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**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503**

May 26, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #M-331

TO: Legislative Liaison Officer -

**INTERIOR - Ralph Hill - (202)208-6706 - 329
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
EPA - Thomas C. Roberts - (202)260-5414 - 326
CEQ - Larry Flick - (202)395-5750 - 256
JUSTICE - Faith Burton - (202)514-2141 - 217**

**FROM: JAMES J. JUKES (for) *Ji-*
Assistant Director for Legislative Reference**

**OMB CONTACT: Jim BROWN (395-3473)
Secretary's line (for simple responses): 395-3454**

SUBJECT: COMMERCE Qs and As on Exxon Valdez Hearing

DEADLINE: 3:00 May 28, 1993

**COMMENTS: If we do not hear from you by the deadline, we will
assume that you have no comment.**

**OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.**

**Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

**CC:
Cora Beebe
Chris Bertram
Rob Fairweather
Holly Fitter
Katie McGinty
Rob Damus
Vince Foster**

**Questions for the Record for Secretary Brown from
Mr. Studds of Massachusetts**

1. Q: What are the criteria to be used in selecting the habitats?
A: We intend to use the following criteria for acquiring land or property rights:
 - a. The parcel or property right is for sale at fair market value (determined according to the "Uniform Appraisal Standards for Federal Land Acquisition--1992" as approved by the Interagency Land Acquisition Conference).
 - b. The parcel contains habitats that, based on scientific data or other relevant information, are linked to, replace, provide the equivalent of, or substitute for resources and/or services affected by the spill. The joint settlement restoration program developed criteria for ranking parcels which will be used to evaluate linkage to spill-injured resources and services.
 - c. Partial property rights to be purchased generally would not exceed 60 percent of the value of full title to the land. The value of partial property rights may be as high as 75 percent on a case by case basis.
 - d. An affected resource or service would benefit from protection beyond that provided by the current owner and applicable laws and regulations.
 - e. The acquisition is an inholding in an existing Federal management unit; the acquisition will be consistent with the proposed management plans of the Federal land management agency; and the agency agrees to the acquisition.
2. Q: Will species injured by the oil spill be considered in the habitat selection and protected by restoration choices made?
A: Yes, as indicated above, the major component of the evaluation and ranking criteria procedure involves: (1) identifying affected resources or services that are not adequately recovering; (2) identifying habitats that are linked to recovery; and (3) developing protection objectives for each injured resource or service and linked habitat component.

3. Q: Will the land be within the Prince William Sound area? If so, will land affected by the spill be purchased or will the monies be reserved for pristine lands? Will large, contiguous parcels be preferred for purchase over small, insular parcels?
- A: Purchases will not be limited to lands confined entirely within the Prince William Sound area, but will include parcels located in Cook Inlet (Kenai Peninsula), and Kodiak (Alaska Peninsula). Only lands located within the area affected by the oil spill are being considered for acquisition. Land acquisitions are expected to include both large parcels (more habitat) and smaller "in-holdings" that could be affected adversely by development activities.
4. Q: There remains to be spent both criminal restitution and civil penalties allocated by the settlement to restoration. How do the federal trustees foresee these restoration funds being allocated?
- A: The Restoration Plan being developed will determine the appropriate use of the civil settlement. The plan will allocate these monies between various restoration options including habitat protection and acquisition, recovery monitoring, and general restoration. The Restoration Plan will be subject to public review and comment during the summer. Criminal restitution funds are being considered for a variety of uses including: land acquisition; long-term monitoring; restoration; replacement of affected resources or services; and research to prevent, contain, clean-up and ameliorate oil spills.
5. Q: How do the federal trustees evaluate the trustee process? Is the requirement that actions proceed only upon unanimous consent burdensome? Is the trustee process hindering efforts to proceed with the restoration process?
- A: As with any new organization, the trustee process has undergone "growing pains," but it is working. Consensus voting has been difficult at times, but the trustee process was designed to maintain "checks and balances." The trustee process is a public process allowing a wide spectrum of opinions to be brought to the attention of the trustees. It is important that the trustees have an opportunity to evaluate these views before making decisions on restoration options. While some persons have complained that the process is

slow at times, the trustees do not believe that restoration efforts have been hindered.

6. Q: You stated during the hearing that "our knowledge of environmental systems is far from complete." Similarly, Dr. Peterson suggested that "now that a relatively clear understanding of the present extent of natural resources damages has been achieved, it would be appropriate to compare these impacts to what was anticipated in the many ecological impact and risk analyses prepared prior to receipt of permits for installation of the pipeline to Port Valdez. This comparison would represent a test of how well the public can rely upon the present process of environmental impact analysis as specified by NEPA and other environmental protection legislation."

This appears to be a valid and worthwhile study which would benefit our working knowledge of environmental impact statements. Would NOAA consider doing this study?

- A: NOAA would be a logical agency to conduct the marine-related aspects of the study. The Departments of the Interior and Agriculture may provide valuable contributions to portions of a study concerning on-land aspects of pipeline installation.

Questions for the Record for Secretary Brown
from Mr. Pombo of California

1. Q: Have you already identified land acquisition in the Prince William Sound region that is valued at \$25 million?
A: Yes, parcels of land have been identified tentatively. However, "fair market value" appraisals have not been completed. The federal trustees have identified 17 parcels for consideration and ranked their relative importance in meeting restoration objectives. Of the 17 parcels being considered, 7 have rankings high enough for further consideration. Their values will likely total \$25 million.
2. Q: If not, how did you arrive at the decision to commit \$25 million to this purpose?
A: See above.
3. Q: Is this \$25 million in addition to the other settlement funds the Council will spend to acquire equivalent habitat?
A: Yes. The State of Alaska is proposing to use a portion of its \$50 million criminal settlement funds for habitat acquisition. The Trustee Council considers use of the joint funds for habitat acquisition to be a high priority. The Trustee Council has identified \$20 million from the joint fund to purchase land. The Trustee Council has approved \$7.5 million of this amount for acquiring habitat in Kachemak Bay State Park.
4. Q: Will you acquire land only from willing sellers? What about private parties who are not interested in selling land for this purpose?
A: The federal trustees do not believe condemnation is a preferred option at this point.
5. Q: Will these funds be used to buy land in the Prince William Sound region only, or will you also consider buying land in other parts of Alaska far removed from the habitat actually damaged by the oil spill?
A: The only land being considered for acquisition is within the "oil spill affected area," which includes Prince William Sound, Kodiak (Alaska Peninsula), and Cook Inlet (Kenai Peninsula).

6. Q: Will the lands purchased actually be equivalent habitat for species damaged from the oil spill, or will you acquire "imminent threat" parcels in large part to protect them from future logging or other activities?
- A: All parcels will be ranked by their relative importance to resources and services injured by the spill. "Imminent threat" refers to a process for immediate consideration of parcels which are important to resources and services injured by the spill and which are imminently threatened by degradation through timbering or other activities. The trustees are presently in the Comprehensive Evaluation Process which considers all private lands with willing sellers or negotiators and which are of importance to resources and services injured by the spill.
7. Q: Do you agree with the assertion by one of the other witnesses at the hearing that "there really is no such thing as oil spill restoration," and that the "resources will heal if they are allowed to?"
- A: No, not as a blanket statement. Some resources may not heal or could continue to decline because of other factors. Restoration can augment and enhance healing and reverse the course of further degradation. Some species will recover naturally, but restoration could accelerate recovery. However, there are some resources for which no feasible restoration project can be identified other than natural recovery. In such circumstances, the rate and time to recovery should be monitored.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

May 25, 1993

LEGISLATIVE REFERRAL MEMORANDUM

URGENT

LRM #M-329

TO: Legislative Liaison Officer -

AGRIC-CR - Robin Rorapaugh (all testimony) - (202)720-7095 - 230
CORPS ENGINEERS - Susan Bond - (202)272-0030 - 239
ENERGY - Bob Rabben - (202)586-6718 - 209
EPA - Thomas C. Roberts - (202)260-5414 - 326
INTERIOR - Ralph Hill - (202)208-6706 - 329
JUSTICE - Faith Burton - (202)514-2141 - 217
TVA - Alan Carmichael - (202)479-4412 - 332
NEC - Sonia Mathews - (202)456-6722 - 429

FROM: RONALD K. PETERSON (for) *Ronald K. Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: Scott CAMERON (395-6822)

SUBJECT: COMMERCE Proposed Testimony on Endangered
Species Act

DEADLINE: 1:00 P.M., Wednesday, May 26, 1993

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
S. Cameron
J. Payne
K. McGinty
M. Reed

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TALKING POINTS

ECONOMICS AND THE ENDANGERED SPECIES ACT

Karl Gleaves, Attorney Advisor, General Counsel, Fisheries, National Oceanic and Atmospheric Administration, Silver Spring, Maryland; J.D. University of Wisconsin Law School, 1976; M.A. Political Science, University of Wisconsin, 1972; B.A. University of Iowa, 1970.

Introduction

The Endangered Species Act of 1973 (ESA) is one of our nation's strongest and most controversial environmental laws. Often the controversy is framed in terms of "species versus economics." For example, there have been numerous debates on topics such as:

- the snail darter versus the Tellico dam project,
- sea turtles versus the economic impacts on shrimp fishermen and the shrimp industry,
- the northern spotted owl versus thousands of timber-related jobs, and
- Pacific salmon in the West and Northwest versus significant economic consequences for utilities, farmers and other water users.

My comments focus on the role of economics in the ESA. A commonly held view is that the ESA precludes consideration of economic factors. I would suggest that the common impression is overly simplistic, and that it is legitimate and appropriate to consider economics at certain stages of the ESA process. You have already heard a general description of the ESA; I'll review six types of determinations or actions that may occur as a part of the ESA process. In each case, the permissibility of considering economic factors at that stage is analyzed, and if economics can be considered, the importance of economics in that decision is summarized.

1. Proposed and Final Listing Decisions

Typically, the ESA process begins when the National Marine Fisheries Service (NMFS) or the Fish and Wildlife Service (FWS) begins to review the status of a species, either on its own initiative or in response to a petition that presents substantial information.

Economics are not relevant and cannot be considered as a part of the listing process. These determinations shall be made "solely on the basis of the best scientific and commercial data available . . ." The legislative history of the 1982 amendments is explicit that: "economic considerations have no relevance to determinations regarding the status of a species . . ."

Consequently, the listing process is exempt from various laws and executive orders that otherwise would require an economic analysis.³

2. Proposed and Final Critical Habitat Designations

Under the ESA, critical habitat should be designated at the time of the final listing of a species, but can be delayed up to one year in very limited circumstances. The first step in designating critical habitat consists of determining the physical and biological features that are essential to the conservation of the species and determining whether these features may need special management considerations and protections.

Critical habitat also involves a second step. Economics are to be considered in this decision. "The Secretary shall designate critical habitat . . . on the basis of the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."⁴

It appears that various laws and executive orders which require an economic analysis apply to the designation of critical habitat.

While critical habitat designations must involve the consideration of economic impacts, evaluating the extent of these economic impacts is problematic. As interpreted by NMFS and FWS, the critical habitat designation, by itself, may have little direct economic impact. Most of the economic consequences are derived from listing the species and are not directly attributable to the critical habitat designation.

3. Jeopardy Determinations and the Mandate to Avoid Jeopardy

Once a species is listed under the ESA, the mandatory provisions of section 7(a)(2) apply. Federal agencies are required to ensure that their actions are not likely to jeopardize the continued existence of listed species. Similarly, once critical habitat is designated, agencies must avoid the destruction or adverse modification of these areas. The no-jeopardy obligation and the duty to avoid destruction or modification of critical habitat are to be carried out in consultation with NMFS or FWS. In making determinations under section 7(a)(2), an agency must use "the best scientific and commercial data available."⁵ Consequently, NMFS and FWS do not consider economics in issuing biological opinions or making jeopardy determinations as a part of the section 7 consultation process.

The Supreme Court decision in the Tellico dam case indicated that economic consequences are irrelevant to the section 7 mandate to avoid jeopardy. "The value of this genetic heritage is, quite literally, incalculable." The court went on to state:

Quite obviously, it would be difficult for a court to balance a sum certain - even \$100 million - against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not."

Thus, economic factors are irrelevant in making jeopardy determinations under section 7(a)(2); likewise, the no-jeopardy mandate does not provide for the consideration of economic factors, except in the extraordinary situation where an exemption is sought from the Endangered Species Committee.

4. Alternatives to Avoid Jeopardy and the Duty to Conserve

As a practical matter, economic considerations are important in the evaluation of alternatives that are acceptable under the ESA. Normally, economic factors are considered when an agency proposes an action, and if applicable, economic and National Environmental Policy Act (NEPA) documents are prepared. During consultation with NMFS and FWS, the impact of the proposed action on endangered and threatened species and their habitat is evaluated, and sometimes, the proposed action is modified to mitigate adverse impacts (wherein economic factors are often considered). While language in some earlier cases suggested the duty to conserve species under section 7(a)(1) imposed a stringent obligation, a more recent decision indicated that there is a large degree of latitude in fulfilling this duty if that action is consistent with a biological opinion issued through the consultation process. "Provided the agency proposing the action complies with the no-jeopardy mandate and does not adversely modify critical habitat, there is considerable discretion in choosing a preferred alternative, and economic or other factors may be considered in making this choice."

If a biological opinion concludes that an agency action is likely to jeopardize a listed species or to destroy or adversely modify critical habitat, the Secretary of Commerce or Secretary of the Interior must suggest "reasonable and prudent alternatives" to avoid this conclusion. Regulations define "reasonable and prudent alternatives" as alternative actions that are "economically and technologically feasible." In fact, jeopardy opinions are relatively infrequent. But even with a jeopardy opinion, nothing restricts or prohibits the consideration of economic factors in selecting among the acceptable reasonable and prudent alternatives.

5. The Endangered Species Committee and the Exemption Process

In response to IVA v. Hill, the 1978 ESA amendments created an Endangered Species Committee and provided a mechanism for obtaining an exemption from the no-jeopardy mandate of section 7.¹⁰ Economic factors are considered in the exemption process.

The exemption process begins upon application to the Endangered Species Committee, following completion of the normal consultation process. This Committee, sometimes referred to as the "God Squad," consists of the Secretaries of Agriculture, Army, and Interior, the Chairman of the Council of Economic Advisors, the Administrator of EPA, the Administrator of NOAA, and an individual to represent the affected state. Five members must vote in person to allow for an exemption.

Before a waiver may be granted, the Endangered Species Committee must determine on the record that: first, "there are no reasonable and prudent alternatives," second, "the benefits of such action clearly outweigh" an alternative course of action that would preserve the species or its critical habitat, and "the action would be in the public interest, and third, "the action is of regional or national significance."¹¹ After making those determinations, the Committee is required to establish reasonable mitigation and enhancement measures to minimize adverse effects on the species and habitat concerned."

Since the creation of the exemption process, the Endangered Species Committee has voted in only three cases: the Tellico Dam project, the Grayrocks dam project, and, most recently, on certain timber sales in the Pacific Northwest. An exemption was granted for the Grayrocks project and for a limited number of timber sales. Legislative action authorized completion of the Tellico project. Recently, the Bureau of Land Management has announced its decision not to go forward with the exempted timber sales in the Pacific Northwest.

Because the exemption process has been used so rarely, there is some uncertainty concerning how various laws and executive orders requiring an economic evaluation would apply to this process.

6. Recovery Plans and Management Actions

The role of economics in the recovery planning process is at a minimum complex, and in some cases, confusing. To begin with, it is important to distinguish between the development of and content of a recovery plan and the implementation of specific management measures to achieve the plan's goals. Timing is not specified by statute although certain priorities are established; for example, a high priority is specified for "species that are,

or may be, in conflict with construction or other development projects or other forms of economic activity."¹⁸

Economics considerations are relevant to the recovery planning process; however, it is important to distinguish between the development and content of a recovery plan and the implementation of specific management measures to achieve a plan's goals. With respect to the former, the Conference Report on the 1988 Amendments states that "the development and content of recovery plans will continue to be based solely on biological considerations."¹⁹

Recovery plans are to include "site-specific management actions" and "estimates of the time and costs required to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal."²⁰ NMFS or FWS is responsible for the development and implementation of a recovery plan for a listed species, although the responsibility for many of the specific management actions and conservation measures may rest with other agencies, with NMFS or FWS acting in a consulting capacity.

A recovery plan is subject to public notice and an opportunity for public comment prior to final approval, but whether a complete economic analysis is required or whether various laws and executive orders would apply is unresolved. The answer probably depends on the nature of the plan. If the plan itself includes only research objectives, goals, and general recommendations, most of the requirements and procedures of these various executive orders and acts may be inapplicable.

Implementation of management actions, especially regulatory actions, probably would need an economic analysis and would be subject to various executive orders and statutes requiring the preparation of this type of analysis. The ESA does not specify a schedule for implementing management measures. Management actions could be taken as a part of the recovery planning process, or under other statutory authority.

In general, consideration of economics and other factors may be most important and relevant during the recovery planning process and when specific management and conservation measures are being implemented. While the mandate to avoid jeopardy establishes a legal minimum, recovery planning and conservation management options involve more latitude. The consideration of various options should involve the evaluation of broader social and economic costs and benefits as well as the narrow evaluation of the impact on the listed species.

Summary of Legal Constraints and Considerations

Economic considerations are not relevant to determinations that are part of the ESA listing process. Likewise, economic impacts are not considered in making jeopardy or adverse modification determinations; and, except in extraordinary circumstances, economic considerations may not be used to excuse compliance with the duty to avoid agency actions that are likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. In the rare case where an application for an exemption is submitted to the Endangered Species Committee, economic factors are considered.

Three other ESA actions may involve the consideration of economic consequences. Economic impacts must be considered in the designation of critical habitat although the relevance and importance of economics at this stage of the ESA process may be limited. As a practical matter, the consideration of economics probably is very important in evaluating options that are available to avoid jeopardy. Finally, economic considerations may be especially relevant and important during the latter stages of the ESA process and should be considered during the recovery planning process and in implementing management actions and conservation measures.

Economic considerations are not ignored by the ESA. The role of economics in the ESA, while circumscribed in some instances, is an important part of evaluating projects that may affect listed species or their habitat, and is valuable in the implementation of recovery actions and management controls.

Endnotes

1. §4(b)(1)(A) (emphasis added); "solely" was added by the 1982 Amendments, Pub. L. 97-304, 102 Stat. 2306. The use of the "word 'commercial' is not intended, in any way, to authorize the use of economic considerations in the process of listing a species." H.R. Rep. No. 897, 97th Cong., 2d Sess. 19-20 (1982). The term is used to allow for the use of trade data. *Id.* The legislative history of the 1982 amendments is clear that the purpose of these amendments is to ensure that "decisions in every phase of the process pertaining to the listing or delisting of species are based solely on biological criteria and to prevent non-biological considerations from affecting such decisions." Conference Report, H.R. Rep. No. 835, 97th Cong., 2d Sess. 20 (1982).

2. Conference Report, H.R. Rep. No. 835, 97th Cong., 2d Sess. 20 (1982) (emphasis added).

3. See, e.g., Exec. Order No. 12291, 46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C.A. § 601 (Supp. 1992); Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1988); Paperwork Reduction Act of 1980, as amended, 44 U.S.C. §§ 3501-3520 (1988).

The Conference Report states: "[T]he economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act, will not apply to any phase of the listing process." Conference Report, H.R. Rep. No. 835, 93rd Cong., 2d Sess. 20 (1982).

Similarly, listing actions should not subject to the requirements of Exec. Order No. 12612, 52 Fed. Reg. 41,685 (1987), reprinted in 5 U.S.C.A. § 601 (Supp. 1992). But see Exec. Order No. 12630, 53 Fed. Reg. 2,659 (1988), reprinted in 5 U.S.C.A. § 601 (Supp. 1992)."

4. §4(b)(2) (emphasis added).

5. §7(a)(2).

6. *TVA v. Hill*, 437 U.S. at 178, (citing H.R. Rep. No. 412, 93d Cong.).

7. *TVA v. Hill*, 437 U.S. at 188-189.

8. *Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy*, 898 F.2d 1410 (9th Cir. 1990). See also *Carson-Truckee Water Conservation Dist. v. Watt*, 549 F. Supp. 704 (D. Nev. 1982), modified 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985); and

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Nat'l Wildlife Fed'n v. Nat'l Park Service, 669 F. Supp. 384 (D. Wyo. 1987).

9. 50 C.F.R. §402.02 (1991).

10. §7(e)-(p). See 50 C.F.R. Parts 450-482 (1990).

11. §7(h)(1)(A)(i)-(iii).

12. §7(h)(1)(B).

13. §4(f)(1)(A).

14. H.R. CONF. REP. NO. 100-928, 100th Cong., 2d Sess (1988), printed in 134 CONG. REC. H7,719 (1988). See also floor debate concerning Amendment 2724, a proposal to require a comprehensive economic analysis as a part of a new or revised recovery plan. 134 CONG. REC. S10,765-69 (1988). In this floor debate, Senator Mitchell argued:

It is especially critical to the scientific credibility of the endangered species program that decisions about when to delist a species as recovered be based on the biological status of the species, not on how much it will cost to restore its numbers or whose economic interests it may affect.

It is essential to the act's integrity that recovery goals for the number of individuals or populations needed to ensure a species existence be based solely on the best available scientific data.

134 CONG. REC. S10,166 (1988). Amendment 2724 was withdrawn.

15. §4(f)(1)(B)(i) and (iii) (emphasis added); it is not clear whether these "costs" are limited to the actual cost of implementing specific measures or could include indirect costs and expenses resulting from recovery efforts.

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503**

URGENT

July 26, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-942

TO: Legislative Liaison Officer -

AGRIC-CR - Hal Gross (all testimony) - (202)720-7095 - 230
DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
ENERGY - Bob Rabben - (202)586-6718 - 209
HHS - Frances White - (202)690-7760 - 328
INTERIOR - Ralph Hill - (202)208-6706 - 329
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
STATE - Julie C. Norton - (202)647-2137 - 225
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
ARMY CivilWorks - Morgan Rees - (703)695-1370 - 205
CORPS ENGINEERS - Susan Bond - (202)272-0030 - 239
EPA - Thomas C. Roberts - (202)260-5414 - 326
GSA - William R. Ratchford - (202)501-0563 - 237

FROM:

RONALD K. PETERSON (for) *Ronald K. Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: Holly FITTER (395-3233)
Secretary's line (for simple responses): 395-6194
Linda WIESMAN (395-6808)

**SUBJECT: COMMERCE Proposed Testimony RE: HR 1899, Gulf
of Mexico Economic and Environmental
Protection Act of 1993**

DEADLINE: 9:30 AM July 27, 1993

**COMMENTS: This testimony also references HR 1566, a related
Gulf of Mexico bill.**

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:

M. Mitchell
J. Payne
M. Weatherly
B. McQuaid
S. Cameron

D. Tangherlini
K. McGinty
B. Burke
H. Paster

FAX 9pgs

LRN #I-942

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is simple (e.g., concur/no comment) we prefer that you respond by faxing us this response sheet. If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a secretary.

You may also respond by (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please include the LRM number shown above, and the subject shown below.

TO: Holly FITTER
Office of Management and Budget
Fax Number: (202) 395-5691
Analyst/Attorney's Direct Number: (202) 395-3233
Branch-Wide Line (to reach secretary): (202) 395-6194

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

SUBJECT: COMMERCE Proposed Testimony RE: HR 1899, Gulf of Mexico Economic and Environmental Protection Act of 1993

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No objection

_____ No comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this
_____ response sheet

**TESTIMONY OF DR. DONALD SCAVIA
DIRECTOR, NOAA COASTAL OCEAN PROGRAM
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

**BEFORE THE SUBCOMMITTEE ON OCEANOGRAPHY,
GULF OF MEXICO, AND THE OUTER CONTINENTAL SHELF
MERCHANT MARINE AND FISHERIES COMMITTEE
U.S. HOUSE OF REPRESENTATIVES**

JULY 28, 1993

Mr. Chairman and Members of the Subcommittee:

Good morning. I am Dr. Donald Scavia, Director of the Coastal Ocean Office, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. I appreciate the opportunity to testify on legislation concerning the Gulf of Mexico. NOAA's expertise and mandates related to estuarine and coastal ocean monitoring, assessment, and management provide it with unique capabilities to address many of the issues before the Subcommittee.

NOAA conducts a broad range of basic research, predictive services, and information transfer activities in the region and is responsible for Federal living and other marine resources management and habitat protection. NOAA has approximately 1,500 employees at 90 locations among the states of Alabama, Florida, Louisiana, Mississippi, and Texas. Total NOAA expenditures for its operations in the five Gulf states in Fiscal Year 1991 was approximately \$125 million, including grant obligations. As related to the protection of coastal and marine resources in the

Gulf of Mexico, NOAA's activities include: (1) maintaining coastal and marine research facilities; (2) maintaining National Marine Sanctuaries; and (3) overseeing National Estuarine Research Reserves and approved Coastal Zone Management Plans in four coastal states. NOAA also manages fisheries, protects marine mammals and endangered species and works to minimize plastic pollution. In addition, NOAA has direct ties to universities and colleges through the National Sea Grant College Program and the Coastal Ocean Program. NOAA's programs address not only national-scale coastal and estuarine issues, but also specific problems affecting individual estuarine and coastal ocean systems in areas such as the Gulf of Mexico. In this regard, with its regional research strength and its mandated management capabilities and responsibilities, there is a preeminent role for NOAA in many areas of concern in the region.

NOAA has been an active participant in the Environmental Protection Agency's (EPA) existing Gulf of Mexico Program since it began in 1988. NOAA is presently represented in this Gulf of Mexico Program through individuals serving on the Program's Executive Committee, Policy Review Board, Technical Steering Committee, and Subcommittees, and NOAA has an on-site coordinator for the Gulf of Mexico Program Office located at Stennis Space Center in Mississippi. Through this partnership, NOAA is working with EPA in its planning and coordination among involved agencies to identify environmental issues facing the Gulf of Mexico and to

develop action plans. NOAA believes that the Gulf of Mexico Program should continue to be a full partnership among agencies and that the focus of the Program should be to address issues that cut across individual agency missions.

NOAA concurs in the need to improve the environmental and economic health of the Gulf of Mexico and believes that the bills being considered by this Subcommittee can serve as the basis for appropriate Gulf of Mexico legislation. However, NOAA does have thoughts on the statutory establishment of a new regional authority for the Gulf of Mexico which I would like to share.

Shift of emphasis towards implementation

A great deal of planning efforts have already been undertaken in the Gulf of Mexico. Any legislation should recognize and build upon the planning that has been accomplished by the present EPA Gulf of Mexico Program. Implementation should stress research to identify information gaps, provide for the transfer of information to users, and foster efforts to facilitate remedial actions.

Potential conflicts of agency mandates and responsibilities

A mechanism for balancing priority actions must be carefully coordinated to avoid conflict with statutorily mandated activities. For example, the Secretary of Commerce is responsible for marine resource management and land and water

uses in the Gulf region. These responsibilities must continue to be carefully coordinated with activities of other Federal agencies.

Given the diversity among the economies and the approaches to and levels of environmental protection of the Gulf states, the relationship of any activities under the Gulf of Mexico program must also take into account existing state authorities.

Concerns over potential conflicts of agency responsibilities could be resolved with the inclusion of clarifying legislative language. In addition, careful consideration should be given to the appropriateness of requiring any Federal agency to give an executive board prior notification of actions in the Gulf that may be "significantly contrary" to a preliminary plan which has not gone through an approval process. Also, any Gulf of Mexico legislation should minimize the need for additional regulations.

Agency responsibilities

The Gulf of Mexico Program should be a true partnership among agencies. An executive board moves substantially in that direction. Several agencies have considerable knowledge and responsibilities concerning Gulf of Mexico issues and legislation might provide a rotating chair for any such board. This would permit the leadership role to be shared.

Critical functions of the Gulf of Mexico Program, such as establishment of a plan detailing the activities to be conducted should be approved by such a board. No one agency should make the final determination; the legislation should provide for collegial decision-making.

Legislation should establish a process for agencies to identify their appropriate roles and responsibilities in connection with the development and implementation of a plan. The legislation must ensure that each agency's expertise is reflected in any plan for coordinating activities in the Gulf region. Specific measures to improve the Gulf, based upon existing authorities, should be performed by the agencies having the expertise and the responsibility to promulgate regulations, monitor the results, and report on accomplishments. For example, the Secretary of Commerce, under the Magnuson Act, has the responsibility to oversee actions related to living marine resources. Any measures to improve the Gulf should include habitat considerations as well as social and economic impacts to users.

Duplication of effort

Any comprehensive assessment of the economic and environmental conditions and trends of the Gulf of Mexico and of managing data should build upon, not duplicate, activities already conducted by agencies participating in the existing Gulf of Mexico program. For example, NOAA has many of the required capabilities in place

and already conducts annual assessments of fisheries resources and environmental trends in the Gulf of Mexico.

Funding

The concerned Federal agencies could potentially undertake an expanded role in the Gulf of Mexico Program as envisioned in legislation before the Subcommittee -- if provided with adequate funding. However, an integrated ecosystem-wide approach to the Gulf of Mexico's environmental problems focusing on implementation would require additional appropriations on the order of magnitude currently under consideration by the Subcommittee. Limited to existing resources, NOAA would not be able to participate in such an expanded program.

Any legislation should provide that agency funding requests be determined in a coordinated fashion through the appropriations process. NOAA recommends that any subsequent appropriations to implement the legislation be provided directly to each agency.

Commission concept

NOAA believes that strong links between a program office and oversight board would be better accomplished through the use of an executive board than through a commission. The structure and authority of a commission may not be suitable for addressing environmental issues on a Gulf-wide basis.

SENT BY:METROPOLITAN BUS MACH ; 7-26-93 ; 0:34 ; PROPERTY MANAGMENT

038558811# 8

Support for citizens advisory committee

NOAA supports the inclusion of a citizens advisory committee in any Gulf of Mexico legislation. NOAA's experience in the development of the Florida Keys National Marine Sanctuary Program Management Plan suggests that inclusion of a citizens advisory committee may contribute significantly to a program's success.

Conclusion

In summary, NOAA supports the goals of the Gulf of Mexico legislation being considered here today, and looks forward to working with this Subcommittee to ensure that agency expertise and missions are recognized in such legislation. We believe many of the planning objectives of the bills are being achieved through actions already underway in the existing Gulf of Mexico Program and future emphasis should be on measures to implement plans. Finally, in order to be successful, the Program should be a true partnership among the participating agencies.

Mr. Chairman, this concludes my testimony. I will be happy to answer any questions the Subcommittee may have.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

October 18, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-1463

TO: Legislative Liaison Officer -

INTERIOR - Danny Conenstein - (202)208-6706 - 329
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
STATE - Julia C. Norton - (202)647-4463 - 225
EPA - Thomas C. Roberts - (202)260-5414 - 326
NEC - Sonia Mathews - (202)456-6722 - 429
MMC - John R. Twiss, Jr. - (202)606-5504 - 259

FROM: JAMES J. JUKES (for) *JJ*
Assistant Director for Legislative Reference

OMB CONTACT: Jeffrey WEINBERG (395-3457)
Secretary's line (for simple responses): 395-3454

SUBJECT: COMMERCE Proposed Testimony RE: HR 779,
Reauthorization of the Atlantic Tunas
Convention Act

DEADLINE: NOON October 19, 1993

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
Howard Paster
Katie McGinty
Ken Schwartz
Cora Beebe
Jeff Payne
Scott Cameron
Jeff Hill
Jonathan Gledhill

N/C

SENT BY:

10-18-93 : 8:52AM : DOC/OGC/OAGC-L&R-

202 385 3108:# 3/ 7

**STATEMENT
OF
DR. NANCY FOSTER
DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

**BEFORE THE
SUBCOMMITTEE ON FISHERIES MANAGEMENT
MERCHANT MARINE AND FISHERIES COMMITTEE
U.S. HOUSE OF REPRESENTATIVES**

OCTOBER 20, 1993

Mr. Chairman and Members of the Subcommittee:

My name is Dr. Nancy Foster. I am the Deputy Assistant Administrator for Fisheries of the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, U.S. Department of Commerce (Department).

I appreciate the opportunity to appear before this Subcommittee to present the Department's views on the reauthorization of the Atlantic Tuna Convention Act (ATCA). My brief presentation here today focuses on three points concerning the ATCA -- namely: the purpose and provisions of the ATCA, the role of the Department and NMFS under the ATCA, and an issue which we believe should be addressed during reauthorization.

Purpose and Provisions of ATCA

The Secretary of Commerce (Secretary) has been using the ATCA to manage Atlantic tunas, particularly bluefin tuna, since 1975.

Other species covered by the ATCA (including swordfish and

SENT BY:

10-18-83 : 8:52AM : DOC/OGC/OAGC-L&R-

202 395 3109:# 4/ 7

billfish) have been the Secretary's responsibility since passage of amendments to the ATCA in 1990. The ATCA provides the Secretary with the regulatory authority to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT) for tunas, swordfish, and billfish. The 1990 amendments to ATCA indicated that species working groups should be established to provide ICCAT Commissioners and the ICCAT Advisory Committee with advice on highly migratory species (HMS). Such species working groups have been established for bluefin tuna, other tunas, billfish, and swordfish. These working groups are comprised of members from both the ICCAT Advisory Committee itself as well, as other organizations (including the fishing industry).

Role of the Department and NMFS

The role of the Secretary, and more specifically of NMFS, is to implement ICCAT recommendations through domestic policy, either by way of ATCA regulations or through Magnuson Fishery Conservation and Management Act (Magnuson Act) fishery management plans (FMP) and implementing regulations. NMFS has established a Highly Migratory Species Division within the Office of Fisheries Conservation and Management to meet the management obligations as required under the ATCA, as well as the Magnuson Act. The HMS Division works closely with our Regional Offices and Science Centers, the Regional Fishery Management Councils (Councils), ICCAT Commissioners, fishing industry, and others in formulating

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10-18-93 : 8:53AM : DOC/OGC/OAGC-L&R-

202 395 3109:# 5/ 7

and implementing domestic management policy pursuant to ICCAT recommendations.

NMFS recently finalized its HMS Process Document, which is intended only to set forth administrative procedures that NMFS will follow in preparing and issuing Magnuson Act HMS FMPs and FMP amendments. Any regulations implemented under the ATCA must be consistent to the extent practicable with FMPs prepared and implemented under the Magnuson Act. The HMS Process identifies the opportunities for involvement by the public, the fishing industry, the Regional Councils, and the ICCAT Commissioners and advisory groups. In the future, we intend to address additional activities such as improved methods to track landings of recreationally-caught bluefin tuna, development of fishery-independent stock abundance indices, additional tagging studies, geographical coverage for scoping and regulatory hearings, and economic studies on all HMS fisheries.

The United States has generally been successful in implementing and enforcing quotas, area closures, and size limits as per ICCAT recommendations. Indeed, some ICCAT recommendations have been applied by the United States in a manner to further maximize yield and conservation efforts, such as a larger minimum size for sale of bluefin tuna to help speed recovery of the spawning stock biomass. However, ICCAT's Standing Committee on Research and Statistics, as well as our own scientists, believe the western

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10-18-93 : 9:53AM : DOC/OGC/OAGC-L&R-

202 305 3100:# 6/ 7

Atlantic stock of bluefin tuna continues to be in a state of significant decline.

The U.S. commercial and recreational fleets currently harvest 52 percent of the total western Atlantic bluefin tuna quota, and approximately 4 to 6 percent of the total Atlantic catch. The U.S. catch of other tunas is equally low relative to total Atlantic catch. There is no commercial fishery for billfish in the United States, and the recreational catch is again a small part of total billfish catch in the Atlantic and Caribbean. Billfish are managed under the Magnuson Act since there are no ICCAT recommendations for billfish. Although the U.S. share of total Atlantic catch of species covered by the ATCA is relatively low, the United States continues to actively implement the recommendations of ICCAT and believes that ICCAT is a primary avenue through which these important resources can be successfully managed.

Issues to be Addressed in Reauthorization

The Department supports H.R. 779 and reauthorization of the ATCA. Nevertheless, we believe the ATCA should be amended to delete the provision prohibiting the Secretary from issuing regulations which have the effect of increasing or decreasing the total quota allocated to the United States. We believe that the primary international management program for HMS should continue to be accomplished through ICCAT. However, the ATCA's current

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10-18-93 : 9:54AM : DOC/OGC/OAGC-L&R-

202 385 3100:# 7/ 7

requirement that U.S. regulations may not have the effect of increasing or decreasing the total quota allocated to the United States may pose a problem if the United States wishes to establish a domestic quota on a local stock or substock of a HMS for conservation purposes that is less than that allowed by ICCAT. The inability to set a lower quota could result in local overfishing and the loss of long-term benefits.

Mr. Chairman and Members of the Subcommittee, this concludes my testimony. I thank you for this opportunity to express the views of the Department. I would be pleased to respond to any questions you may have.

I

103D CONGRESS
1ST SESSION

H. R. 779

To reauthorize the Atlantic Tunas Convention Act of 1976.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1993

Mr. MANTON (for himself, Mr. STUDDS, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

A BILL

To reauthorize the Atlantic Tunas Convention Act of 1976.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. REAUTHORIZATION OF ATLANTIC TUNAS CON-**
4 **VENTION ACT OF 1976.**

5 Section 10 of the Atlantic Tunas Convention Act of
6 1976 (16 U.S.C. 971h) is amended by striking "1989,"
7 and all that follows through the end of the section and
8 inserting the following: "1993, 1994, 1995, 1996, and
9 1997."

O

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

4 pages
fitch

October 19, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-1475

TO: Legislative Liaison Officer -

INTERIOR - Danny Conenstein - (202)208-6706 - 329
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
EPA - Thomas C. Roberts - (202)260-5414 - 326
NEC - Sonia Mathews - (202)456-6722 - 429
OSTP - Chris Clary - (202)456-7116 - 288
GSA - William R. Hatchford - (202)501-0563 - 237

FROM: JAMES J. JUKES (for) *J. J.*
Assistant Director for Legislative Reference

OMB CONTACT: Jeffrey WEINBERG (395-3457)
Secretary's line (for simple responses): 395-3454

SUBJECT: COMMERCE Proposed Report RE: HR 2761, Ocean
and Coastal Management Improvement Act

DEADLINE: NOON October 26, 1993

COMMENTS: Please note that Commerce states that it would
recommend a veto of HR 2761 (see second to last paragraph of
letter).

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:

Howard Paster
Martha Foley
Jennifer Palmieri
Katie McGinty
C. Walden
Ken Schwartz
Cora Beebe
Jeff Payne
Ron Cogswell
Bruce Beard
Rob Fairweather
Bernie Martin
Margaret Shaw

SENT BY:

10-15-83 : 4:33PM :

DOC/OGC/OAGC L&R

202 395 3109:# 3/ 4



GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

The Honorable Gerry E. Studds
Chairman, Merchant Marine and
Fisheries Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the
Department of Commerce on H.R. 2761, a bill entitled

The Ocean and Coastal Management Improvement
Act of 1993.

The Department, on behalf of the Administration and with the
concurrence of other affected agencies, strongly opposes
H.R. 2761.

The bill would transfer significant portions of the National
Oceanic and Atmospheric Administration (NOAA) from the Department
of Commerce to the Department of the Interior and the proposed
Department of Environmental Protection. The NOAA offices to be
transferred perform research and other functions related
primarily to ocean and coastal areas -- the "wet side" of NOAA.
The offices proposed for transfer by H.R. 2761 are: (1) the
National Ocean Service; (2) the National Marine Fisheries
Service; (3) the Office of Oceanic and Atmospheric Research; and
(4) the NOAA Corps and its fleet of research and survey vessels.

NOAA is the Nation's oceanic and atmospheric agency. Its
mission, through science and service, is to describe and predict
changes in the Earth's environment, manage the Nation's ocean and
coastal resources, and promote global stewardship of the world's
oceans and atmosphere. To fulfill this mission, NOAA conducts
oceanic and atmospheric research to improve environmental
products and services; develops and maintains environmental data
bases and disseminates environmental information products;
manages the marine environment; protects habitat and endangered
species; and operates environmental satellites, ships, aircraft
and buoys.

NOAA's oceanic and atmospheric missions are closely tied to the
goals of economic growth and environmental protection emphasized
by this Administration and NOAA's location in the Department of
Commerce fosters both goals. NOAA conducts objective and valued
scientific research covering many areas, such as fisheries
management, which underlie our policies concerning trade and the
environment. NOAA's location within the Department allows its
scientists to work more closely with other components of the
Department to this end. In addition, separating the interrelated

-2-

oceanic and atmospheric functions of NOAA could likely diminish the overall level of scientific research being conducted.

During his confirmation hearings, the Secretary stated his commitment to ensuring that NOAA's critical missions receive the attention they deserve. NOAA's responsibilities concerning the oceans and atmosphere are intimately related to a central challenge of this Department -- strengthening the U.S. economy. Our efforts to promote trade must continue to reflect the unique long-term environmental perspective charged to NOAA scientists and managers. NOAA's programs and missions are appropriately situated in the Department of Commerce and portions should not be transferred elsewhere.

H.R. 2761 is objectionable for additional reasons. Transferring portions of NOAA from the Department could send a signal, albeit incorrect, that this Administration is not serious about the need for close coordination between our Nation's environmental and industrial communities. Housing NOAA within the Department of Commerce is an important reminder of the need for such coordination. In addition, H.R. 2761 appears to divert resources from NOAA's important scientific research to fund the administrative tasks inherent in an interdepartmental transfer that is not justified.

For these reasons, this Department strongly objects to transferring portions of NOAA to the Departments of the Interior and Environmental Protection. We have been advised that the Secretary of the Interior and the Administrator of the Environmental Protection Agency concur in our opposition to H.R. 2761. If H.R. 2761 were enacted, the Secretary of Commerce would recommend a veto.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report and the enactment of H.R. 2761 is not in accord with the program of the President.

Sincerely,

Carol C. Darr
Acting General Counsel

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503**

November 22, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-1743

TO: Legislative Liaison Officer -

INTERIOR - Danny Consenstein - (202)208-6706 - 329
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
OSTP - Chris Clary - (202)456-7116 - 288

FROM: RONALD K. PETERSON (for) *Ronald K Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: MIKE GOAD (395-7301)
Secretary's line (for simple responses): 395-6194

SUBJECT: Commerce Proposed Report RE: HR 2457, Winter
Run Chinook Salmon Captive Broodstock Act

DEADLINE: 10:00 A.M., MONDAY, November 29, 1993

COMMENTS: If you do not respond by the deadline, we may assume
that your agency has no comment.

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19..

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:

J. Payne
S. Cameron
B. Wolf
N. Starler
J. Palmieri
H. Paster
~~K. McGinty~~
C. Walden



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

Honorable Gerry E. Studds
Chairman, Committee on Merchant
Marine and Fisheries
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Commerce (Department) provides the following views on H.R. 2457, the "Winter Run Chinook Salmon Captive Broodstock Act of 1993." The Department is concerned with the bill as introduced, but would not object to H.R. 2457 if amended as detailed below.

H.R. 2457 would establish a winter-run chinook captive broodstock program within the Department of the Interior's U.S. Fish and Wildlife Service (USFWS). A winter-run chinook captive broodstock program is currently authorized by a permit under section 10 of the Endangered Species Act (ESA) (16 U.S.C. § 1539). The Department -- through the National Marine Fisheries Service (NMFS) -- is responsible for the protection and recovery of the winter-run chinook salmon, and specifically, for overseeing compliance with the terms and conditions of permits issued by NMFS under the ESA.

Our objections to H.R. 2457 as introduced are as follows. Since this program is currently authorized by a permit under section 10 of the ESA, additional authorization from the Congress is not necessary. While the bill authorizes the captive broodstock program for a period of ten years, the current section 10 permit expires December 31, 1995. Any program activity after 1995 would still require a new section 10 permit by NMFS pursuant to the ESA. The flexibility in the captive broodstock program should be maintained to ensure that the program is consistent with the overall recovery program. The current permitting process under the ESA provides the needed flexibility in establishing terms and conditions for, and modifying, permits.

The bill does not parallel requirements under the ESA. For example, the bill does not require the USFWS to consult with NMFS pursuant to section 7 of the ESA, nor require a permit to be issued by NMFS pursuant to section 10 of the ESA. NMFS and USFWS are currently engaged in formal consultation under section 7 of the ESA to assess the effects of the captive broodstock program and other USFWS hatchery programs on recovery of the winter-run of chinook salmon. At this time, it is not possible to tell whether the bill, as drafted, will correspond with the biological opinion to be issued by NMFS as a result of this consultation.

The bill may be premature since a recovery plan for winter-run chinook salmon is currently being developed. While the plan will address captive broodstock programs, it is too early to know what role such programs will play in the overall recovery plan. The recovery team has indicated that such a program will not be the cornerstone of the plan, nor will it likely be a high priority task. Further, the bill would emphasize only one aspect of the recovery effort. Other current recovery efforts include: a fish screening program for unscreened diversions in the Sacramento River; modeling of fish survival at various life stages in response to water management scenarios; and investigation of methods for identifying juvenile chinook salmon to race. These measures would serve to reduce the adverse effects of water diversions and provide water-users with greater reliability, which would likely make these efforts higher priority than the captive broodstock program.

The bill also does not parallel other aspects of NMFS' implementation of the ESA, such as the interim artificial propagation policy recently published by NMFS. In short, H.R. 2457 may create confusion and perhaps conflicts with the existing ESA program.

The Department would not object to the bill if it were closely tied to the recovery plan to ensure that the program is consistent with the goals, policies and priorities of that plan. In addition, the bill should not preempt any procedural or substantive requirements of the ESA, including section 7 consultations by NMFS regarding winter-run chinook salmon and section 10 permitting requirements.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Carol C. Darr
Acting General Counsel

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503



January 26, 1994

LEGISLATIVE REFERRAL MEMORANDUM

LRM #M-1052

TO: Legislative Liaison Officer -

AGRICULTURE - Marvin Shapiro - (202)720-1516 - 312
CORPS ENGINEERS - Susan Bond - (202)272-0030 - 239
ENERGY - Bob Rabben - (202)586-6718 - 209
EPA - Thomas C. Roberts - (202)260-5414 - 326
INTERIOR - Danny Consenstein - (202)208-6706 - 329
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
MMC - John R. Twiss, Jr. - (202)606-5504 - 259
NEC - Sonyia Matthews - (202)456-6722 - 429

FROM: RONALD K. PETERSON (for) *Ronald K. Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: Jeffrey PAYNE (395-3914)

SUBJECT: COMMERCE Qs and As on the Endangered Species
Act Consultation on the Boston Harbor Outfall

DEADLINE: 10:00 A.M., Wednesday, February 2, 1994

COMMENTS: If you do not respond by the deadline, we will
assume that your agency has no comment.

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:

J. Payne
S. Cameron
J. Kazel
R. Fairweather
C. Walden
K. McGinty

**FOLLOW-UP QUESTIONS FOR THOMAS BIGFORD
FOR THE HEARING ON
THE ENDANGERED SPECIES ACT
CONSULTATION ON THE BOSTON HARBOR OUTFALL
BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES
OCTOBER 18, 1993**

QUESTIONS FORWARDED BY REPRESENTATIVE GERRY E. STUDDS, CHAIRMAN

Question 1: Why did the National Marine Fisheries Service (NMFS) ignore both Congressional intent and subsequent interpretation by the Courts that, when there is uncertainty regarding impact, the benefit of the doubt should go to the endangered species?

Answer: Some degree of uncertainty exists in virtually every situation in which government agencies are required to predict impacts to the environment from proposed development projects. "In cases where there is not enough information on a particular species to evaluate probable impacts of an action, the 'benefit of the doubt' should continue to be given to the species." NOAA Memorandum dated December 19, 1986, "Final Regulations and Guidelines for Endangered Species Act Section 7 Consultations," page 3. In this case, "NMFS reviewed the best available information conservatively and believes this information is adequate to fully support a no-jeopardy conclusion."

The Environmental Protection Agency (EPA), United States Geological Survey (USGS), and other sources provided information that indicates that the relocation of the Boston Harbor outfall and subsequent implementation of secondary treatment would lessen farfield impacts from those that may be caused by the existing outfall. NMFS applied a conservative interpretation to the proffered data and concluded that the farfield impacts will be similar to current impacts. The existing Boston Harbor outfalls do not appear to be jeopardizing the existence of any listed species. Therefore, NMFS believes that its conservative interpretation of the data presented for the new outfall, as well as additional information, indicate that the relocation of the outfall "cannot reasonably be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species or appreciably diminish the value of critical habitat for both the survival and recovery of a listed species," (the jeopardy standard).

Since NMFS also concluded that the proposed outfall may affect listed species, NMFS has recommended that a number of additional studies be conducted prior to initiation of the discharge and once the discharge is online. These studies were not recommended because there are doubts about the no jeopardy conclusion, rather

to provide information which may be helpful in mitigating any adverse effects that do occur. Furthermore, the ongoing monitoring program will provide the agencies with continuous information, and should unexpected problems arise, consultation could be reinitiated to determine if changes are necessary.

Question 2: What is your justification that the benefit of the doubt should go to the project?

Answer: NMFS did not give the project the benefit of the doubt. See the answers to Question 1 and 3.

Question 3: Would the finding have been different if NMFS were analyzing an unbuilt project, as opposed to a largely completed one?

Answer: The status of expenditures and the stage of development of the proposed outfall were not considered and had no bearing on the conclusions of the biological opinion. NMFS considers the impacts on listed species of projects proposed by an action agency, as required by Section 7 of the Endangered Species Act. This ESA Section 7 consultation was conducted with EPA to consider the impacts of the issuance of a permit for the discharge of sewage 9.5 miles from Boston Harbor.

The existing Boston Harbor outfalls are covered under a permit issued in 1986. Reissuance of a permit for the current outfalls would have required Section 7 consultation also, since information collected since 1986 by the Massachusetts Water Resources Authority (MWRA), EPA and scientists studying the bays and endangered species indicated that the existing outfalls may affect listed species.

Question 4: Do you agree that it makes little sense to monitor unless you know what you are looking for and unless there is a commitment to act upon that information?

Answer: Yes, we agree that it would make little sense to monitor unless we knew what information we were looking for and unless there was a commitment to act upon that information. The Massachusetts Water Resources Authority, with the assistance of the Massachusetts Executive Office of Environmental Affairs' Outfall Monitoring Task Force (NMFS is a voting member of the task force), has prepared and begun implementing an extensive monitoring program which is designed to gather information on current (baseline) conditions and to answer some fundamental questions about physical and biological processes in Boston Harbor, and Massachusetts and Cape Cod Bays. The monitoring plan outlines a series of questions to be addressed which are based on potential impacts that may be caused by the outfall. The data being collected is designed to answer the questions posed by the monitoring plan. Refinements to the plan will continue with the

assistance of the Outfall Monitoring Task Force as data are collected and analyzed to ensure that the information is answering the questions posed.

Once the discharge at the new location has been started, several years' worth of baseline data will have been collected. A post-discharge monitoring plan will then be implemented to determine the impact of the effluent discharge on the marine resources of Massachusetts Bay. Results from the post-discharge monitoring program will be continuously compared with the baseline data to determine if significant changes have occurred as a result of the outfall.

This monitoring program is, perhaps, the most extensive of its type in the world and MWRA is spending about \$2.7 million per year on its implementation. However, the NMFS biological opinion on the outfall project concluded that the monitoring plan is not sufficient to determine impacts in the "farfield" -- on Stellwagen Bank and in eastern Cape Cod Bay in particular. NMFS, therefore, recommended that EPA design a monitoring plan for these areas for the purpose of determining the impact of the outfall and other perturbations on the endangered species in these areas. The details of this monitoring plan have yet to be worked out. However, NMFS is committed to working with EPA and other interested parties in designing a workable, cost effective monitoring plan for the farfield. Concerns for impacts beyond endangered species and including resources at the Stellwagen Bank Sanctuary could be considered in the monitoring plan.

We have received assurances that, should adverse change be detected by the ongoing monitoring program, appropriate action will be taken by the EPA.

Question 5: What is your definition of meaningful change?

Answer: The answer to this question depends on what parameter is being monitored. In a general sense, meaningful change is any change that is detected that can be attributed to an anthropogenic source and is causing adverse effects to living resources or that has changed ambient conditions in a manner that could lead to adverse effects to living resources. One of the principal goals of the Outfall Monitoring Task Force is to advise EPA and the MWRA on meaningful levels of change of selected variables. The Task Force has not yet taken on that task because many of the variables require several years of data collection and analysis before meaningful levels of change can be established. The most simplistic definition of meaningful change is a violation of federal or state water quality standards. For those parameters which do not have a state or federal standard (e.g., nitrogen) meaningful change could be any statistically significant difference between the observed conditions and the

baseline conditions. However, statistical significance does not necessarily imply ecological significance.

The ongoing collection of baseline data is critical for defining meaningful change. The existing program is gathering data on numerous parameters and will ideally lead to a determination of the natural variability in these parameters. Without an understanding of the natural variability in the system it will be impossible to determine if future detected changes are due to the outfall or natural variability.

It is NMFS' belief that EPA, as the permitting agency, is responsible for determining the level of meaningful change. Nonetheless, the determination of meaningful change will ultimately rely upon the collective expertise and judgement of the regulatory agencies and scientists on the Outfall Monitoring Task Force.

Question 6: How can we differentiate "harm" from jeopardy, short of dead whales?

Answer: The meaning of this question is not clear, although it apparently refers to the "may affect" finding of the biological opinion. NMFS believes, after reviewing the best available information, that the existing MWRA discharges into Boston Harbor may be affecting listed species and their habitat, and that any effects caused by the proposed outfall would be similar. A variety of environmental indicators can and will be used in the monitoring program to determine if problems are developing as a result of the proposed MWRA discharge. These indicators include changes in plankton abundance and species composition, fish health, water quality conditions, benthic community structure, and primary production, among others. The monitoring of these parameters is designed to detect changes well before they cause "harm" to endangered species. As an additional step NMFS recommended that EPA and other Federal agencies should monitor the level of contaminants over time in whales that frequent the Massachusetts/Cape Cod Bay areas. Increasing levels of contaminants in the whales could indicate "harm" to the animals but would not necessarily cause death to individual whales or jeopardize the continued existence of the species. As defined at 50 CFR §402.02, to jeopardize the continued existence of a species means to engage in any action that reasonably is expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species. This does not preclude all adverse impacts upon a species or even individual takings of a species.

Question 7 part 1: What is the financial relationship among the MWRA, EPA and the scientists who conducted the research upon which the biological opinion was based?

Answer: NMFS has no specific knowledge regarding financial negotiations between the MWRA, EPA, and their consultants, and defers to EPA and MWRA with regard to questions on financing. EPA and the MWRA should be able to answer this question. Much, if not all, of the research conducted in Massachusetts and Cape Cod Bays that is either directly or indirectly related to the outfall is funded by Federal or state grants, and is a matter of public record. In addition to the MWRA and EPA supported research, NMFS used the best available information, including communications with scientists and the documents listed in the bibliography of the biological opinion, to make an independent assessment of the impacts of the proposed outfall on listed species. NMFS biologists and other NOAA scientists that authored and reviewed the biological opinion were not paid by MWRA or EPA.

Question 7 part 2: Did they also participate in the previous studies for the Biological Assessment?

Answer: Yes. That information undoubtedly included the results of studies conducted by or for MWRA. NMFS believes that EPA and their consultants used the best available information to prepare their Biological Assessment.

Question 7 part 3: If so, does asking them to evaluate their own work raise a question of the veracity of the biological opinion?

Answer: NMFS staff independently assessed the best available information to form the biological opinion. NMFS did not ask anyone to "evaluate their own work," although many scientists were contacted to clarify research results. Additionally, a number of NOAA scientists were asked to review the Assessment and a draft of the opinion. NMFS did not hire contractors or ask anyone outside NOAA to prepare or assist in the preparation of the biological opinion.

Question 8: Can NMFS provide relative assurance that our current scientific capabilities will permit us to detect changes to the environment in a timely manner? If we do detect these changes, does current knowledge allow linkage of change to the effluent flow of the outfall tunnel?

Answer: The MWRA monitoring program is designed to evaluate the effects of the outfall on the marine resources of Massachusetts Bay. We have every reason to believe that the monitoring program together with the conservation recommendations we provided to EPA will provide us with information in a timely manner. Linking an observed change to the outfall discharge will depend on the type, magnitude, and location of that change. For example, if the benthic community in the nearfield of the outfall changes to a pollution tolerant and less diverse community it should be possible, with an adequate pre-discharge baseline on the benthic

community, to link that change to the outfall discharge. Making such a linkage, however, with naturally, highly variable parameters will not be an easy task, particularly as the distance from the outfall becomes greater. The National Marine Fisheries Service believes, however, that the burden of proof should fall on EPA and MWRA.

Question 9: Has NMFS taken into consideration the cumulative impacts of the additional outfalls proposed for Massachusetts and Cape Cod Bays?

Answer: NMFS has not been apprised of new outfalls proposed for Massachusetts and Cape Cod Bays. Note that the term "cumulative effects" has a specific statutory meaning, discussed in the answer to question 18. NMFS considered the combined effects of all perturbations on Massachusetts and Cape Cod Bays by assessing the effects of existing conditions on listed species and analyzing how those conditions may change as a result of the outfall relocation. NMFS concluded that existing conditions may be affecting but are not jeopardizing the continued existence of any listed species. Furthermore, with the advent of secondary treatment and increased dilution at the new outfall location a net benefit to the Massachusetts Bay ecosystem may result.

NMFS and EPA have initiated discussions on the combined effects of all discharges and disposal operations in the Massachusetts and Cape Cod Bays, as well as in other water bodies. Models, monitoring results, and associated studies conducted for the MWRA outfall will provide important baseline, predictive, and monitoring tools for one area-wide consultation addressing all federal activities that impact water quality.

Question 10: Given the low number of North Atlantic Right Whales in existence, is NMFS's assertion that the project "may effect or is likely to adversely effect a listed species," yet "it does not necessarily follow that the action will jeopardize the continued existence of the species," a justifiable conclusion? Is it not possible that any adverse effect may serve to place the North Atlantic Right Whale in jeopardy?

NMFS does not expect the relocation of the Boston Harbor outfalls to a location 9.5 miles from Deer Island to result in any new impacts to right whales, which occur primarily in the farfield. Conservatively interpreting the best available information, NMFS concluded there may be effects on listed species including right whales, and those effects may continue when the discharge is relocated. However, NMFS believes the right whale population is not jeopardized by the Boston Harbor discharges. Please see the answer to Question 6 for a discussion on the difference between adverse effects and harm to a species and jeopardy.

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Finn (1992) prepared a population model that considered the effects of various parameters on the modelled projections of population growth of the northern right whale population. That model indicated growth rate was not sensitive to most parameters, including a change in the reproductive interval from 3 to 5 years. Model runs with best guess parameters showed very low recovery projections. Model runs with no entanglement or ship strike mortalities resulted in much improved population growth. While this is a rough population model, it suggests that the low recovery rate of the right whale population may be due primarily to direct mortality resulting from human activities.

Question 11: Given the following, why doesn't NMFS demand the "reasonable alternative" of the discharge of secondarily treated effluent into Boston Harbor?

- a. The MWRA claims that the only standard it will be unable to meet if it continues to discharge into the Harbor after full secondary treatment is on line is dissolved oxygen.
- b. The potential exists for particulate-induced B.O.D. problems in Stellwagen Basin and Cape Cod Bay under stratified conditions.
- c. There have been a relatively low number of D.O. violations under current conditions in the Harbor (State of Boston Harbor, 1991).
- d. In 1980, NMFS recommended rejection of the MDC's waiver application for secondary treatment discharge into the Harbor.
- e. Uncertainties remain about the possible impacts of relocating the discharge, including the new site's potential attraction for endangered species and the resulting exposure to toxins and toxic phytoplankton.

The entire premise of the Biological Opinion is that there is an inherent benefit in relocating the outfall. Why didn't NMFS follow the protocol established by the ESA, which requires a look at all reasonable alternatives? Given the amount of uncertainties outlined in the Biological Opinion, there is ample evidence that this alternative should have been examined.

Answer: NMFS's responsibilities, spelled out in 50 CFR 402.14 (g), include evaluation of "the effects of the action and cumulative effects on the listed species or critical habitat" (50 CFR 402.12(g)(3)). The action for which consultation was requested, and that which was evaluated in the biological opinion, was the proposed issuance of a permit for discharge from an outfall 9.5 miles from Deer Island. NMFS is not required to "look at all reasonable alternatives" as expressed in the above question. Rather, the regulations specify that "A 'jeopardy' biological opinion shall include reasonable and prudent alternatives, if any." Since NMFS found that the proposed action was not likely to jeopardize the continued existence of any listed species, reasonable and prudent alternatives were not developed or assessed.

The rationale for the relocation of the Boston Harbor outfall can be found in the various environmental impact statements prepared for this project by EPA and MWRA. Inquiries regarding that rationale, implied in sections (a.), (b.) and (c.) of this question, should be addressed to those agencies.

Section d. of this question states that NMFS rejected the Metropolitan District Commission's 1980 waiver request for secondary treatment discharge into Boston Harbor. Our records indicate that the 1980 waiver application requested a waiver of the secondary treatment requirements of the Clean Water Act, and discharge of primary-only treated sewage near Graves Light, outside of Boston Harbor. Comments to EPA at that time identified NMFS' concerns regarding all living marine resources and their habitat, and apprised EPA of their additional Section 7 responsibilities. NMFS remains concerned about the potential nearfield and farfield impacts of the proposed discharge on living marine resources and their habitat. These concerns are reflected in the biological opinion and will be expressed in separate comments on the draft NPDES permit. However, although NMFS may recommend modifications of a project due to impacts to habitat, NMFS does not have statutory authority to require such modifications.

Section e. of this question is addressed in the answer to question 21.

Question 12: Given the following, why doesn't NMFS, at the very minimum, demand secondary treatment of all effluent prior to discharge from the tunnel?

- a. Secondary treatment has a large benefit over primary treatment in that B.O.D. removal is increased (from 35% removing in primary treatment to 85-90% removal during secondary treatment).
- b. Secondary treatment is also superior to primary treatment in toxins removal (from approximately 40% removal in primary treatment to 70% removal during secondary treatment).
- c. There is a potential for D.O. problems to be experienced in Stellwagen Basin and Cape Cod Bays with relocation of particulate discharge.
- d. Discomfort has been expressed regarding the toxins discharge being relocated closer to endangered species.
- e. NMFS has a predisposition to requiring secondary treatment.
- f. Since Boston Harbor is already degraded, all improvements to treatment facilities will result in a net gain for the Harbor.

Answer: Given the relatively short period of time that primary-only treated sewage will be discharged at the new location NMFS does not believe that problems for endangered and threatened species will arise. In addition, model predictions indicate that much of the discharge from the existing outfall locations is

rapidly flushed into Massachusetts Bay. Therefore, there should be very little, if any, distinguishable difference between current conditions and future conditions in the farfield where listed species occur and current conditions are not likely to jeopardize the continued existence of endangered and threatened species.

NMFS' mandate under the Endangered Species Act is limited to protecting against threats to listed species and critical habitat. The agency, however, has expressed concerns, on numerous occasions, about potential impacts to fisheries habitat from a primary-treated discharge in Massachusetts Bay, particularly in the nearfield. These concerns, which were discussed in the biological opinion, include potential decreased levels of dissolved oxygen, elevated levels of toxic contaminants in both the sediments and benthic animals, increased phytoplankton productivity, and changes in benthic community structure. However, these potential changes are not likely to result in adverse effects to listed species. NMFS will address these and other concerns during the review of the draft NPDES permit.

Question 13: On page 26 of the Biological Opinion NMFS states that "...Further consultation will be required if the use of explosives is deemed necessary.". My understanding of the Endangered Species Act is that consultation should be undergone prior to any expenditure on a project. Why isn't the need for consultation for potential use of explosives being considered prior to further expenditures on this project?

Answer: Information on the potential effects of explosives on listed species was given in the biological opinion because of anecdotal reports that explosives were being considered to complete the connection of the risers from the outfall tunnel. Furthermore, NMFS has been told that completion of the project does not require use of explosives. NMFS identified the problems associated with explosives to discourage their deployment. Because NMFS has not received any details regarding use of explosives, and the use of explosives is not presently part of the action for which the biological opinion was issued, no conclusion regarding the likelihood of effects to listed species has been made. Therefore, reinitiation requirements were included in the section cited above. As provided by 50 CFR §402.16(c), reinitiation of consultation is required if the agency action is subsequently modified in a manner that causes an effect to a listed species that was not considered in the opinion.

Question 14: The argument presented on page 36 and elsewhere in the Biological Opinion that the "weak tidal circulation" will result in greater dilution does not mesh with earlier contentions that vigorous circulation would result in rapid flushing of the

effluent. Does this "weak circulation" allow for a longer residence time in the bays which will, in turn, allow for greater settling and geoaccumulation of particulate pollutants?

Answer: A major concern discussed in the biological opinion is the rapid transport of effluent into farfield areas and proposed critical habitats prior to its adequate dilution to ambient or near ambient concentrations. The location of the outfall in an area lying to the west of the major circulation patterns of the Massachusetts Bay system and in an area of weaker tidal circulation, provides better assurance that the above scenario will not happen.

The use of the term "weak" relative to tidal circulation does not imply stagnant conditions or an absence of circulation. Tidal currents of approximately 10 cm/sec occur in the outfall area (near the surface), and coupled with wind-driven circulation, will disperse effluent from the discharge site. However, these tidal currents are not as strong as currents that occur at the mouth of Boston Harbor and offshore from Race Point (e.g., of approximately 80 cm/sec). NMFS would view the presence of stronger currents in the area of the outfall as undesirable, especially if favoring a particular direction (e.g., towards Cape Cod Bay, or toward Stellwagen Basin), since they would increase the potential for transport of concentrated effluent into proposed critical habitats, particularly if inadequate dilution were occurring at the discharge point. While weaker circulation may favor higher effluent and nutrient/toxics concentrations, and higher particulate depositional and geoaccumulation rates in the near field, such occurrences are preferred over rapid transport of concentrated pollutants into the farfield, because the nearfield environment does not constitute critical habitat for endangered species. Longer retention in the nearfield means more gradual dispersal to the areas important to endangered species.

Within the nearfield environment, adequate dilution of effluent will be a more important factor in controlling pollutant concentrations and protecting farfield habitats than will strong circulation. Because the proposed outfall site is approximately three times the depth of the current discharge site within Boston Harbor, effluent rising through a more voluminous water column should reach adequate dilution levels within a much smaller area than it does under current conditions of discharge within a shallow water, rapidly flushed system. Adequate dilution will ensure that once effluent is dispersed to the farfield, pollutants will be near or at ambient concentrations, similar to conditions under the existing discharge.

State-of-the-art methods using acoustical monitoring of effluent will provide a clearer picture of effluent behavior (i.e., dilution and dispersion) in the nearfield area. If it is determined that effluent dilution is inadequate in the nearfield,

these methods should also provide the justification needed for requiring changes in the quality of effluent discharge via more sophisticated treatment options.

Question 15: On page 39 of the Biological Opinion, the statement is made that "...The current level of understanding is not sufficient...to predict responses in advance of project implementation and link them to an outfall factor, especially in the farfield environment...". Why is NMFS convinced that monitoring after the project is on line will be capable of detecting these responses and linking them to an "outfall factor", while the current level of understanding is incapable of predicting such?

Answer: As in writing of the biological opinion, NMFS will use the best available scientific information to make recommendations on post-construction issues that may arise during the monitoring program. It is unlikely that post-project monitoring will detect responses that, in every case, can be definitively linked to the outfall. However, certain ecological changes that were difficult to predict prior to project implementation will be detectable once the outfall is operational and will allow appropriate actions to be recommended to counter unacceptable conditions.

Detecting a response is expected to be most discernable and easily linked to the outfall in the nearfield; e.g., accumulation of toxics (metals, chlorinated hydrocarbons) in nearfield sediments and benthic organisms. Another example of nearfield impacts that should be discernable, and will be relevant to endangered species, is red-tide activity. Occasional red-tide events may occur in the vicinity of the outfall due to circumstances (other than the outfall) influencing the entire Massachusetts Bay region. However, beyond these occasional events, an increase in the frequency, intensity, and duration of red tides in the outfall vicinity would be a significant and detectable response. In the face of significant scientific uncertainty on the linkage of such red-tide events to the discharge, NMFS will likely view such a change as reasonable justification for reinitiation of consultation.

However, as one moves further from the point of discharge and into farfield habitats which are under greater influence from oceanic factors, detection of ecological responses and linkage of those responses to the outfall will be much more difficult. Such changes may be subtle and occur over the long term, such as those involving plankton population dynamics and species composition. While we believe that the effects of the proposed discharge on farfield areas will not be different from those of the existing discharge, we have recommended an enhanced farfield monitoring program as a precautionary measure to ensure protection of endangered species habitat. NMFS also recommended the

development of contingency plans. Implementation of these plans may be necessary if significant changes occur in farfield areas.

Question 16: NMFS acknowledges work by Anderson and others that indicate current red tide events occur with influx of low salinity waters, but discards the possibility of impacts of the outfall on the same waters based on additional nitrogen discharge (pages 46-47). What about potential impacts on red tide occurrences caused by the injection of low salinity waters at the new discharge site (in an area closer to known areas of red tide influxes from coastal riverine plumes)?

Answer: Discharge of low-salinity, nutrient-laden effluent has occurred for decades from Boston Harbor. However, best scientific evidence on red-tide blooms in the Massachusetts Bay region does not indicate an association between harbor effluent and red-tide activity. Most red-tide activity in the Boston Harbor vicinity and northern Massachusetts Bay area can be linked to red-tide organisms transported into the area within a buoyant low-salinity coastal plume generated from northern sources in the Gulf of Maine. Based on this evidence, we have speculated that a relocated discharge will also have a similar disassociation with red-tide activity.

It is not known why harbor effluent has not been stimulatory to red-tide organisms, although hypothesized explanations have been offered by the research community. For example, toxics and/or other materials characteristic of the effluent may have an inhibitory effect on the growth or blooming of red-tide organisms. Alexandrium tamerensis, one of the primary organisms responsible for red tide blooms occurring in the bay, has been shown to have a sensitivity to copper, a common constituent of harbor effluent. However, further research is needed on this matter to elucidate an association between toxics and an inhibitory factor.

Donald Anderson and others have shown that another key element associated with local or regional red-tide activity is a persistent seed bank of dinoflagellate cysts in coastal and estuarine sediments which act as primary source of motile red tide organisms. Sedimentary cyst banks were established throughout the Bay and Cape Cod area during the massive region-wide red tide of 1972. Since that bloom, repeated/chronic blooms have occurred on a local scale within small semi-enclosed estuaries along Cape Cod and Cape Ann, seeded by local cyst banks. However, cyst distributions throughout much of the Massachusetts Bay system are, in general, patchy, and essentially nonexistent in the Boston Harbor estuary, and limited in their capacity to seed bloom activity. Widespread and dense cyst distribution along coastal areas of Maine and within offshore areas in the Gulf of Maine are characteristic of an area which

has been experiencing chronic red tide activity which restores sedimentary cyst banks via more frequent bloom occurrence. It is, therefore, more plausible that these northern locations have been and will continue to be the primary source of regional red tide activity in Massachusetts Bay.

Boston Harbor effluent has also not been associated with exacerbating red tide activity originating from the north, possibly in part due to regional circulation patterns which do not favor frequent contact of the coastal plume and red tide influxes with waters in the Harbor vicinity. Due to prevailing southwesterly winds during periods favoring red tide activity, most low salinity influxes from the north pass to the east of the Harbor area. A similar situation should also occur with the relocated outfall. Even when wind conditions favor westward movement of a red tide-bearing plume, contact with waters surrounding the new outfall will also be limited by the relatively small size of the outfall's nearfield area. Consequently, opportunities for the new outfall to exacerbate existing red tide activity will also be infrequent.

Question 17: Given the following, shouldn't NMFS assume that the problems with reproductive vitality of right whales might be linked to toxic substances and react conservatively to any further exposure possibilities (rather than assume that "no data" indicates "no problem")?

- a. The assertion on page 48 that "chemical contaminants will continue to decrease" belies the earlier acknowledgment that Boston's population (and thus effluent loadings) are sure to grow during the lifetime of the outfall.
- b. The removal of 85% of the suspended solids (page 46) should be broken into discharge constituents, since the MWRA brochure "How we Plan to Clean the Dirtiest Harbor in the Nation" states that only 70% removal of toxins is anticipated after full secondary treatment.
- c. The Right Whale Recovery Team, along with many others, has made clear its concerns that toxins in coastal waters are inhibiting the animal's recovery.
- d. There is no way to quantify potential impacts of the existing discharge on endangered species, much less a discharge that is located in closer proximity to said species.
- e. The potential bioaccumulation of toxins is not fully understood.
- f. Marine mammals' immune systems and reproductive failures are strongly linked with bioaccumulated substances.

Answer: Toxic contaminants are a major concern to the National Marine Fisheries Service because of the adverse effects they cause to all living marine resources. As described in the NMFS biological opinion limited data do indicate that low levels (relative to those found in other marine mammals) of contaminants

have been detected in blubber samples from right whales from the North Atlantic population (Woodley et al. 1991). However, the source of these contaminants and significance of these levels is not known.

The completion of the secondary treatment plant and continued implementation of the MWRA pretreatment program will substantially reduce chemical contaminants entering Massachusetts Bay. Additionally, Marx and Mayo (1992) summarized data from studies conducted since 1984 which indicate an average of 40 individual right whales visit Cape Cod and Massachusetts Bay annually, for an average of seven days, with the longest residency time of 67 days. Right whales, therefore, forage primarily outside the bays. This would not justify exposure to increased hazards, however, with improved treatment, there will be a substantially lower risk of endangered and threatened species' exposure to toxic chemicals.

The probable causes of the low reproductive rate observed in the northern right whale population, relative to the population in the southern hemisphere, has not been fully explained. Schevill et al. (1986) suggest that there was no evidence that the right whale population in the 17th century was any larger than it is today. Reeves and Mitchell (1987) were unable to refute that possibility based on their review of whaling data. Possible sources attributed to the apparent low recovery rate of the right whale population include inbreeding depression (Kraus 1990, Schaeff et al. 1992), which would be consistent with these estimates of centuries of low population numbers. Kraus (1990) also attributed low recovery rates to other human activities, including ship strikes and entanglements. Current information does not indicate that toxins are contributing to the low reproductive rate of right whales. However, NMFS believes the occurrence of toxins in the blubber of listed species shows that whales are encountering these toxins in their habitat. This is of sufficient concern to warrant efforts to reduce the introduction of toxins to these waters.

We have recommended to the EPA that updated estimates for loadings with population growth be provided and modeled by the MWRA (MWRA has tentatively agreed to this recommendation). In addition, we have recommended that EPA develop a contingency plan that would include methods to further reduce pollutant loadings (MWRA has tentatively agreed to provide EPA and NMFS with a contingency plan). The point must be made again, however, that in the opinion of NMFS, relocation of the outfall will not substantially change conditions in the farfield. Therefore, any change in loadings due to population increases will affect the Massachusetts Bay system in similar ways regardless of the location of the outfall. The most important factors in reducing the risk of exposure to toxic chemicals are source reduction and

secondary treatment. Both efforts are underway and both will lead to reduced risk of contaminant exposure to listed species.

NMFS recommended a number of additional monitoring elements and studies to ensure improved understanding of the fate and effect of toxic chemicals discharged from the outfall. These recommendations include:

- (1) assess the relative proportion of contaminants associated with the particulate and dissolved fractions of the effluent and in the water column upon dilution. These numbers will assist in accurately predicting transport and loadings of contaminants to depositional areas;
- (2) analyze the results of the USGS studies to predict the transport, re-suspension, and accumulation of particulates and toxins discharged from the proposed outfall prior to discharge at the new location;
- (3) federal agencies permitting, funding, conducting or involved in activities that may affect water quality should initiate a study to identify and monitor the effects of anthropogenic toxins on endangered species, and to monitor those effects;
- (4) chronic toxicity testing (as required in the current permit) should be required in the NPDES permit for the proposed discharge;
- (5) establish effluent limits for all pollutants that have the potential to violate acute or chronic water quality or interim sediment quality criteria;
- (6) EPA should require MWRA to further reduce pollutant loadings in the effluent.

Question 18: Does consideration of "cumulative effects" include the idea that this outfall will be operating day-in and day-out for at least 25-100 years or more?

Answer: The "Cumulative Effects" section of the NMFS biological opinion considered the effects of future state or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the MWRA sewage outfall. This term is defined in the Endangered Species Act section 7 regulations (50 CFR §402.02). The rationale for this definition is that other Federal activities have been, or will be, the subject of consultation under the ESA. Nonetheless, NMFS did consider the cumulative effects of all projects in the region on the listed species by assessing the impacts of current conditions on the species and analyzing how those conditions may change as a result of the relocated outfall.

Determining impacts 25 to 100 years from now with any degree of certainty is exceedingly difficult with a project such as the MWRA outfall. In determining that the effluent is not likely to jeopardize the continued existence of listed species, NMFS took into account the following long-term factors: the high degree of dilution that the effluent will undergo in the area; the improvement in the quality of the effluent that is expected over time; the conservative models that were used to predict contaminant buildup in the sediments and water column; and the post-discharge monitoring recommendations we provided to EPA.

As we have stated before, given the uncertainties, particularly with respect to the potential long-term accumulation of contaminants in depositional areas, we have requested that several studies be completed prior to the initiation of the discharge. In addition, the ongoing monitoring program, together with the monitoring recommendations we provided to EPA should enable us to take necessary remedial action should adverse effects arise in the future. Furthermore, Section 7 consultation must be reinitiated if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.

Question 19: Why doesn't Conclusion #2 address earlier statements concerning the potential (and seemingly likely) effects of particulate accumulation on B.O.D. in the benthic areas in which sea turtles frequently feed?

Although juvenile loggerhead and Kemp's ridley sea turtles are benthic feeders, there is no information on areas in which they frequently feed in Cape Cod and Massachusetts Bays. Changes in prey distribution due to anoxic conditions may result in small scale changes in the distribution of these hard shelled sea turtles. Due to the abundance of their preferred prey species, such changes in distribution would not likely adversely affect loggerhead or Kemp's ridley sea turtles. Additionally, in areas where juvenile loggerheads and Kemp's ridleys are well studied, such as the Long Island Sound, foraging occurs primarily in waters of up to 8 meters, and has not been observed in deeper waters. Stellwagen Basin and other deep water depositional areas, therefore, are unlikely habitat for foraging sea turtles.

Question 20: Why does Conclusion # 4 indicate that we need not be concerned by "transient individuals" feeding in these areas when we should be addressing their needs in all parts of their range? (Taking this argument to an extreme would mean that any migratory endangered species would not fall under an arena for concern.)

Answer: Conclusion # 4 refers to NMFS' opinion that relocating the outfall and subsequently providing secondary treatment for sewage to be discharged is not likely to jeopardize harbor

porpoise, in part, because porpoise appear to transit the area and would not be subjected to chronic exposure to toxins. Toxic contaminants should not be a significant problem for harbor porpoise because as secondary treatment is phased in the discharge of toxic contaminants will be reduced and EPA does not predict violations of acute or chronic water quality criteria after secondary treatment and initial dilution. For these reasons, impacts on these animals due to the Boston Harbor outfall is likely minimal. NMFS is concerned, however, that overall water quality problems due to permitted and unpermitted discharges, disposal operations, and air pollution may affect porpoise. As a result, NMFS is concerned about migratory endangered species due to overall water quality impacts. Conservation Recommendations M-6 and M-7 suggest continued consultation on the efficacy of existing water quality criteria and on the aggregate effects of projects on Cape Cod and Massachusetts Bays and other water bodies. NMFS and EPA have initiated discussions on the cumulative impacts of all discharges and disposal operations in the Massachusetts and Cape Cod Bays, as well as in other water bodies. These discussions should lead to an assessment of impacts of all pollution threats to listed species in the region.

Question 21: Why does Conclusion #5 ignore the previous evidence that near-field phytoplankton growth could attract all elements of the food chain to new areas of feeding interest?

Answer: Conclusion #5 summarizes the discussion, on page 42 of the biological opinion, regarding the potential for the attraction of endangered species to the outfall area. That discussion concluded that:

...the nearfield environment may not contain the circulatory and hydrologic processes necessary for retaining/concentrating zooplankton at densities required by feeding cetaceans and pelagic finfish, particularly during the late winter/early spring period when right whales are in greatest abundance and zooplankton generation time is on the order of two to three months (Davis, 1993).

Question 22: Why doesn't Conclusion #8 acknowledge earlier admissions of changes in particulate accumulation and potential impacts on Stellwagen Basin and Cape Cod Bay.

Answer: Issues regarding particle transport and deposition in farfield areas such as Stellwagen Basin and Cape Cod Bay were raised in the biological opinion primarily to make a strong statement on NMFS' concerns for the potential impacts to the overall ecology of these areas and to living marine resources other than endangered species. While impacts from particle loading have some linkage to endangered species, they would be

indirect in nature, and essentially unlikely to occur. These concerns will be included in NMFS' comments on EPA's draft NPDES permit.

Impacts from increased particle transport and deposition, should they occur, will likely be subtle in nature, and chiefly affect benthic and demersal communities by changing oxygen regimes and sediment characteristics. Consequently, the only listed species that could be effected are marine turtles whose feeding habits link them to benthic communities. Primary areas of marine turtle use in the Bay system has occurred in south Cape Cod Bay, while Stellwagen basin is not of importance to turtles. Furthermore, turtles using Cape Cod Bay are at the northern end of their potential range; consequently, the bay is not critical habitat for turtles. Effects on turtle food supply, should they occur, would likely result in turtles moving to other areas to seek food.

Additionally, impacts from increased particle loading to Cape Cod Bay would likely affect sediment texture/quality more so than oxygen regimes (do to its shallow nature), and impacts to benthos, should they occur, would be on a long-term scale. Initial impacts (on a short-time scale) would likely occur to smaller benthic infauna as opposed to larger more mobile benthic organisms on which turtles feed. Consequently, increased particle loading to the bay and farfield areas would be of greater concern under a scenario of long term discharge of primary effluent from the proposed outfall. Under the proposed outfall plan, primary effluent will be gradually phased out over a four-year period, essentially eliminating the source of allochthonously produced particles, and reducing particle loadings within the Bay to levels which are at or lower than existing conditions.

While allochthonous particles will be reduced with secondary treatment, nutrient-generated phytoplankton/bacterial plankton production will also result in particle loading to the farfield. However, levels of autothoonously-produced particles should be similar to that occurring under existing conditions, since the majority (85 percent) of dissolved nutrients generated by the present outfall are transported to Massachusetts Bay.

NMFS recommended that EPA and other responsible agencies conduct a number of additional studies and develop an enhanced farfield monitoring program to further assess and minimize the potential for adverse affects to the farfield areas. The objective of the studies and monitoring will be to track long-term depositional rates and health of sensitive benthic communities in Stellwagen Basin and Cape Cod Bay.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

URGENT

February 4, 1994

LEGISLATIVE REFERRAL MEMORANDUM

LRM #M-1080

TO: Legislative Liaison Officer -

STATE - Julia C. Norton - (202)647-4463 - 225
LABOR - Robert A. Shapiro - (202)219-8201 - 330
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
TREASURY - Richard S. Carro - (202)622-1146 - 228
EPA - Thomas C. Roberts - (202)260-5414 - 326
NEC - Sonyia Matthews - (202)456-6722 - 429
CEA - - (202)395-5036 - 242
AGRIC-CR - Hal Gross (all testimony) - (202)720-7095 - 230
USTR - Fred Montgomery - (202)395-3475 - 223
INTERIOR - Danny Conenstein - (202)208-6706 - 329
HHS - Frances White - (202)690-7760 - 328

FROM: RONALD K. PETERSON (for) *Ronald K. Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: Annette ROONEY (395-7300)
Secretary's line (for simple responses): 395-6194

SUBJECT: COMMERCE Proposed Testimony on GATT Uruguay
Round Trade Agreements (H. Ways and Means)

DEADLINE: 3:00 P.M. Monday February 7, 1994

COMMENTS: If you do not respond by the deadline, we will
presume that your agency has no comment.

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

QC:
K. Kizer
R. Tuccillo
D. Heath
K. McGinty
L. Matlack
L. Miller

Fax 2/1 pg

**TESTIMONY OF JEFFREY B. CARTER
UNDER SECRETARY OF COMMERCE
FOR INTERNATIONAL TRADE**

**BEFORE THE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON TRADE
U.S. HOUSE OF REPRESENTATIVES**

Introduction

Mr. Chairman, Members of the Committee, thank you very much. It is a pleasure to be here today to discuss the achievements of the Uruguay Round agreements, focusing in particular on the results of the antidumping and subsidies negotiations.

Uruguay Round Gains

For seven years, U.S. trade negotiators under the leadership of three successive administrations devoted their intellectual, physical and emotional energies to the successful completion of this negotiation. This agreement is a success for the United States because our negotiators had both the courage to say no to a bad deal and the leadership to coalesce support behind a final package in December 1993 which promises great benefits both for the United States and the global economy. The Uruguay Round agreement is a groundbreaking achievement in advancing free and fair trade in an increasingly complex and interrelated world economic setting. Let me review some of the more important gains in store for the United States.

This historic agreement will result in:

- o lower tariff and non-tariff barriers to U.S. manufactured products. For ten vital industrial sectors (construction

equipment, paper and pulp products, medical equipment, brown distilled spirits and beer, steel, agricultural equipment, furniture, pharmaceuticals, toys and printed materials), U.S. exporters will now face no duties at all in many lucrative foreign markets. In addition, very substantial duty reductions were achieved in such key export sectors as scientific equipment, semiconductors and computers as well as harmonization at very low rates of chemical sector tariffs in primary foreign markets.

- o rules to protect the intellectual property of U.S. entrepreneurs in such industries as pharmaceuticals, entertainment and software products;
- o fair competition and open markets in agriculture;
- o integration of textiles into the GATT system, with a ten-year phase-out of the Multifiber Arrangement (MFA);
- o full participation of developing countries in the global trading system;
- o expanded coverage of the Government Procurement Agreement to services and construction which will provide new opportunities for U.S. exporters;
- o an effective system of "rules of the road" in such areas as standards, import licensing, customs valuation, rules of origin and preshipment inspection which will lead to a more open, equitable and predictable trading system;
- o a revised and revitalized dispute settlement system that provides the means of ensuring that trade disputes will

be addressed in a more certain, timely and effective manner; and

- o a successor institution to the GATT, the World Trade Organization, which will: ensure the full, effective implementation of the revitalized trading system; require, for the first time, the full participation of all members; and provide a permanent, comprehensive forum to address the new or evolving issues of the 21st century global market.

Clinton Administration Steps Toward Greater Competitiveness

The Uruguay Round agreement opens up an immense opportunity for the United States to turn to its advantage the many other initiatives which the Administration has undertaken over the past year to enhance U.S. competitiveness. Within the last year, the Clinton Administration took up the challenge on a variety of fronts to harness or energize those elements of U.S. public policy which directly affect how well America competes. It was the year when the draining budget deficit was finally brought under control; a year when long term interest rates dropped significantly -- in large part because of President Clinton's new fiscal policies -- allowing a surge of new investment to occur; a year when Presidential attention turned to educating and training our workforce to compete effectively in the decades ahead; and a year when civilian research and development policies, designed to rejuvenate the U.S. technological base, took on new direction and

focus.

On the trade front, it was a year in which Washington established a National Export Strategy for the first time, an aggressive set of policies which could transform America's approach to opening markets; a year in which Japan and the United States agreed to a new approach to trade negotiations: the Framework Talks; a year when a historic agreement, NAFTA, was concluded leading to further economic integration of the North American market; a year when President Clinton invited the APEC leaders to Seattle to focus an intense light on closer economic ties in the Asia-Pacific region; and a year which culminated in the conclusion of the global Uruguay Round trade negotiation, an unprecedented agreement in both its scope and its implications for greater and fairer commercial opportunities for U.S. firms and workers. It is now our responsibility to embrace these opportunities and take the additional steps necessary to make the promise of the Uruguay Round a reality. To prosper, we must compete, and the Uruguay Round has opened up an enormous new playing field for the competition to take place.

Uruguay Round Achievements Affecting U.S. Trade Laws

Opportunities alone are not enough. If America is to compete successfully, we have to not only understand that the world is our market -- we must also prepare for and develop responses to those aspects of economic globalization which can surreptitiously hinder

our ability to take full advantage of the opportunities which await us. We live in a world characterized by the internationalization of both trade and production, a marketplace where national borders mean less and less -- irrespective of official policies -- and where exchange rates, stock markets and consumer confidence are often as affected by developments in Singapore and Seoul as they are by policy changes in Berlin, Brasilia or Beijing. In such an environment, the temptation to compete through unfair advantage can be quite compelling. This underscores the need to maintain our vigilance against unfair trade competition, both through the vigorous application of trade laws as well as through the development of multilateral disincentives against engaging in such competition. Aggressive competition should be welcomed, but deftly disguised predatory pricing and government subsidization must not be permitted to undermine the benefits of free global trade competition.

As the world gets smaller, and our marketplace expands, we also have to realize that we can no longer hope to assure the security of U.S. interests merely through a series of national responses. The preservation and promotion of U.S. commercial interests requires that we increasingly turn our attention and resources to multilateral settings. As multilateral decisionmaking necessarily assumes greater weight in the resolution of international trade disputes, we have an important stake in persuading our trading partners that the hallmarks of U.S.

jurisprudence find their origin and rationality in the finest standards of all humanity. No nation can legitimately lay claim to the concepts of fairness, due process and transparency, and yet these standards have helped a country as diverse and competitive as the United States ensure that each party gets a fair and open hearing. We, therefore, have a responsibility to ourselves and to the rest of the world to make certain that the settlement of commercial differences by multilateral authorities under multilateral rules is faithful to the same standards which have worked so well in the United States. While the United States will always be a leader of multilateral initiatives, our views on individual issues or disputes will not always prevail. In light of this, we need to make sure that the system operates such that we will know there was a fair and equitable consideration of the differences.

Following from these realities of the modern commercial world, while we can see that the opening of markets is critical to securing the growth and competitiveness of the U.S. economy, these steps must also be buttressed by specific, affirmative measures to counter unfair trade practices and to revitalize our own manufacturing capabilities. As the agency responsible both for the enforcement of U.S. antidumping (AD) and countervailing duty (CVD) laws and for the promotion of public/private partnerships in the development of new technologies, the Department of Commerce has a special concern and sensitivity towards how the Uruguay Round

agreement affects the application of international trade rules. On this score, I can report to you with confidence that the Uruguay Round agreements on antidumping and subsidies effectively promote the interests of the United States. The outcome of both negotiations meaningfully advances the ability of U.S. manufacturers to compete in both the domestic market and abroad.

U.S. Negotiating Objectives

The United States looked to fulfill a variety of objectives in these negotiations. In antidumping, where we faced stiff opposition from a host of countries, we had to ensure that the effectiveness of U.S. law was preserved while at the same time hold other governments administering antidumping laws accountable to the same standards of transparency and due process that we apply under our system. In subsidies, while we also strived to maintain the countervailing duty law as an effective remedy against subsidies in the U.S. market, we looked beyond our borders to the establishment of strong, new multilateral rules which would discipline the most distortive subsidies and extend the availability of effective remedies to foreign markets. All of these goals were substantially met.

U.S. Negotiating Results

How was this achieved? First, the agreements have enabled the United States to maintain tough and effective laws against unfair trade. This is important for several reasons. U.S. manufacturers

need to be assured of the fact that they do not have to compete in the U.S. market against injurious, unfairly traded imports made possible either by the deep pockets of protected foreign competitors or by the deep pockets of foreign government treasuries. More broadly, effective unfair trade remedies are key to maintaining a base of support in the United States for an open world trading system. Indeed, international trade rules have for decades recognized that the ability to respond to and offset injurious dumped and subsidized import competition is an integral aspect of the liberal trading system. These remedies need to remain reliable and accessible as an insurance for the expansion of world trade and the further opening of markets. The Uruguay Round agreements provide for this, and the Administration is fully committed to ensuring that the AD and CVD laws remain a prominent feature of an aggressive yet liberal U.S. trade policy.

But the assurance of fair trade in the U.S. market alone is no longer sufficient to provide for the competitiveness and prosperity of U.S. firms and workers. U.S. exporters need to know that their increased access to foreign markets will not be prejudiced by the application of foreign AD/CVD laws that in the past have not lived up to U.S. standards of openness and due process. This, too, has been secured by the Uruguay Round agreements. Virtually all of the U.S. proposals relating to the transparency of investigations, the rights of participants, the access to information, and the guarantee of judicial review were incorporated into the final

agreements. This will go a long way towards eliminating the possibility that the fate of U.S. exporters will be decided in the proverbial "black box."

Finally, in the area of subsidies, the agreement strikes a fine balance which comprehensively and successfully addresses the competitive interests of the United States. The outcome of this negotiation has elicited some degree of controversy in recent weeks, but I must respectfully disagree with those who have contended that the subsidies agreement reflects a desire of this Administration to practice "industrial policy" or to engage in a "subsidies war" with our international competitors. The simple facts of the matter are that the subsidies agreement will enable the United States to continue to integrate its trade and technology policies for the purposes of enhancing U.S. competitiveness, a process which began long before this Administration assumed office but to which we have coordinated and redirected Federal resources with the active cooperation of the Congress. The new subsidies agreement represents a landmark step forward in defining and strengthening international disciplines over the most distortive kinds of subsidies. It also protects those technology development activities in which the United States has the lead and which are crucial to our ability to compete successfully in the global marketplace.

Specific Accomplishments

Negotiations were extremely difficult and controversial. While the United States did not feel changes to the 1979 Antidumping Code were essential, many of our trading partners wanted changes that would cripple the effectiveness of our AD and CVD laws. This culminated in the Dunkel Draft of 1991 which would have severely restricted effective AD/CVD enforcement. Almost without support from other countries, we were able in December 1993 to reverse all of the worst elements of the Dunkel Draft.

Dispute Settlement: Our most important achievement was in the area of dispute settlement. The new WTO dispute settlement process is much more effective than under the prior GATT system. Panel findings will be binding. The United States encouraged and applauded this development, but recognized a need for special rules for panels reviewing AD and CVD actions and interpreting the relevant agreements. We will, of course, faithfully follow all the rules explicitly required by the agreements, but we could never agree to let panels substitute their judgement for that of the experts at the Department and the ITC, or create, through "interpretation," additional rules never agreed to through negotiation. Our goal has been fully achieved with special rules for panels to follow when deciding disputes between WTO members on application of AD and CVD laws.

There are some specific changes which will affect U.S. practices in applying the AD and CVD laws. The major changes

follow.

Sunset Provisions: There will be reviews of AD and CVD orders every five years to determine if they are still serving their purpose. These so-called "sunset" reviews will enable us to continue duties if their removal would likely lead to renewed or continued dumping and injury. This is in stark contrast to the Dunkel Draft which would have made the continuance of duties beyond five years nearly impossible.

Anti-Circumvention: The Dunkel Draft also contained fatal restrictions on our exercise of anti-circumvention authority. The final agreements totally eliminated these restrictions. If the WTO members are able to craft uniform international rules on the application of anti-circumvention authority through the process of consensus, we will of course adopt them. Until that time, we remain free to apply our current laws against circumvention of AD and CVD duties, and to improve these laws as conditions change.

Standings: The Dunkel Draft would have stolen from U.S. workers the right to file AD and CVD petitions to protect their livelihoods from injurious dumping and subsidization. This right has been completely restored with the agreements. In addition, we have obtained clear and precise rules for determining the degree of support needed by domestic management or labor to justify the initiation of AD and CVD investigations. The lack of guidance in

the prior Codes led to adverse GATT panel rulings with the potential to invalidate fully justified duties on narrow technical and procedural grounds.

Cumulation: The cumulation of imports from several countries in finding the injury required to impose AD and CVD duties has been specifically authorized in the final Antidumping Agreement. While the Dunkel Draft had done so for CVD, it was silent on antidumping. The potential loss of this authority would have been disastrous for our antidumping law. Our objective here was fully recognized.

Technical Corrections: We were also able to correct several technical problems in the Dunkel antidumping text dealing with determining when sales are at less than cost, price averaging, expression of dumping margins, and determining negligible volumes. While too technical for discussion here, these changes corrected problems which could have had a severely negative effect on antidumping determinations.

Improvements in Subsidies Code

While the Dunkel Draft on Subsidies shared the problems outlined above, it also represented a great improvement from the 1979 Code in the development of effective multilateral disciplines on subsidies. This is critical where the damage to American producers comes through competition with unfairly subsidized production in foreign markets. The combination of clear rules for

defining subsidies, definitions of the "adverse effects" which subsidies cause, and the new binding dispute settlement system provided for the first time a remedy, in addition to countervailing duty law, to protect our industry from unfair subsidies.

The Subsidies Agreement takes a "traffic light" approach. "Red-light" or prohibited subsidies are forbidden. This includes export subsidies, and subsidies conditioned on local content. "Green-light" subsidies are shielded from both multilateral disciplines and application of countervailing duties. These include, under stringent conditions which will prevent abuse and harm to domestic producers, certain subsidies for research and carefully circumscribed development, certain subsidies for economically deprived regions, and subsidies of up to 20% of the cost of equipment required for bringing existing facilities into compliance with new environmental regulations.

The green-light categories have existed for some time in previous drafts of the agreement; the concept is not new, though the environmental category reappeared after the Dunkel Draft. Our goals were to see that the categories were not subject to abuse and did not unduly restrict the ability of the United States to use them where we desired. This is not a matter of industrial policy, it is a matter of fair and symmetrical treatment. As noted above, this was a particular concern in the R&D category. We recognized that the Dunkel formulation could endanger many current and past

U.S. technology initiatives while fully protecting the assistance programs of some of our largest competitors.

In view of the unbalanced nature of the R&D green-light category, we achieved some significant improvements.

First, the categories of basic and applied industrial research were redefined and partially merged, and the limit on protected government share of costs was raised. This will provide a safe harbor for existing U.S. government technology programs which have varying caps on government share and do not follow the Dunkel division between basic and applied research. Examples of such programs which would have been at risk under the Dunkel Text include Commerce's Advanced Technology Program, the Technology Reinvestment Project (defense conversion) funded through the Advanced Research Projects Agency of the Defense Department, and Department of Energy's AMTEX Partnership program (R&D collaboration between DOE labs and the domestic textile industry) and Clean Coal Program. These are just examples of the many USC technology programs that will now be protected under the revised Subsidies Code. (See attached annex of programs)

Second, a category of very narrow development assistance was created with maximum protected government participation limited to 50 percent. Protection stops after the production of the first, non-commercial prototype. Also, the caps are averaged for programs

which cover both categories.

The last change is that civil aircraft R&D subsidies are not eligible for protection from either multilateral or CVD action. The current U.S.-EC bilateral agreement on aircraft continues to apply.

Another change from the Dunkel Draft is that the notification process is no longer the only way to obtain protection from dispute settlement action or countervailing duties. Notification required detailed disclosure of all facts of subsidy programs and their examination by the WTO to obtain green-light protection. This posed particular concerns to U.S. industry and the Federal technology agencies as it could have led to our having to reveal information about the strategic direction of R&D as well as competitively valuable information about the actions of U.S. firms. Now, green-light notification is optional, with governments either free to use the notification process, or to show how they have met the green-light rules in the context of a case. If the rules are shown to have been followed, no duty or restraints may be imposed.

All other types of subsidies (i.e., those not prohibited or protected) are in the "yellow-light" category. They may be subject to countervailing duties if injury is shown, or subject to multilateral action if adverse trade effects in other markets are demonstrated. A special feature of the latter provision is that

adverse effects are presumed to exist in various circumstances, such as if the subsidy exceeds 5% of the value of the subsidized product. Though the presumption is can be rebutted by the subsidizing government, this new rule will be of great benefit to the United States where we choose to use multilateral remedies. Even where the 5% level is not reached, the new objective measurements provided in the Agreement for showing adverse trade effects are a great step forward in our efforts to curb and remedy unfair subsidies.

Goals Not Achieved

Frankly, in both the antidumping and subsidies realms, there are other areas where we were not successful in achieving our goals. Additional clarity would have been desirable for dealing with diversionary dumping, treatment of start-up costs, minimum profit levels, and firmer recognition that injurious dumping is an internationally condemned practice. In the Subsidies and Countervailing Duty Agreement, the rules for phasing out special treatment for developing countries remain more generous than we wished. We also would have preferred that the newly increased level of effective multilateral subsidies discipline not restrict our right to apply countervailing duties.

However, it is never possible in any negotiation to walk away with a perfect agreement. We simply had to determine whether these agreements were in our interests overall. I firmly believe that

they are.

I will not claim that our antidumping and countervailing duty laws and practices will not be affected by this Agreement; they will. There will be cases in which dumping duties are lower than they would have been previously, where countervailing duties may not be applied, or where duties are terminated earlier. However, the overall effectiveness of our laws will be maintained. The new degree of detail, compared with the 1979 Codes, also provides invaluable recognition and protection of the most critical elements of current U.S. practice. For example, our law allowing fair value for antidumping purposes to exclude foreign prices below cost has been largely adopted, and the Antidumping Code is in fact less restrictive in some cases than our own law. Similarly, in its definitions of the types of actions which constitute subsidies and in determining when subsidies unfairly benefit certain industries (so-called "specificity") the Subsidies Agreement hews very closely to our own practice.

The explicit recognition of U.S. practice in the agreements will make successful WTO challenge very difficult, particularly when combined with the explicit guidance given to panels in conducting their reviews. However, it was inevitable that in agreements as detailed and specific as these, one would find some differences from some of the current laws and practices of the United States. Nonetheless, I believe that many of the changes,

such as a preference for comparing average prices to average prices or special treatment for certain types of subsidies are not on their face unreasonable. Furthermore, we have sufficient latitude in crafting and applying our laws to prevent abuse. We will exercise that latitude aggressively to protect our producers from injurious dumping or subsidization.

Administration of the Law

We fought hard, and with little support from others, to successfully maintain the effectiveness of our antidumping and countervailing duty laws. I will follow through with continued vigor in the application of our laws in investigating unfair trade complaints, always respectful of the requirements of our own laws and the need for fair treatment of all parties. I know we have the fairest, most open, and most effective antidumping and countervailing duty system in the world and I pledge to keep it that way.

I also can assure you that this Administration will use the new tools given us by these Agreements and the WTO dispute settlement system to ensure that our domestic industry receives fair treatment from foreign governments. This will require continued vigilance and prompt assistance to our exporters who are not treated properly, and they will receive it.

When I was confirmed by the Senate in early November, I

pledged to the Congress that I would vigorously uphold and administer the U.S. trade laws, and that I would make this my number one priority as Under Secretary of Commerce. I was dead serious then, as I am now. With the leadership and support of Secretary Ron Brown, the Department of Commerce worked alongside Ambassador Kantor and his team to fight for the preservation of our laws in the face of overwhelming opposition. But even though the negotiations are over, our work is hardly begun. We have implementing legislation ahead, and we have the daily administration of the laws. Let me, therefore, pledge to you once more that I will do all that I can to uphold our vital interests in this area.

Thank you for the opportunity to appear before this Committee. I would be happy to answer any questions you may have.

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503**

SPECIAL

February 3, 1994

LEGISLATIVE REFERRAL MEMORANDUM

**LRM #D-559
DRAFT #465**

TO: Legislative Liaison Officer -

**DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
HHS - Frances White - (202)690-7760 - 328
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
NSC - William H. Itoh - (202)395-3723 - 249**

**FROM: JANET R. FORSGREN (for) *Janet R. Forsgren*
Assistant Director for Legislative Reference**

**OMB CONTACT: Melissa COOK (395-3924)
Secretary's line (for simple responses): 395-7362**

**SUBJECT: COMMERCE Draft Bill Authority for the
commissioned corps of the National Oceanic
and Atmospheric Administration**

DEADLINE: 2:00PM February 15, 1994

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:

**Katie McGinty
Will Stelle
Ken Schwartz
Harry Meyers
Jeff Payne
Jim Fish
Wendell Waites
Jeff Hill
Joe Lackey
Art Stigile
Janet Forsgren
Delphine Motley**

N/C

Honorable Albert Gore, Jr.
President of the Senate
Washington, D.C. 20510-0010

Dear Mr. President:

Enclosed are six copies of a draft bill to amend the statutory authority of the commissioned corps of the National Oceanic and Atmospheric Administration together with a statement of purpose and need and sectional analysis.

We have been advised by the Office of Management and Budget that ~~enactment of this legislative proposal would be in accord with the program of the President.~~ *from the standpoint of the*

*Administration, there is no
objection to the presentation
of this proposal for the
consideration of the
Congress.*

Sincerely,

Ronald H. Brown

Enclosures

STATEMENT OF PURPOSE AND NEED

The National Oceanic and Atmospheric Administration (NOAA) Corps' existing statutory authority (codified as amended at 33 U.S.C. sections 851, et seq.) does not explicitly provide the Secretary of Commerce the authority to promulgate regulations regarding the operation of the NOAA Corps. This lack of express authority has led to confusion regarding the Secretary of Commerce's ability to promulgate regulations in this area. The draft bill would expressly state that the Secretary of Commerce has the authority to do any and all things necessary to carry out the purposes of the NOAA Corps including promulgating regulations applicable to the NOAA Corps regarding such matters as appointment, retirement, termination of commission, titles, pay, uniforms, allowances and discipline. This change will conform the NOAA Corps' statutory authority to the statutory authority of the other uniformed services. See 14 U.S.C. sections 92, 631-633.

The NOAA Corps' existing statutory authority provides for original appointments only to the grades of lieutenant or lieutenant (junior grade). This has unduly limited the NOAA Corps' ability to reappoint persons with qualifications or skills that the Corps requires who had, at some prior time, served as an officer in the NOAA Corps or to appoint highly qualified individuals to the NOAA Corps. The draft bill would allow original appointments as well as reappointments of former officers to be made to the NOAA Corps up to and including the grade of captain. In addition, the draft bill adds, for the purpose of determining basic pay, assumed lengths of service applicable to persons appointed to the NOAA Corps to grades above lieutenant pursuant to this revised appointment authority. The proposed lengths of service are derived from existing NOAA Corps regulations.

The NOAA Corps existing statutory authority references and thereby makes applicable the provisions of section 2(g) of Reorganization Plan No. 4 of 1970 (84 Stat. 2090, 5 U.S.C. App.) regarding retirement rank, pay, and allowances to an officer who retires while serving in a grade above captain in a position of importance and responsibility or after completion of such service while serving in a lower rank or grade and provisions of 2(g) regarding reversion to former grade upon completion of service in a position of importance and responsibility. The requirement to cross reference section 2(g) of Reorganization Plan No. 4 and other sections stated in that section has led to confusion regarding retirement rank, pay and allowances and reversion to former grade requirements. The draft bill would replace the reference in the existing law to section 2(g) of the Reorganization Plan No. 4 with the actual language of that section with appropriate modifications to take into account a new section discussed below providing for retention of rank in limited circumstances following termination.

2

Unlike members of other uniformed services, NOAA commissioned officers appointed to a grade above captain (vice admiral, rear admiral or rear admiral lower half) to serve in a position of importance and responsibility cannot retain their rank for a limited period of time -- while awaiting retirement, while hospitalized or while being processed for physical disability retirement. Given the statutory limit on the number of positions above the grade of captain, the NOAA Corps is presently required to demote these officers to a lower grade while they are awaiting retirement, while hospitalized or while being processed for physical disability retirement. The draft bill would allow officers serving in positions of importance and responsibility to retain their rank for a limited period of time (not more than 60 days) while awaiting retirement, while hospitalized (not more than 180 days), or while being processed for disability retirement (not more than 180 days). To clear up confusion regarding the effect of transfer orders on the grade of officers serving in a position of importance and responsibility, the draft bill expressly states that officers appointed above the grade of captain to serve in a position of importance and responsibility shall continue to hold that grade while serving in that position and while under orders transferring them to another position designated to carry one of those grades. These changes will conform the NOAA Corps' statutory authority to the statutory authority of the other uniformed services.

NOAA estimates that the personnel costs associated with this proposal will be negligible.

SECTION-BY-SECTION ANALYSIS

Section 1 provides that the Secretary of Commerce may, within the limits of appropriations, do any and all things necessary to carry out the purposes of the NOAA Corps including promulgating regulations concerning the operation of the NOAA Corps.

Section 2 provides that appointments may be made to the NOAA Corps up to and including the grade of captain. This section deletes the word "Original" from the caption of 33 U.S.C., section 853t to allow both original appointments and reappointments to be made to the NOAA Corps. In addition, for the purpose of determining basic pay, this section provides assumed lengths of service for appointments to the NOAA Corps pursuant to this section.

Section 3 provides that (except in certain limited cases specified therein) an officer who serves in a grade above captain in a position of importance and responsibility and is retired while serving or upon completion of such service while serving in a lower rank or grade, shall be retired with the rank, pay or allowances for the highest grade and rank held by the officer; but any such officer upon termination of the officer's appointment in a rank above that of captain, shall revert to the grade and number the officer would have occupied had the officer not served in a rank above that of captain. In addition, section 3 provides that an officer who is appointed to a grade above captain to serve in a position of importance and responsibility may retain the officer's rank for a limited period of time (not more than 60 days) while awaiting retirement, while hospitalized (not more than 180 days) or while being processed for physical disability retirement (not more than 180 days). Finally, section 3 provides that an officer appointed to a grade above captain to serve in a position of importance and responsibility shall continue to hold that grade while under orders transferring the officer to another position designated to carry one of those grades.

Section 4 provides that the amendments made by this bill would take effect upon enactment.

A Bill

To amend the authority of the commissioned corps of the National Oceanic and Atmospheric Administration to clarify the authority of the Secretary of Commerce and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Secretary of Commerce General Powers

(a) Title 33 of the United States Code is amended by adding a new section 851a to read as follows:

"Sec. 851a Secretary of Commerce; general powers
"For the purpose of executing the duties and functions of the commissioned corps of the National Oceanic and Atmospheric Administration the Secretary of Commerce may, within the limits of appropriations made therefor, do any and all things necessary to carry out the purposes of this title."

(b) Title 33 of the United States Code is amended by adding a new section 851b to read as follows:

"Sec. 851b Regulations

"In addition to the authority conferred by the other provisions of this title, the Secretary of Commerce may promulgate such regulations and orders as the Secretary of Commerce deems appropriate to carry out the provisions of this title or any other law applicable to the commissioned corps of the National Oceanic and Atmospheric Administration including, but not limited

to, regulations with respect to the appointment, promotion, retirement, termination of commission, titles, pay, uniforms, allowances and discipline of the commissioned corps."

Sec. 2. Appointments

(a) Title 33 of the United States Code section 853t is amended --

(1) in the caption of the section by --

- (A) striking "Original appointments"; and
- (B) adding "Appointments"

(2) in subsection (a) by --

- (A) striking "Original appointments";
- (B) adding "Appointments";
- (C) striking "lieutenant" after "including";
- (D) adding "captain" after "including"; and

(3) in subsection (c) paragraph (1) by --

(A) striking "to the grade of lieutenant or lieutenant (junior grade) shall be considered as having, on date of appointment, three years or one and one-half years service respectively" after "section"; and

(B) inserting "shall, except as provided in paragraph (2) of this subsection, be considered as having on the date of appointment the following length

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of service: one and one-half years if appointed to the grade of lieutenant (junior grade); three years if appointed to the grade of lieutenant; six years if appointed to the grade of lieutenant commander; ten years if appointed to the grade of commander; and fourteen years if appointed to the grade of captain" after "section".

Sec. 3. Positions of Importance and Responsibility

(a) Title 33 of the United States Code section 853u is amended by revising existing section 853u(e) to read as follows:

"(e) Retirement rank, pay, and allowances

"Except as provided in subsection (f), an officer who serves in a grade above captain under an appointment under this section and is retired while so serving or is retired after the completion of such service while serving in a lower rank or grade, shall be retired with the rank, pay, and allowances authorized by law for the highest grade and rank held by the officer; but any such officer, upon termination of the officer's appointment in a rank above that of captain, shall, unless appointed or assigned to some other position for which a higher rank or grade is provided, revert to the grade and number the officer would have occupied had the officer not served in a rank above that of captain and such officer shall be an extra number in that grade."

4

(b) Title 33 of the United States Code section 553u is amended by adding a new sub-section 553u(f) to read as follows:

"(f) Retention of rank following termination

"An officer who is appointed to a grade above captain for service in a position of importance and responsibility designated to carry that grade shall continue to hold that grade--

"(1) while serving in that position of importance and responsibility;

"(2) while under orders transferring the officer to another position designated to carry one of those grades, beginning on the day the officer's assignment to the first position is terminated and ending on the day before the day on which the officer assumes the second position;

"(3) while hospitalized, beginning on the day of the hospitalization and ending on the day the officer is discharged from the hospital (but not more than 180 days);

"(4) while awaiting retirement, beginning on the day the officer is relieved from the position designated to carry one of those grades and ending on the day before the officer's retirement (but not for more than 60 days); and

5

"(5) while being processed for physical disability retirement, beginning on the day of processing and ending on the day the officer is retired (but not for more than 180 days).".

Sec. 4. Effective date. The amendments made by this Act shall take effect upon the date of enactment.

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503**

URGENT

February 24, 1994

LEGISLATIVE REFERRAL MEMORANDUM

LRM #M-1147

TO: Legislative Liaison Officer -

AGRIC-CR - Vince Ancell (all testimony) - (202)720-7095 - 230
CORPS ENGINEERS - Susan Bond - (202)272-0030 - 239
ENERGY - Bob Rabben - (202)586-6718 - 209
EPA - Thomas C. Roberts - (202)260-5414 - 326
INTERIOR - Danny Consenstein - (202)208-6706 - 329
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
NEC - Sonyia Matthews - (202)456-6722 - 429

FROM: RONALD K. PETERSON (for) *Ronald K. Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: Scott CAMERON (395-6822)

**SUBJECT: COMMERCE Proposed Testimony on Propagation of
Threatened and Endangered Species**

DEADLINE: 5:00 P.M., Friday, February 25, 1994

**COMMENTS: If you do not respond by the deadline, we will
assume that your agency has no comment.**

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:

S. Cameron
J. Payne
T. Lindseth
M. Reed

9 pages

DRAFT

2/24 - 4:10 pm.

Testimony of

**Gary C. Matlock, Ph.D.
Deputy Regional Director, Southwest Region
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
U.S. Department of Commerce**

Before the

**Subcommittee on Environment and Natural Resources
Committee on Merchant Marine and Fisheries
United States House of Representatives**

March 1, 1994

Mr. Chairman and Members of the Subcommittee:

I am Dr. Gary C. Matlock, Deputy Regional Director, Southwest Region, National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. I appreciate this opportunity to inform you of the Department's views on the use of captive propagation to assist in the recovery of species listed under the Endangered Species Act (ESA).

For more than a century, NMFS and its predecessors have been involved in captive propagation. The ESA recognizes that captive propagation may be a useful tool for the conservation and recovery of threatened and endangered species. However, the ESA emphasizes the need to conserve species in their natural habitat. NMFS supports captive propagation programs for some listed species, but only as a last resort for recovery purposes.

SENT BY:

2-24-84 : 5:48PM : DOC/OGC/OAGC-L&R-

83855691 # 3/ 8

Currently, NMFS and the U.S. Fish and Wildlife Service (USFWS) are jointly developing a Cooperative Policy for Controlled Propagation of Species Listed Under the ESA to provide guidelines for the use of captive propagation for listed animals and plants. These policies are necessary because there are a number of genetic and ecological risks associated with captive propagation. These risks include (1) decline or extinction of the wild population because of the removal of adults for broodstock, (2) domestication in captivity which may diminish ability to survive and reproduce in the wild after release, (3) disease transfer between captive and wild populations, (4) displacement of wild populations through increased competition for food, space, and mates with captively reared individuals, (5) inbreeding in captive and wild populations resulting from the enhancement of only a portion of the gene pool, (6) reduction in genetic variability of the wild population due to swamping of wild populations with captively reared individuals, and (7) erosion of genetic differences between populations.

It is not always clear, however, that captive propagation will facilitate conservation and recovery efforts under the ESA. For example, at this time, we do not know if sea turtles raised in captivity and released in the wild assist recovery efforts. For this reason, NMFS does not support the use of captive propagation of endangered sea turtles. Our efforts with the

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2-24-84 ; 5:48PM ; DOC/OGC/OAGC-L&R-

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Kemp's ridley sea turtle best illustrate this uncertainty.

From 1980 through 1988, the National Marine Fisheries Service collaborated with the Cayman Turtle Farm on a captive breeding program for the Kemp's ridley sea turtle. The goal of this program was to breed Kemp's ridleys in captivity and to establish a captive breeding population. The Cayman Turtle Farm had very limited success breeding Kemp's ridleys. For example, only 30 percent of the female Kemp's ridleys bred in captivity. These breeding females laid fewer clutches than their wild counterparts, fewer eggs per clutch, and most of the eggs were either infertile or did not develop fully during incubation (Wood and Wood, 1988). Also, there have been no published reports on the growth and survival of the hatchling Kemp's ridleys produced at the Cayman Turtle Farm. In addition, their ability to survive in the wild has not been determined. And most importantly, their reproductive potential is unknown. If captive bred sea turtles cannot reproduce in the wild, they will not contribute to the recovery of the species.

Our program to rear and release Kemp's ridley sea turtles - more commonly known as the Kemp's Ridley Head Start Program - has had limited success. The Headstart Program was an experiment designed to determine if it is possible to increase the numbers of this critically endangered species in the wild population. Phase I of the Head Start Program was conducted from 1978 until

SENT BY:

2-24-94 ; 5:48PM ; DOC/OGC/OAGC-L&R-

83855691 # 5/ 8

1993. During Phase I, Kemp's ridley hatchlings were reared in captivity for approximately nine months and then released in the Gulf of Mexico. The program successfully reared Kemp's ridleys and produced useful information on sea turtle husbandry, behavior, and physiology. However, we cannot yet determine the effectiveness of this program because we do not know how successful headstart turtles have been in the wild.

In an effort to remove this uncertainty, we entered Phase II of the Kemp's Ridley Head Start Program in 1993. During Phase II, we will evaluate the success of the headstart experiment by measuring the survivorship and fecundity of the 16,500 headstart turtles that were released in the Gulf of Mexico between 1978 and 1993. This strategy was recommended by the most recent independent review of the headstart experiment (Eckert et al. 1992). The review panel determined that we already had released a sufficient number of juvenile Kemp's ridleys and recommended that we look for these turtles in marine habitats and at nesting beaches, rather than growing more turtles.

Headstart is not a proven conservation technique for the recovery of sea turtles and should not be viewed as such until we can determine the success of our headstart experiment. There is some evidence available that shows some headstart turtles survive, grow, and utilize the same habitats where wild Kemp's ridleys occur. There is just as much evidence which suggests

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2-24-94 : 5:50PM : DOC/OOC/OAGC-L&R-

83955691 # 6/ 8

headstart turtles do not behave like their wild counterparts. Headstart turtles suffer high mortality during the first 12 months in the wild (Manzella et al. 1988); they wash ashore on beaches after their release, they ingest tar and other floating marine debris, they are caught by hook and line fishermen, they swim up to boats, they bump into surf fishermen, and they have been recaptured in regions where Kemp's ridleys are not known to occur.

Aside from our experience with sea turtles, captive propagation programs affecting species protected by NMFS have been used to supplement runs of anadromous fishes for fisheries enhancement and mitigation.....especially salmon in the Pacific Northwest in the Snake River. By avoiding most of the high mortality that occurs in the early life stages, salmon hatcheries can produce more smolts to migrate out to sea. However, such programs may do little to increase natural spawning populations of salmon. At present, NMFS bases decisions concerning the use of captive propagation of threatened and endangered salmon on the Interim Policy on Artificial Propagation of Pacific Salmon, published in 1993 (Interim Policy on Artificial Propagation of Pacific Salmon, April 5, 1993). We intend to review this Interim Policy in the context of the joint policy we are developing with the USFWS, and discuss the issue further with Tribes and other interested parties.

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2-24-94 : 5:50PM : DOC/OGC/OAGC-L&R-

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A good example of the importance NMFS places on using captive propagation only as a last resort for recovery purposes is the Snake River sockeye salmon captive broodstock program initiated when the run was down to four adults in 1991. This program involves the artificial spawning of adults, rearing of their progeny to maturity, spawning of the progeny, and releasing the progeny's offspring into the wild. The success of the program is yet to be determined since the first progeny of the captively reared sockeye salmon are expected to be released in 1995. Smolts will be marked with distinctive tags for future evaluation of success or failure of hatchery supplementation.

NMFS has also authorized captive propagation programs for threatened Snake River spring/summer chinook salmon, on a limited basis. We cautiously evaluate hatchery permit applications because poorly planned hatchery programs have contributed to the decline of wild Snake River spring/summer chinook salmon. Notwithstanding the captive propagation program, NMFS believes that effective recovery of listed Pacific Northwest salmon requires substantial changes to the primary activities that have caused the species' decline -- the Columbia River Basin hydropower system, watershed habitat management, and fish harvest.

Captive propagation programs have also been authorized by NMFS for the depressed population of Sacramento River winter-run

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2-24-94 ; 5:51PM ; DOC/OGC/OAGC-L&R-

93855691 # 8/ 8

chinook salmon and for the threatened Gulf sturgeon. Jurisdiction for the sturgeon program is shared with USFWS. The results of these programs will not be known for several years.

In summary, NMFS only supports the use of captive propagation to assist in the recovery efforts of listed species as a last resort, when identified by a recovery team of experts, if the genetic and ecological risks are minimized, if adequate monitoring is included, and other recovery actions that address the causes of a species decline are also implemented. Captive propagation must not be a substitute for solving difficult problems such as restoring habitats or reducing incidental take and mortality of listed species.

Thank you Mr. Chairman for the opportunity to testify on this important subject. I would be happy to answer any questions you or other members of the Subcommittee may have.

URGENT

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503**

URGENT

March 7, 1994

LEGISLATIVE REFERRAL MEMORANDUM

LRM #M-1171

TO: Legislative Liaison Officer -

STATE - Julia C. Norton - (202)647-4463 - 225
LABOR - Robert A. Shapiro - (202)219-8201 - 330
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
TREASURY - Richard S. Carro - (202)622-1146 - 228
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NASA - Jeff Lawrence - (202)358-1948 - 219
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
EDUCATION - John Kristy - (202)401-2670 - 207

FROM: RONALD K. PETERSON (for) *Ronald K Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: Annette ROONEY (395-7300)
Secretary's line (for simple responses): 395-6194

SUBJECT: COMMERCE Proposed Testimony on GATT:
Subsidies and Countervailing Duties (S.
Finance)

DEADLINE: 4:00, TODAY March 7, 1994

COMMENTS: USTR is also testifying at this hearing. If you do not respond by the deadline, we will presume that your agency has no comment.

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

13 pg

cc:

K. Kizer
R. Tuccillo
D. Heath
K. McGinty
L. Matlack
L. Miller
L. Koch
J. Fellows

Version of March 7, 1994 \\ 8:30 am

TESTIMONY OF COMMERCE UNDER SECRETARY FOR TECHNOLOGY

MARY LOWE GOOD

"DEVELOPMENTS UNDER THE URUGUAY ROUND"

BEFORE THE SENATE FINANCE COMMITTEE

WEDNESDAY, MARCH 9, 1994

Mr. Chairman, thank you very much. I very much appreciate this opportunity to be here today, and to discuss with the Committee the Administration's achievements under the Uruguay Round agreements, particularly as they relate to our country's investment in civilian technology.

The provisions of the Uruguay Round relating to our technology investments, built on public-private partnerships, are an important achievement under the GATT round. These achievements send a strong message that the United States is prepared to fight unfair subsidies that distort free trade, and protect technology programs with long-standing bi-partisan support here at home that link technology to economic growth, create jobs, and ensure a rising standard of living for all Americans.

These provisions reflect both strong trade policy and competitive technology policy, unlike previous trade agreements. Simply said, the Dunkel Text tied our hands when it came to investing in research and development. The 1979 Code tied no one's hands. In the Uruguay Round, we crafted provisions that were defined by us for us -- and not by our competitors abroad. And the result is a more clearly defined and effective GATT Code on Subsidies.

Technology: The Engine of Economic Growth

Since the end of World War II, there has been a bi-partisan consensus that technological progress fuels economic growth. That bi-partisan consensus has allowed this nation to build a Research & Development infrastructure that created new industries and reinvigorated old ones. It enables small businesses to do high-quality design and manufacturing work that previously required the resources of big business. It helps big business achieve the speed, flexibility, and closeness to customers that once were a defining characteristic of small business. Technology is a major contributor to a more productive workforce, and is key to improving the Nation's standard of living. As the 1994 Economic Report of the President states:

"Every recent generation has seen its dreams turn into technological marvels, new products from new industries that have transformed the way we live and work: from the telephone, radio, airplanes, and x-rays, to television, xerography, computers, and magnetic resonance imaging equipment. Advances in technical know-how have accounted for at least one-quarter of our Nation's economic growth over the past half-century."

Our nation's advances in technology have contributed to a stronger economy primarily because it was the private sector's ingenuity and the private sector's utilization of the fruits of our discoveries. It is the private sector -- not government -- that adapts technology to produce new products, expand markets, and improve production efficiencies. Our Administration continues to recognize this essential fact of technology investment, so as to ensure that technology remains the engine of economic growth.

The World-Class U.S. R&D Infrastructure

The Research and Development infrastructure that has given our nation the opportunity to benefit from technology investments remains second to none. And it is still a world-class R&D infrastructure primarily because, more often than not, it has been built through public-private partnerships -- partnerships that link industry, academia, and government together. This principle of public-private partnerships is one that spans the political spectrum and extends back for decades, and it is at the heart of the Clinton Administration's technology initiatives.

The long-standing bi-partisan support for technology investments recognizes that government investment in research and development is essential: new technologies and improvements to promote domestic development often fail to attract sufficient private sector investment. Their risk is often high, and the globalization of the economy is putting tremendous pressure on industry to reduce costs. After several years of cutbacks, major U.S. companies spend less than 22% of R&D on long-term projects, vs. nearly 50% by their counterparts in Japan, according to estimates by the Council on Competitiveness. And the pressure is

mounting. The Industrial Research Institute's survey of 253 industry R&D managers found that 41% said they would reduce total R&D in 1994, vs. 20% that plan increases. Three times as many plan to cut long-term research funding as to raise it.

Concerns with the Dunkel Text

The draft Dunkel text presented a number of concerns for the private sector and to long-standing technology programs.

Let me say at the outset of this discussion that concern over the R&D language in the Subsidies Code of the Dunkel text came from a variety of quarters. Yes, there was concern from government officials involved in technology, and you will hear about that from others here today. But, this was more than just another interagency working group talking to itself.

Before becoming the Under Secretary for Technology at the Department of Commerce, I was the Senior Vice President for Technology at Allied-Signal. In this and previous capacities, I served as a private sector member of a number of Presidential Commissions on Science and Technology under the last three Presidents, and as the Chair of the National Science Board which oversees the programs of the National Science Foundation. It was only by accident that I, like so many of my colleagues in the private sector, learned about what had been proposed in the Dunkel Text with regard to Research and Development. This lack of input by the private sector, which would be most affected by the draft Code under the Dunkel Text, I believe, is a major reason why this Administration sought a comprehensive review, which included a wide variety of companies from different industries.

Let me make my point even more bluntly. Had the Dunkel Text been implemented, it would have been very difficult for my former company to participate in Federal government civilian industrial technology programs, like the Advanced Technology Program at the Department of Commerce. The company would have been exposed to potential challenges, and it could have been forced to release

proprietary information to gain perhaps some protection from challenge by our competitors. It simply would not have been worth the risk to participate, despite the opportunity to tackle a key problem facing technology development.

The Dunkel Text Impeded Public-Private Partnerships

Mr. Chairman, I would like to explain in concrete terms how the Dunkel Text would have impeded building effective public-private partnerships in technology in industry.

First, and foremost, the Dunkel Text undercut one of the primary advantages the United States has over our competitors: our R&D infrastructure. As measured by every category of R&D investment, the United States outperforms other major industrialized nations. This advantage is true for total (public and private) research and development investment.¹ It is also true for government support for R&D.²

Of course, the U.S. figures for all governmental R&D investment include our substantial defense-related R&D investment. No other country comes close to our historic commitment in this arena, and none ever will. Paring all of this down to government support for non-defense, civilian R&D, the United States outpaces its competitors. According to the latest figures available for comparison, the United States government invested \$28.4 billion in

¹ Source: NSF Science and Engineering Indicators 1993, using 1991 expenditures. In total support for R&D -- i.e., public and private investment -- the U.S. maintains better than a 2-to-1 advantage over Japan (much of Japan's R&D is private sector funded through other means), more than a 4-to-1 advantage over Germany, and even stronger margins over France and the United Kingdom.

² Source: NSF Science and Engineering Indicators 1993, using 1991 expenditures. For our discussion here today, we must focus on the level of government support for Research and Development. With more than \$59 billion in R&D expenditures, the United States' investment dominates that of other nations. By comparison with Japan and Germany, our closest competitors, the U.S. governmental investment is 4.5 times higher. The U.S. advantage over France and Britain is even higher.

civilian R&D in 1991, as measured in real dollars.³ Germany, the next largest country in terms of civilian R&D investment, spends 55% less. Japanese governmental investment in civilian R&D is even lower.

The figures I have just shared with you underlie a long-term, bi-partisan commitment to technology investment to promote economic growth. The tangible examples of these investments include programs like the Advanced Technology Program at the Department of Commerce (a program initiated during the previous Administration), as well as the dual-purpose initiatives embodied in the Technology Reinvestment Program at the Department of Defense. They also include the world-class bio-medical research of the National Institutes of Health; NASA's historic aeronautics programs; Defense Department investments in flat panel displays and multi-chip modules; and an increased focus on civilian technology by the national laboratories. And this commitment to technology investment through public-private partnerships is also reflected in the more than 2,000 Cooperative Research and Development Agreements that have revolutionized industry-government collaboration.

The Administration has reinvigorated the public-private partnership as a key means of achieving technology investments. In most cases, projects are cost-shared (often 50% from industry and 50% from government), and selection is merit-based. These initiatives reflect the proper role of government in working with industry to sustain the high-risk, enabling technologies that are key to economic growth. The President's Fiscal 1995 budget does include a 1% increase in research and development investments. But, more fundamentally, this budget is implementing the President's call for a redirection of government R&D spending to achieve a roughly equal balance between military purposes and civilian and dual-use purposes within a few years. The R&D

³ Source: NSF Science and Engineering Indicators 1993, using 1991 expenditures. Germany expends \$10.5 billion; Japan \$8.5 billion.

spending proposed in the FY 95 budget would be 44% civilian, and 47% civilian plus dual use. This compares with 41% civilian R&D in FY 93.

Under the draft Dunkel Text, the larger and more transparent U.S. technology programs would have been open to foreign challenge. It would have impeded what every administration has recognized: investment in research and development is a desirable, effective, and long-term investment in our future.

The second problem posed by the Draft Dunkel Text was that it relied on definitions of "basic" and "applied" research that did not fit the model of U.S. technology programs. This ambiguity was compounded by the fact that thresholds of non-actionable government investment envisioned in the Dunkel Text were out of line with the bipartisan view that programs should be equally cost-shared. To put it more bluntly, it made absolutely no sense to have our technology programs require both government and industry put up 50% each, while exposing a company to challenge if the government investment exceeded 25%!

If the private sector was frustrated with that kind of inconsistent governmental policy, they were deeply distressed with the Dunkel Text's provisions related to "notification". In order to gain limited protection under the Dunkel Text, highly detailed notifications of programs would have had to be made to the GATT Subsidies Committee, possibly requiring the government to share extensive and competitively valuable information about activities of U.S. firms. Instead of seeing hope and protection in these notification requirements, the private sector saw greater regulation, more paperwork, threats to sensitive information, and less incentive to work with government in this important area.

The Uruguay Round: Strong Trade and Technology Policy

I have summarized very briefly, Mr. Chairman, the problems that arose during the Administration's review of the Dunkel Text. The United States found it necessary to address these provisions if

the prospective Uruguay Round agreement on subsidies was to ensure -- rather than impair -- the long-term competitiveness of U.S. industry in the global economy.

Significantly, many of the subsidy tools typically used by our competitors will remain very much actionable under the provisions of the Uruguay Round subsidies agreement. Indeed, the disciplines applicable to these practices will be stronger than they have ever been in the past. All forms of export subsidies and subsidies conditioned on the use of domestic content are flatly prohibited. A presumption of injurious trade effects will exist whenever governments provide subsidies to forgive debt or to cover operating losses, or when they subsidize products at levels exceeding 5 percent of a product's sales value. The agreement also makes it easier for us to show how subsidies have harmed our exports to other markets and, when such harm is identified, it creates a legal obligation for the subsidizing government to withdraw the subsidies or alleviate the trade loss. If such remedial action is not taken within six months, the agreement automatically authorizes us to impose retaliatory measures.

The portion of the Uruguay Round agreement that addresses R&D investment is a major improvement over the Dunkel Text. Our investment in "fundamental research" is fully protected. The extraordinary contributions of our Universities, Research Institutes, and national Laboratories in the areas of basic science are preserved.

We have ensured that government involvement in "industrial research", a mainstay of our public-private partnerships, continues without threat. The government may be involved -- either directly with funds, or with personnel or in-kind resources -- in critical investigations aimed at the discovery of new knowledge, with the objective that such knowledge may down the road be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services. These kinds of partnerships are industry-focused, very

pre-competitive, and have the potential to provide benefits across a number of companies and industries.

And, consistent with our bi-partisan, merit-based, cost-shared technology programs, government may partner up to 50% of a project that focuses on "pre-competitive development activity". This means that government, working with industry, shares the risk of translating industrial research findings into a plan, blueprint, or design for new, modified or improved products, processes or services -- but this involvement is limited. It must not include the creation of a commercially viable prototype.

These definitions are drawn from actual industrial practice, specifically the Industrial Research Institute which represents the senior research executives from over 260 companies. This approach reflects the orientation of U.S. technology programs.

The Uruguay Round achievement also addressed the sensitive issue of "notification". The agreement maintains the ability to receive protection through special notification, but does not mandate that notification occur in order to protect an investment from the measures under the R&D criteria. Instead, if there is ever a challenge, we can at that time show how any support provided is consistent with the R&D provisions. The final Uruguay Round also clarifies that the notification requirements will not force the U.S. to release any proprietary or confidential information to the GATT Subsidies Committee.

Conclusion

Mr. Chairman, as can be concluded from the above, the changes which the United States sought and obtained in Geneva were aimed at protecting a variety of valuable, on-going technology investments which have received broad bi-partisan support for many years. We, therefore, established new definitions of research drawn from U.S. terminology and experience, and we incorporated new rules which better reflect the ways in which research is conducted and cost-shared in the United States.

Had we not sought changes to the greenlight rules governing R&D, the result would not have been to prevent or discourage foreign governments in their support for industrial research and development. Instead, our European trading partners would have enjoyed the protection of the Dunkel Text's greenlight rules, which were patterned after the European Community's own internal rules, while U.S. technology programs would not have enjoyed such protection.

The completion of the Uruguay Round represents the latest step in a long-term, bipartisan effort to improve world trading rules and enhance U.S. competitiveness. From the vantage of promoting economic growth, the agreement recognizes that our technology policy is significant and directly linked to the demands and needs of industry to promote a rising standard of living. It represents an integration of trade and technology policy, an important facet of which is a continued commitment to fight unfair subsidies used by other countries.

Mr. Chairman, and all the members of the Committee, I appreciate this opportunity to discuss this important issue with you today, and I will be glad to take any questions that you may have.