UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL
APR 20 2011

MEMORANDUM

TO: Eric Schwaab

FROM: Lois Schiffer

SUBJECT: Interpretation of Amendment re: Use of 2011 Appropriated Funds for Limited Access Privilege Programs

This memorandum responds to your request for advice regarding the interpretation of the following language (the "Jones Amendment") included in the Full Year Continuing Appropriations Act for 2011:

> SEC. 1349. None of the funds made available by this division may be used to approve a new limited access privilege program (as that term is used in section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1853a)) for any fishery under the jurisdiction of the South Atlantic, Mid-Atlantic, New England, or Gulf of Mexico Fishery Management Councils in fiscal year 2011: Provided, That nothing in this section shall prevent development activities related to limited access privilege programs.

We have reviewed the language and offer the following advice regarding its interpretation:

1. The language that prohibits "approval" of "limited access privilege programs" is limited to fishery management plans that contain new limited access privilege programs (LAPPs) as defined in Magnuson Act section 303A (16 U.S.C. 1853a). Section 303A defines the term limited access privilege programs more narrowly than the general concept of limited access programs or even catch share programs. For example, NOAA has taken the position that the New England sector program is not a limited access privilege program as defined in section 303A. The language would not affect limited access programs that are not within the definition of LAPPs included in section 303A.

2. The restriction applies to fisheries under the jurisdiction of the South Atlantic, Mid-Atlantic, New England, or Gulf of Mexico Councils but would have no effect on activities under the jurisdiction of the Caribbean, North Pacific, Pacific, or Western Pacific Councils.

3. Since the Magnuson Act uses the verb "approve" only with respect to Secretarial action on fishery management plans (*see* 16 U.S.C. 1854(a)(3)), and not with respect to

issuance of regulations to implement a plan (*see* 16 U.S.C. 1854(b)(1)(A)), there is a reasonable argument that the language does not prevent issuance of regulations to implement plans that have already been approved. (For regulations, MSA says if the Secretary finds they are consistent with the plan they implement, they must be "published" for comment, and then "promulgated" within 30 days after the end of the comment period. It does not use the verb "approve" in that connection.)

4. The final proviso in the new language permits NOAA to continue "development activities" for LAPPs, which could reasonably be read to allow activities designed to lead to approval, though actual approval in FY 2011 would be prohibited.

5. The language is limited to "new" LAPPs, so there is a reasonable basis to say that it would not apply to modifications to existing LAPP programs, including approval of fishery management plans to modify such existing plans.

6. Fishery Management Councils may continue to work on LAPPs even if their activities are funded by FY 2011 appropriations. Under the Magnuson Act, Fishery Management Councils do not "approve" fishery management plans; instead they are authorized to "prepare and submit" them to the Secretary (16 U.S.C. 1852(h)(1)) for approval. Therefore one could interpret the new language to allow submission by the Councils to the Secretary of plans containing LAPPs. However, once a plan has been submitted, the absence of action by the Secretary can result in a plan "tak[ing] effect as if approved" (*see* 16 U.S.C. 1854(a)(3)). We therefore interpret the new language as prohibiting the submission to the Secretary of fishery management plans that the Secretary would be prohibited from approving under the new language.

We have shared a draft of the memorandum with The General Law Division of the Assistant General Counsel for Administration at the Department of Commerce General Counsel's Office and they have no objection to this interpretation.