NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 01-0002
	)	
OCEAN SPRAY PARTNERSHIP,	)	DECISION ON
Appellant.	)	RECONSIDERATION
	)	
_______________________________	)	June 15, 2001

STATEMENT OF THE CASE

This Office entered a Decision in this appeal on April 13, 2001. The Restricted Access Management Program [RAM] had until April 23, 2001 to request reconsideration. RAM requested an extension of time to file a motion for reconsideration until May 4, 2001. Ocean Spray Partnership [Ocean Spray] opposed any extension. I granted RAM an extension until April 27, 2001. RAM filed a motion for reconsideration and submitted documents with its motion that were not in the original administrative record.

On May 2, 2001, this Office entered an "Order Staying Effective Date of Decision and Addressing Subjects Related to RAM's Motion for Reconsideration." The Order accepted RAM's documents as part of the appellate record and gave Ocean Spray until May 14, 2001 to offer additional documents for inclusion in the appellate record but expressly reserved the question of what weight, if any, to give to non-public documents in interpreting Pub. L. 106-562. The Order set May 14, 2001 as the deadline for Ocean Spray to respond to any issues raised by RAM's Motion for Reconsideration. The Order also asked Ocean Spray to address specific issues raised by the Motion for Reconsideration. Ocean Spray filed a response.

SUMMARY OF DECISION ON RECONSIDERATION

I have carefully reconsidered the original Decision in light of the issues raised by RAM in its motion for reconsideration. I conclude that the Decision adopts the proper interpretation of Pub. L. 106-562. Pub. L. 106-562 requires that, notwithstanding the fact that the F/V PROVIDIAN did not have any pollock catch history, the F/V PROVIDIAN should be treated as though it had a catch history from 1995 - 1997 and receive all the benefits that accrue under the AFA to a vessel with a catch history from 1995 - 1997.

The legislative history supplies the method for NMFS to determine these benefits. The F/V PROVIDIAN is a replacement vessel for the F/V OCEAN SPRAY. When making allocations under section 210 of the AFA, NMFS will use the 1992 - 1994 catch history of the F/V OCEAN SPRAY instead of the nonexistent 1995 - 1997 catch history of the F/V PROVIDIAN. Because I conclude that the original Decision adopted the correct interpretation of Pub. L. 106-562, I incorporate by

reference the original Decision into this Decision on Reconsideration.

BACKGROUND AND ORIGINAL DECISION

This appeal concerns Ocean Spray's rights under the American Fisheries Act [AFA],[1] as modified by Title V of Public Law No. 106-562.[2] Ocean Spray applied for an AFA catcher vessel permit with an inshore sector endorsement for the F/V PROVIDIAN on December 28, 2000, not December 27th as stated in the Decision of April 13th.[3] Ocean Spray indicated that it wished to join the Peter Pan Fleet Cooperative. Ocean Spray requested that NMFS determine the allocation to the Peter Pan Fleet Cooperative by using the best two out of three years from the 1992 - 1994 catch history of the F/V OCEAN SPRAY.

The Initial Administrative Determination [IAD] granted Ocean Spray's application in part and denied it in part. <u>First</u>, it granted Ocean Spray an AFA catcher vessel permit with an inshore sector endorsement under section 208. <u>Second</u>, the IAD stated that RAM was adding the catch history of the F/V OCEAN SPRAY to the catch history of the F/V PROVIDIAN for the purpose of eligibility and allocations under the AFA. <u>Third</u>, it stated that the F/V PROVIDIAN was eligible to join the Peter Pan Fleet Cooperative, a catcher vessel cooperative that has an AFA inshore cooperative permit. <u>Fourth</u>, it denied Ocean Spray's request to increase the allocation on the Peter Pan Fleet Cooperative's inshore cooperative permit by adding the best two out of three years of the F/V OCEAN SPRAY's pollock catch history from 1992 to 1994.[4]

Ocean Spray appealed the fourth determination of the IAD. I issued a Decision on April 13, 2001 which reversed that determination. The Decision concluded that Pub. L. 106-562 did require that NMFS determine the allocation to the F/V PROVIDIAN's cooperative using the 1992 - 1994 catch history of the F/V OCEAN SPRAY. The Decision adopted that interpretation of Pub. L. 106-562 because that interpretation best served the purpose of Pub. L. 106-562, because Pub. L. 106-562 was

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[1] Div. C. Title II, Subtitle II, Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998). The AFA and the AFA regulations can be found on the NMFS website: http://www.fakr.noaa.gov. The AFA can also be found in the 1998 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.), 112 Stat. 2681-616 to 112 Stat. 2681-637. The AFA has 13 sections: § 201 through § 213. This decision will cite the AFA by section number only.

[2] 114 Stat. 2794, 2807 (Dec. 23, 2000).

[3] Mr. Walt Raber, a principal of Ocean Spray, filed this application. When this Decision refers to actions by Mr. Raber, these should be taken as actions by Ocean Spray.

[4] The Peter Pan Fleet Cooperative's final Bering Sea Co-Op Allocation was 10,433 metric tons, which represents 1.725% of the Bering Sea inshore pollock allocation. Exhibit 11.

a remedial statute and because a statute should not be construed as a nullity. The Decision concluded that Pub. L. 106-562 did not require that NMFS recalculate the cooperative allocations it had already made for the year 2001.

PUB. L. 106-562 AND ITS LEGISLATIVE HISTORY

For ease of reading, I will restate the entire text of Title V of Pub. L. 106-562 and its entire, documented, legislative history.

> Title V - MISCELLANEOUS
>
> SEC. 501. TREATMENT OF VESSEL AS AN ELIGIBLE VESSEL.
>
> Notwithstanding paragraphs (1) through (3) of section 208(a) of the American Fisheries Act (title II of division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Pub. L. No. 105-277; 112 Stat. 2681-624), the catcher vessel HAZEL LORRAINE (United States Official Number 592211) and the catcher vessel PROVIDIAN (United States Official Number 1062183) shall be considered to be vessels that are eligible to harvest the directed fishing allowance under section 206(b)(1) of that Act pursuant to a Federal fishing permit in the same manner as, and subject to the same requirements and limitations on that harvesting as apply to, catcher vessels that are eligible to harvest that directed fishing allowance under section 208(a) of that Act.[5]

The only documented legislative history of this provision is in a statement by Senator Olympia Snowe in the Congressional Record of December 15, 2000.[6]

> **Title V of the bill makes a technical correction to the American Fisheries Act (AFA) with regard to two fishing vessels, the *Providian* (United States Official Number 1062183) and the *Hazel Lorraine* (United States Official Number 592211).** The 1998 AFA authorized the participation of certain US-owned fishing

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[5] 114 Stat. 2794, 2807 (Dec. 23, 2000). When the Decision refers to Pub. L. 106-562, it will be referring to Title V of Pub. L. 106-562. The title of Pub. L. 106-562 is An Act to complete the orderly withdrawal of the NOAA from the civil administration of the Pribilof Islands, Alaska and to assist in the conservation of coral reefs, and for other purposes. No other provisions of Pub. L. 106-562 relate to this appeal.

[6] I address the issue of private correspondence *infra* and decide not to give it any consideration in determining legislative intent.

vessels in the Bering Sea pollock fishery. The AFA was designed to work in conjunction with the license limitation provisions of the fishery management plan developed by the North Pacific Fishery Management Council. **Certain "qualifying years" were established in order to determine which vessels had earned a "fishing history" to allow them future access to pollock-fishing quotas. During the consideration of the AFA, the special circumstances of many vessels were taken into account. At that time, the fishing vessel *Providian* was being built in a U.S. shipyard as a replacement vessel for the pollock-fishing vessel *Ocean Spray*.**

In 1994, the *Ocean Spray* was lost at sea–fortunately without the loss of a single life. **Had the *Ocean Spray* not been lost, the vessel would have continued to fish for Bering Sea pollock during the years leading up to the development of the AFA**. After the loss of the *Ocean Spray*, the owner-operator followed the replacement guidelines in order to secure his federal fishing permits and endorsement for his new vessel, the *Providian.* **According to landing records, it appears that the average pollock harvest of the *Ocean Spray* during the years 1992 through 1994, exceeded 2000 metric tons.**

Since the construction of the *Providian* was completed, the owner decided to bring his vessel to Bath, Maine to work in the Maine herring fishery. The current location of this vessel does not eliminate the need to establish fairness and restore the vessel owner's pollock-fishing rights earned with the *Ocean Spray* during 1992-1994. This amendment to the AFA is intended to provide the North Pacific Fishery Management Council and the National Marine Fisheries Service with the authority to qualify the *Providian* under the AFA with directed onshore pollock-fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992-1994.

Mr. President, the authors of the AFA certainly took into account the particular circumstances of other vessel owners and companies. This technical amendment simply qualifies two vessels, the *Providian* and the *Hazel Lorraine* under the AFA for fishing rights that they otherwise should have received allow [sic] for the participation of two additional catcher vessels in the Alaskan pollock fishery. **These vessels were able to demonstrate that they should have been included in the Act when it passed in 1998.** [emphasis added][7]

ISSUES

[7] 146 Cong. Rec. S11893, S11894 (Dec. 15, 2000)(statement of Sen. Snowe).

1. Did the Decision err in using principles of statutory interpretation?

2. Did the Decision misunderstand how Congress intended to benefit the owner of the F/V PROVIDIAN?

3. Does Pub. L. 106-562 direct NMFS to make allocations to the F/V PROVIDIAN's cooperative based on the F/V OCEAN SPRAY's 1992-1994 catch history?

4. Does RAM's interpretation render Pub. L. 106-562 a nullity?

5 Should the Appeals Officer have considered evidence in the record bearing on Mr. Raber's expectations and should the appeals officer develop the record further to determine whether the IAD gave Mr. Raber what he expected from Pub. L. 106-562?

6. Should an Appeals Officer rely on private correspondence to determine Congressional intent?

7. Should the Appeals Officer hold a hearing to determine the benefits to the owner of the F/V PROVIDIAN from receiving a section 208 permit?

ANALYSIS

1. Did the Decision err in using principles of statutory interpretation?

RAM's Motion for Reconsideration argues that the Decision erred in turning to principles of statutory interpretation because Pub. L. 106-562 is clear and unambiguous.[8] The Decision used the following principles of statutory interpretation: [1] a statute must be interpreted to accomplish its purpose; [2] a remedial statute is liberally construed to accomplish its purpose; and [3] a statute should not be construed as a nullity. Words in a statute simply can never be so clear and unambiguous that a court or an agency would not consider the statute's purpose, the nature of the statute, or whether an interpretation renders the statute a nullity or produces an unreasonable result.

RAM's argument commits the fallacy of literalism. Words do not have

> single, fixed, and immutable meanings established by some authority, natural or supernatural. Instead, they have only such meanings as are given to them from time to time when they are spoken, written, heard or ready by persons endeavoring to

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[8] RAM's Motion for Reconsideration at 3.

participate in the communication process.[9]

Words are communication and must always be interpreted in context. Statutory words are communication from a legislature to the public, the executive and the judiciary. An administrative agency, just as a court, is under a duty to make a judgment as to what the legislature intended to communicate with the words it used and to carry out the legislature's intent. The "great and controlling principle" of statutory interpretation is legislative intent.[10]

Therefore, an agency must analyze a statute's purpose and choose the interpretation that best serves that purpose. It is **always** proper to ask whether a statute was enacted to remedy a particular problem. It is **always** right to ask whether an interpretation of a statute renders the statute a nullity or produces an unreasonable result. Judge Learned Hand observed that "statutes **always** have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[11] The Decision quoted the Supreme Court's directive that "in **all** cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve."[12] If an agency does **not** ask those questions, its interpretation may violate legislative intent. Therefore, I find that the Decision did not err by using principles of statutory interpretation.

RAM does not, in fact, approach interpreting Pub. L. 106-562 without looking at legislative intent. RAM argues that the Decision misunderstood how Pub. L. 106-562 "is intended to benefit the owner of the F/V PROVIDIAN." This accurately states the question in this appeal. What interpretation of Pub. L. 106-562 grants the owner of the F/V PROVIDIAN the benefits that Congress intended to grant?

2. Did the Decision misunderstand how Congress intended to benefit the owner of the F/V PROVIDIAN?

RAM asserts that Congress enacted Pub. L. 106-562 only to grant the owner of the F/V

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[9] 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.01 at 5 (6th ed. 2000 revision)(footnote omitted).

[10] Decision at 14 n. 32, *quoting Carr v. New York State Board of Elections*, 356 N.E. 2d 713, 715 (N.Y. 1976).

[11] *Cabell v. Markham*, 148 F. 2d 737, 739 (2d. Cir. 1945), *cert. granted*, 325 U.S. 847 (1945), *judgment aff'd*, 326 U.S. 404 (1945)(emphasis added).

[12] *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Company of Virginia,* 464 U.S. 30, 35 (1983), *quoting Chapman v. Houston Welfare Rights Org.,* 443 U.S. U.S. 600, 608 (1979)(emphasis added), quoted in the Decision at 14.

PROVIDIAN a permit under section 208 of the AFA and did not intend to grant the F/V PROVIDIAN the benefit of contributing catch history to a cooperative under section 210.

The Decision concluded that Congress enacted Pub. L. 106-562 to grant the owner of the F/V PROVIDIAN all the AFA benefits that accrue under the AFA to a catcher vessel with a catch history in the years 1995 to 1997. A key benefit that the AFA grants to a catcher vessel is the ability to harvest the directed inshore allowance in section 206 (b)(1) by joining a cooperative and contributing catch history to a cooperative. Therefore, the Decision concludes that Pub. L. 106-562 grants that benefit to the owner of the F/V PROVIDIAN. The legislative history supplies the method to calculate that benefit: use the 1992 - 1994 catch history of the F/V OCEAN SPRAY in place of the nonexistent 1995 - 1997 catch history of the F/V PROVIDIAN. I conclude the Decision adopts the correct interpretation of legislative intent.

<u>First</u>, the IAD is inconsistent. RAM argues that the Decision erred by going beyond the language of the statute to determine what benefits the F/V PROVIDIAN should receive, yet the IAD relies on the statement of Senator Snowe to <u>add</u> the 1992 - 1994 catch history of the F/V OCEAN SPRAY to the catch history of the F/V PROVIDIAN.[13] It is only because RAM adds the catch history of the F/V OCEAN SPRAY to the catch history of the F/V PROVIDIAN that the F/V PROVIDIAN is a "qualified catcher vessel" under section 210(b)(3) and therefore able to join a cooperative. But neither section 210(b)(3) nor federal regulation 50 C.F.R. § 679.2 permit a vessel to join a cooperative based on another vessel's catch history.[14]

By combining catch histories for the F/V OCEAN SPRAY and the F/V PROVIDIAN, the IAD [1] goes outside the language of the statute, [2] changes the application of section 210 to the F/V PROVIDIAN, [3] does that without a Council recommendation and regulation and [4] subjects the F/V PROVIDIAN to different requirements for defining an AFA catch history than every other AFA catcher vessel.

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[13] IAD at 3.

[14] Section 210(b)(3) of the AFA only authorizes a "qualified catcher vessel" to join a cooperative: a vessel is a qualified catcher vessel only if " **<u>it</u>** delivered more pollock to the shoreside processor to which **<u>it</u>** will deliver pollock under the fishery cooperative in paragraph (1) than to any other shoreside processor." Under the revised definition, a qualified catcher vessel is still determined by looking at the catch history of that vessel. 50 C.F.R. § 679.2 provides in relevant part:

> *AFA qualified catcher vessel* (applicable through July 17, 2001) is **a vessel** that delivered more pollock to the AFA inshore processor that is associated with the inshore catcher vessel cooperative that **the vessel** wishes to join than to any other inshore processor in the last year in which **the vessel** engaged in directed fishing for pollock in the BSAI for delivery to the inshore sector.

Second, the Decision better explains the language of the statute. RAM argues that the phrase "notwithstanding paragraphs (1) through (3) of section 208(a)" only requires that NMFS grant the F/V PROVIDIAN a section 208 permit, even though the F/V PROVIDIAN does not meet the catch history requirements in section 208(a) because it did not deliver at least 250 metric tons of pollock for inshore processing in 1996, 1997 or between January l, 1998 and September l, 1998.[15]

The Decision interprets the phrase "notwithstanding paragraphs (1) through (3) of section 208(a) of the American Fisheries Act" as meaning that NMFS should not disqualify the F/V PROVIDIAN from AFA benefits because it did not have a pollock catch history in 1998 or before 1998. But that phrase, by itself, does not say what benefit Congress granted the F/V PROVIDIAN. That is in the next part of the statute. The F/V PROVIDIAN "**shall be considered** to be [a] vessel[] **eligible to harvest the directed fishing allowance under section 206(b)(1)** pursuant to a federal fishing permit **in the same manner** as . . . catcher vessels that are eligible to harvest that directed fishing allowance under section 208(a) of [the AFA]."

Section 210(b) specifies the manner in which catcher vessels under the AFA harvest the inshore allowance under section 206(b)(1). The manner in which other catcher vessels harvest the section 206(b)(1) allowance is through contribution of their catch history to a cooperative which gets a guaranteed percentage of the allowance.[16] The provision that the F/V PROVIDIAN shall be able to harvest "in the same manner" as other catcher vessels is best read to mean that the F/V PROVIDIAN can also harvest pollock by contributing catch history to a cooperative.

Third, the Decision adopts an interpretation more in accord with this statute's legislative history. The only legislative history of Pub. L. 106-562 is the statement of Senator Snowe in the Congressional Record of December 15, 2000. On its face, Pub. L. 106-562 singles out the F/V PROVIDIAN as deserving relief. Senator Snowe's statement explains why. Senator Snowe explains that "the authors of the AFA certainly took into account the particular circumstances of other vessel owners and

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[15] AFA § 208(a)(1). The F/V PROVIDIAN meets the requirements in section 208(a)(2): it is eligible to harvest pollock in the LLP program. It meets the requirements in section 208(a)(3): it is not listed in section 208(b) as a catcher vessel eligible to harvest the offshore allocation.

[16] Although catcher vessels can remain in the open access sector, very few have done so. Decision at 5 - 6. The purpose and effect of the AFA has been to encourage the development of catcher vessel cooperatives as a way to rationalize the BSAI inshore pollock fishery. The Council recommended, and the Secretary adopted, a regulation that revised the formula for the open access sector to avoid any incentives for vessels to leave cooperatives, because that "could prevent rationalizing the BSAI pollock fishery, an objective of AFA." Emergency Interim Rule, 66 Fed. Reg. 7327, 7329 (Jan. 22, 2001)

companies."[17] The AFA did not take into account the special circumstances of the F/V PROVIDIAN, and Pub. L. 106-562 remedies that oversight by providing a needed "technical correction" and "technical amendment" to the AFA. It "simply qualifies two vessels, the *Providian* and the *Hazel Lorraine* under the AFA for fishing rights that they otherwise should have received." Senator Snowe states: "These vessels were able to demonstrate that they should have been included in the Act when it passed in 1998."

What were the special circumstances of the owner of the F/V PROVIDIAN? He owned a vessel, the F/V OCEAN SPRAY, with a substantial pollock history that sank in 1994. He built a replacement vessel, the F/V PROVIDIAN, that was not ready until 1998. He had two vessels but neither had any catch history between 1995 and 1998. Senator Snowe explained:

> During the consideration of the AFA, the special circumstances of many vessels were taken into account. **At that time, the fishing vessel *Providian* was being built in a U.S. shipyard as a replacement vessel for the pollock-fishing vessel *Ocean Spray*.**
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> In 1994, the *Ocean Spray* was lost at sea–fortunately without the loss of a single life. **Had the *Ocean Spray* not been lost, the vessel would have continued to fish for Bering Sea pollock during the years leading up to the development of the AFA**. After the loss of the *Ocean Spray*, the owner-operator followed the replacement guidelines in order to secure his federal fishing permits and endorsement for his new vessel, the *Providian.* **According to landing records, it appears that the average pollock harvest of the *Ocean Spray* during the years 1992 through 1994, exceeded 2000 metric tons.**

The Decision interprets Pub. L. 106-562 to require that NMFS treat the F/V PROVIDIAN as a replacement vessel for the vessel it actually replaced, namely a vessel with a substantial catch history, and grant the owner of the F/V PROVIDIAN benefits based on that prior vessel's catch history. If the F/V OCEAN SPRAY had not sunk, it would have had a substantial catch history in the years leading up to the AFA, namely 1994 through 1998. If it had a substantial catch history in those years, the F/V OCEAN SPRAY would have received a section 208 permit.

But, if the F/V OCEAN SPRAY had a substantial catch history in 1995 through 1998, the owners of the F/V OCEAN SPRAY also would have been able to contribute its catch history from 1995 to 1997 to a cooperative under section 210, thereby increasing the cooperative's allocation. The owners of the F/V OCEAN SPRAY would have been able to harvest that pollock themselves or lease those harvest privileges to other co-op members, based simply on their determination of what was in their best

[17] 146 Cong. Rec. S11893, S11894 (Dec. 15, 2000).

interest. The owners of the F/V OCEAN SPRAY would have realized value from its catch history. None of these benefits would have depended in any way on whether the owners of the F/V OCEAN SPRAY kept their vessel in Alaska or moved it to Bath, Maine. The owner of the F/V PROVIDIAN should receive these same benefits because the F/V PROVIDIAN is a replacement vessel for the F/V OCEAN SPRAY.

RAM interprets Pub. L. 106-562 as treating the F/V PROVIDIAN as though it replaced a vessel that only met the section 208 requirements, namely a vessel that harvested 250 metric tons of pollock in 1996, 1997 or between January l, 1998 and September l, 1998. This interpretation does not recognize the "special circumstances" of the F/V PROVIDIAN, namely that it replaced a vessel with a substantial history of participation in the pollock fishery. This interpretation does not "restore the vessel owner's pollock-fishing rights earned with the *Ocean Spray* during 1992-1994"[18] because it grants Ocean Spray absolutely no benefit which is determined by the F/V OCEAN SPRAY's 1992 to 1994 catch history.

Fourth, the Decision did not misunderstand the "same requirements and limitations" phrase in Pub. L. 106-562. RAM argues that Pub. L 106-562 is intended to prohibit NMFS from using anything other than the F/V PROVIDIAN's 1995-1997 catch history for determining the allocation to the F/V PROVIDIAN's cooperative because that is how NMFS determines other allocations under section 210, and because Pub. L. 106-562 states that the F/V PROVIDIAN shall be "subject to the same requirements and limitations on that harvesting as apply to, catcher vessels that are eligible to harvest that directed fishing allowance under section 208(a) of [the AFA]."

This is an implausible reading of that phrase. To paraphrase RAM's interpretation of the statute, it is as if Congress said, "Notwithstanding the fact that the F/V PROVIDIAN does not have catch history from 1998 or before 1998, NMFS must use the F/V PROVIDIAN's catch history from 1995 to 1997 to determine the allocation to the F/V PROVIDIAN's cooperative." Senator Snowe's statement shows that the driving fact behind Pub. L. 106-562 was that Ocean Spray did not own a vessel with any catch history between 1995 and 1997. If either the F/V OCEAN SPRAY or the F/V PROVIDIAN had a pollock catch history in 1995 to 1997, there would have been no need for Pub. L. 106-562. It is unreasonable to attribute to Congress an intent to pass a law that requires NMFS to use the F/V PROVIDIAN's 1995 to 1997 catch history in making allocations to the F/V PROVIDIAN's cooperative, when Congress knew that neither the F/V OCEAN SPRAY nor the F/V PROVIDIAN had any catch history in those years.

The Decision notes that the co-op formula in section 210 is probably more in the nature of a benefit than a requirement or limitation on harvesting.

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[18] 146 Cong. Rec. S11893, S11894 (Dec. 15, 2000)(statement of Sen. Snowe).

> It is a fair question whether the allocation to a co-op under the section 210 formula is more in the nature of a benefit rather than a "requirement and limitation on harvesting." Although section 210 does limit the co-op to what its members harvested in 1995, 1996 and 1997, it is probably more in the nature of a benefit since it gives the cooperatives an extremely valuable benefit: the right to control a suballocation of the harvest.[19]

The Decision offers a better interpretation of Congressional intent behind this phrase:

> This phrase can and should be given meaning. A fair reading of this phrase is that, apart from any changes that are required to implement Pub. L. No. 106-562, all other requirements apply, such as sideboard harvest restrictions and reporting requirements. Congress was underlining that, except for the changes necessary because of the F/V PROVIDIAN's special circumstances, this vessel would receive no special treatment and would be subject to all other requirements.[20]

Fifth, the Decision adopts a liberal interpretation of Pub. L. 106-562, since it is a remedial statute. The Decision noted that: "A liberal construction 'is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction.'"[21] The Decision quoted a leading treatise on statutory interpretation:

> Remedial statutes are liberally construed to suppress the evil and advance the remedy. The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established. Expressions of that rule appear over and over in judicial opinions.[22]

NMFS faces a question whether Pub. L. 106-562 applies to grant the F/V PROVIDIAN the benefit of contributing catch history to a cooperative. This rule of statutory interpretation supports granting the F/V PROVIDIAN that benefit.

Finally, RAM argues that the Decision overlooked section 211(e) of the AFA, which grants the F/V LISA MARIE a section 208 permit but not an allocation to a cooperative. Section 211(e) is worded

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[19] Decision at 17.

[20] *Id.*

[21] Decision at 16 *quoting* 3 SUTHERLAND ON STATUTORY CONSTRUCTION § 60.01 at 147 (Norman Singer, ed., 5th ed. 1992 rev.)(footnotes omitted).

[22] 3 SUTHERLAND ON STATUTORY CONSTRUCTION § 60.01 at 147 (Norman Singer, ed., 5th ed. 1992 rev.)(footnotes omitted).

differently from Pub. L. 106-562. Section 211(e) merely states that the F/V LISA MARIE "shall be eligible under such sections [section 208(a) and 208(c)] in the same manner as other vessels eligible under such sections. Pub. L. 106-562 specifically states that the F/V PROVIDIAN shall be eligible "to harvest the directed fishing allowance under section 206(b)(1) of [the AFA]" in the same manner as other catcher vessels. As noted, the manner in which catcher vessels harvest the section 206(b)(1) allowance is through contribution of their catch history to a cooperative which gets a guaranteed percentage of the allowance.

Furthermore, I have no reason to believe that the F/V LISA MARIE is in a similar situation to the F/V PROVIDIAN. Neither the F/V LISA MARIE nor the F/V PROVIIDAN met the requirements in section 208 for an inshore permit but I have no reason to believe that the F/V LISA MARIE replaced a vessel that sank in 1994 with a substantial pollock catch history. I have no indication how NMFS even could determine a catch history to attribute to the F/V LISA MARIE. I have no indication that Congress concluded NMFS should attribute the catch history of any other vessel to the F/V LISA MARIE.

By contrast, the critical fact about the F/V PROVIDIAN is that it is a replacement vessel for the F/V OCEAN SPRAY, which had a substantial pollock catch history and sank in 1994. The substantial catch history of the F/V OCEAN SPRAY provides a method by which NMFS could determine what catch history to attribute to the F/V PROVIDIAN. The legislative history of Pub. L. 106-562 clearly indicates that Congress concluded that the owner of the F/V PROVIDIAN should receive pollock fishing rights based on the catch history of the F/V OCEAN SPRAY.

Section 211(e) is a perfect example of Senator Snowe's statement that "the authors of the AFA certainly took into account the particular circumstances of other vessel owners and companies."[23] Pub. L. 106-562 reflects Congress's determination that the AFA should have taken into account the special circumstances of the F/V PROVIDIAN and represents its decision to correct that oversight.

3. Does Pub. L. 106-562 direct NMFS to make allocations to the F/V PROVIDIAN's cooperative based on the F/V OCEAN SPRAY's 1992-1994 catch history?

The Decision concluded that, in enacting Pub. L. 106-562, Congress made a policy determination that the F/V PROVIDIAN should be treated the same as a catcher vessel with a substantial catch history from 1995 -1997 because the F/V PROVIDIAN replaced a vessel, the F/V OCEAN SPRAY, which had a substantial catch history in 1992 - 1994. RAM's motion for reconsideration argued that, in enacting Pub. L. 106-562, Congress decided only that the F/V PROVIDIAN would receive a section 208 permit.[24] Congress did this, RAM argues, to remove an obstacle to the Council using its authority

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[23] *Id.*

[24] RAM's Motion for Reconsideration at 5 - 6.

under section 213 to recommend a change in the cooperative formula that would grant the owners of the F/V PROVIDIAN a benefit based on the F/V OCEAN SPRAY's 1992 - 1994 catch history. Section 213 requires a recommendation from the Council and regulations by the Secretary, pursuant to the Magnuson-Stevens Act, to change the cooperative allocation formula in section 210.

RAM relies on this part of Senator Snowe's statement:

> This amendment to the AFA is intended to provide **the North Pacific Fishery Management Council** and the National Marine Fisheries Service with the **authority** to qualify the *Providian* under the AFA with **directed onshore pollock-fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992-1994**. [emphasis added][25]

Black's Law Dictionary notes that "authorize" has two meanings.

> "Authorized" is sometimes construed as equivalent to "permitted;" **or** "directed," or to similar mandatory language.[26]

The question is whether Pub. L. 106-562 merely **permits** NMFS to use the 1992-1994 catch history of the F/V OCEAN SPRAY in determining the allocation to the F/V PROVIDIAN's cooperative if the Council, **if** the Council makes a recommendation and NMFS promulgates regulations under section 213 of the AFA to that effect, or whether Pub. L. 106-562 **directs** NMFS to use the 1992-1994 catch history of the F/V OCEAN SPRAY in determining the allocation to the F/V PROVIDIAN's cooperative. I conclude that a **directory** interpretation of Pub. L. 106-562, with respect to what it is telling NMFS to do, is the correct interpretation. I reach that conclusion for many reasons.

First**,** Pub. L. 106-562 amends the AFA and corrects an oversight that resulted because Congress was unaware of the special circumstances of the F/V PROVIDIAN. The F/V PROVIDIAN should therefore be treated as if the terms of Pub. L. 106-562 were written into the AFA. If that had happened, NMFS would have implemented Pub. L. 106-562 just as it implemented the AFA itself. Pub. L. 106-562 is of equal dignity to the AFA. It is also an Act of Congress. NMFS did not require Magnuson Act rulemaking by the Council to implement the AFA. NMFS cannot, and should not, require Magnuson Act rulemaking by the Council to implement Pub. L. 106-562.

Second, Pub. L. 106-562 is not a response to a general problem with the cooperative allocation formula. Rather, Congress was responding to the "special circumstances" of the F/V PROVIDIAN

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[25] 146 Cong. Rec. S11893, S11894 (Dec. 15, 2000)(statement of Sen. Snowe).

[26] BLACK'S LAW DICTIONARY 133 (6th ed. 1990).

and another vessel.[27] The Council and NMFS already had a mechanism to correct general problems with the allocation formula. Section 213(c)(3) provides:

> *(c) Changes to Fishery Cooperative Limitations and Pollock CDQ Allocation.*–The North Pacific Council may recommend and the Secretary may approve conservation and management measures in accordance with the Magnuson-Stevens Act–
> . . . ;
> (3) that supersede the criteria required in paragraph (1) of section 210(b) to be used by the Secretary to set the percentage allowed to be harvested by catcher vessels pursuant to a fishery cooperative under such paragraph.

Changes made pursuant to section 213(c)(3) must be general[28] and affect the percentage of the pollock harvest "to be harvested **by catcher vessels** pursuant to a fishery cooperative."[29] Thus, section 213 does not empower the Council to fix the F/V PROVIDIAN's problem, unless it determined that there were other vessels in the F/V PROVIDIAN's situation, namely replacement vessels that were being unfairly denied credit from a sunken vessel's catch history.

But the record contains no indication that Congress found there were other vessels with this problem or that Congress concluded that the formula, across-the-board, needed to be changed. The opposite is true. The legislative history describes in detail only the problems of the F/V PROVIDIAN. It is therefore implausible to assert that Congress intended to send Ocean Spray to the Council to seek a

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[27] Pub. L. 106-562 also benefits the F/V HAZEL LORRAINE but Senator Snowe did not describe the special circumstances of the F/V HAZEL LORRAINE. The Decision concluded that the circumstances of the F/V HAZEL LORRAINE were not relevant to resolving this appeal. Decision at 12 n. 30.

[28] The changes which the Council has recommended under section 213 have been general: a change in the definition of "qualified catcher vessel" to allow a retired or inactive vessel to maintain membership in an inshore cooperative; a revision to the open access formula to decrease the open access sector; determining co-op allocations by the highest landings in two out of three years years rather than 1995 and 1996 and 1997; and allowing certain inshore catcher vessels to receive credit in their catch history for offshore landings. The Secretary has adopted these recommendations as regulations. Emergency Interim Rule, 66 Fed. Reg. 4327 (Jan. 22, 2001).

[29] RAM argues that the Decision overlooked section 213(c)(3) and quotes that portion of section 213. Motion for Reconsideration at 7. It is not clear whether RAM argues that the F/V PROVIDIAN should seek relief under section 213(c)(1) but that also requires that the Council find "adverse effects in fisheries or on owners of few than three vessels." Section 213(c)(3) further requires that any measures and that the measures "take into account all factors affecting the fisheries and are imposed fairly and equitably to the extent practicable among and within the sectors in the directed pollock fishery."

general change in the allocation formula under section 213.

Third, even if the Council could use its section 213 authority to change the formula for one vessel only, that does not mean that Congress could not enact a statute that grants the same relief to that vessel. The AFA itself is a prime example of Congress acting even though the Council could have addressed the same problem. Section 206 of the AFA makes directed allowances of the BSAI pollock catch. The Council could have proposed regulations under the Magnuson-Act to make these allowances but it had not done so.[30] Mr. Raber sought relief from the Council.[31] He did not receive it and sought relief from Congress. Just as some vessels sought benefits from Congress through the enactment of the AFA, the F/V PROVIDIAN sought relief from Congress through Pub. L. 106-562, an amendment to the AFA.

Fourth, a directory interpretation is more consistent with the liberal interpretation given remedial statutes. It interprets Congress as actually solving Ocean Spray's problem rather than simply referring Ocean Spray back to the Council to consider whether to solve it.

Fifth, a directory interpretation of Pub. L. 106-562 – that the statute directs NMFS to recognize the F/V OCEAN SPRAY's 1992-1994 catch history when it makes allocations to the F/V PROVIDIAN's cooperative – is more consistent with Senator Snowe's statement because it actually solves the F/V PROVIDIAN's problem as described by Senator Snowe. RAM's interpretation merely refers the problem back to the Council. A directory interpretation addresses the "special circumstances" of the F/V PROVIDIAN, namely that it replaced a vessel with a substantial pollock fishing history that sank in 1994, and it was not completed until 1998. A directory interpretation grants the F/V PROVIDIAN relief from the fact that the AFA "certainly took into account the particular circumstances of other vessel owners and companies" but did not take into account the F/V PROVIDIAN's circumstances. A directory interpretation "restore[s] the vessel owner's pollock-fishing rights earned with the *Ocean Spray* during 1992 - 1994" rather than simply letting the vessel owner ask the Council to restore those rights.

A directory interpretation is consistent with the part of Senator Snowe's comment that RAM quotes. Two phrases deserve comment, which I indicate by bold type:

> This amendment to the AFA is intended to provide the North Pacific Fishery Management Council and the National Marine Fisheries Service with the **authority to qualify** the *Providian* under the AFA with **directed onshore pollock fishing rights**

[30] Congress enacted the AFA to resolve the "tremendous allocation disputes regarding this resource [the North Pacific pollock fishery] before the North Pacific Fishery Management Council." 144 Cong. Rec. S12696-03, S12707 (statement of Senator Patty Murray).

[31] Exhibit 7.

equivalent to those earned by the *Ocean Spray* during the years 1992-1994.[32]

The first is the reference to giving the Council and NMFS "authority to qualify the *Providian* under the AFA." The Council approved a list of AFA vessels in May 1999.[33] Mr. Raber's vessel, the F/V PROVIDIAN, was not on it. Senator Snowe's statement is best read as instructing whoever implements Pub. L. 106-562 – the Council, NMFS or a mix of the two – to qualify the F/V PROVIDIAN with something.

That something is in the second bracketed part of the statement: "directed onshore pollock fishing rights equivalent to those earned by the *Ocean Spray* during the years 1992-1994.[34] Under the AFA, as originally enacted, the F/V OCEAN SPRAY earned no fishing rights with its 1992 - 1994 catch history. So, unless Pub. L. 106-562 changes the fact that the F/V OCEAN SPRAY earned no fishing rights with its 1992-1994 catch history, this sentence means that Pub. L. 106-562 provides the authority to award the F/V PROVIDIAN no fishing rights because no fishing rights are equivalent to no fishing rights. This is absurd. A far better reading of this statement is that Congress intends that Pub. L. 106-562 amends the AFA so that the AFA will grant the F/V PROVIDIAN pollock fishing rights based on the F/V OCEAN SPRAY's catch history in 1992 - 1994.

Sixth, a directory interpretation is far more consistent with the language of Pub. L. 106-562. Congress clearly intended to grant the F/V PROVIDIAN a benefit through Pub. L. 106-562. The benefit is that the F/V PROVIDIAN "shall be considered" a vessel eligible to harvest the directed fishing allowance in the same manner as other catcher vessels. This language does not suggest that the benefit Congress wished to confer was dependent on any other entity acting. Shall is usually mandatory language. Black's Law Dictionary defines shall as follows:

> As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be be given a compulsory meaning; as denoting obligation. The word in ordinary usage means "must' and is inconsistent with a concept of discretion. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or

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[32] 146 Cong. Rec. S11893, S 11894 (Dec. 15, 2000)(bracketed numbers added).

[33] NPFMC Newsletter for April 21-26, 1999 meeting, published May 3, 1999, available at "http://www.fakr.noaa.gov/npfmc/Newsletters/499news.htm."

[34] 146 Cong. Rec. S11893, S 11894 (Dec. 15, 2000)(bracketed numbers added).

enforced, unless a contrary intent appears.[35]

Pub. L. 106-562 is addressed to public officials and grants the F/V PROVIDIAN a right which ought to be enforced. Pub. L. 106-562 does not state the amount of pounds that should be credited to the F/V PROVIDIAN based on the 1992 - 1994 catch history of the F/V OCEAN SPRAY. RAM did not make such a determination because it did not believe it had the authority. I conclude that Pub. L. 106-562 requires RAM to make such a determination. NMFS should expeditiously implement Pub. L. 106-562 to grant the F/V PROVIDIAN the relief that Congress intended.

4. Does RAM's interpretation render Pub. L. 106-562 a nullity?

RAM argues that the Decision incorrectly concluded that the IAD rendered Pub. L. 106-562 a nullity. RAM argues that the Decision overlooked that the F/V PROVIDIAN could participate in the open access sector, that the F/V PROVIDIAN could lease harvest privileges from other co-op members or that the F/V PROVIDIAN's cooperative might choose to distribute harvest privileges on some basis other than what the vessels contributed to the cooperative. These arguments do not result in any change in the Conclusions of Law in the original Decision.

First, RAM's Motion for Reconsideration brought up these advantages as a response to statements in the Decision that Pub. L. 106-562, as interpreted by RAM, was a nullity[36] and provided the F/V PROVIDIAN "no meaningful rights under the AFA.[37] The principal basis of the Decision was that the IAD's interpretation of Pub. L. 106-562 did not achieve the purpose of the statute.[38] Thus, even if the IAD's interpretation of Pub. L. 106-562 does not render it a nullity, it should be rejected because it does not carry out the purpose of the statute.

Assuming that the IAD's interpretation of Pub. L. 106-562 grants some benefits to the F/V PROVIDIAN, the question is still whether these are the benefits that Congress intended to grant by statute to the F/V PROVIDIAN. I conclude they are not, because these benefits are not the benefits of a three-year substantial pollock catch history. The ability to buy additional pollock rights from other co-op members is a benefit from joining a cooperative. However, undeniably, under the AFA, the crucial benefit of three years of a substantial pollock catch history is that the vessel owner receives value for that catch history through harvest privileges in a cooperative that he does not have to purchase. The vessel owner can realize the value of those harvest privileges by fishing them himself or leasing them to

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[35] Black's Law Dictionary (6th ed. 1990)(citations omitted)(part of the defintion of shall).

[36] Decision at 2, 16.

[37] Decision at 12.

[38] Decision at 11 - 16.

other co-op members.

Put another way, if the F/V OCEAN SPRAY had continued to fish, its ability to harvest pollock would not have been limited to the open access sector and would not have required the purchase or a gift of harvest privileges from other co-op members. The F/V OCEAN SPRAY would have had guaranteed harvest privileges from a cooperative based on its catch history. Pub. L. 106-562 intended to grant the F/V PROVIDIAN those same benefits.

Second, RAM argues that Pub. L. 106-562 is a nullity only if the owner of the F/V PROVIDIAN wishes to keep his vessel in Maine.[39] Ocean Spray has stated that it intends to keep the F/V PROVIDIAN in Maine to participate in the herring fishery.[40] Thus, given the F/V PROVIDIAN's current intention and circumstances, the IAD does render Pub. L. 106-562 a nullity.

An interpretation that requires the F/V PROVIDIAN to move back to Alaska to obtain benefits under Pub. L. 106-562 violates Congressional intent. Congress granted relief to this vessel with full knowledge that it had moved to Maine. Senator Snowe stated:

> Since the construction of the *Providian* was completed, the owner decided to bring his vessel to Bath, Maine to work in the Maine herring fishery. The current location of this vessel does not eliminate the need to establish fairness and restore the vessel owner's pollock-fishing rights earned with the *Ocean Spray* during 1992-1994."[41]

An interpretation of Pub. L. 106-562 that required the F/V PROVIDIAN to move back to Alaska to obtain benefits would be inconsistent with the AFA. The AFA allows cooperative members to fish

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[39] RAM's Motion for Reconsideration states at page 6:

> A fair and proper reading of the AFA leads us to the conclusion that the only circumstance in which the owner of the F/V PROVIDIAN does not benefit financially from the eligibility to fish under § 208(a), is if the owner **choses to keep his vessel in Maine and not to deploy it to fish for pollock in the BSAI** and instead wishes to simply lease out his cooperative allocation to other cooperative members. The fact that the vessel received zero percent of the cooperative's initial allocation under the cooperative agreement means that, under the current terms of the agreement, the owner has nothing of value to lease to the other members. This simply means the owner of the F/V PROVIDIAN cannot benefit from the AFA unless he actually chooses to actively participate in the fishery. He cannot receive a paycheck for **not fishing** for pollock in the BSAI.

[40] Ocean Spray's response to materials added to record, Letter from Ocean spray to Mary Alice McKeen, March 28, 2001 at 3-4.

[41] 146 Cong. Rec. S11893, S11894 (Dec. 15, 2000)

their catch history themselves or lease to others, as long as the leasing is in accord with the cooperative contract. Nothing in the AFA nor in the regulations implementing the AFA makes that choice dependent on where the vessel is or where the vessel's owner lives.[42] In fact, the recent change in the definition of "qualified catcher vessel" was specifically made to permit vessels to remain inactive and still be co-op members.[43] Thus, when RAM states that the F/V PROVIDIAN could lease harvest privileges from other coop members, it is only because the AFA permits those co-op members to, in effect, "receive a paycheck for not fishing for pollock in the BSAI."[44]

Third, the IAD grants the F/V PROVIDIAN the right to join a cooperative only because the IAD is inconsistent and goes outside the language of Pub. L. 106-562 to add the 1992 - 1994 catch history of the F/V OCEAN SPRAY to the catch history of the F/V PROVIDIAN. If RAM did not add the catch history of the F/V OCEAN SPRAY to the catch history of the F/V PROVIDIAN, the only benefit that the F/V PROVIDIAN would get from Pub. L. 106-562 is the ability to participate in the open access sector. That is a meager benefit, and much less than Congress intended to grant.[45]

As the Decision noted, the open access sector is minuscule when compared to the co-op sector. Of the 241,902 metric tons of Bering Sea pollock available in the 2001 A/B season, 944 metric tons are allocated to the open access sector and 240,976 metric tons to the co-op sector.[46] The size of the open access sector is due to two developments. The first is that the Council recently recommended a change in the open access formula that decreased the size of the open access sector.[47] The second is that the vast majority of catcher vessels are choosing the co-op sectors, because of the advantages of co-ops. Both are enduring structural reasons.

Thus, a section 208 permit alone grants the F/V PROVIDIAN no guaranteed harvest privileges. The F/V PROVIDIAN could only race for fish with the other vessels in the open access sector (and this year the race would be for 942 tons of pollock). Since the F/V PROVIDIAN would have no catch

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[42] I do not imply that a statute could do that. A statute would have to be analyzed under federal constitutional protections (the privileges and immunities clause and the right to travel). The Magnuson-Stevens Act in section 301(a)(4) states that a fishery management plan and any regulation to implement a plan "shall not discriminate between residents of different States."

[43] Emergency Interim Rule, 66 Fed. Reg. 7327, 7328 (Jan. 22, 2001).

[44] RAM's Motion for Reconsideration at 6,

[45] The IAD did not state that the F/V PROVIDIAN could participate in the open access sector but the Motion for Reconsideration at page 5 makes that argument.

[46] Emergency Interim Rule, 66 Fed. Reg. 15,656 (March 20, 2001).

[47] Emergency Interim Rule, 66 Fed. Reg. 7327, 7329 (Jan. 22, 2001).

history to contribute to the open access sector, it could harvest pollock only if <u>other</u> vessels choose to stay in the open access sector and then only to the extent of those <u>other vessels' catch history</u>. Since the rights in the open access sector are not transferable, the only way that the F/V PROVIDIAN could participate in the open access sector is if it came back to Alaska and it could not even buy harvest privileges from other vessels. The benefits of the open access sector are light years away from the benefits that accrue to a vessel under the AFA with a substantial three year catch history. An interpretation of Pub. L. 106-562 that confines the F/V PROVIDIAN to the open access sector is not a reasonable interpretation of Congressional intent.

5. Should the appeals officer have considered evidence in the record bearing on Mr. Raber's expectations, and should the appeals officer develop the record further to determine whether the IAD gave Mr. Raber what he expected from Pub. L. 106-562.

RAM argues that the Decision adopts an interpretation of Pub. L. 106-562 that is not what Mr. Raber expected from that statute. RAM states: "the Appeals Officer ignored evidence in the record that demonstrates that the F/V PROVIDIAN's owner had quite a different set of expectations [from the statute.]" In effect, RAM argues that Mr. Raber is seeking through this appeal more then he asked Congress for. RAM argues that the Appeals Officer should hold a hearing to determine what Mr. Raber expected from Pub. L. 106-562.

Ocean Spray argued that RAM's additional documents were not relevant to the question of Congressional intent but in the alternative, submitted additional documents if I was going to consider materials outside the publicly documented legislative history of Pub. L. 106-562 and determine the expectations of Mr. Raber.

RAM is correct that the Decision did not analyze Al Geiser's e-mail to Walt Raber [Exhibit 12] and Mr. Raber's letter to Jeff Kaelin [Exhibit 13] and did not determine Mr. Raber's expectations from Pub. L. 106-562. RAM is also correct that, if I were to conclude that I should make a finding as to Mr. Raber's expectations from this legislation, I would have to hold a hearing.

I decline to order a hearing on that issue. The question before me is the proper interpretation of Pub. L. 106-562. Mr. Raber, the UCB, the Maine Sardine Council, staff of the Commerce Committee and Senator Snowe are not parties to a private contract. My task is not to piece together who said what to whom and when so I can determine Mr. Raber's expectations, whether he communicated those to the other party or parties to the contract, or whether he got more than he "bargained for." I am interpreting a statute, not a contract.

The task of statutory interpretation is to determine Congressional intent. At best, the letters in the record from the UCB [Exhibit 14 and 15] and the Maine Sardine Council [Exhibit 16] to Senator Snowe show that these groups communicated their views to Senator Snowe. This does not show that Senator Snowe accepted the views of UCB or the Maine Sardine Council, incorporated those views in the legislation she introduced or presented those views to Congress. The only document that shows

what views Senator Snowe accepted and presented to Congress is her statement in the Congressional Record of December 15, 2000. Senator Snowe does not refer to the position of the UCB or state that Pub. L. 106-562 adopts their position in addressing the F/V PROVIDIAN's problem.

A statute is a public document. The documents that courts use in interpreting statutes are public documents: Committee reports, statements on the Senate or House floor by bill sponsors, testimony at Committee hearings, reports by blue ribbon panels and special commissions on particular problems that lead to legislation.[44]

Courts sometimes do consider the views of private parties on legislation – such as law professors or industry representatives – but only when these persons testify before Congress and usually because they have participated in drafting the statute in question.[45] If courts or agencies considered private communications made to a senator or Senate committee staff in interpreting legislation, that could require testimony from the Senator herself as to who said what and whether she adopted their views in the legislation in issue.

The problem with relying on communications to staff is even worse. That would require investigation into the identity of staff persons, whether they were acting on behalf of a senator, whether they communicated a group's views to the Senator and whether the Senator said she was adopting them. For an Appeals Officer in an executive agency to make such an investigation would be an intolerable intrusion into the Congressional process.

If private documents were considered, it would also be extremely difficult for an Appeals Officer to know if he or she had gotten all the relevant documents. It is possible for an Appeals Officer to know

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[44] *See* 2A Norman Singer, Statutes and Statutory Construction §§ 48.06 - 48.19 (6th ed. 2000 revision). "The legislative history of the SMCRA [the Surface Mining Control and Restoration Act], consisting of public documents, is clearly relevant to the issue before the Court, but it is 'law' not 'evidence.'" *Indiana Coal Council v. Hodel*, 118 F.R.D. 264, 267 (D.C. Cir. 1988).

[45] *See, e.g., Piper v. Chris-Craft Industries, Inc.,* 430 U.S. l, 29 (1977)(testimony of law professor before Senate Subcommittee on need for investor protections in hostile takeovers); *United States v. Giordano*, 416 U.S. 505, 517 - 519 (1974)(testimony before House Judiciary Committee by law professor who authored draft wiretapping statute that was published in the President's Commission on Law Enforcement and Administrative of Justice that served as basis for statute that was being interpreted); *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 534 (1972)(testimony before Senate Committee by law professor who was principal consultant to drafters of statute); *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories,* 460 U.S. 150, 160 (1983)("The most relevant legislative history is the testimony of the Act's principal draftsmen, H.B. Teegarden, before the House Judicial Committee.")(footnote omitted); *Dawson Chemical Co. v. Rohm and Haas Co.,* 448 U.S. 176, 204 - 205 (1980)(testimony before House Subcommittee on Patents by New York Patent Law Association and individual attorneys who drafted the bill).

that he or she has gotten all the documents in the public legislative history. The behind-the-scenes maneuvering that precedes legislation can be extensive, hectic, contradictory, and extremely hard to track down and document. It would be difficult, if not impossible, for an Appeals Officer to know that he or she had gotten a complete record. Therefore, unless something finds its way into the public, legislative history of a statute, it cannot be considered in determining legislative intent.[46]

6. Should the Appeals Officer hold a hearing to determine the benefits to the owner of the F/V PROVIDIAN from receiving a section 208 permit?

RAM argues that the Appeals Officer should engage in factfinding to determine the value to the owner of the F/V PROVIDIAN from receiving a section 208 permit but not a cooperative allocation under section 210. The original Decision and this Decision on Reconsideration does interpret Pub. L. 106-562 by analyzing what benefits Congress intended to grant to the owner of the F/V PROVIDIAN and whether the IAD grants those benefits. In interpreting Pub. L. 106-562, the original Decision and this Decision on Reconsideration did analyze whether RAM's interpretation renders the statute a legal nullity. Statutory interpretation, however, is still a question of law.[47] I conclude that the record is sufficiently developed for me to evaluate and decide these questions of law.

If RAM is suggesting that I should hold a hearing to determine the proper interpretation of Pub. L. 106-562, I decline to do that. An appeals officer may not order a hearing on issues of policy or law.[48]

CONCLUSIONS OF LAW

I restate the Conclusions of Law from the Decision, dated April 13, 2001, with one minor change,[49] in conclusions 1 through 5. Conclusions 6 - 11 result from the issues on reconsideration.

1. Title V of Pub. L. No. 106-562 is ambiguous as to whether NMFS is required to substitute the catch history of the F/V OCEAN SPRAY in the years 1992 - 1994 for the catch history of the F/V PROVIDIAN in the years 1995 - 1997.

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[46] Although I do not make a finding as to Mr. Raber's expectations, I do wish to note that the record contains substantial evidence that Mr. Raber sought legislation granting him AFA benefits based on the F/V OCEAN SPRAY's 1992 - 1994 catch history and that he believed Pub. L. 106-562 did that.

[47] *E.g., Amoco Oil v. U.S.,* 234 F. Ed 1374, 1377 (Fed. Cir. 2000).

[48] 50 C.F.R. § 679.43(g)(3)(i).

[49] I added the phrase in the second conclusion of law, "and had a substantial pollock catch history from 1992 - 1994."

2. The purpose of Title V of Pub. L. No. 106-562 was to solve the problem caused the confluence of these events: [1] Congress enacted the AFA; [2] the F/V OCEAN SPRAY sank in 1994 and had a substantial pollock catch history from 1992 to 1994; [3] the F/V PROVIDIAN was not built until late 1998.

3. Title V of Pub. L. No. 106-562 requires that NMFS issue the F/V PROVIDIAN an inshore catcher vessel permit under section 208 of the AFA.

4. Title V of Pub. L. No. 106-562 requires that NMFS substitute the catch history of the F/V OCEAN SPRAY in 1992 -1994 for the catch history ofthe F/V PROVIDIAN in 1995 - 1997 when making allocations to cooperatives under section 210(b) of the AFA.

5. Title V of Pub. L. No. 106-562 does not require that NMFS recalculate the AFA allocations to inshore vessel cooperatives that it has already made for the year 2001.

6. The Decision properly used principles of statutory interpretation.

7. The Decision did not misunderstand how Congress intended to benefit the owner of the F/V PROVIDIAN.

8. The IAD renders Pub. L. 106-562 a nullity if the F/V PROVIDIAN remains in Maine.

9. An Appeals Officer should not determine an appellant's private expectations when interpreting a statute.

10. An Appeals Officer should not rely on private correspondence in interpreting a statute.

11. An Appeals Officer should not hold a hearing to determine the benefits to the owner of the F/V PROVIDIAN from receiving a section 208 permit.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is AFFIRMED in part and VACATED in part. Determinations No. 1, 2 and 3 at page 5 of the IAD are AFFIRMED. Determination No. 4 is VACATED. The Decision of April 13, 2001 is incorporated by reference into this Decision on Reconsideration, except as modified herein.

RAM is ORDERED to allocate Bering Sea pollock to the Appellant's cooperative under section 210(b) of the AFA based on the 1992-1994 catch history of the F/V OCEAN SPRAY, beginning in 2002. This Decision on Reconsideration takes effect July 16, 2001, unless by that date the Regional Administrator orders review of the Decision.

Because time is of the essence to the Appellant, I recommend that the Regional Administrator expedite review of this Decision.

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Mary Alice McKeen
Appeals Officer