



# Marine Conservation Alliance

*promoting sustainable fisheries to feed the world*

P O Box 20676  
Juneau, AK 99802  
(907) 523-0731  
(206) 260-3639 fax

Adak Fisheries, LLC  
Alyeska Seafoods  
Alaska Crab Coalition  
Alaska Druggers Association  
Alaska Groundfish Data Bank  
Alaskan Leader Fisheries  
Alaska Pacific Seafoods  
Aleutian Islands Brown Crab Coalition  
Aleutian Pribilof Island Community Development Association  
Akutan, Adka, False Pass, Nelson Lagoon, Nikolski, St. George  
At-Sea Processors Association  
Bristol Bay Economic Development Corp.  
Aleknagik, Clark's Point, Dillingham, Egegik, Ekuk, Ekwook, King Salmon, Levelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Toogak, Twin Hills, Ugashik  
Central Bering Sea Fishermen's Association  
St. Paul  
City of Unalaska  
Coastal Villages Region Fund  
Chelofnak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kipnuk, Kongsigpak, Kwigillingok, Makooyak, Napakakik, Napasakik, Newtok, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tunututalik, Tununak  
Groundfish Forum  
High Seas Catchers Cooperative  
Icicle Seafoods  
McCarty and Associates  
Mid-Water Trawlers Cooperative  
Mothership Group  
PV Excellence  
PV Ocean Phoenix  
PV Golden Alaska  
North Pacific Longline Association  
Norton Sound Economic Development Corporation  
Brevig Mission, Diomedes, Elm, Gambell, Golovin, Koyuk, Nome, Saint Michael, Savonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, White Mountain  
Pacific Seafood Processors Association  
Alaska General Seafoods  
Alyeska Seafoods, Inc.  
Golden Alaska Seafoods, Inc.  
Peter Pan Seafoods, Inc.  
Premier Pacific Seafoods, Inc.  
Supreme Alaska Seafoods, Inc.  
UniSea Inc.  
Wardis Cove Packing Company  
Western Alaska Fisheries, Inc.  
Westward Seafoods, Inc.  
Prowler Fisheries  
Trident Seafoods Corp.  
United Catcher Boats  
Akutan Catcher Vessel Assoc.  
Arctic Enterprise Assoc.  
Mothership Fleet Cooperative  
Northern Victor Fleet  
Peter Pan Fleet Cooperative  
Unalaska Co-op  
Unisea Fleet Cooperative  
Westward Fleet Cooperative  
U.S. Seafoods  
Waterfront Associates  
Western Alaska Fisheries, Inc.  
Yukon Delta Fisheries Development Association  
Alakanuk, Emmonak, Grayling, Kotik, Mountain Village, Nunam Iqaa

November 2, 2007

Ambassador David Balton  
OES/O  
U.S. Department of State  
2201 C Street NW  
Washington, DC 20520

## Re: The Agreement for the Conservation of Albatrosses and Petrels (ACAP)

Dear Ambassador Balton,

The Marine Conservation Alliance (MCA) is a coalition of seafood processors, harvesters, support industries and coastal communities that are active in Alaska fisheries. The MCA represents approximately 75% of the participants in Alaska shellfish and groundfish fisheries and promotes science-based conservation measures to ensure sustainable fisheries.

We are aware that the Executive Branch is currently considering whether the United States should become a party to ACAP, and have been asked for an industry position on the subject. To date, we do not have a position regarding U.S. ratification of this convention. Our membership has several questions regarding the implementation of ACAP and the practical effects it might have on U.S. fisheries in the future. Our board believes that these issues need to be clarified, and urge caution in proceeding to ratification until such clarification is received. They have asked that these issues be raised with you to seek such clarification.

First, much of the impact of U.S. ratification of ACAP would depend on the nature of any implementing U.S. legislation. Some have suggested that existing authorities, *e.g.*, the Fish and Wildlife Coordination Act, might be invoked to implement ACAP. We suspect that this will not be the ultimate position of the Executive Branch, which in its briefing papers to Congress acknowledges that, "Additional legislation would likely be needed..., particularly to enhance coordination among existing U.S. seabird conservation programs." As currently written the Magnuson-Stevens Fishery Conservation and Management Act (the MSA) provides no direct authority to manage the incidental take of seabirds in offshore fisheries. Proposals to amend the MSA to include seabirds within the definition of "bycatch" would be problematic in our view. All the management obligations in the Act would be triggered. Under National Standard 9 an obligation to "minimize" seabird bycatch and related mortality in fishery conservation and management measures would arise. Every fishery management plan, under Section

303(a)(11), would also have to “establish a standardized reporting methodology to assess the amount and type of” seabird bycatch and include “to the extent practicable” bycatch and bycatch mortality minimization measures. Additionally, if prescriptive legislation were adopted, establishing strict, substantive standards for protecting seabirds in fisheries, this would markedly increase the risk of litigation challenging measures as inadequate under the law. We would withhold final judgment on ACAP until the shape of implementing legislation is clear.

We also seek clarification regarding the species that can be made subject to ACAP’s protections. We are concerned about expansion of ACAP to all tube-nosed seabird species, including shearwaters and fulmars. Both species are quite numerous, and there is no indication that they are taken in biologically significant quantities. Notwithstanding the broad view taken by the ACAP Advisory Committee at its June 2007 meeting, we would prefer that ACAP or U.S. participation in ACAP be more narrowly limited, as its name implies and as the Agreement itself states, just to species of “albatrosses and petrels.” We seek assurances from the U.S. government in this regard.

ACAP calls for the parties to “progressively” undertake measures to implement the Action Plan. It is uncertain just what the term “progressively” means. It might be interpreted to mean that the parties should be continually upgrading their seabird protection efforts, and that a failure to adopt increasingly stringent requirements could put a party in potential breach of its treaty obligations. At the least, whether a party is meeting this obligation could be the subject of dispute. It would be useful for the U.S. Government to clarify that this language is not intended to require annual or other periodic enhancements of seabird protections within any set timeframe.

The Action Plan calls upon the parties to follow “where possible...best current practice.” “Best current practice” is not defined in the Agreement, and there may not be a consensus among the parties as to what constitutes “best current practice.” Further, there may not be agreement about whether particular measures are “possible” within fisheries. Thus, disputes about a party’s compliance with this obligation could arise. It is also conceivable that the Advisory Committee might be tasked with formulating criteria for application of this provision or actually devising “best management practices” for particular fisheries. We would like the U.S. Government to explain how it understands this provision and whether U.S. management practices might be put at risk by determinations of the Advisory Committee, or treaty parties themselves, as to what practices meet the standards of Annex 2.

Moreover, ACAP’s basic standard – the “achievement and maintenance of a favourable conservation status for albatrosses and petrels” – contains conditions that may be problematic to implement. In particular, the fourth condition, which calls for “the distribution and abundance of the migratory species [to] approach historic coverage and levels to the extent that potentially suitable ecosystems exist ...,” may not be achievable for some species. For example, only 2,200 short-tailed albatrosses exist today, though they once numbered in the millions, yet the habitat remains which theoretically could support pristine population levels. Realistically, however, it is questionable whether pristine population levels could ever be restored. Achievement of the goal is qualified in ACAP by the phrase “to the extent consistent with wise wildlife management.” Such language is vague and open to considerable interpretation. We believe that a more practical approach to seabird conservation, with clear guidance, is needed and would like to understand better how this might be enshrined either in the convention or in U.S. implementing legislation.

Some ambiguity also exists regarding the obligations that may be imposed upon the parties when the Advisory Committee finds that an emergency exists. In particular, it would be helpful for the U.S. Government to confirm that, consistent with the treaty language and contrary to the apparent effect of Annex 2 (“affected parties *shall* develop and implement emergency measures” – emphasis added), only non-binding “recommendations” would be issued in cases of emergency, and a party would not be in non-compliance with its duties under the Agreement if it decided not to adopt particular emergency protections in its fisheries.

It is unclear if the Action Plan would require the United States to take actions to “restore” albatross and petrel populations to “favourable conservation status” through efforts to restore habitat, modify fisheries, or a combination of several actions. This language to “restore” appears in the Action Plan’s discussion of habitat conservation efforts but not in the Action Plan’s discussion of efforts to manage incidental mortality in fisheries. Fisheries may not have any role in “restoring” a seabird population and certainly inclusion in the Action Plan may be cause for concern. It would be helpful if the U.S. Government would confirm that the restoration obligation in the Action Plan is limited to habitat and does not extend to the management of incidental taking in fisheries.

Finally, the Agreement requires mandatory dispute resolution for matters of a “technical nature.” It specifies that “the procedures relating to technical arbitration panels and other procedures to resolve disputes shall be determined by a Meeting of the Parties.” To date, those procedures have not been established. At this point, it is uncertain just what matters the parties would consider to be of a “technical nature” and what matters would not fall within this rubric. It would be objectionable if, for example, issues relating to the efficacy of seabird avoidance regulations in U.S. fisheries in the EEZ of the North Pacific could be deemed to be technical in nature, so that some international arbitration panel could as a practical matter dictate what measures are acceptable or unacceptable within our own jurisdiction. It would be desirable if assurances could be obtained that this cannot and will not occur.

We appreciate the opportunity to comment and raise questions with you on ACAP and its implementation. We have raised questions and sought assurance on a variety of issues. We are prepared to review your responses promptly, and to provide an opinion on accession when these matters are clarified.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Benton". The signature is fluid and cursive, with the first name "Dave" and the last name "Benton" clearly distinguishable.

Dave Benton  
Executive Director