: the controversy over offshore v. onshore U.S. fisheries development.
  - a. NOAA interim policy on U.S. processor preference announced in February 1978 reversed in May 1978 for lack of sufficient legislative intent to give a preference.



b. Led to Processor Preference Amendment enacted into law in Aug. 1978.

3. The policy of "Fish and Chips".

a. Initially implemented in 1978 linking foreign allocations with willingness on the part of foreign nations to provide greater access for U.S. seafood products to its markets.

b. Tariff reductions conceded by Japan during MTN, but resulted in few sales to Japan.

c. The shift in policy.

(1) 40,000 mt of Japanese BS/A pollock allocation withheld during 1980.

(2) Led to the first Japanese JV during 1981 for 15,000 mt by Taiyo and Nippon Suisan.

(3) One half of each nation's foreign allocation withheld during 1982 for purpose of stimulating increased JV operations.

d. The policy is implemented into law.

4. The expansion of Japanese JV operations.

a. The Seattle meeting, June of 1982 and follow-up technical meeting in November of 1982.

b. The current status of JV operations under the June 1982 MEMORANDUM OF DISCUSSIONS. See TABLES I and II.

G. Are increased joint venture fisheries under the pressure of the "fish and chips" policy healthy for the development of the U.S. fishing industry?

1. Can both parties negotiate and contract freely for the mutual benefit of both parties engaged in the business operation?

2. How do joint venture operations increase our knowledge and capability for developing both domestic and export markets for underutilized fishery resources?

FIGURE I

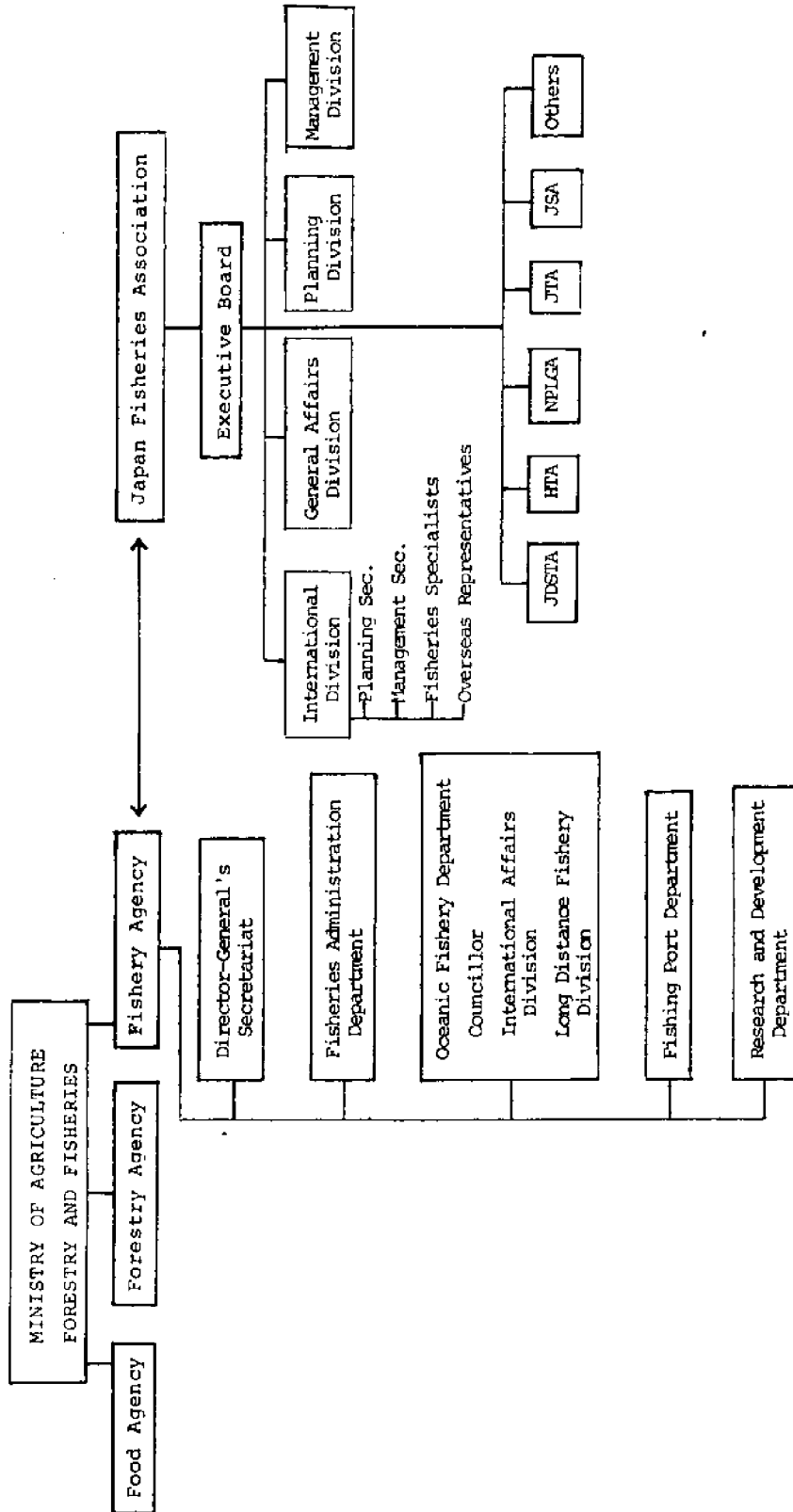


FIGURE II

□組織 Organization  
●機構 Organization Chart

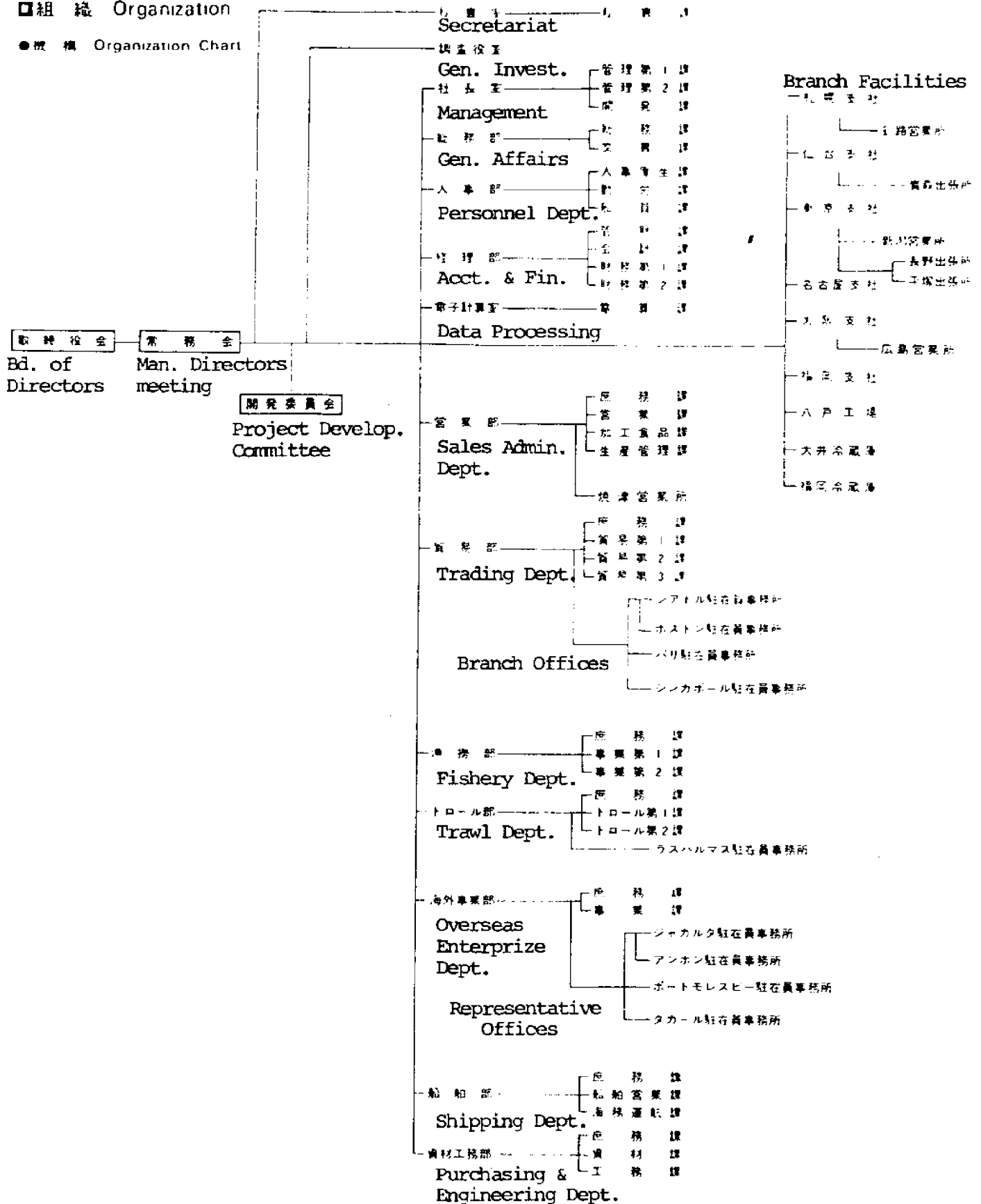


FIGURE III

Ranks within a Japanese Firm

Chairman:	Kaicho	会長
President:	Shacho	社長
Vice President:	Fuku Shacho	副社長
Senior Executive Managing Director:	Senmu Torishimariyaku	専務取締役
Executive Managing Director:	Jomu Torishimariyaku	常務取締役
Director:	Torishimariyaku	取締役
General Manager:	Bucho	部長
Deputy General Manager:	Bucho Dairi	部長代理
Section Chief:	Kacho	課長
Deputy Section Chief:	Kacho Dairi	課長代理
Chief:	Kakaricho	係長

FIGURE IV

**Organization Structure of  
a Major General Trading Firm**

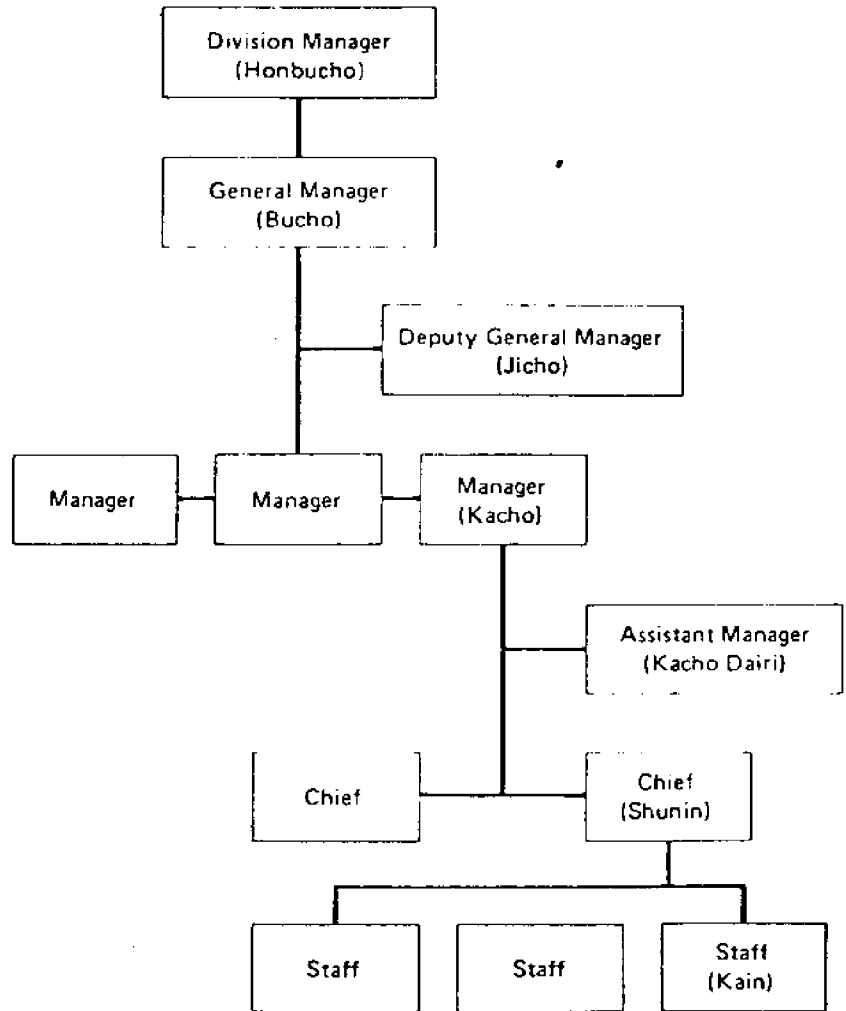


FIGURE V

**Typical Office Layout**

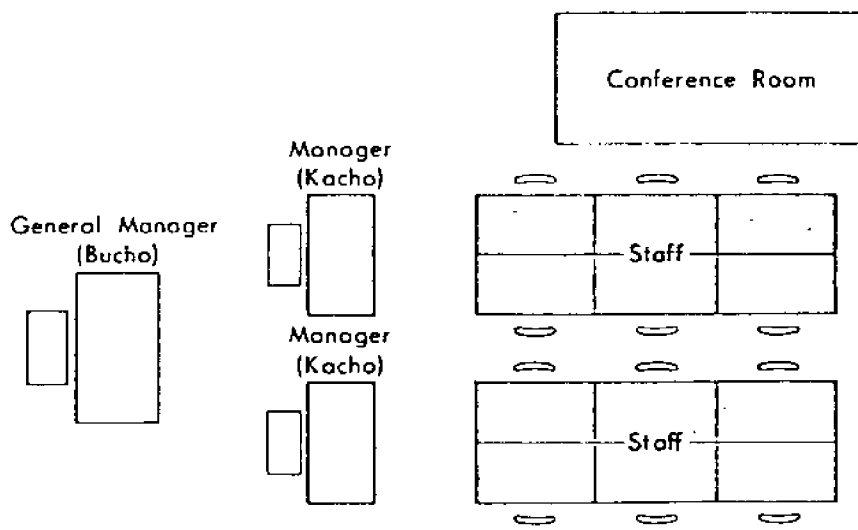


FIGURE VI

海洋漁業株式会社  
 南方海上事業部  
 部長 田中 恵

〒14 東京都千代田区有明一丁目十二番一丁  
 (郵政番号) 100-0012  
 電話 東京 03(74) 6161 番(代表)

船舶漁業株式会社

取締役 白神 郁夫

〒100 東京都千代田区千代田一丁目三番一丁  
 (郵政番号) 100-0001  
 電話 東京 03(26) 4111 番(代表)

大分水産株式会社  
 事業部 事業第三課

課長 水金 平良 雄

〒14 東京都千代田区有明一丁目十二番一丁  
 (郵政番号) 100-0012  
 電話 東京 03(74) 6161 番(代表)

日本漁業株式会社  
 広報室長 小野 真一

郵便番号 100  
 〒100 東京都千代田区千代田一丁目一十一番  
 (郵政番号) 100-0011  
 電話 東京 03(26) 4111 番(代表)

森下水産株式会社  
 北洋部 北洋第二課

専門役員 吉原 雅信

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 (郵政番号) 100-0012  
 電話 東京 03(74) 6161 番(代表)

A 西武漁業株式会社

B 事業部

C 課長

D 伊藤 信夫

E

〒14 東京都千代田区有明一丁目十二番一丁  
 (郵政番号) 100-0012  
 電話 東京 03(74) 6161 番(代表)

Identification Code:

- A - Company name
- B - Division and/or section
- C - Rank
- D - Name
- E - Company information

TABLE I

JAPANESE JOINT VENTURE FISHERIES OFF ALASKA  
1982 - 1983

Company	1982		1983		1983 Vessel Permit Applications
	1/1 - 5/31	6/1 - 12/31	1/1 - 5/31	6/1 - 12/31	
NIPPON SUITSAN	9,909 mt	11,407 mt	30,000 mt	30,000 mt	Kongo Maru Haruna Maru Koyo Maru No. 3 Rikuzen Maru
TAIYO	16,600 mt	10,000 mt *	20,000 mt	25,000 mt	Tenyo Maru Zuiyo Maru No. 2 Zuiyo Maru No. 3
KYOKUYO	957 mt	8,975 mt	10,000 mt	10,000 mt	Ohtori Maru Daishin Maru No. 28
HOKO	2,418 mt	9,213 mt	15,000 mt	11,000 mt	Tsuda Maru Chikubu Maru
NICHIRO	-	-	10,000 mt	-	Akebono Maru No. 72
Total	29,884 mt	39,595 mt	85,000 mt	76,000 mt	
	69,479 mt	124,595 mt	161,000 mt		

\* Projected (fishery to begin at the end September)



TABLE II

JAPANESE JOINT VENTURE HARVEST LEVELS OFF ALASKA  
June 1, 1982 through May 31, 1983

Company/ Vessel	NISSUI	TAIYO	HOKO	KYOKUYO	NICHIRO	Total
June 1, 1982	Haruna 11,408	Zuiyo #3 598 Tenyo 6,718	Chikubu 9,214	Ontori 8,976		
Dec. 31, 1982						
Subtotal	11,408	7,316	9,214	8,976		36,914
Jan. 1, 1983	Haruna 11,007	Zuiyo #3 11,275 Tenyo 17,323	Chikubu 1,810 Tsuda 11,108	Daishin 11,324 #28	Akebono 10,972 #72	
May 31, 1983	Kongo 10,818 Koyo 10,638					
Subtotal	32,463	28,598	12,918	11,324	10,972	*96,275
Total	43,871	35,914	22,132	20,300	10,972	**133,189

\* Original target level 85,000 mt

\*\* Original target level 120,000 mt

KENELM W. COONS

Mr. Coons is the Executive Director of the New England Fisheries Development Foundation in Boston, Massachusetts. The Foundation, an organization devoted to the development of the regional seafood industry, consists of 130 New England fishermen's groups, seafood processors, and seafood distributor. Before joining the Foundation as its first director, Mr. Coons was the Executive Director of the Rhode Island Seafood Council for four years.

Mr. Coons was the Executive Vice-President of the Prelude Corporation, a seafood importing and retailing company in Rhode Island from 1973-1977. Prior to that, he was in charge of marketing for Doxsee Foods of Baltimore, Maryland. His other marketing experience has been with Richardson-Vick, Level Brothers, and General Foods.

Mr. Coons has a B.A. in Sociology from Harvard College. He received the Masters in Marine Affairs from the University of Rhode Island in 1977.

JOHN H. DUNNIGAN

Mr. Dunnigan recently opened his own consulting practice, specializing in fisheries, marine affairs, international trade, and governmental and regulatory matters. Immediately prior to that he was Deputy Executive Director of the New England Fishery Management Council, and was generally responsible for the development and drafting of Fishery Management Plans. Mr. Dunnigan spent 8-1/2 years in NOAA field legal offices, serving as legal counsel to each of the NMFS regions. He was the NOAA Regional Attorney in both the Southeast and Northeast Regions, and thus served as counsel to five of the eight Regional Fishery Management Councils. He also spent a short time as NOAA's Acting Deputy Assistant General Counsel for Fisheries in Washington. Mr. Dunnigan earned two law degrees from the University of Washington: a J.D. in 1973, and a LL.M. (Marine Affairs) in 1974.

RALPH J. GILLIS

Mr. Gillis, in addition to his private practice in Plymouth, Mass., serves as General Counsel to the New England Fisheries Development Foundation. He is on the Advisory Committee for Oceans, Environmental and Scientific Affairs. Previously he was with the law firm of Northcutt Ely, Washington, D.C. where he was involved in international maritime boundary disputes, deepsea mining and offshore hydrocarbon development, and other maritime and environmental legal issues

Between 1973 and 1976, Mr. Gillis was an attorney with the Marine Resources Section of the U.S. Department of Justice in Washington, D.C. He participated in preparing the early drafts of the superfund legislation, and in Law of The Sea issues, interstate maritime boundary disputes, and issues relating to offshore hydrocarbon and mineral resources. He was the attorney for the U.S. as amicus curiae before the Supreme Court in Douglas v. Seacoast Products, Inc.

Mr. Gillis earned his B.A. in 1969 from St. Francis Xavier University, Nova Scotia, and the J.D. in 1972 from the University of Maine School of Law. He received the LLM in International Maritime Law in 1975 from Edinbough University, UK, and the Ph.D... (S.J.D.) in 1978 from Cambridge University, U.K.

DONALD E. GRAHAM

Mr. Graham joined the law firm of McDermott, Will and Emery of Washington, D.C. as a partner in 1982. Immediately before that, he was Vice-President and General Counsel for the National Council of Farmer Cooperatives for 12 years. He worked in all phases of the law as it relates to cooperatives: taxation, antitrust, securities, and transportation

Mr. Graham's previous experience includes work for the U.S. Department of Agriculture as a trial attorney, as a transportation attorney, and as a Department of Agriculture representative before the Interstate Commerce Commission, The Federal Maritime Commission, the Civil Aeronautics Board, and other state and federal regulatory agencies. Between 1951 and 1963, Mr. Graham was a lay-brother with the Trappist Monks. Beginning as the general manager of orchards and dairy herd at a California monastery, he volunteered to go to Lantau Island, Hong Kong, to spend two years teaching modern farming and dairying to a group of refugee Chinese monks and setting up their milk distribution system in Hong Kong and the other islands in the New Territories.

A native of New Orleans, Mr. Graham earned his LL.B. from Loyola University in 1950.

ALAN D. GUIMOND

A member of the New England Fishery Management Council, Mr. Guimond is the President of Stonington Seafood Products of Point Judith, Rhode Island. His company recently joined the Spanish company Anavar S.A. to form Stonavar Offshore Processing, a joint venture for Loligo squid, incorporated in Rhode Island and operating in the Mid-Atlantic region.

He is the past president of the Atlantic Offshore Fishermen's Association, and a member of the Marine Fisheries Advisory Committee to the Department of Commerce.

JAY D. HASTINGS

Mr. Hastings is currently a legal and fisheries consultant in private practice in Seattle, Washington. Since 1978, his office has specialized in fishery management affairs under a major retainer contract with the Japanese Fishing Association, an umbrella organization for the Japanese fishing industry. Under this contract, his office assists and advises the Japanese fishing industry and government on fisheries management and development of fisheries within the jurisdiction of the United States.

From 1978 to 1979, Mr. Hastings served as a consultant with the firm of Earl R. Combs, Inc, in Mercer, Washington, and assisted in a trade development program for the Indian tribes of the Pacific Northwest under contract with the United Indians for All Tribes Foundation, Seattle, Washington. From 1976 to 1978 he was employed by the Nichiro Fisheries Company, Ltd., as a legal and fisheries consultant. His previous experience includes serving as an Assistant Attorney General for the State of Washington, as Law Clerk for the firm of Winston and Cashatt of Spokane, Washington, and as Deputy County Clerk for the Superior Court in Spokane, Washington.

Mr. Hastings received his LL.B. from Gonzaga University in Spokane, Washington, and his Master of Laws from the University of Washington.

ROBERT HAYES

Mr. Hayes is the Director of the Office of Industry Services, National Marine Fisheries Services. He manages and directs a multidisciplinary approach to the development of the United States fisheries which includes: financial services, loan guarantees, compensation for at-sea gear casualties, technology development and transfer, safety and utilization, research, regulatory impact review, export and domestic market promotion, tariff policy, and trade negotiations.

Before joining the Office of Industry Services in 1980, his past work experience within the National Oceanic and Atmospheric Administration included positions as legal counsel with the Southeast Regional Office, the Northeast Regional Office, and NOAA, Washington.

Mr. Hayes earned the B.S. from Boston University in 1968, and the J.D. from Catholic University, Washington, D.C. in 1974.



DAVID C. HOOVER

Mr. Hoover is the General Counsel to the Division of Marine Fisheries, Massachusetts Department of Fisheries, Wildlife, and Recreational Vehicles in Boston. He is also the Administrative Law Judge for adjudicatory proceedings conducted by the Division of Marine Fisheries. He has served as a special Assistant Attorney General for libel actions arising out of the enforcement of the marine fishery laws of the Commonwealth of Massachusetts.

Prior to joining the Division of Marine Fisheries, Mr. Hoover was a staff attorney for the Office of the General Counsel, National Oceanic Atmospheric Administration, Washington, D.C. His assignments included the Office of Coastal Zone Management and the National Marine Fisheries Service

TERRY L. LEITZELL

Mr. Leitzell is counsel to the Seattle, Washington law firm of Bogle & Gates in its Washington, D.C. office. Prior to joining the firm in 1981, he was the Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, responsible among other duties, for reviewing, approving and implementing all fishery management plans authorized by the Magnuson Fishery Conservation and Management Act.

Between 1973 and 1977, Mr. Leitzell was the Chief United State Negotiator for the Third Committee, United Nations Law of the Sea Conference.

Mr. Leitzell received his undergraduate degree from Cornell University in 1964, and the J.D. from the University of Pennsylvania in 1967.

PAUL MacGREGOR

Paul MacGregor is a partner in the Seattle law firm of Mundt, MacGregor, Happel, Falconer, Zulauf & Hall, which represents a number of clients engaged in the harvesting, processing and marketing of seafoods. Mr. MacGregor has had extensive experience in the representation of foreign fishermen before the North Pacific Fishery Management Council.

A graduate of the University of Southern California, Mr. MacGregor received a Masters degree from the London School of Economics in 1967, and a law degree from Stanford University in 1970. He clerked for Judge Max Rosenn of the U.S. Court of Appeals for the Third Circuit in 1971, and practiced antitrust and trade regulation law in Washington, D.C. before moving to Seattle in 1976 to become a founding partner in Mundt, MacGregor.

TIMOTHY R. MCHUGH

Mr. McHugh is with the Boston law firm of Hoch, Flanagan, and Snyder, specializing in admiralty, commercial transactions and litigation. Prior to joining the firm, he was employed by the Division of Stationary Source Enforcement of the U.S. Environmental Protection Agency.

Mr. McHugh served six years with the U.S. Coast Guard, rising to the rank of Lieutenant. He was a Coast Guard representative to international fishery negotiations and officer responsible for seizing foreign vessels in violation of the Fishery Conservation and Management Act and other U.S. laws. His duty stations included the USCGS VIGILANT based in New Bedford, Massachusetts, the First Coast Guard District Intelligence and Law Enforcement Branch, and the Ocean operations Division at C.G. Headquarters in Washington, D.C.

He earned a B.A. in Government and International Relations from the University of Notre Dame in 1970 and the J.D. from Washington College of Law, The American University in 1978

JOHN R. MCKERNAN, JR.

Representative McKernan was elected to the 98th Congress in November 1982. He serves on the Merchant Marine and Fisheries Committee and its Subcommittee on Fisheries and the Environment, the Government Operations Committee, and the Select Committee on Children, Youth and Families.

Mr. McKernan was formerly a partner in the law firm of Verrill & Dana of Portland, Maine. He was a member of the Maine House of Representatives from 1972-1976 where he served as Assistant House Minority Leader between 1975 and 1976.

Mr. McKernan earned a B.A. from Dartmouth College in 1970 and the J.D. from the University of Maine Law School in 1974.

DR. GUY MARCHESSEAULT

Dr. Guy Marchesseault is the Deputy Director of the New England Fishery Management Council. Prior to his present position he was Senior Biologist and Chief Scientist on the Council staff. He has served the Council since 1977. He has played a principle role in the development of the Council's fishery management plans and amendments, including conducting biological resource analyses.

As a lecturer at Harvard University's Division of Applied Sciences, Dr. Marchesseault has taught courses in the management of marine fisheries. He is also the author of numerous scientific publications in fishery resource assessment and management. He received his Ph.D. in oceanography in 1976 from the University of Rhode Island.

LT.CMDR. LAURENCE P. MINOTT, JR.

Lieutenant Commander Bud Minott has served in the United States Coast Guard since enlistment in 1964. After serving on C.G.C. CASTLEROCK out of Portland, Maine, and C.G.C. McCULLOCH and WINNEBAGO out of Wilmington, N.C., he was transferred in 1972 to the Marine Inspection Office in Long Beach, Ca., where he served for two and a half years as the Senior Investigating Officer for all casualties, including fishing vessels. He then spent four years as the Senior Investigating Officer and Chief of the licensing branch of the Marine Safety Division in Huntington, W.V. In 1980 he was transferred to his present position as Chief, Prevention and Enforcement Section, Marine Safety Division, at the First Coast Guard District in Boston. In this position he has responsibility for all violations of Coast Guard safety regulations by commercial vessels, including fishing vessels.

ROBERTO MORENO

Mr. Moreno is an attorney with the Law Offices of Jimeney & Fuste of San Juan, Puerto Rico, which specializes in admiralty and maritime law and general litigation in Federal Court. Mr. Moreno's personal expertise is in marine environmental law.

Formerly an Assistant U.S. Attorney, Mr. Moreno handled all environmental litigation, admiralty and maritime suits and was the principal trial attorney for U.S. Navy matters.

His earlier experience was as Regional Counsel of the National Oceanic and Atmospheric Administration (NOAA) for the Southeastern part of the United States. As such, he served as Chief Counsel for the Southeast Regional Director of the National Marine Fisheries Service (NMFS) and as the legal advisor to the Gulf of Mexico, South Atlantic and Caribbean Fishery Management Councils. Prior to this, Mr. Moreno was a NOAA staff attorney in the Office of Marine Fisheries in Washington, D.C.



MYRON H. NORDQUIST

Mr. Nordquist is a partner in the Washington, D.C. law firm of Duncan, Allen and Mitchell. His practice focuses on oceans, natural resources, and international law. He has special expertise in fishery joint ventures, vessel financing, environmental permitting, alternative energy projects, export licensing, government contracting, and capital formation. He has represented a number of international clients, including major natural resources companies and foreign governments.

Mr. Nordquist has taught various international or natural resources law courses at American University, George Washington University and the University of Virginia. He has published extensively on ocean law, including the ten-volume series New Directions, and the two-volume set North America, Asia-Pacific and the Development Law of the Sea.

Mr. Nordquist chairs the American Bar Association's Law of the Sea Committee and the Marine Law and Policy Committee of the Marine Technology Society. He is on the Marine Board of the National Academy of Engineering as well as on the Advisory Board of the Center for Ocean Law and Policy, University of Virginia.

For eight years, Mr. Nordquist served with the Office of Legal Advisor in the U.S. Department of State. He specialized in ocean affairs serving as U.S. Alternative Representative to the Third U.N. Conference on the Law of the Sea and Office Director of the National Security Council Interagency Task Force on Law of the Sea. Mr. Nordquist also participated in Congressional activities as Legislative Counsel to the Department.

A graduate of Oregon State University, he received his J.D. from California Western University in 1969, a diploma from Cambridge University in 1974, in international law, and the S.J.D. from University of Virginia in 1981.

CRAIG R. O'CONNOR

Mr. O'Connor has been NOAA Regional Counsel in St. Petersburg, Florida for the past five years. He was previously employed in the private sector as an attorney in Phoenix, Arizona.

He earned the B.S. from Northern Arizona University, the J.D. from Arizona State University, and the LL.M. from the University of Miami.

WALTER T. PEREYRA

Dr. Pereyra is the Vice President and General Manager of Marine Resources Company, Seattle, Washington, a rapidly-growing joint Soviet-American seafood venture. Initiated in 1977, the company had sales of \$25 million in 1982. Dr. Pereyra is also a managing partner in three fishing trawlers.

Dr. Pereyra spent 16-1/2 years with the National Marine Fisheries Service. His last position there was Director, Division of Resource Assessment and Conservation Engineering at Northwest and Alaska Fisheries Center in Seattle. He taught seven years as an affiliate associate professor at College of Fisheries, University of Washington and authored more than 40 scientific publications in the areas of fisheries development, marine ecology, and resource assessment. Dr. Pereyra earned his B.S. in zoology at the University of Maine, and the M.S. and Ph.D. in Fisheries at the University of Washington.

ALISON RIESER

Alison Rieser is the Director of the Marine Law Institute of the University of Maine School of Law and the University of Southern Maine. She teaches Ocean and Coastal Law at the Law School.

Prior to her present position she was a Research Fellow in Marine Policy and Ocean Management at the Woods Hole Oceanographic Institution. She has also served in the Office of General Counsel for the National Oceanic and Atmospheric Administration and for the U.S. Environmental Protection Agency in Washington, D.C. From 1978-1981 she was a consultant to the New England Fishery Management Council.

She holds a bachelor's degree from Cornell University and a Juris Doctor from the National Law Center of George Washington University.

ROY D. TATE

Mr. Tate is the Deputy Director of the 1500-member Massachusetts Lobstermen's Association. He is a self-employed government and public affairs consultant, representing clients as a registered legislative agent at the federal, state, and municipal levels of government.

From 1975 to 1981, Mr. Tate worked for the Greater Boston Chamber of Commerce, Inc., where, in addition to supervising the administration and operation of the organization, he acted as liaison between the Chamber and government, labor, community and media groups. His previous experience was with the airline industry, including Eastern Air Lines, Mohawk Airlines, United Air Lines, and Travel Systems International, Ltd.

Mr. Tate has a B.A. degree from Adelphi College.