

MEMORANDUM


TO : Governor

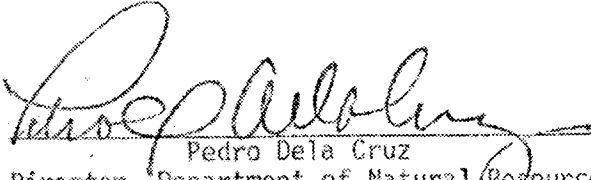
DATE: June 27, 1979

FROM : Fishery Task Force

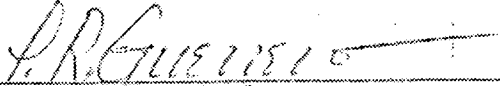
SUBJECT: Applicability of FCMA

Enclosed please find Position Paper and attachments strongly recommended by the members of the Fishery Task Force for your endorsement and promulgation. It is, also, recommended that this Position should be uniformly adopted by the Executive and Legislative Branches.



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Office of the Attorney General



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Director, Department of Natural Resources

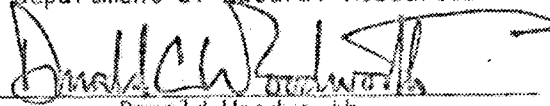

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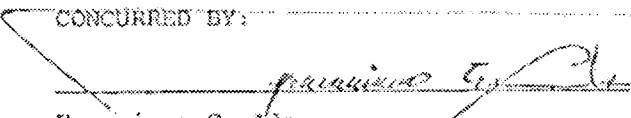

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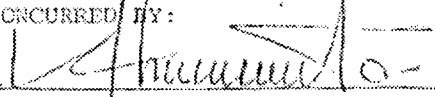

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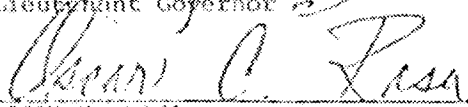

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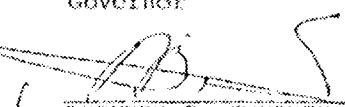
CONCURRED BY:

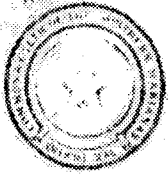

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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
POSITION PAPER
REGARDING APPLICABILITY OF THE FISHERY CONSERVATION
AND MANAGEMENT ACT (FCMA) OF 1976, AS AMENDED

I. LEGAL POSITION

The FCMA cannot apply to the CNMI for the following reasons:

1. The FCMA Section 3 (21) defines coastal state as any of the Commonwealths, Territories or possessions of the United States. Section 101 of the Covenant provides that the CNMI will not become a Commonwealth in political union with and under the sovereignty of the United States until the termination of the Trusteeship Agreement. As noted in the FCMA Analysis, Section 3, the CNMI, according to the terms of the United Nations Charter, Articles 73-91 and the Trusteeship Agreement, may not be considered to be a possession territory or Commonwealth of the United States.
2. Section 101 of the FCMA establishes a Fishery Conservation Zone contiguous to the territorial sea of the United States which would not include the waters of the CNMI because United States sovereignty may not attach until termination of the Trusteeship Agreement. THERE IS NO UNITED STATES TERRITORIAL SEA IN THE WATERS SURROUNDING THE NORTHERN MARIANA ISLANDS. Since the FCMA must be tied to the U.S. Territorial sea, no restrictions relating to fishing in a Fishery Conservation Zone (FCZ) apply to the waters surrounding the Northern Mariana Islands and 502(A)(2) of the Covenant does not make FCMA applicable. However, the FCMA is a unique statute since it has a spatial and resources tracking jurisdiction through the concept of an established fishery conservation zone (FCZ). The waters surrounding the Northern Marianas and the living resources therein are under the exclusive regulatory authority of the CNMI. Section 102 (1) of FCMA Title I provides that the U.S. shall exercise exclusive fisheries management authority over all fish in the FCZ except highly migratory species. There can

be no fisheries management authority without a FCZ, since only the fish of the FCZ can be managed. Section 102 (2 and 3) further establish that the U.S. authority to manage fisheries resources is a species identified authority based on a species/territorial sea concept. Section 502(a) (2) of the Covenant in defining what U.S. laws apply to the FCMA is unique and its own peculiarity makes it impossible to apply in waters of the CNMI.

3. It is clear from Sections 502 (b) and 503 (b) of the Covenant that the U.S. and the CNMI clearly intended to exclude any existing U.S. fisheries or coastwise law that worked a hardship or retarded the development of the CNMI. These Sections are a recognition by the U.S. Congress of the distinctly different location of the CNMI as a developing economic entity as opposed to be developed entity such as the U.S. The FCMA was not law when the CNMI was established. It is also clear from the Purposes Section of the FCMA itself that the development of domestic commercial and recreational fisheries are favored. However, the FCMA works a reverse result upon CNMI fisheries development. Read with the intentions of Section 502(b) and 503(b) of the Covenant, the spirit of the FCMA purpose is violated by its own application to the CNMI. Moreover, had the FCMA been in existence the CNMI delegates in the Covenant would have specifically excluded its onerous sections from application in the CNMI through the Covenant.
4. The FCMA does not impose the 5-ton limit alleged by the U.S. Coast Guard. The 5-ton provision arises from Coast Guard Regulations based upon coastwise laws which specifically do not apply to the CNMI by Section 502 (b) of the Covenant. The 5-ton limit on State-registered vessels qualifying as "Vessels of the United States" for purposes of the FCMA, as set out in 50 CFR 611.2gg, is in direct conflict with the statute and constitutes an illegal exercise of authority beyond that granted by the Congress. Section 3 of the FCMA states that "As used in this Act, ... (25) the term "Vessel of the United States" means any vessel documented under the laws of the United States or registered under the laws of any State". There is no limit on the size of the State-registered vessels which may qualify under this definition. The fact that the term "Vessel of the United States" may be defined differently for purposes of other Acts is immaterial. Only the way this term is "used in this Act" can serve as the basis for regulation under this Act. The only regulation legally setting a 5-ton limit on foreign-built State-registered vessels is 46FR67.01. This relates to shipping and not to activities under the FCMA.

It is based on laws designed to protect the U.S. shipbuilding industry from large foreign-built vessels being used in the coastwise trade. However, the Coastwise Laws are not applicable to the CNMI, pursuant to Section 502(b) of the Covenant. Consequently, even if the 5-ton limit applies to FCMA activities in other areas, which is doubtful, it cannot apply to CNMI-registered vessels, because the statutes on which it is based do not apply.

Should these regulations apply, they would be in direct conflict with Section 301(a)(4)(A & C) and 301(a)(7) of the FCMA.

II. ADVERSE ECONOMIC IMPACT

- A. Application of the FCMA to the waters within and adjacent to the CNMI would have a significant detrimental effect on the economic development and growth of the Commonwealth. This would severely inhibit its attempts to achieve a reasonable measured self-sufficiency by the time the funds provided by the Covenant run out in 1985 and virtually insure continued reliance on massive U.S. subsidies beyond that date.
1. The distance of the CNMI from U.S. shipyards, as well as its extremely low per capita income, makes the purchase of U.S.-built fishing vessels prohibitively expensive for CNMI fishermen. Conversely, the proximity of the countries of Asia, and the lower prices for ships and materials, brings them within an affordable range of CNMI fishermen and makes these countries the logical and natural market for purchase of vessels. It has been estimated that U.S. vessels cost twice as much delivered to the CNMI as equivalent foreign-built vessels. CNMI fishermen do not have sufficient capitalization to subsidize U.S. shipyards in this fashion. If the alleged 5-ton limit on foreign bottoms is held applicable, therefore, CNMI citizens would be relegated to subsistence fishing only, and the hopes of building a domestic CNMI commercial fishery would be quashed forever.
 2. The primary impetus for Congressional passage of the FCMA was the protection of domestic commercial fishing interests from foreign fishing in traditional U.S. fishing grounds. Its application to the CNMI would have the opposite effect. As discussed above, CNMI fishermen would not be able to afford to conduct commercial fishing activities, and U.S. fishing

companies are not active in CNMI and adjacent waters. This leaves only foreign fishermen, who are close to home, who could use their own foreign-built ships, and who could operate under a GIFA or IFA, as the only interests for whom it would be both economically and legally possible to fish off the CNMI. Rather than protect domestic fishery, application of this law destroys it.

3. Another reason for Congressional interest in enacting the FCMA was to ensure that there would be enough fish landed in the U.S. to feed its people. Application of the FCMA to the CNMI would have the opposite effect. The U. S. Government would give away CNMI fish to foreign countries without the consent of the CNMI, at the same time if effectively prohibit fishing by CNMI citizens. Because of this, the CNMI will have to continue to import fish while sitting in the middle of one of the richest fisheries in the world. Fish could be caught in CNMI waters under a GIFA and foreign fishing permit, landed in a foreign country, then process and returned to the CNMI. This keeps food prices high, the standard of living low, and increases the need for food stamps, SSI, and other U.S. welfare payments.
4. By no means does the CNMI intend to totally prohibit foreign interests from participating in the CNMI fishery. To the contrary, the CNMI needs foreign capital to finance the expansion of its commercial fishing industry. The FCMA, however, sets extremely rigorous requirements for functional joint ventures and does not even contemplate the sort of equity sharing which provides capitalization for the domestic enterprise itself.
5. In the absence of the FCMA, the CNMI could act to ensure that fish taken by foreign interests in CNMI waters are first landed at a CNMI port to the extent necessary to meet CNMI nutritional and market needs. This landing of fish by foreign bottoms is guaranteed under Section 503(b) of the Covenant. This not only would solve the problem discussed in paragraph 3, but would increase CNMI port development as well.
6. The CNMI does not have a shipbuilding industry at present. If it were to attempt to establish one, however, it would founder in the face of regulations which require all of a ship's major

components and at least half of its engines to be of U.S. origin in order to qualify for U.S. documentation. The long distances from the U.S. make the cost of shipping such components to the CNMI prohibitive. Foreign components are the only practical alternative, and the FCMA would then act to prevent the CNMI from using its own locally-built boats to catch its own fish.

The U.S. fishing and shipbuilding industries do not need protection against the CNMI. The Commonwealth is too small and too far away to be a threat. On the other hand, application of the FCMA is a direct threat to CNMI fishery, port, and shipbuilding development, and works against the economic advancement and well-being of its people.

- B. The negative impact of the FCMA upon efforts to develop a local fishing industry in the Mariana Islands which is set out in paragraph II a., above is in direct conflict with the declared purposes of the Act itself, especially with Section 2(b)(3) 16 USC 1801 (b) (3) which states in part that the act is designed to "...promote domestic commercial and recreational fishing...". Applying the FCMA directly to the Northern Mariana Islands without modification clearly does not "...take into account the social and economic needs of..." the Northern Mariana Islands, as is required by Section 2(b)(5)(B) (16 USC 1801 (b)(5)(B)).

The problems we have identified above, the ways in which the FCMA frustrates economic development in the Northern Mariana Islands, are not abstract fears. Already the application of this act threatens the existence of a creative and highly desirable fisheries development project within the Commonwealth. Marianas Fisheries Inc. is a private non-profit corporation registered under the laws of the Commonwealth of the Northern Mariana Islands." From the beginning, this corporation has been sponsored and aided by the Carolinian Affairs division of the Governor's Office. The Commonwealth Government has authorized Marianas Fisheries Inc. to use for one year a 26 ton Japanese built War Reparations fishing vessel known as the M/V OLVOL.

The corporation has planned, with the encouragement of the government, to use the M/V OLVOL to teach commercial fishing methods in the waters surrounding the Mariana Islands. Since the corporation is entirely controlled by the Carolinian Community (an ethnic and economically disadvantaged minority on Saipan), it has planned that specialized and traditional Carolinian bottom fishing techniques would be used and taught

on board the M/V OLNOL. Earnings derived from the sale of its catch would be used to pay the crew and other employees of the Corporation, and to finance the purchase of additional equipment and supplies.

Relying upon this plan, members of the Corporation recently spent several weeks working without compensation to prepare the M/V OLNOL for fishing. The vessel is now fully prepared and a crew of experienced Carolinian fisherman and younger trainees are ready and waiting to go fishing.

Unfortunately, because of the questionable application of the FCMA, the U.S. Coast Guard has advised this fledgling organization that they risk arrest and prosecution if they attempt to fish offshore of their own island. Solely because they wish to use a Japanese-built vessel which was given to the Marianas' Government for fishing purposes, with the full knowledge and concurrence of the U.S. Department of State, in part payment for the devastation suffered here during WW-II, the Federal Government wants to keep them on the beach.

Thus, because of the clumsy application of the FCMA in an undeveloped island context Marianas Fisheries Inc., an exciting economic development project which is the product of long months of work by the members of the corporation and numerous government employees, may be destroyed. With it will go any immediate hope for the development of a locally controlled fishery.