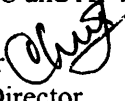


MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver 
Executive Director

DATE: September 23, 2009

SUBJECT: Central Gulf of Alaska Rockfish Program

ESTIMATED TIME 6 HOURS

ACTION REQUIRED

Preliminary review of the CGOA rockfish program analysis

BACKGROUND

In June 2009, the Council adopted a suite of elements and options for developing a new management program for the Central Gulf of Alaska rockfish fishery to replace the existing pilot program, which is set to expire after the 2011 fishing season. A copy of the elements and options are attached as **Item C-2(1)**. Since June, staff has been preparing a preliminary EA/RIR/IRFA analyzing alternatives defined by those elements and options. The analysis includes a description of the alternatives defined by the elements and options, a detailed description of the existing conditions in the rockfish fishery during two periods – the period leading up to the rockfish pilot program and the period since implementation of the rockfish pilot program, and preliminary drafts of the EA and the IRFA. A copy of the preliminary analysis was mailed on September 22.

Given the uncertainty of Council authority for some alternatives and the pending opinion of NOAA GC concerning that authority, staff has focused its efforts on portions of the analysis less likely to be affected by that opinion.

At the June 2009 meeting, the Council directed staff to draft a letter to NOAA General Counsel requesting its opinion of the Council's authority to adopt management programs defined by the alternatives. A copy of the letter is attached as **Item C-2(2)**. To date, the Council office has not received a written response to this letter. It is possible that a response will be available for distribution at the meeting, or that NOAA General Counsel may be able to comment concerning the scope of the Council's authority at that time.

In addition to the preliminary EA/RIR/IRFA, staff has prepared a separate discussion paper with information concerning specific decision points that the Council could consider addressing at this meeting. The discussion paper includes a description of the proposed allocations to harvesting sectors and their members, as well as the proposed allocations to shore based processors. The discussion paper also includes an analysis of proposed allocations to participants in the pilot program trawl entry level fishery (including shore based processors that participated in that fishery), proposed shortraker and rougheye rockfish allocations, management of sablefish and Pacific cod allocations to harvest sectors, and the rollover of unused halibut PSC from the rockfish fishery cooperatives to other Gulf trawl fisheries. Under this agenda item, the Council could consider selecting preferred options concerning these aspects of the program to simplify and streamline the future analysis of the program alternatives. The discussion paper is attached as **Item C-2(3)**.

Elements and options defining the program alternatives

The Council has identified the following elements and options to define its alternatives:

Alternatives, Elements, and Options

Entry-Level Fishery Alternatives (EL)

1. Status Quo (revert back to LLP management)
2. Entry level trawl/fixed gear fisheries (the pilot program structure)
3. Fixed gear only fishery

Catcher Processor Alternatives (CP)

1. Status Quo (revert back to LLP management)
2. Catcher processor cooperative only (the pilot program structure)
3. Cooperative or limited access

Catcher Vessel Alternatives (CV)

1. Status Quo (revert back to LLP management)
2. Harvester only cooperative
3. Allocation of harvest shares to processors
4. Harvester cooperatives with unseverable processor associations (the pilot program structure)
5. Severable harvester/processor association – one time forfeiture
6. Severable harvester/processor association – ongoing forfeitures
7. Severable harvester/processor association – no forfeiture

The above alternatives are defined by the following elements and options.

1 ICA Set Aside

Prior to allocation of catch history to the sectors, NMFS shall set aside an Incidental Catch Allocation (ICA) of Pacific Ocean perch (POP), northern rockfish, and pelagic shelf rockfish to meet the incidental catch needs of fisheries not included in the cooperative program. (EL – all)

2 Entry-level Set Aside (EL – all)

A percentage of CGOA POP, northern rockfish and pelagic shelf rockfish for catcher vessels not eligible to participate in the program.

2.1 Trawl and fixed gear entry level fisheries (EL – 2)

The annual set aside will be 5 percent of each of these target rockfish species.

Set-asides shall be apportioned at 50% for trawl gear and 50% for fixed gear. The trawl sector's allocation by weight (based on the aggregate TAC for Pacific Ocean perch, Northern and pelagic shelf rockfish) shall first be Pacific Ocean perch.

Unharvested allocations to either sector shall be available to both sectors at the end of the third quarter.

The entry level fishery will be managed as a limited entry fishery.

Start dates for the entry level fishery should be January 1 for fixed gear and approximately May 1 for trawl gear.

2.1.2 Halibut PSC Limit Allocation

Prosecution of the entry level fishery will be supported by general allowance of halibut PSC to the gear type and the general allocations of secondary species.

Trawl halibut PSC options

Option 1: If sufficient halibut PSC is not available at the start of the trawl gear fishery (May 1), the start date will be on the next release of halibut PSC.

Option 2: If sufficient halibut PSC is not available at the start of the trawl gear fishery (May 1), halibut usage will be deducted against the following quarter's halibut PSC allowance.

Vessels that can participate in the entry level fishery are those vessels that did not qualify for the CGOA rockfish cooperative program. Before the beginning of each fishing year an application must be filed with NMFS by the interested vessel that includes a statement from a non-qualified processor confirming an available market.

Processors who purchase and process the entry level rockfish quota must be non-qualified processors.

Entry level fixed gear sector are exempt from VMS requirements.

2.2 Fixed gear only entry level fishery

The annual set aside will be;

1 – 10 mt of the POP TAC

1 - 10 mt of the northern rockfish TAC

10 - 30 mt of the pelagic shelf rockfish TAC.

If the entry-level fishery harvests 90% or more of their allocation of a species, the set-aside would increase by the amount of the initial allocation the following year:

1 - 10 mt POP

1 - 10 mt Northern rockfish

10 - 30 mt pelagic shelf rockfish

This increase would be capped at a maximum of:

POP

a. 1%

b. 3%

c. 5%

Northern Rockfish

a. 2%

b. 3%

c. 5%

Pelagic Shelf Rockfish

- a. 2.5%
- b. 3%
- c. 5%

The entry level fishery will be managed as a limited entry fishery.

Start date for the entry level fishery should be January 1.

Prosecution of the entry level fishery will be supported by general allowance of halibut PSC to the gear type and the general allocations of secondary species.

Any vessel or gear type exempt from CGOA LLP requirements or any holder of a CGOA fixed gear LLP may enter a vessel in the entry level fishery.

Entry level fixed gear sector are exempt from VMS requirements.

3 Program eligibility (CP – all and CV – all)

The eligibility for entry into the cooperative program is one targeted landing of POP, Northern rockfish or PSR caught in CGOA during the qualifying period using a CGOA trawl LLP license.

Option: In addition, the following participants would be eligible to enter the program: those persons whose vessel had one targeted landing of POP, northern rockfish or PSR caught in CGOA during the qualifying period with interim trawl CGOA license that was later determined to be an invalid trawl CGOA endorsement, but who acquired a valid CGOA trawl license prior to December 31, 2003, which has been continuously assigned to the vessel with the target landing since acquired until the date of final Council action.

4 Qualified catch (CP – all and CV – all)

4.1 Basis for the allocation to the LLP license holder is the catch history of the vessel on which the LLP license is based and shall be on a fishery-by-fishery basis. The underlying principle of this program is one history per license. In cases where the fishing privileges (i.e., moratorium qualification or LLP license) of an LLP qualifying vessel have been transferred, the allocation of harvest shares to the LLP shall be based on the aggregate catch histories of (1) the vessel on which LLP license was based up to the date of transfer, and (2) the vessel owned or controlled by the LLP license holder and identified by the license holder as having been operated under the fishing privileges of the LLP qualifying vessel after the date of transfer. (Only one catch history per LLP license.)

Option: For licenses qualified based on catch of a vessel using an interim license, the basis for the allocation will be the catch history of such vessel, notwithstanding the invalidity of the interim Central Gulf trawl LLP endorsement under which the vessel operated during the qualifying period. History allocated under this provision shall be assigned to the LLP license.

4.2 Catch history will be the history during the following qualifying period:

- 1) 1996-2002 (drop two) Alt. 2
- 2) 1998-2006 (drop two or four)
- 3) 2000-2006 (drop two)

- 4.3 Qualified target species history is allocated based on retained catch (excluding meal) during the rockfish target fishery. Different years may be used (or dropped) for determining the history of each of the three rockfish species.

The CP catch history will be based on WPR data.
CV catch history will be based on fish tickets.

- 4.4 Entry level trawl qualification/allocations for the main program:
- 1) Vessels / LLPs that do not qualify for Cooperative quota (CQ) for the CGOA rockfish cooperative program.
 - 2) The trawl LLP must have registered for the entry level fishery both in 2007 and 2008.
 - 3) The trawl LLP must have made a landing of fish in the entry level fishery with trawl gear in either 2007 or 2008.
- 4.5 The qualified entry level trawl LLP would receive an allocation of QS for the primary rockfish species equivalent to:
- 1) Average of the lowest one-quarter to one-third of the qualified CV LLPs that actively fished in the RPP program in either 2007 or 2008.
 - 2) Average of the lowest one-quarter to one-third of all qualified CV LLPs.
 - 3) Actual catch history of the vessel/LLP in 2007 or 2008 (information would be withheld due to confidentiality restrictions unless the vessel(s) agrees to have the data released to the public).
 - 4) Average of the qualified CV LLPs that actively fished in the RPP program in either 2007 or 2008
 - 5) Average of all qualified CV LLPs

Note: secondary and halibut PSC allocations are calculated the same as the other qualified LLPs.

5 Sector definitions (CP – all and CV – all)

Trawl catcher vessel – A trawl catcher-vessel that has a CV or CP LLP license, but does not process its catch on board.

Trawl catcher processor - A trawl catcher-processor is a trawl vessel that has a CP LLP license and that processes its catch on board.

6 Rationalized areas (CP – all and CV – all)

History is allocated for the CGOA only (NMFS statistical areas 620 and 630).

7 Sector allocations (CP – all and CV – all)

7.1 Target rockfish species

Catch history is determined by the sector's qualified catch in pounds as a proportion of the total qualified catch in pounds.

Sector allocations of target rockfish species are based on individual qualified vessel histories applying any applicable drop year provision at the vessel level.

Full retention of the target rockfish species required

7.2 Secondary species

Secondary species history is allocated based on retained catch of the species while targeting rockfish over retained catch in all fisheries.

7.2.1 Except as provided below, history will be allocated to each sector for the following secondary species:

- sablefish,
- shortraker rockfish
- rougheye rockfish,
- thornyhead rockfish, and
- Pacific cod.

7.2.3 Except as otherwise provided below, secondary species allocations will be based on: The sector's average annual percentage of retained catch of the secondary species by the rockfish target fisheries during the qualifying period. For each qualifying year calculate the sector's retained catch of the species in the target rockfish fisheries divided by the retained catch of all CGOA fisheries. Sum these percentages and divided by the number of qualifying years. The calculated average annual percentage is multiplied by the secondary species TAC for that fishery year and allocated to each sector in the cooperative program.

7.2.4 Exceptions:

For the catcher processor sector, Pacific cod history will be managed by MRA of 4 percent.

For shortraker and rougheye:

For the CP sector, a shortraker allocation of the TAC will be:

Option 1a: 30.03 percent

Option 1b: 50 percent

To be managed as a hard cap, and a rougheye allocation of 58.87% of the TAC, to be managed as a hard cap.

Option 2: shortraker and rougheye will be managed with a combined MRA of 2%.

For the CV sector, shortraker and rougheye should be managed with a combined MRA of 2 percent. If harvest of shortraker by the CV sector reaches 9.72% of the shortraker TAC, then shortraker should go on PSC status for that sector.

Option: Manage Pacific cod and sablefish under a modified MRA.

Participants must retain all allocated secondary species and stop fishing when cap is reached.

7.3 Prohibited species (halibut mortality)

Allocation to the rockfish cooperative program will be based on historic average usage, calculated by dividing the total number of metric tons of halibut mortality in the CGOA rockfish target fisheries during the qualifying years by the number of years. This allocation will be divided between sectors based on the relative amount of target rockfish species allocated to each sector (e.g., the sector's share of total qualified catch).

Do we need a direct provision/discussion of the rollover of halibut to other fisheries

8 Allocation from sector to vessel (CP – all and CV – all)

Within each sector, history will be assigned to LLP holders with CGOA endorsement that qualify for a sector under the 'sector allocations' above. The allocations will be to the current owner of the LLP of the vessel which earned the history.

Target Species

Each LLP holder will receive an allocation of history equivalent to the license's proportion of the total of the sector qualifying history.

Secondary Species

Each LLP holder will receive an allocation of allocated secondary species equal to the license's proportion of the sector' target rockfish history.

PSC (Halibut Mortality)

Each LLP holder will receive an allocation of halibut mortality equivalent to the license's proportion of the sector's target rockfish history.

Allocations are revocable privileges

The allocations under this program:

- 1) may be revoked, limited, or modified at any time,
- 2) shall not confer any right of compensation to the holder, if it is revoked, limited, or modified, and
- 3) shall not create or be construed to create any right, title, or interest in or to any fish before the fish is harvested by the holder.

Domestic processing

All fish harvested with an allocation from this program must be processed in the U.S.

Regionalization – Apply to catcher vessel sector only:

Option 1: All CV CQ must be landed in the Port of Kodiak.

9 Catcher vessel/shore based processor provisions (CV – all)

9.1 Processor eligibility (CV-3, 4, 5, and 6)

An eligible processor is a processing facility that has purchased:

Option 1 - 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish harvest per year, for 4 years, from 1996 to 2000.

Option 2 - 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish per year, for 4 years, from 2000 to 2006.

Suboption: (entry level fishery processor): 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish harvested from 2007 to 2008.

Processor qualifying years

Each eligible shore based processor is allocated processor catch history based on individual processor histories of CGOA target rockfish for the years:

Option 1 - 1996-2000 (drop 1 year)

Option 2 - 2000–2006 (drop 2 year)

Suboption 1: (entry level processors): 2007–2008

Suboption 2: (entry level processors) Eligible entry level processors will be allocated target rockfish, secondary species, and halibut PSC from the

processor pool of harvest shares that are derived from those trawl LLPs that received allocations based on participation in the entry level trawl fishery into the main program.

For alternatives with processor associations the drop year is selected by the processor and applied to all LLP licenses when determining those associations.

9.2 Option A - Harvester only cooperative (CV-2)

Allocation of the primary rockfish, secondary species, and halibut PSC to the CV sector shall be to harvesters (i.e., 100/0).

A holder of catcher vessel harvest history may join a cooperative to coordinate the harvest of allocations. (Cooperatives are subject to general cooperative rules below.) Membership agreements will specify that processor affiliated cooperative members cannot participate in price setting negotiations except as permitted by general antitrust law.

Cooperatives are intended only to conduct and coordinate harvest activities of the members and are not FCMA cooperatives.

Co-ops may engage in inter-cooperative transfers of annual allocations to other cooperatives.

Membership agreements will specify that processor affiliated cooperative members cannot participate in price setting negotiations except as permitted by general antitrust law.

9.3 Option B - Processor allocation of harvest shares (CV – 3)

Allocation of the primary rockfish, secondary species, and halibut PSC to the CV sector shall be apportioned between harvesters (CV only) and shore based processors:

Option 1: 90/10

Option 2: 80/20

Eligible processors will be allocated target rockfish, secondary species, and halibut PSC from the processor pool of harvest shares in proportion to its qualifying processing history. Annual allocations will be of the same species and subject to the same allocation and harvest rules governing catcher vessel allocations.

Option: Processor allocations of CV harvest shares may be harvested only by vessels that are not owned or controlled by the holder of those harvester shares (using the AFA rules for determining control and ownership).

A holder of catcher vessel harvest history or processor histories may join a cooperative to coordinate the harvest of allocations. (Cooperatives are subject to general cooperative rules below.) Membership agreements will specify that processor affiliated cooperative members cannot participate in price setting negotiations except as permitted by general antitrust law.

Cooperatives are intended only to conduct and coordinate harvest activities of the members and are not FCMA cooperatives.

Co-ops may engage in inter-cooperative transfers of annual allocations to other cooperatives.

Membership agreements will specify that processor affiliated cooperative members cannot participate in price setting negotiations except as permitted by general antitrust law.

9.4 Option C – Harvester cooperatives with processor association alternatives
(CV – 4, 5, 6, and 7)

On implementation of the program, each eligible harvester will be eligible to join a cooperative in association with any processing facility in the community to which it delivered the most pounds of the three rockfish species combined in the processor qualifying years. (additional constraints may apply by alternative)

If a processing facility has closed down and another processing facility has acquired that processing history through purchase, the history belongs to the facility that purchased that history. That history must remain in the community that it was generated in. (CV – 4, 5, and 6)

If an LLP holder has no deliveries to a qualified processor, the LLP holder may join a cooperative with any one of the qualified processors. (CV – 4, 5, and 6)

The processor will be an associate of the cooperative but will not be a cooperative member.

A pre-season contract between eligible, willing harvesters in association with a processor is a pre-requisite to a cooperative receiving an annual allocation.

Co-op membership agreements will specify that processor affiliated harvesters cannot participate in price setting negotiations except as permitted by general antitrust law.

Processors are limited to 1 co-op per plant.

Co-ops may engage in inter-cooperative transfers of annual allocations to other cooperatives with agreement of the associated qualified processor.

Membership agreements will specify that processor affiliated cooperative members cannot participate in price setting negotiations except as permitted by general antitrust law.

Harvester cooperatives are intended only to conduct and coordinate harvest activities of the members and are not FCMA cooperatives.

Option 1 - Harvester cooperatives with unseverable processor associations (CV-4)

Catcher vessel cooperatives are required to have at least 75 percent of the eligible historical shares for each cooperative associated with its processor.

If an LLP holder has no deliveries to a qualified processor, the LLP holder may join a cooperative with any one of the qualified processors.

The membership of an LLP holder that has no deliveries to a qualified processor in a cooperative will not be considered in determining whether the threshold is met for cooperative formation.

Harvesters can participate in a:

Option 1: Cooperative or LLP/open access. In the limited access fishery, all participating LLPs' shares will be fished in a competitive fishery open to rockfish qualified vessels that are not members of a cooperative.

Suboption: The LLP/open access share must be delivered to one of the qualified processors.

Option 2 - Harvester cooperatives with severable processor associations and one time forfeiture (CV-5)

If an eligible harvester joins a cooperative in association with the processor to which it delivered the most pounds of the three rockfish species combined during the processor qualifying years, it will maintain all landings history without forfeiture. An eligible harvester may elect not to join the cooperative in association with the processor identified by its landings history in any year, including the first year of the program. In the first season that an eligible harvester elects not to join a cooperative in association with the processor identified by its landings history, it will forfeit:

Option 1 – 10 percent

Option 2 – 20 percent

Option 3 – 30 percent

of its qualified catch history to the (1) identified processor or (2) identified processor affiliated cooperative. The share forfeiture is

(1) a permanent forfeiture or

(2) a temporary forfeiture for a period of 1 to 2 years.

After forfeiture, the harvester may elect to enter and exit any cooperative in the fishery without share forfeiture.

If an LLP holder has no deliveries to a qualified processor, the LLP holder may join a cooperative with any one of the qualified processors. After the first year, an LLP holder that has no deliveries to a qualified processor must make a forfeiture of qualified catch history on changing processor associations, as if the processor were identified by the harvester's landings history.

Harvesters must join a cooperative to can participate in the target rockfish fisheries.

Option 3 - Harvester cooperatives with severable processor associations and ongoing forfeiture (CV-6)

If an eligible harvester joins a cooperative in association with the processor to which it delivered the most pounds of the three rockfish species combined during the processor qualifying years, it will maintain all landings history without forfeiture. An eligible harvester may elect not to join the cooperative in association with the processor identified by its landings history in any year, including the first year of the program. In the first season that an eligible harvester elects not to join a cooperative in association with the processor identified by its landings history, it will forfeit:

Option 1 - 10 percent

Option 2 - 20 percent

Option 3 - 30 percent

of its qualified catch history to the (1) identified processor or (2) identified processor affiliated cooperative. The share forfeiture is a temporary forfeiture for a period of 1 to 2 years. After forfeiture, the harvester may elect to enter and exit any cooperative in the fishery without share forfeiture. Each time an LLP holder exits a cooperative it will be required to make a share forfeiture of the same quantity and duration.

If an LLP holder has no deliveries to a qualified processor, the LLP holder may join a cooperative with any one of the qualified processors. LLP holders that have no deliveries to a qualified processor will make a forfeiture of qualified catch history as other LLP holders.

Harvesters must join a cooperative to can participate in the target rockfish fisheries.

Option 4 - Harvester cooperatives with severable processor associations and no forfeiture (CV-7)

Harvesters must join a cooperative to can participate in the target rockfish fisheries.

10 Catcher processor cooperatives

More than one co-op may form within the sector.

Allocations may be transferred between co-ops of at least two LLPs.

Participants have a choice of participating in:

Option 1: a co-op or opt out of the rockfish program,

Option 2: a co-op, a limited access fishery, or opt of the rockfish program

Under the LLP/open access fishery option, the LLP's historic share will be fished in a competitive fishery open to rockfish qualified vessels who are not members of a cooperative. The secondary species would be managed under the following reduced MRAs, intended to maintain catch levels below the allocated amount: Pacific cod - 4 percent, sablefish - 3 percent, shortraker/rougheye - 2 percent, and thornyhead - 4 percent. All other species would be managed with MRAs at their current levels.

11 General cooperative provisions – apply to both sectors

Duration of cooperative agreements is 1 year.

The cooperative membership agreement (and an ancillary agreement with an associated processor, if applicable) will be filed with the RAM Division. The cooperative membership agreement must contain a fishing plan for the harvest of all cooperative fish.

Cooperative members shall internally allocate and manage the cooperative's allocation per the cooperative agreement.

Subject to any harvesting caps that may be adopted, allocated history may be transferred and consolidated within the cooperative.

The cooperative agreement must have a monitoring program. Cooperative members are jointly and severally responsible for cooperative vessels harvesting in the aggregate no more than their cooperative's allocation of target rockfish species, secondary species and PSC mortality, as may be adjusted by inter-cooperative transfers.

A cooperative may adopt and enforce fishing practice codes of conduct as part of their membership agreement.

Option: Cooperative membership agreements shall allow for the entry of other eligible harvesters into the cooperative under the same terms and conditions as agreed to by the original agreement.

Cooperatives will report annually to the Council as per AFA.

12 Sector Transfer provisions

CP annual allocations may be transferred to CV cooperatives. CV annual allocations may not be transferred to CP cooperatives.

All transfers of annual allocations would be temporary and history would revert to the original LLP at the beginning of the next year.

A person holding an LLP that is eligible for this program may transfer that LLP. That transfer will effectively transfer all history associated with the LLP and any privilege to participate in this program that might be derived from the LLP.

Permit post-delivery transfers of cooperative quota (annual allocations to cooperatives).

There would be no limits on the number or magnitude of post-delivery transfers. All post-delivery transfers must be completed by December 31st.

No cooperative vessel shall be permitted to begin a fishing trip unless the cooperative holds unused cooperative quota.

13 Cooperative Harvest Use Caps

CV cooperatives

No person may hold or use more than 5% of the CV historic shares, using the individual and collective rule (with grandfather provision).

Control of harvest share by a CV cooperative shall be capped at 30% of aggregate POP, Northern Rockfish and PSR for the CV sector.

CP cooperatives

No person may hold or use more than 20% of the CP historic shares, using the individual and collective rule (with grandfather provision).

Control of harvest share by a CP shall be capped at 60% of aggregate POP, Northern Rockfish and PSR for the CP sector. Eligible CPs will be grandfathered at the current level.

Shoreside Processor Use Caps

Shoreside processors shall be capped at the entity level.

No processor shall process more than 30% of aggregate POP, Northern Rockfish and PSR for the CV sector. (The year 2002 will be used as a base (or index) year for applying the aggregate caps.)

Eligible processors will be grandfathered.

14 Harvesting provisions

The cooperative season start date is May 1 and closing date is November 15. Any limited access fishery will open in early July, as under the previous License Limitation Program management.

All non-allocated species will be managed by MRA, as in the current regime. This includes Arrowtooth flounder, deep water flatfish, shallow water flatfish, flathead sole, rex sole, pollock, other species, Atka mackerel and other rockfish. Basis species for purposes of determining MRAs will be:

- Option 1 - Only primary allocated rockfish species
- Option 2 - All allocated species

Secondary species allocations may be fished independently of the primary species allocations.

Option: No directed fishing for secondary species Pacific cod and sablefish.

Full retention of all allocated species is required.

15 Program review

A formal detailed review of the program shall be undertaken 5 years after implementation. The review shall assess:

- 1) the progress of the program in achieving the goals identified in the purpose and need statement and the MSA, and
- 2) whether management, data collection and analysis, and enforcement needs are adequately met. Additional reviews will be conducted every 7 years thereafter coinciding with the fishery management plan policy review.

Antitrust review – An information collection system and a review process will be defined to provide any information to determine whether any illegal acts of anti-competition, antitrust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges.

16 Share duration

The duration of all CGOA rockfish LAPP program permits are 10 years. These permits shall be renewed before their expiration, unless the permit has been revoked, limited, or modified.

The Secretary may revoke any privilege under this program from any person found to have violated antitrust laws.

17 Cost recovery

A fee, not to exceed 3 percent of ex vessel value, will be charged on all landings to cover the costs of administration of the program.

18 Sideboards

18.1 General Provisions

There are no exemptions from sideboards, except for a partial exemption for CP vessels which opt out of the cooperative program or join cooperatives.

WYAK and WGOA Primary Rockfish Species

Option 1: For fisheries that close on TAC in the GOA, the qualified vessels in each sector (trawl CV and trawl CP) would be limited, in aggregate, in the month of July to the historic average catch of those vessels based on the retained catch as a percentage of the retained catch in the fishery in the month of July during the qualification years. Fisheries that this sideboard provision would apply to include West Yakutat rockfish and WGOA rockfish.

Option 2: For catcher processors, remove sideboard limits for WYAK and WGOA primary rockfish species.

Option 3: For catcher vessels, prohibit directed fishing for WYAK and WGOA primary rockfish species.

Halibut PSC

Option 1: For flatfish fisheries in the GOA that close because of halibut bycatch, the qualified vessels in each sector (trawl CV and trawl CP) would be limited, in the aggregate, in the month of July to the historic average halibut mortality taken by those vessels in the target flatfish fisheries in the month of July by deep and shallow complex as a Gulf-wide cap.

Option 2: For catcher processors, remove sideboard limits for WYAK and WGOA 3rd season halibut PSC.

Option 3: For the month of July, limit all CVs to the shallow halibut complex fisheries (except for rockfish target fisheries in CGOA, WYAK and WGOA).

Suboption: Limit all CPs to the deep water halibut complex fisheries for the month of July.

In the event that one or more target rockfish fisheries are not open, sideboard restrictions will not apply for those target allocations.

IFQ halibut and sablefish are exempt from sideboard provisions

18.2 CP Specific Sideboard Provisions

CP vessels may decide to opt out of the CGOA cooperative program on an annual basis. These CP vessels may not target POP, Northern rockfish or Pelagic Shelf rockfish in the CGOA in the years they choose to opt out. They may retain these species up to the MRA amount in other fisheries. They will be sideboarded at the sector level in the GOA as described in the general provisions.

The history of CP vessels which opt out will remain with the sector.

CPs that opt out of the rockfish cooperative program will be prohibited, for two weeks following the start of the traditional July rockfish fishery, from entering other GOA fisheries in which they have not previously participated. Participation shall be defined as having been in the target fishery during the first week of July in at least two of the qualifying years. For purposes of qualifying under this provision, history from area 650 (SEO) will be considered the same as history from area 640 (WY). The following weekending dates will be used for determining participation in a target fishery:

1996 – July 6
1997 – July 5
1998 – July 4
1999 – July 10
2000 – July 15
2001 – July 7
2002 – July 6

Opting out is an annual decision. CP vessels which choose to opt out must so notify NMFS. The decision to opt out should not in any way alter the status of their catch history for future rationalization programs.

For the CP sector, the cooperative program fishery participants must either:

- 1) start fishing in the target rockfish fisheries at the same time as the opening of the CGOA rockfish limited access fisheries (in July) and harvest 90% of their CGOA rockfish allocation prior to entering any other GOA non-pollock groundfish fishery, or
- 2) standdown for two weeks from the opening of the CGOA rockfish limited access fishery prior to participating in any other GOA non-pollock groundfish fishery.

A vessel which has met either standdown requirement can then move into the GOA open access fisheries subject to the sector level limitations in the GOA in the general sideboard provisions.

To the extent permitted by the motion, history may be leased between vessels. Each member of a cooperative that transfers its history to another CP or CV must still refrain from operating in any other GOA groundfish fishery until the earlier of:

- 1) 90% of all of the CGOA rockfish allocation on the stacked vessel is harvested in the CGOA, provided fishing of the allocation began on or after the opening of the limited access fishery
- 2) two weeks from the opening of the limited access fishery prior to participating in any other GOA groundfish fishery.

Members of a cooperative will be subject to all limitations and restrictions described in the general sideboard provisions and CP specific sideboard provisions except that cooperative members shall not be subject to any standdown in the GOA groundfish fisheries, if all vessels in the co-op maintain adequate monitoring plan during all fishing for CGOA rockfish sideboard fisheries.

In addition to the other limitations and restrictions described above, each cooperative will be limited in the aggregate:

- 1) for fisheries that close on TAC in the GOA in the month of July, to the historic average total catch of the cooperative members in the month of July during the qualification years 1996 to 2002. Fisheries that this sideboard provision would apply to include West Yakutat rockfish and WGOA rockfish, and
- 2) for flatfish fisheries in the GOA that close because of halibut bycatch in the month of July, to the historic average halibut mortality taken by cooperative members in the target flatfish fisheries in the month of July by deep and shallow complex.

The limited access fishery starts at the same time as the traditional rockfish target fishery (early July). For vessels that account for less than 5% of the allocated CP history in the Pacific Ocean perch fishery that participate in the limited access rockfish fishery, there are no additional intra-sector sideboards. For vessels that account for greater than or equal to 5 percent of the allocated CP history in the Pacific Ocean fishery that participate in the limited access rockfish fishery and GOA standdowns are in place until 90% of the limited access Pacific Ocean perch quota is achieved.

18.3 CV Specific Sideboard Provisions

The qualifying vessels in the trawl CV sector cannot participate in the directed yellowfin sole, other flatfish (flathead, etc) or Pacific Ocean perch fisheries in the BSAI in the month of July.

Option 1: The qualifying vessels in the trawl CV sector can participate in the limited access yellowfin sole, other flatfish or Pacific Ocean perch fisheries in the BSAI in the month of July.

Qualifying vessels in the trawl CV sector would be limited, in aggregate, in the month of July, to the historic average catch of those vessels in the BSAI Pacific cod fishery based on the retained catch as a percentage of retained catch in the CV trawl fishery in July during the qualification years 1996 to 2002.

Option 2: The qualifying vessels in the trawl CV sector can participate in the BSAI Pacific cod fishery in the month of July.

AFA non-GOA exempt CVs qualified under this program are subject to the restraints of AFA sideboards and their coop agreement, and not subject to additional sideboards under this program.

North Pacific Fishery Management Council

Eric A. Olson, Chairman
Chris Oliver, Executive Director

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AGENDA C-2(2)
OCTOBER 2009

July 2, 2009

Ms. Lisa Lindeman
NOAA General Counsel
P.O. Box 21109
Juneau, AK 99802

Dear Lisa:

As you are aware, the current management program for the Central Gulf of Alaska rockfish fisheries is set to expire after the 2011 season. In the absence of the development of a follow on management program, the fishery will revert to limited access management. To address this contingency, the Council is considering alternative management programs for the fisheries intended to continue the benefits of the existing management. Given the reauthorization of the Magnuson Stevens Act, and the attendant provisions for LAPPs, the Council seeks your assistance in discerning the scope of its authority to develop management programs under its MSA authority. Specifically, the Council is considering a variety of alternatives derivative of the current management program intended to protect processor investment and dependence on these fisheries. To that end, the Council requests NOAA GC's interpretation of the Council's authority to develop the management measures described below. We request an opinion on these options in time for review at our October 2009 meeting.

The current program – fixed harvester/processor linkages

Among the alternatives proposed for analysis is the current management program. The current program was established under Section 802 of the Consolidated Appropriations Act of 2004, which provided:

SEC. 802. GULF OF ALASKA ROCKFISH DEMONSTRATION PROGRAM. The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) and historic participation of fish processors (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in Central Gulf of Alaska. Such a pilot program shall (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historical harvesting of such bycatch species. The pilot program will sunset when a Gulf of Alaska Groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from date of implementation, whichever is earlier.

Under this authority (together with the more general authority provided by the Magnuson Stevens Act), the Council developed, and the Secretary approved, a management program under which each harvester with history during the statutorily designated vessel participation period may access an exclusive allocation of rockfish by joining a cooperative. The allocation to each cooperative is based on the harvest histories of its members during the statutorily designated vessel participation period. Each harvester is eligible to join a single cooperative that is associated with the processor to which it delivered the most

pounds of rockfish during the statutorily designated processor participation period. The terms of that association are subject to the negotiation between the cooperative and the processor, but are generally expected to include obligations for the harvester to deliver certain catches to the processor. Harvesters that choose not to join a cooperative are permitted to fish in a limited access fishery (without exclusive allocation). The allocation to the limited access fishery is based on the harvest histories of vessels participating in that fishery. All catch from the limited access fishery must be delivered to one of the processors which qualifies for association with a cooperative, based on harvester landing histories. The program provides no latitude for harvesters to move among cooperatives (or change processor associations).

An allocation of harvest shares to processors

A second alternative under consideration would divide the harvest share allocation between historic harvest sector participants and historic processing sector participants. Under this alternative, a fixed percentage of the harvest share pool (i.e., exclusive harvest share allocations) would be divided among harvester sector participants based on harvest histories during a specified time period. The remaining portion of the harvest share pool would be divided among processing sector participants based on processing histories during a specified time period.

The allocations of harvest shares to processors in this alternative would be intended to protect processor investments and dependences on the fishery and processor employment; however, some stakeholders have argued that while a harvesting privilege may provide indirect financial remuneration to a processor, it does little protect the processing operation on which the processor and its employees rely. Similarly, the harvest share allocation to processors may impinge on the protection to harvesters by the program depriving members of that sector of a portion of the harvest share allocation, as well as create an incentive for processors to vertically integrate by developing harvest capacity. To mitigate against this potentiality, the Council has included an option in this alternative that would require that a processor's allocation of harvest shares be harvested by a vessel that is not affiliated with the processor.¹ This provision is intended to lead processors to use the harvest share allocation to negotiate for landings from harvesters, rather than develop or expand a processor's interest in the harvest sector. In addition, the Council has elected to examine alternative structures that may more directly protect the interests of processors and their employees, without depriving harvesters of the interests they have developed.

Severable harvester/processor association – one time forfeiture

This alternative parallels the current program by establishing a system of cooperatives that harvesters must join to access exclusive harvest privileges. At the outset, a harvester is eligible to join a cooperative in association with the processor to which it delivered the most pounds during a specified time period. If a harvester elects not to join that cooperative, it may move to another cooperative (and processor association) by forfeiting a portion of its harvest allocation. The forfeiture would be made either directly to the processor losing the harvester association or to the cooperative associated with that processor. The Council is examining two options defining the harvest share forfeiture. Under the first, the forfeiture would be a permanent transfer of the long term harvest share privilege. Under the second, the forfeiture would be a short term (i.e., one or two year) forfeiture of a portion of the harvest share privilege. After the forfeiture, the harvester would be eligible to join a cooperative in association with any processor in the

¹ It is unclear whether this provision can be effectively implemented, as tracking of individual share usage in a cooperative management program may be infeasible. It is possible that a variant of this provision could be developed that would prevent processors using these allocations to expand harvest sector activity in a manner that does not impose an unreasonable administrative burden.

community to which it delivered the most pounds in a designated time period.² As a result, all cooperatives would be required to maintain a processor association. Although the terms of harvester/cooperative associations are subject to negotiation, it is anticipated that these associations will include harvester delivery obligations. The processor leverage in negotiating those obligations would be expected to be greater for the processor identified for the original association with a harvester that has not severed that original association, since harvesters that have severed the original association can negotiate with several processors, all of which will be on equal footing. Perpetuating the processor associations in this manner is believed to be an important component for maintaining stability in the processing sector.

When evaluating this alternative, a few characteristics should be considered it. First, no limit on processor entry is provided; any processor may choose to compete for deliveries. Second, although a harvester must associate with a processor that is based in the community to which it delivered the most pounds during a specific period, the program may (or may not) include a requirement that deliveries be made in that community.³ Third, although a processor association is required, after the first association is severed, no preference is given to any processor over any other processor (including any new entrant) provided the processor operates in the community in which the harvester historically delivered the most pounds. And lastly, in the event harvesters elect to sever their initial associations and incur the forfeiture of shares, the result is a harvest share distribution that is very similar to the direct allocation of harvest shares to processors proposed in the previous alternative.

Severable harvester/processor linkages – ongoing forfeitures

This alternative is identical to the previous alternative except with respect to the forfeiture of shares by a harvester when severing a processor association. Each time a harvester severs a processor association (moving to a cooperative that associates with another processor) that harvester would forfeit a portion of its annual allocation for one or two years to either the processor (or the associated cooperative). The alternative would use a harvester's landing histories to identify the original processor association, which may be severed at any time, subject to the forfeiture requirement. Once the initial association is severed, the harvester would be permitted to associate with any processor in the community to which it delivered the most pounds in the qualifying period. Each subsequent association could be severed, but would be subject to the same forfeiture as the initial association severance. As with the preceding alternative, the ongoing associations are intended to increase stability in the processing sector. The ongoing forfeitures would contribute to greater long run stability (as harvesters sever their first associations). As with the preceding alternative, no explicit processor delivery requirement would be established by the program, but delivery requirements could be included in the negotiated associations. A community delivery requirement is being considered, and no limit on processor entry would be included in the program.

If it is determined that either of the two program options described above are allowable, a related question is whether there is a limit on the magnitude of the forfeiture which can be established by the Council. Currently, the Council is considering forfeitures of between 0 and 30% of a harvester's quota (of either QS or annual IFQ).

Additional questions

During Council discussion of these issues at the June 2009 meeting, a more generic question was raised relative to the Council's authorities for managing or limiting processing activities. Specifically, the Council would like to know the bounds of its authority for establishing a 'closed class' of processors, or

² Based on preliminary analyses, all harvesters in the program have made a plurality of deliveries to processors based in Kodiak. That community is currently home to at least 8 processors that have received deliveries from the rockfish fishery.

³ If a community landing requirement is incorporated in the program, it is likely that all landings would be required to be made to Kodiak, which may raise concerns for geographic overconsolidation of processing.

an exclusive class of processors for particular fisheries. Expressed somewhat differently, the question could be posed as whether a limited entry program could be established for processors under which qualified processors would:

- 1) be the exclusive markets for delivery of landings in a fishery, or
- 2) be exclusive markets for delivery of a specific portion of the landings in a fishery.

An ancillary question arises, which is, would development of a means for transfer of processor limited entry permits (or privileges) affect the determination of whether authority exists for establishing such a limited entry system for processors.

The Council appreciates the ongoing advice of NOAA GC relative to these and other issues. In this instance we request a specific legal opinion so that we can proceed with consideration of viable alternatives under a constrained timeline for implementation. Please contact me or Dr. Mark Fina if you have any questions regarding this request.

Sincerely,



Chris Oliver
Executive Director

CC: Council members

**Options and issues discussion paper
Central Gulf of Alaska rockfish program
North Pacific Fishery Management Council
October 2009**

Introduction

At its June 2009 meeting, the Council adopted a suite of elements and options for developing a new Central Gulf of Alaska rockfish program to replace the existing pilot program, which is set to expire after the 2011 fishing season. Since June, staff has been preparing a preliminary EA/RIR/IRFA for the proposed development of the new rockfish program. Staff mailed that document to the Council during the week of September 21st. In that mailing staff included a letter informing the Council that in addition to the draft analysis, it would provide the Council with this document analyzing certain aspects of the alternatives.

This paper includes analyses of the following issues for Council consideration:

- proposed allocations to harvesting sectors and their members, as well as the proposed allocations shore based processors.
- proposed allocations to former participants in the pilot program trawl entry level fishery (including shore based processors that participated in that fishery)
- proposed shortraker and roughey rockfish allocations,
- rollover of unused halibut PSC from the rockfish fishery cooperatives to other Gulf trawl fisheries,
- proposed changes in management of Pacific cod and sablefish.

Trawl catcher processor and trawl catcher vessel allocations

The Council has adopted for analysis a variety of elements and options for defining allocations under the program. These include provisions defining allocations to sectors, general eligibility and qualified catch histories for license holders, general eligibility and qualifying processing histories for processors, eligibility and allocations for license holders and processors that participated in the entry level fishery in the pilot program. In all cases, the allocations would include primary rockfish species (Pacific ocean perch, northern rockfish, and pelagic shelf rockfish), secondary species (which may include shortraker rockfish, roughey rockfish, thornyhead rockfish, Pacific cod, and sablefish), and halibut PSC.

Primary rockfish species allocations to each sector would be based on the aggregate allocations to its sector members. These allocations within a sector are based on retained catch (excluding landings processed into meal) of vessels using an eligible license in the sector during the qualifying years. Different years could be used for each species by each license for determining the allocation to maximize the allocation attributable to that license. There are four different year combinations:

- 1996-2002 with each license dropping its 2 lowest years,
- 1998-2006 with each license dropping its 2 lowest years,
- 1998-2006 with each license dropping its 4 lowest years, and
- 2000-2006 with each license dropping its 2 lowest years.

Permanent LLP licenses used by a vessel to make a targeted landing of CGOA rockfish during the applicable qualifying period are eligible for the program. All in-season rockfish harvests made using an eligible LLP license would be counted toward that license's allocation. Under an option, a permanent license that was not used in the fishery could be eligible for the program, if the vessel to which that permanent license is assigned had targeted rockfish landings using an interim license that was later withdrawn, provided the permanent license has been continuously assigned to the vessels since December 31, 2003. The history of the rockfish targeting vessel would then be assigned to the permanent license eligible under this provision. A analysis of this option will be provided at the December 2009 Council meeting.

3 Program eligibility (CP – all and CV – all)

The eligibility for entry into the cooperative program is one targeted landing of POP, Northern rockfish or PSR caught in CGOA during the qualifying period using a CGOA trawl LLP license.

Option: In addition, the following participants would be eligible to enter the program:

those persons whose vessel had one targeted landing of POP, northern rockfish or PSR caught in CGOA during the qualifying period with interim trawl CGOA license that was later determined to be an invalid trawl CGOA endorsement, but who acquired a valid CGOA trawl license prior to December 31, 2003, which has been continuously assigned to the vessel with the target landing since acquired until the date of final Council action.

4 Qualified catch (CP – all and CV – all)

4.1 Basis for the allocation to the LLP license holder is the catch history of the vessel on which the LLP license is based and shall be on a fishery-by-fishery basis. The underlying principle of this program is one history per license. In cases where the fishing privileges (i.e., moratorium qualification or LLP license) of an LLP qualifying vessel have been transferred, the allocation of harvest shares to the LLP shall be based on the aggregate catch histories of (1) the vessel on which LLP license was based up to the date of transfer, and (2) the vessel owned or controlled by the LLP license holder and identified by the license holder as having been operated under the fishing privileges of the LLP qualifying vessel after the date of transfer. (Only one catch history per LLP license.)

Option: For licenses qualified based on catch of a vessel using an interim license, the basis for the allocation will be the catch history of such vessel, notwithstanding the invalidity of the interim Central Gulf trawl LLP endorsement under which the vessel operated during the qualifying period. History allocated under this provision shall be assigned to the LLP license.

4.2 Catch history will be the history during the following qualifying period:

- 1) 1996-2002 (drop two) Alt. 2
- 2) 1998-2006 (drop two or four)
- 3) 2000-2006 (drop two)

4.3 Qualified target species history is allocated based on retained catch (excluding meal) during the rockfish target fishery. Different years may be used (or dropped) for determining the history of each of the three rockfish species

7 Sector allocations (CP – all and CV – all)

7.1 Target rockfish species

Catch history is determined by the sector's qualified catch in pounds as a proportion of the total qualified catch in pounds.

Sector allocations of target rockfish species are based on individual qualified vessel histories applying any applicable drop year provision at the vessel level.

Full retention of the target rockfish species required

7.2 Secondary species

Secondary species history is allocated based on retained catch of the species while targeting rockfish over retained catch in all fisheries.

7.2.1 Except as provided below, history will be allocated to each sector for the following secondary species:

sablefish,
shortraker rockfish
roughey rockfish,
thornyhead rockfish, and
Pacific cod.

7.2.3 Except as otherwise provided below, secondary species allocations will be based on: The sector's average annual percentage of retained catch of the secondary species by the rockfish target fisheries during the qualifying period. For each qualifying year calculate the sector's retained catch of the species in the target rockfish fisheries divided by the retained catch of all CGOA fisheries. Sum these percentages and divided by the number of qualifying years. The calculated average annual percentage is multiplied by the secondary species TAC for that fishery year and allocated to each sector in the cooperative program.

7.2.4 Exceptions:

For the catcher processor sector, Pacific cod history will be managed by MRA of 4 percent.

For shortraker and roughey:

For the CP sector, a shortraker allocation of the TAC will be:

Option 1a: 30.03 percent

Option 1b: 50 percent

To be managed as a hard cap, and a roughey allocation of 58.87% of the TAC, to be managed as a hard cap.

Option 2: shortraker and roughey will be managed with a combined MRA of 2%.

For the CV sector, shortraker and roughey should be managed with a combined MRA of 2 percent. If harvest of shortraker by the CV sector reaches 9.72% of the shortraker TAC, then shortraker should go on PSC status for that sector.

Option: Manage Pacific cod and sablefish under a modified MRA.

Participants must retain all allocated secondary species and stop fishing when cap is reached.

7.3 Prohibited species (halibut mortality)

Allocation to the rockfish cooperative program will be based on historic average usage, calculated by dividing the total number of metric tons of halibut mortality in the CGOA rockfish target fisheries during the qualifying years by the number of years. This allocation will be divided between sectors based on the relative amount of target rockfish species allocated to each sector (e.g., the sector's share of total qualified catch).

Primary rockfish allocations

Table 1 shows the allocations to the trawl catcher processor sector and the trawl catcher vessel sector for the 4 different year qualification combinations. Overall, more recent qualifying year combinations results in higher allocations for the trawl catcher vessel sector. For example, the estimated allocation to the trawl catcher vessel sector for Pacific ocean perch using 1996-2002 is 48 percent, while the estimated allocation using 2000-2006 is 61 percent. This change in the distribution between the sectors may be explained, in part, by the number of catcher processors participating in the fishery in recent years. Since 2000, no more than 7 catcher processors have participated in the fishery in any year.

Using the 1996 – 2002 (drop 2) qualifying years, the trawl catcher vessel sector would be allocated 58 percent of the northern rockfish fishery, 48 percent of the Pacific ocean perch fishery, and 44 percent of the pelagic shelf rockfish (in each case, after the allocation to the entry level fishery and the ICA). Applying these allocation percentages to the 2009 TAC yields an allocation of 1,279 metric tons for northern rockfish, 3,898 metric tons for Pacific ocean perch, and 1,462 for pelagic shelf rockfish. The trawl catcher processor sector would be allocated the remainder, 42 percent of the northern rockfish fishery, 52 percent of the Pacific ocean perch rockfish fishery, and 56 percent of the pelagic shelf rockfish fishery. Again, applying these percentages to the 2009 TAC for these rockfish species yields an allocation of 929 metric tons for northern rockfish, 4,148 metric tons for Pacific ocean perch, and 1,842 metric tons for pelagic shelf rockfish.

The qualifying year options 1998-2006 (drop 2) and 1998-2006 (drop 4) resulted in allocations that are almost identical to one another. As seen in Table 1, the difference in the allocations was roughly 1 percent or less depending on the species. Looking specifically at 1998-2006 (drop 2), the trawl catch vessel sector would be allocated 61 percent of the northern rockfish fishery, 56 percent of the Pacific ocean perch fishery, and 55 percent of the pelagic shelf rockfish fishery. For the trawl catcher processors, the allocations would be 39 percent for northern rockfish, 44 percent for Pacific ocean perch, and 45 percent for pelagic shelf rockfish. Applying the 2009 TAC to these allocations, the catcher vessels would be allocated 1,348 metric tons of northern rockfish, 4,494 metric tons of Pacific ocean perch, and 1,826 metric tons of pelagic shelf rockfish. Catcher processors would be allocated 860 metric tons of northern rockfish, 3,552 metric tons of Pacific ocean perch, and 1,478 metric tons of pelagic shelf rockfish.

Under the 2000-2006 (drop 2) qualifying year option, the trawl catcher vessel sector would be allocated 61 percent of the northern rockfish fishery, 61 percent of the Pacific ocean perch fishery, and 63 percent of the pelagic shelf rockfish fishery. Catcher processors would be allocated 39 percent of the northern rockfish fishery, 39 percent of the Pacific ocean perch fishery, and 38 percent of the pelagic shelf rockfish fishery.

Table 1. Sector participation, qualified landings, allocation percent, and 2009 allocation of Central Gulf of Alaska rockfish

Qualifying year	Species	Sector	Vessel count	Total qualifying landings (mt)	Allocation percent	Allocation using 2009 TAC* (mt)
1996-2002 (drop 2)	All	CP	19	39,564	n/a	6,919
		CV	52	39,207	n/a	6,639
	Northern rockfish	CP	18	7,746	42.1	929
		CV	50	10,661	57.9	1,279
	Pacific ocean perch	CP	18	22,559	51.6	4,148
		CV	52	21,200	48.4	3,898
	Pelagic shelf rockfish	CP	19	9,258	55.8	1,842
		CV	52	7,346	44.2	1,462
1998-2006 (drop 2)	All	CP	16	48,006	n/a	5,891
		CV	53	63,823	n/a	7,667
	Northern rockfish	CP	16	11,157	38.9	860
		CV	53	17,488	61.1	1,348
	Pacific ocean perch	CP	16	27,604	44.2	3,552
		CV	53	34,918	55.8	4,494
	Pelagic shelf rockfish	CP	16	9,245	44.7	1,478
		CV	53	11,417	55.3	1,826
1998-2006 (drop 4)	All	CP	16	40,960	n/a	5,835
		CV	53	55,173	n/a	7,723
	Northern rockfish	CP	16	10,208	39.9	881
		CV	53	15,373	60.1	1,327
	Pacific ocean perch	CP	16	22,605	43.2	3,472
		CV	53	29,772	56.8	4,574
	Pelagic shelf rockfish	CP	16	8,147	44.8	1,481
		CV	53	10,028	55.2	1,823
2000-2006 (drop 2)	All	CP	10	31,885	n/a	5,269
		CV	43	49,988	n/a	8,289
	Northern rockfish	CP	10	8,369	38.9	859
		CV	43	13,133	61.1	1,349
	Pacific ocean perch	CP	9	18,145	39.4	3,169
		CV	42	27,921	60.6	4,877
	Pelagic shelf rockfish	CP	10	5,370	37.5	1,240
		CV	43	8,934	62.5	2,064

Source: Alaska Department of Fish and Game for CV data and WPR for CP data

* Note that a 100 mt ICA was deducted for northern rockfish, and pelagic shelf rockfish TAC, while 200 mt ICA was deducted from Pacific ocean perch TAC

After a sector's allocation is determined, allocations would be made to eligible LLP license holders within the sector. Table 2 shows the numbers of eligible LLP licenses in the trawl catcher vessel and trawl catcher processor sectors in the different rockfish fisheries and simple statistics concerning their allocations between sector members including allocations based on the 2009 TACs.

Table 2. Mean, median, and four largest allocations by Central Gulf of Alaska rockfish species

Qualifying Year	Species	Sector	Vessel count	Mean allocation (%)	Median allocation (%)	Average of four largest allocations (%)	Allocation using 2009 CQ (mt)		
							Mean	Median	Average of four largest allocations
1996-2002 (drop 2)	Northern rockfish	CP	18	5.6	4.8	11.2	52	44	104
		CV	50	2.0	1.2	7.0	26	16	89
	Pacific ocean perch	CP	18	5.6	3.5	13.4	230	147	555
		CV	52	1.9	1.5	4.5	75	59	174
	Pelagic shelf rockfish	CP	19	5.3	3.9	14.9	97	73	274
		CV	52	1.9	1.4	6.4	28	21	94
1998-2006 (drop 2)	Northern rockfish	CP	16	6.3	1.9	16.6	54	16	143
		CV	53	1.9	1.3	7.5	25	17	101
	Pacific ocean perch	CP	16	6.3	2.8	17.4	222	100	617
		CV	53	1.9	1.7	4.8	85	77	214
	Pelagic shelf rockfish	CP	16	6.3	4.2	17.7	92	63	282
		CV	53	1.9	1.4	6.6	34	25	120
1998-2006 (drop 4)	Northern rockfish	CP	16	6.3	2.1	18.1	95	18	141
		CV	53	1.9	1.4	6.8	25	19	91
	Pacific ocean perch	CP	16	6.3	3.5	16.6	217	120	577
		CV	53	1.9	1.9	4.5	86	87	206
	Pelagic shelf rockfish	CP	16	6.3	4.7	18.9	93	70	251
		CV	53	1.9	1.5	6.1	34	27	111
2000-2006 (drop 2)	Northern rockfish	CP	10	10.0	10.6	18.9	86	91	162
		CV	43	2.3	2.2	7.8	31	29	105
	Pacific ocean perch	CP	9	11.1	14.1	19.9	352	447	631
		CV	42	2.4	2.3	4.8	116	110	233
	Pelagic shelf rockfish	CP	10	10.0	7.0	19.7	124	87	244
		CV	43	2.3	1.9	6.6	48	39	136

Source: Alaska Department of Fish and Game for CV data and WPR for CP data
 * Note: Assumes no processor allocation of harvest shares

The distribution of catcher processor and catcher vessel allocations in the different rockfish fisheries for the qualifying year combinations are shown in Figure 1 through Figure 4, respectively. Allocations are aggregated into groups of four to maintain confidentiality, with vessel groupings made in descending order from the largest estimated allocation to the smallest allocation. The last and smallest groupings contains between 4 and 7 estimated allocations, since at least 4 persons' activities must be included under confidentiality rules. The estimated allocation shown for each 4-vessel group is the average allocation to members of that group. Allocations are shown as shares of the total allocation to the respective sector. Each legend shows the total number of vessels that would receive an allocation in each fishery. Because allocations are averages, it is possible, particularly in the groupings with the largest allocation, that the largest allocation to a single vessel is significantly different from the average of those four vessels.

Comparing the distributions of catcher processor allocations using the different qualifying year options, the most obvious difference is the increase in the size of the highest four allocations as more recent qualifying years are used. As seen in Figure 1, the four largest allocations average approximately 20 percent of total allocation for the species, with the remaining allocations average approximately 4 percent or less for each species. The four largest allocations using the 1998-2006 year combination (Figure 3 and Figure 4) average between 11 percent and 15 percent of the total allocation (depending on the species), while the four largest allocations using 1996 to 2002 (Figure 2) average between 16 percent and 18 percent of the total allocation depending on the species. Looking at the smallest allocations, using the 1996-2002 option, approximately 6 participants in the sector would receive allocations that average less than 2 percent of the sector's northern rockfish and Pacific ocean perch, while approximately 7 participants in the sector would receive allocations that average less than 1 percent of the sector's pelagic shelf rockfish. Under the 1998-2006 options, 4 participants would receive allocations that average less 1 percent for each of the rockfish species.

Figure 1. Allocations of catcher processors by Central Gulf of Alaska rockfish species, 2000-2006 (drop 2)

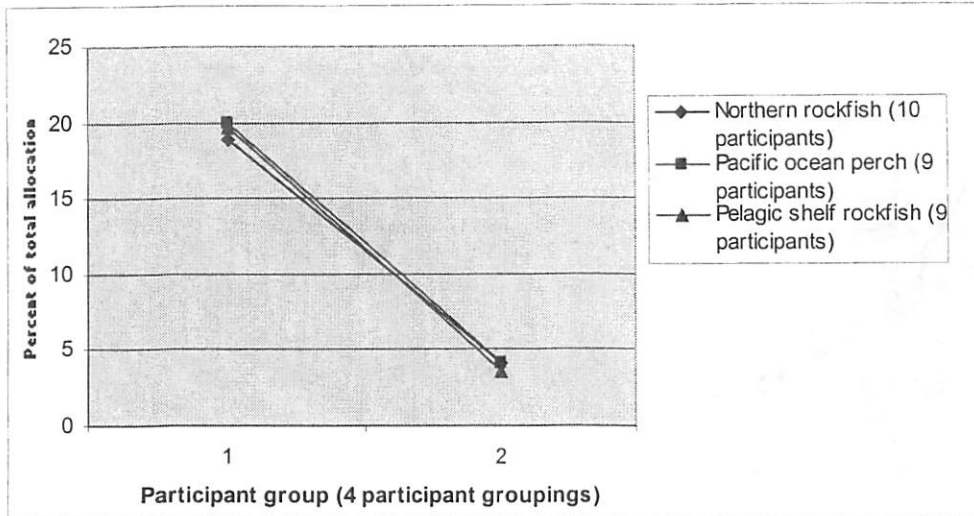


Figure 2. Allocations of catcher processors by Central Gulf of Alaska rockfish species, 1996-2002 (drop 2)

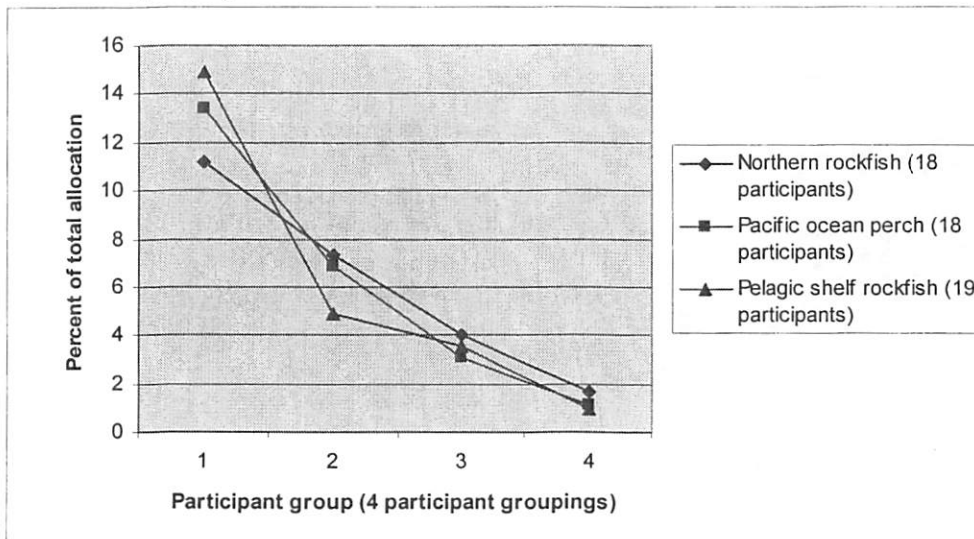


Figure 3. Allocations of catcher processors by Central Gulf of Alaska rockfish species, 1998-2006 (drop 2)

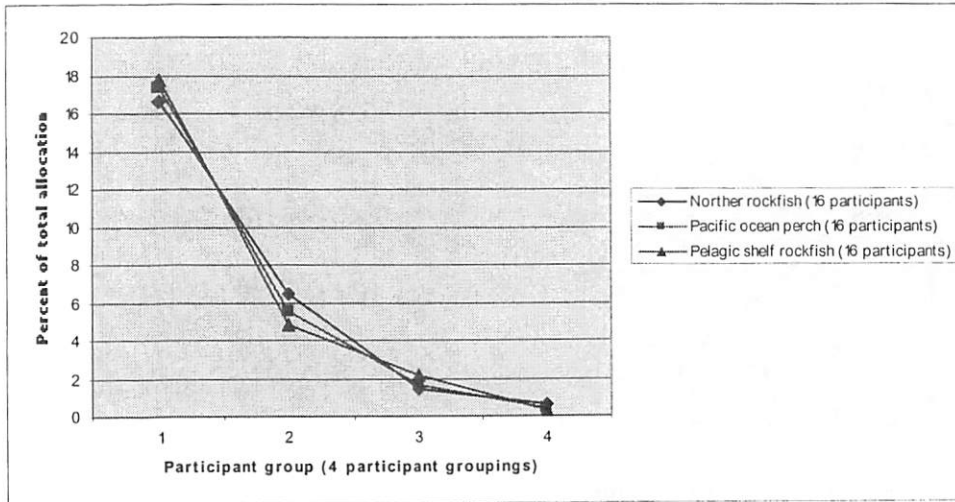
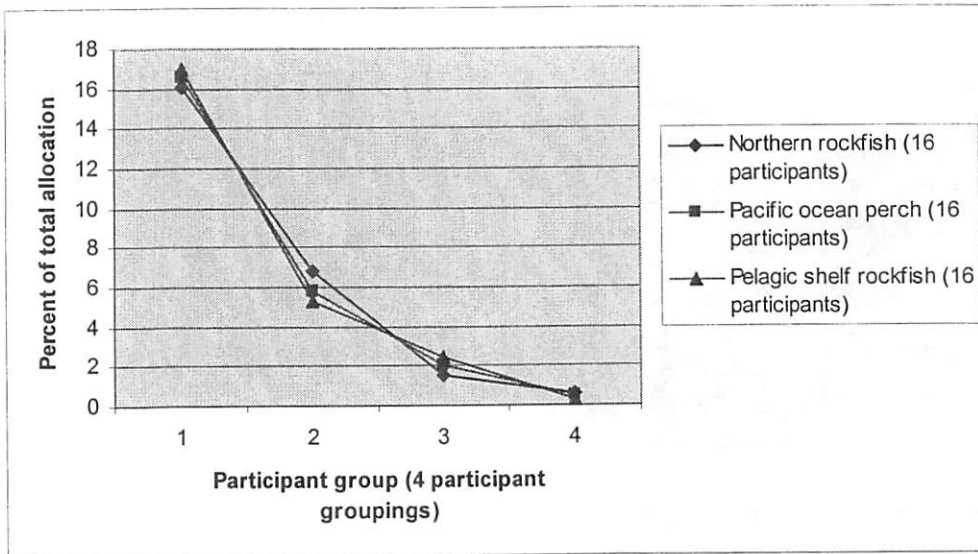


Figure 4. Allocations of catcher processors by Central Gulf of Alaska rockfish species, 1998-2006 (drop 4)



The distribution of catcher vessel share allocations in the different target fisheries are shown in Figure 5 through Figure 8. Unlike the allocation distribution of the catcher processors, allocations to catcher vessels are more evenly distributed across participants. The allocation distributions of the four different qualifying year combinations maintain a fairly consistent pattern. The four largest allocations for northern rockfish average between 7 and 8 percent for each of the different year combinations, slightly less than 5 percent for Pacific ocean perch, and between 6 and 7 percent for pelagic shelf rockfish. Looking at the smallest allocations, between 4 and 7 participants would receive average allocations of each rockfish species well below 1 percent under each of the 4 different year combinations.

Figure 5. Allocations of catcher vessels by Central Gulf of Alaska rockfish species, 2000-2006 (drop 2)

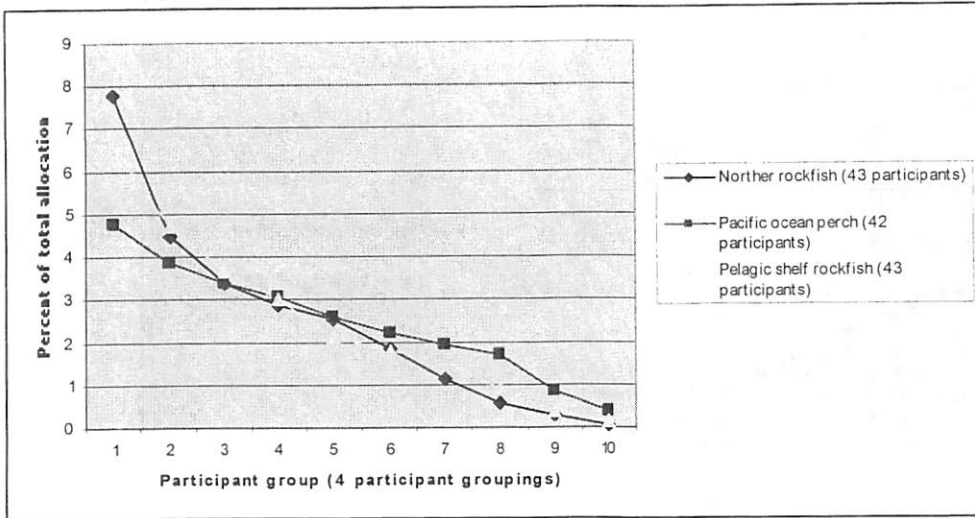


Figure 6. Allocations of catcher vessels by Central Gulf of Alaska rockfish species, 1996-2002 (drop 2)

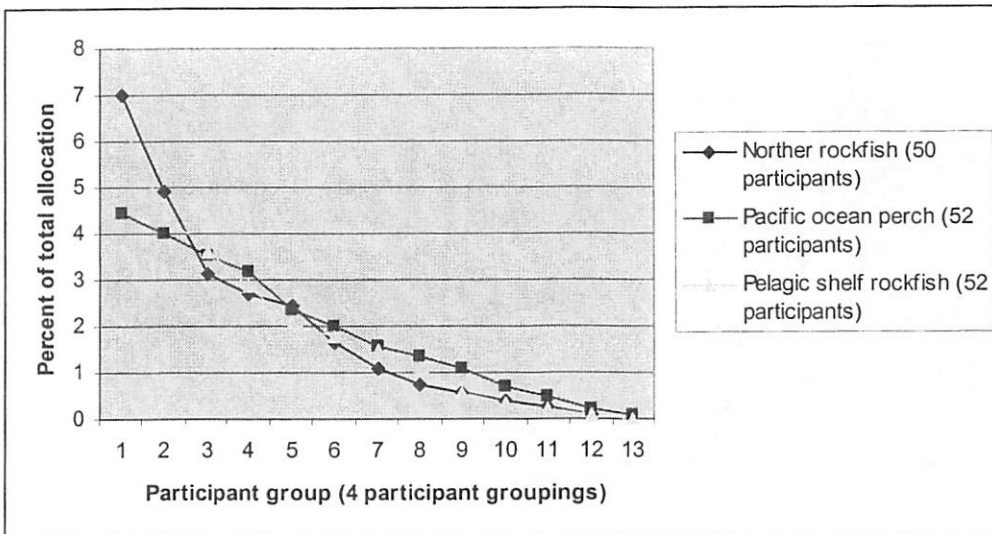


Figure 7. Allocations of catcher vessels by Central Gulf of Alaska rockfish species, 1998-2006 (drop 2)

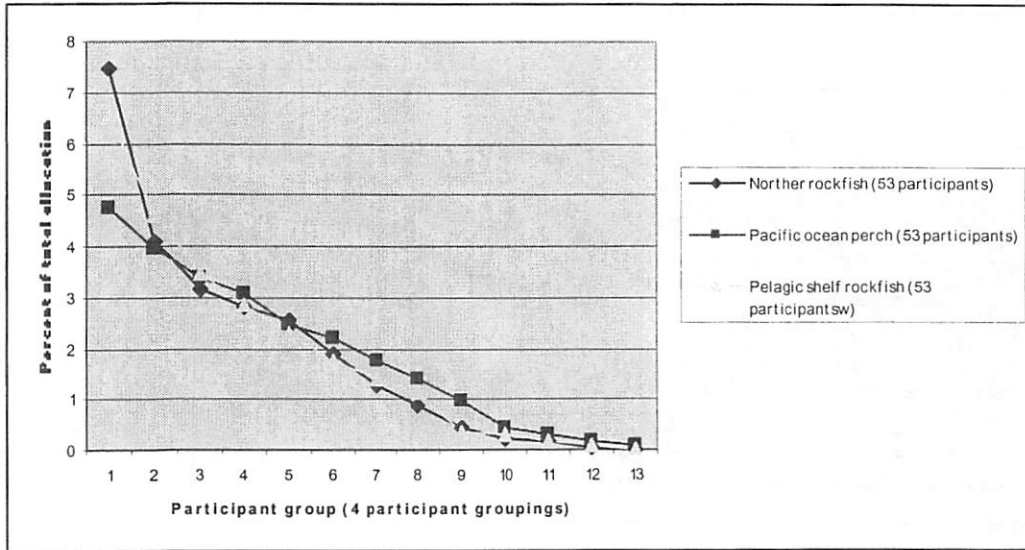
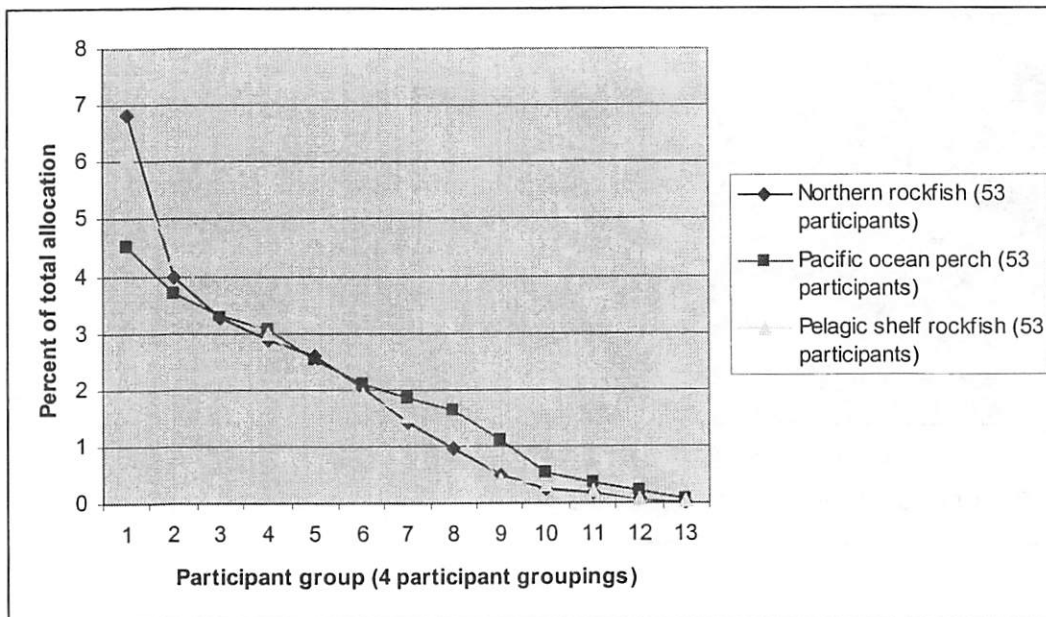


Figure 8. Allocations of catcher vessels by Central Gulf of Alaska rockfish species, 1998-2006 (drop 4)



Sector allocations of secondary species

In addition to the rockfish allocations, allocations would be made to the catcher processors sector and catcher vessel sector for secondary species that are typically harvested when harvesting rockfish. The allocations of secondary species would be based on catch of the secondary species while targeting rockfish. Specifically, the allocation would be a portion of the TAC equal to the average annual percentage of the total retained catch of the secondary species made by the sector. In other words, a sector would be allocated the average of its annual retained catch from the rockfish fishery divided by total retained catch from the CGOA during the qualifying years. The

annual allocation to the sector would this percentage times the annual TAC for that secondary species. Table 3 shows the portion of each secondary species TAC that would be allocated to the different sectors, assuming that all qualified participants join a cooperative (i.e., the maximum allocation to the sector). Comparison of target rockfish ex vessel and wholesale prices with ex vessel and wholesale prices for the secondary species show that these species typically sell for substantially higher prices than target rockfish. Under the LLP, participants in the rockfish fisheries typically boosted revenues by intentionally catching secondary species (as permitted by MRAs).

Table 3. Secondary species allocation by sector

Qualifying Year	Species	Sector	Retained catch (mt)	Average percent	Allocation using 2009 CQ (mt)***
1996-2002	Pacific cod	CP	617	0.2	55
		CV	4,401	2.0	481
	Sablefish	CP	1,924	4.5	226
		CV	2,524	5.9	296
	Shortraker/rougheye	CP	2,574	44.5	511
		CV	261	4.4	50
	Thornyhead rockfish**	CP	641	17.1	147
		CV	323	8.2	70
1998-2006	Pacific cod	CP	982	0.4	85
		CV	8,157	3.3	774
	Rougheye rockfish*	CP	2,391	37.3	311
		CV	285	7.0	58
	Sablefish	CP	2,231	4.0	199
		CV	3,676	6.5	324
	Shortraker rockfish*	CP	2,554	43.9	138
		CV	271	5.0	16
	Thornyhead rockfish	CP	1,129	23.6	203
		CV	386	7.8	67
2000-2006	Pacific cod	CP	585	0.3	78
		CV	7,022	3.8	907
	Rougheye rockfish*	CP	1,700	34.7	289
		CV	226	7.8	65
	Sablefish	CP	1,575	3.5	176
		CV	3,066	6.8	343
	Shortraker rockfish*	CP	1,863	43.2	136
		CV	212	5.3	17
	Thornyhead rockfish	CP	954	26.5	228
		CV	281	7.9	68

Source: Alaska Department of Fish and Game for CV data and WPR for CP data

* Prior to 2005, shortraker and rougheye rockfish were managed in the Central Gulf under an aggregate TAC, as a result, in years prior to 2005 aggregate shortraker and rougheye catch were used in the catch calculation

** Prior to 1998, thornyhead rockfish were managed Gulfwide so 1996 and 1997 catch were omitted from this calculation

*** Assumes all qualified participants join a cooperative

Catcher processors allocations of Pacific cod are relatively small, ranging from a low of 0.2 using 1996-2002 years to high of 0.4 percent using 1998-2006 years, while allocations to the catcher vessels would be substantially larger ranging from 2 percent using 1996-2002 to 3.8 percent using 2000-2006. Given the historic low harvest of Pacific cod by catcher processors in the rockfish fishery, the Council when developing the pilot program, chose to manage the Pacific cod for the

catcher processors under a revised MRA of 4 percent – a level substantially lower than the 20 percent Pacific cod MRA under the LLP. This lower MRA is intended to allow for reasonable Pacific cod retention by catcher processors, without constraining their harvests of primary rockfish allocations.

Sablefish allocations to the catcher vessel sector range from 5.9 percent using 1996-2002 years to 6.8 percent using 2000-2006 years. For the catcher processor sector, allocations of sablefish would range from a low of 3.5 percent using 2000-2006 years to a high of 4.5 percent using 1996-2002 years. Under all of the options, the catcher processor sector would receive a larger allocation of thornyhead rockfish compared to the catcher vessel sector. The estimated catcher processor allocations range from a low of 17.1 percent using 1996-2002 years to a high of 26.5 percent using 2000-2006 years. For catcher vessel sector, the allocations range from a low of 7.8 percent using 1998-2006 years to a high of 8.2 percent using 1996-2002 years.

Sector allocations of shortraker rockfish and rougheye rockfish

Three options are under consideration for managing shortraker rockfish in the catcher processor sector. Two of these options would manage shortraker as an allocated secondary species, with allocations of either 30.03 percent or 50 percent. The third option would combine shortraker rockfish and rougheye rockfish managing those species using a maximum retainable allowance percentage of 2 percent. Catcher vessel sector participants are subject to a 2 percent MRA applicable to aggregate retention of shortraker rockfish and rougheye rockfish. In addition, if the sector's harvest of shortraker rockfish reaches 9.72 percent of the TAC, that species would go on PSC status for the sector, under which any retention is prohibited.

Estimation of allocations of shortraker rockfish and rougheye rockfish under the options requires some interpretation as historical management of these species affects the information. Prior to 2005, shortraker rockfish and rougheye rockfish were managed based on an aggregate TAC, with relatively limited distinction of catch by species. So, for qualifying years prior to 2005, history is credited to both species based on aggregate catches of the two species. This results in the 1996-2002 qualifying year option allocation is the same for both species, while the 1998-2006 and 2000-2006 qualifying year options distinguish allocations of the two species based on catch differentials for the two in 2005 and 2006. Allocations for the catcher vessels are relatively small compared to the catcher processor sector ranging from 4.4 percent of both species using 1996-2002 qualifying years to a high of 7.8 percent for rougheye rockfish and 5.3 percent of shortraker rockfish using 2000-2006 qualifying years. For catcher processors, allocations ranged from a 34.7 for rougheye rockfish and 43.2 percent for shortraker rockfish using 2000-2006 qualifying years to a high of 44.5 percent based on aggregated catches in the 1996-2002 qualifying years.

Several factors should be considered in assessing the various allocation options. Both the process followed by the Council in the development of pilot program allocations and the performance of the fishery under those allocations shed light on these factors. During development of the original rockfish pilot program, the Council first considered allocation of shortraker rockfish and rougheye rockfish based solely on aggregate catches of the two species during the qualifying period. Each sector would then receive an allocation for each species by applying its share of the historic aggregate catch of the two species to each of the two species TACs. Based on that calculation, the catcher processor sector would receive approximately 60 percent each TAC, while the catcher vessel sector would have received approximately 6 percent of each TAC. Although the species were historically managed under an MRA, managers expressed concern that catches of shortraker exceeded rougheye catches, while shortraker stocks were less abundant. To address potential

pressure on the shortraker stock, the Council also considered an option to credit only 75 percent of the catch history of the catcher processors sector in determining its allocation, effectively reducing the allocations to approximately 45 percent of the combined TACs. In considering this allocation, the Council expressed concern that the relatively high history based allocation of these species could leave the stocks vulnerable, if other catches increased in other fisheries under the MRAs.¹

In part, to avoid possible overharvests, the Council elected to use more precise and limiting management allocating catcher processors 30.03 percent of the Central Gulf shortraker TAC and 58.87 percent of the Central rougheye TAC. Each catcher processor cooperative receives a percentage of each of those allocations equal to its percentage of the sector's primary rockfish species quota shares. Sector members that choose to fish in the limited access fishery do not receive an allocation. Instead, limited access participants in the current rockfish pilot program are limited by a maximum retainable amount of combined shortraker rockfish and rougheye rockfish equal to 2 percent of catch of primary rockfish, the same MRA percentage applicable to catcher vessels in the current rockfish pilot program.

Under the pilot program rules, allowable catches of shortraker and rougheye by catcher processors in the program differs with catcher processor sector choices of whether to enter a cooperative or fish in the limited access fishery (see Table 4 and Table 5). Generally, catcher processors are permitted to retain more shortraker rockfish and rougheye rockfish, if they join cooperatives. So, maximum retained catch by the sector would be permitted, if all catcher processors chose to join cooperatives. Yet, since discards are permitted by participants in the limited access, it is possible that total catches of shortraker rockfish and rougheye rockfish could be greater if a large number of catcher processors chose to join the limited access, and participants in the limited access have substantial discards. Since all catcher vessels in the program are subject to an aggregate MRA that limits only retained catch and does not distinguish catch by species, no such difference in allowable retention arises in that sector.

In the first year of the rockfish pilot program, catcher processors participated in both cooperatives and the limited access fishery. The choice of some catcher processors to participate in the limited access fishery reduced the permitted retained catch of the two species by over 150 metric tons. Yet, some catcher processors are reported to have been reluctant to join cooperatives because of the potential that the constraining shortraker and rougheye rockfish allocations would limit their ability to harvest primary species. Included in the proposed action is an option to increase the allocation of shortraker to cooperatives from 30.03 percent to 50 percent or to manage shortraker and rougheye rockfish under a combined MRA of 2 percent for catcher processors fishing in a cooperative. This change in the management of shortraker and rougheye rockfish could eliminate any perceived constraint these species' allocations could have on the harvest of the primary species.

Notwithstanding the reluctance of some catcher processors to join a cooperative, during each of the first two years of the pilot program, total catch of shortraker and rougheye in the limited access was approximately 10 metric tons less than the amount that could be retained under the MRA—substantially less than would have been permitted had these catcher processors elected to participate in cooperatives. In the first year of the program catcher vessels harvested less than 10

¹ In most fisheries (other than the primary rockfish fisheries) the MRA of aggregate shortraker rockfish/rougheye rockfish is 7 percent.

percent of the maximum amount permitted by their MRA, but in the second year the sector's catches increase to almost one-third of the amount permitted by the MRA. Overall, catches of both species in the rockfish fisheries during the first two years of the pilot program were less than historical catches (see Table 6). In addition, catches in the first two years of the program were a relatively smaller portion of the total allowable catch, although the distribution of that catch between the two sectors varied across years.

Table 4. Maximum permitted catches and actual catch of shortaker and rougheye rockfish in 2007

shrtkrngheye 2007		Catcher processor	Catcher vessels	Total
Maximum permitted catches under various co-op membership scenarios	Maximum sector shortaker allocation	106*	NA	
	Maximum sector rougheye allocation	360*	NA	
	Maximum sector catch of MRA shortaker and rougheye - aggregate	192**	204	
	Maximum retained catch of shortaker and rougheye			669
Maximum permitted catches under first year co-op memberships	Allocation of shortaker to cooperatives	60		
	Allocation of rougheye to cooperatives	203		
	Maximum MRA catch of shortaker and rougheye - aggregate	41	204	
	Maximum retained catch of shortaker and rougheye			508
Catches in the first year	Total catch of shortaker by cooperatives	44	9	
	Total catch of rougheye by cooperatives	11	10	
	Total catch of shortaker and rougheye by limited access	32		
	Total catch of shortaker and rougheye			106

Sources: NMFS Catch Accounting data and cooperative reports

Notes: MRA amounts assume that allocations of primary species are harvested in their entirety. MRAs limit only retained catch, so maximum catch under an MRA excludes potential discards. Total catch amounts include discards and retained catch.

* Maximum allocation to cooperatives, if all catcher processors join a cooperative.

** Maximum possible MRA catch, if all catcher processors join the limited access fishery.

Table 5. Maximum permitted catches and actual catch of shortaker and rougheye rockfish in 2008

shrtkrngheye 2008		Catcher processor	Catcher vessels	Total
Maximum permitted catches under various co-op membership scenarios	Maximum sector shortaker allocation	95.0*	NA	
	Maximum sector rougheye allocation	491.0*	NA	
	Maximum sector catch of MRA shortaker and rougheye - aggregate	123.8**	132.5	
	Maximum retained catch of shortaker and rougheye			718.5
Maximum permitted catches under second year co-op memberships	Allocation of shortaker to cooperatives	48.0		
	Allocation of rougheye to cooperatives	251.0		
	Maximum MRA catch of shortaker and rougheye - aggregate	61.9	132.5	
	Maximum retained catch of shortaker and rougheye			493.4
Catches in the second year	Total catch of shortaker by cooperatives	28.7	32.0	
	Total catch of rougheye by cooperatives	6.9	15.0	
	Total catch of shortaker and rougheye by limited access	54.4		
	Total catch of shortaker and rougheye			106.2

Source: NMFS Catch Accounting data

Notes: MRA amounts assume that allocations of primary species are harvested in their entirety. MRAs limit only retained catch, so maximum

* Maximum allocation to cooperatives, if all catcher processors join a cooperative.

** Maximum possible MRA catch, if all catcher processors join the limited access fishery.

During the first two years of the pilot program, rockfish fishery catches of shortaker rockfish were half of their historic levels (see Table 6, Table 7 and Table 8). While rockfish fishery catch of shortaker declined in 2007 and 2008, overall catches of shortaker rockfish in the Central Gulf was down in 2007, but then increased in 2008. In 2008, catch of shortaker outside the rockfish fishery was more than double the catch attributed to the rockfish fisheries. Prior to 2007, catch of shortaker in the rockfish fishery exceeded catches from other fisheries. Whether this increase in shortaker catches by vessels outside the rockfish fishery will persist is not known. Yet, the possible increasing shortaker catches of vessels outside the rockfish fishery should be considered in determining an appropriate allocation to program participants.

Table 6. Total allowable catches and total catches of shortraker rockfish and rougheye rockfish in the Central Gulf rockfish fisheries (2005-2008)

Year	Species	Total allowable catch	Catcher processor sector		Catcher vessel sector		Total	
			Catch (in metric tons)	Percent of the total allowable catch	Catch (in metric tons)	Percent of the total allowable catch	Catch (in metric tons)	Percent of the total allowable catch
2005	Shortraker rockfish	324	127	39	19	6	146	45
	Rougheye rockfish	557	48	9	9	2	57	10
2006	Shortraker rockfish	353	145	41	14	4	159	45
	Rougheye rockfish	608	5	1	30	5	35	6
2007	Shortraker rockfish	353	63	18	4	1	67	19
	Rougheye rockfish	611	19	3	6	1	25	4
2008	Shortraker rockfish	315	57	18	32	10	89	28
	Rougheye rockfish	834	33	4	15	2	49	6

Source: NMFS Catch Accounting.

Table 7. Catches and total allowable catches of shortraker rockfish and rougheye rockfish in all Central Gulf fisheries (2005-2008)

Year	Shortraker rockfish			Rougheye rockfish		
	Catch (in metric tons)	Total allowable catch (in metric tons)	Percent of total allowable catch harvested	Catch (in metric tons)	Total allowable catch (in metric tons)	Percent of total allowable catch harvested
2005	223	324	68.8	122	557	21.9
2006	303	353	85.8	134	608	22.0
2007	158	353	44.8	178	611	29.1
2008	244	315	77.5	190	834	22.8

Source: NMFS Catch reports (2005-2008).

Note: Prior to 2005, shortraker rockfish and rougheye rockfish were managed using an aggregate total allowable catch

Table 8. Catch of shortraker rockfish in all Central Gulf fisheries by gear and sector (2005-2008)

Year	Catcher processor				Catcher vessels				Total	
	Rockfish program (mt)	Hook & line (mt)	Trawl-outside rockfish program (mt)	Total (mt)	Rockfish program (mt)	Hook & line* (mt)	Trawl-outside rockfish program (mt)	Total (mt)	Rockfish program (mt)	Outside rockfish program (mt)
2005	127	19	14	161	19	38	7	64	146	78
2006	145	8	18	171	14	97	51	163	159	175
2007	63	15	7	85	4	49	67	120	67	138
2008	57	25	8	91	32	84	38	154	89	155

Source: NMFS Catch Accounting

*Jig and pot catch totals were included with hook and line catch numbers to protect confidential data.

Under the first option for modifying management of shortraker, the maximum allocation to catcher processor cooperatives would be increased to 50 percent of the shortraker TAC. In the second year of the program, catches of shortraker by catcher vessels in the rockfish fishery were 10 percent of the TAC,² while catches outside of the program were nearly 50 percent of the shortraker TAC (see Table 8). Both catcher vessel rockfish fishery catches and catches outside of the rockfish fishery reached their highest percentage of the shortraker TAC since management of

² This catch of shortraker rockfish effectively equals the maximum percent permitted by the sector prior to managers putting the species on PSC status for the catcher vessels sector (i.e., 9.72 percent).

shortraker was separated from rougheye management in 2005.³ At these catch levels, if catcher processors were to receive an increased allocation in the program and all vessels joined cooperatives, catches by program catcher vessels and non-rockfish fisheries would need to be constrained to prevent overharvest of the shortraker TAC. In all likelihood, managers would put shortraker on PSC status, if needed to limit total catch, to prevent any retention of shortraker in non-rockfish fisheries (and possibly in the catcher vessel sector of the rockfish fishery). In season managers regularly take such actions to manage catches, so such a limitation would not be extraordinary. Although these measures are believed to effectively protect stocks from overharvest, they also can result in discards of the species, an undesirable consequence, especially for a species of concern with a relatively high value, such as shortraker.

Under the second option for shortraker management, all participants in the catcher processor sector would be subject to an aggregate shortraker/rougheye MRA of 2 percent. The reduced TAC would prevent vessels unable to limit their catches of shortraker rockfish and rougheye rockfish from benefiting from the MRA option, as it would remove the risk of being shutdown for fully harvesting the allocation of shortraker (or rougheye), since the consequence of catch exceeding an MRA is a discard requirement. While this greater flexibility may be beneficial, the MRA option may have some undesirable effects. Allowable retention of shortraker and rougheye in the aggregate would be reduced from the level allowed by the current allocation⁴; however, if vessels use the MRA to catch shortraker (and not rougheye), it is possible that shortraker catches could be increased beyond the current allocation amount. Regardless of the behavior of vessels subject to the MRA, if total catch of shortraker (including catches of vessels in other fisheries) approach the TAC, it is possible that shortraker could be put on PSC status preventing any retention.

Generally, MRAs can contribute to discards. As currently applied in the Gulf, an MRA requires discards of catch that exceed the prescribed level at any time. So, a vessel that catches an unexpected amount of an MRA species early in a trip may be forced to discard, even if the catch would be retainable at later time in the trip. For valuable species, an MRA may induce a vessel to catch up to the maximum amount, knowing that overharvest of the MRA may be discarded without risk of penalty. These added discards would be avoided under the current allocations, which counts all harvest against the allocation and does not allow discards.

MRAs can also contribute to excessive harvests of a species. Since an MRA limits only retention, requiring vessels to discard above the retainable amount, they do not limit total harvest of a species. For species of value that are fully utilized, establishing an MRA in a fishery prosecuted with exclusive allocations of basis species and an extended season could provide participants in the fishery with an advantage in the harvest of the MRA species. These persons may fish to the MRA, as they will not be subject to the time pressures that arise in a limited access race for fish.

Sector allocations of halibut PSC

Halibut PSC will also be allocated through a three step process. In the first stage, an allocation would be made to the rockfish program as a whole, based on historic average annual usage of

³ Prior to separation of management of the two species, aggregate harvests of shortraker and rougheye outside the rockfish fishery never exceeded 50 percent of the aggregate TAC.

⁴ In addition, it is possible that harvests could be limited below the level permitted by the MRA, if overall harvests of shortraker approached the TAC. In which case, shortraker would be put on PSC status, preventing any retention. Allocations of shortraker, such as those currently made to catcher processor cooperatives, are less likely to be constrained, as those allocations would be considered in determining whether to impose PSC status.

halibut PSC by the rockfish fisheries. This allocation would then be divided between the sectors based on qualified rockfish catch. In the third stage, each sector's allocation is subdivided within the sector based on primary rockfish allocations within the sector. Table 9 shows the historic halibut PSC usage in the rockfish fishery during the different qualifying year combinations.

Total halibut usage in the rockfish fishery remained relatively stable across the qualifying years, but declined for the catcher processor sector while increasing for the catcher vessel sector in more recent years. During the later qualifying year periods, the increase in primary rockfish harvests by catcher vessels contributed to this increase in halibut usage, but halibut per metric ton of rockfish increased for the sector in the more recent qualifying years. Halibut usage averaged 112 metric tons for the catcher processor sector and 113 metric tons for the catcher vessel sector during the 1996 to 2002 period. During the 1998 to 2006 period, average halibut usage for the catcher processors was 92 metric tons, while average halibut usage for catcher vessel sector was 137 metric tons. For the 2000 to 2006 period, average halibut usage for the catcher processor sector was 73 metric tons, while average halibut usage for the catcher vessel sector during this period was 146 metric tons.

Table 9. Total and average halibut usage by sector during qualifying years

Qualifying Year	Sector	Total halibut usage	Average halibut usage
1996-2002	CP	787	112
	CV	792	113
1998-2006	CP	825	92
	CV	1,233	137
2000-2006	CP	510	73
	CV	1,021	146

Source: ADF&G Fish Tickets for CV data and WPR for CP data

Cooperative allocations of secondary species and halibut PSC

After the sector allocation for secondary species and halibut PSC are determined, allocations of both secondary species and halibut PSC would be made to cooperatives based on the aggregate target rockfish histories of their members'. Since each license holder's catch history is likely to affect the leverage within the cooperative, these individual histories are relevant to assessing the effects of allocations. Table 10 shows the numbers of participants in the trawl catcher vessel and trawl catcher processor sectors and simple statistics of aggregated CGOA primary rockfish histories that would be used to determine allocations of secondary species and halibut PSC within each sector. Applying these allocation percentages using 2009 TAC, Table 11 shows the median allocation in metric tons for the secondary species and halibut PSC, while Table 12 shows the average of four largest allocations for secondary species and halibut PSC. The change in distribution within the sector may be explained, in part, by the number of catcher processors participating in the fishery in recent years. Since 2000, no more than 7 catcher processors have participated in the fishery in any year.

Table 10. Mean, median, and four largest allocations for Central Gulf aggregated rockfish species

Qualifying Year	Sector	Vessel Count	Mean (%)	Median (%)	Average of four largest allocation (%)
1996-2002 (drop 2)	CP	19	5.3	3.6	12.0
	CV	52	1.9	1.6	5.3
1998-2006 (drop 2)	CP	16	6.3	2.6	17.1
	CV	53	1.9	1.8	5.7
1998-2006 (drop 4)	CP	16	6.3	3.0	16.0
	CV	53	1.9	2.0	5.3
2000-2006 (drop 2)	CP	10	10.0	10.4	19.0
	CV	43	2.3	2.4	5.7

Source: ADF&G Fish Tickets for CV data and WPR for CP data

Table 11. Median allocation using 2009 TAC for secondary species and halibut PSC

Sector	Qualifying Year	Median allocation using 2009 TAC (metric tons)						
		Pacific cod	Sablefish	Shortraker/rougheye*	Shortraker*	Rougheye*	Thomyhead	Halibut PSC
CP	1996-2002 (drop 2)	1.97	8.15	18.39	n/a	n/a	5.29	1.98
	1998-2006 (drop 2)	2.19	5.17	n/a	3.58	8.05	5.26	1.43
	1998-2006 (drop 4)	2.57	6.06	n/a	4.20	9.43	6.17	1.67
	2000-2006 (drop 2)	8.09	18.30	n/a	14.11	30.02	23.64	5.71
CV	1996-2002 (drop 2)	7.52	4.83	0.78	n/a	n/a	1.10	1.80
	1998-2006 (drop 2)	13.71	5.74	n/a	0.28	1.03	1.19	2.04
	1998-2006 (drop 4)	15.45	6.47	n/a	0.31	1.16	1.34	2.29
	2000-2006 (drop 2)	21.69	8.19	n/a	0.40	1.56	1.62	2.75

Source: ADF&G Fish Tickets for CV data and WPR for CP data

* Prior to 2005, shortraker and rougheye rockfish were managed in the Central Gulf under an aggregate TAC, as a result, in years prior to 2005 aggregate shortraker and rougheye catch were used in the catch calculation

Table 12. Average of four largest allocations using 2009 TAC for secondary species and halibut PSC

Sector	Qualifying Year	Average of four largest allocations using 2009 TAC (metric tons)						
		Pacific cod	Sablefish	Shortraker/rougheye*	Shortraker*	Rougheye*	Thomyhead	Halibut PSC
CP	1996-2002 (drop 2)	6.59	27.27	61.50	n/a	n/a	17.70	6.62
	1998-2006 (drop 2)	14.44	34.00	n/a	23.56	52.98	34.64	9.38
	1998-2006 (drop 4)	13.53	31.88	n/a	22.09	49.67	32.48	8.80
	2000-2006 (drop 2)	14.83	33.55	n/a	25.88	55.04	43.34	10.46
CV	1996-2002 (drop 2)	25.43	15.67	2.65	n/a	n/a	3.73	6.08
	1998-2006 (drop 2)	44.10	18.46	n/a	0.89	3.31	3.84	6.55
	1998-2006 (drop 4)	40.91	17.13	n/a	0.83	3.07	3.56	6.07
	2000-2006 (drop 2)	52.00	19.63	n/a	0.95	3.74	3.87	6.59

Source: ADF&G Fish Tickets for CV data and WPR for CP data

* Prior to 2005, shortraker and rougheye rockfish were managed in the Central Gulf under an aggregate TAC, as a result, in years prior to 2005 aggregate shortraker and rougheye catch were used in the catch calculation

The distributions of secondary species and halibut PSC for catcher processors and catcher vessels for each of the four different qualifying year options are shown in Figure 9 through Figure 12. Allocations are aggregated into groups of four to maintain confidentiality, with vessel groupings made in descending order from the largest estimated allocation to the smallest allocation. The last and smallest grouping contains between 4 and 7 estimated allocations, since at least 4 persons

activities must be included under confidentiality rules. The estimated allocation shown for each 4-vessel group is the average allocation to members of that group. Allocations are shown as shares of the secondary species and halibut PSC based on the participants proportion of the sectors aggregate rockfish history.

Under the 1996-2002 (drop 2) qualifying year option (Figure 9), the four largest catcher processor allocations would average approximately 12 percent of the total allocation of secondary species and halibut PSC to the sector, while the four largest catcher vessel allocations would average approximately 5 percent of the catcher vessel sector's allocation. The figure shows the last 7 catcher processor participants would receive an average allocation of less than 2 percent each, while the 4 smallest catcher vessel allocations would average less than 1 percent.

The distribution of allocations under the 1998-2006 (drop 2) and the 1998-2006 (drop 4) qualifying year options, shown in Figure 10 and Figure 11, are generally within 1 percent of each other. Looking specifically at allocations using the 1998-2006 (drop 2) year option, the four largest catcher processor allocations would average approximately 16 percent of the sector's total allocation of secondary species and halibut PSC, while the four largest catcher vessel allocations would average approximately 6 percent of that sector's allocation. On the lower end, the 4 smallest catcher processor allocations would average less than 1 percent of that sector's allocation, while the 5 smallest catcher vessel allocations average less than one-eighth of one percent of that sector's allocation.

Looking at the final set of years, 2000-2006 (drop 2) shown in Figure 12, the four largest catcher processor allocations of secondary species and halibut PSC would average almost 20 percent of the sector's allocation, while the 4 largest catcher vessel allocations average almost 6 percent of the sector's total allocation. The smallest 6 catcher processor allocations would receive an average allocation of almost 4 percent of the sector's allocation, while the smallest 7 catcher vessel allocations would average approximately one-quarter of a percent.

Figure 9. Allocations of secondary species and halibut PSC for catcher processors and catcher vessels using 1996-2002 (drop 2) year combination

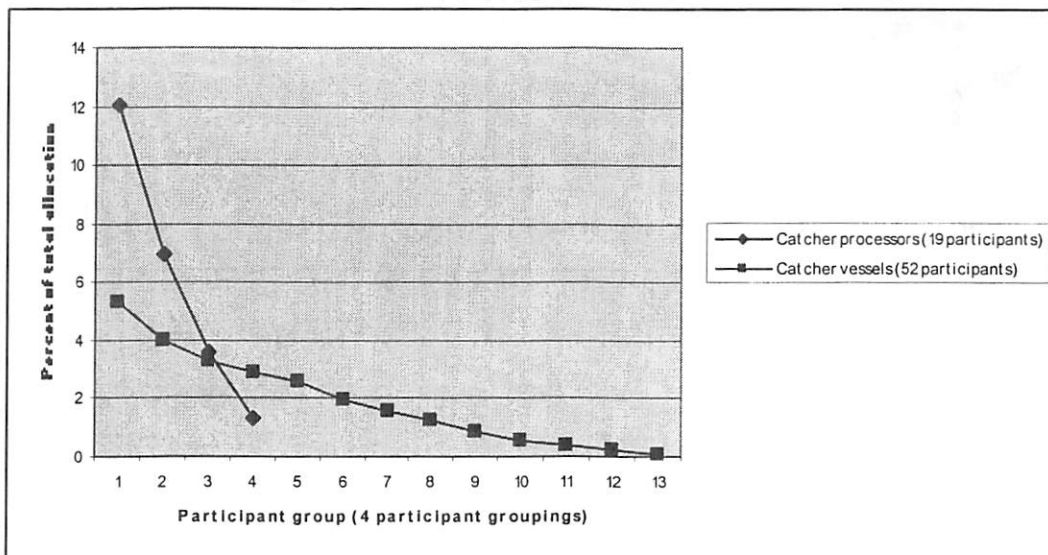


Figure 10. Allocations of secondary species and halibut PSC for catcher processors and catcher vessels using 1998-2006 (drop 2) year combination

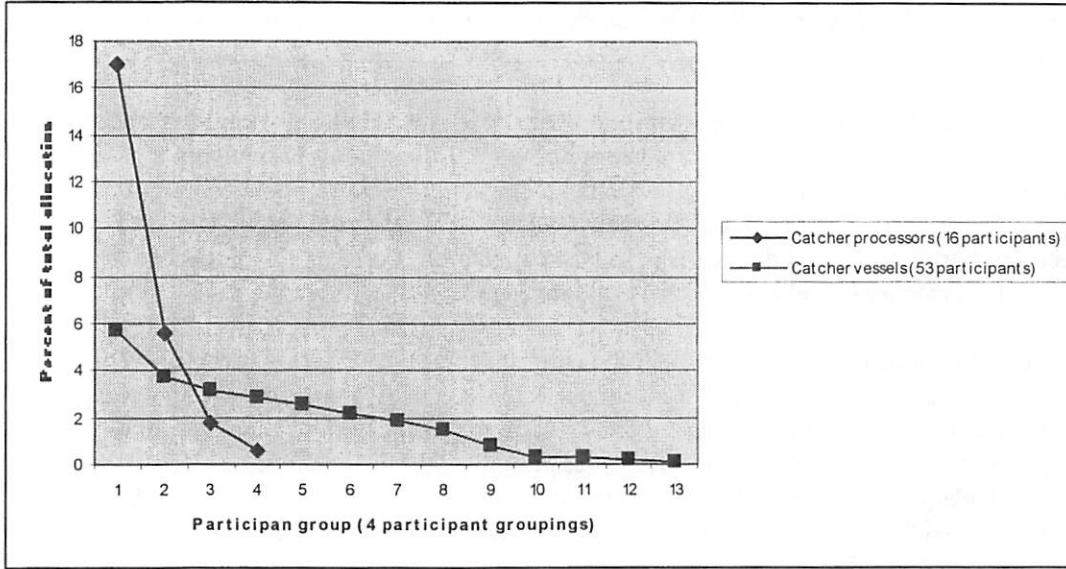


Figure 11. Allocations of secondary species and halibut PSC for catcher processors and catcher vessels using 1998-2006 (drop 4) year combination

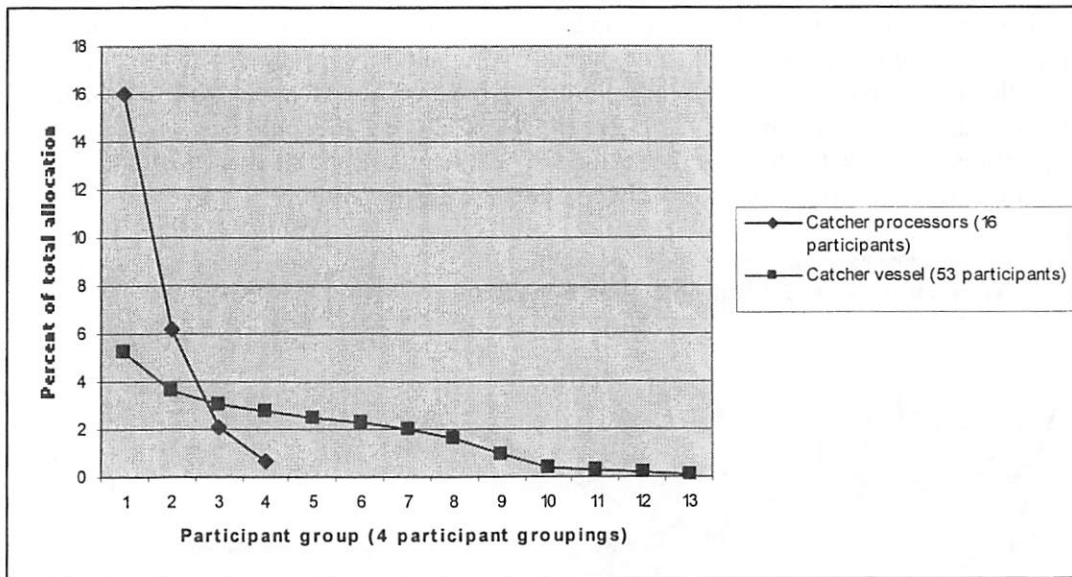
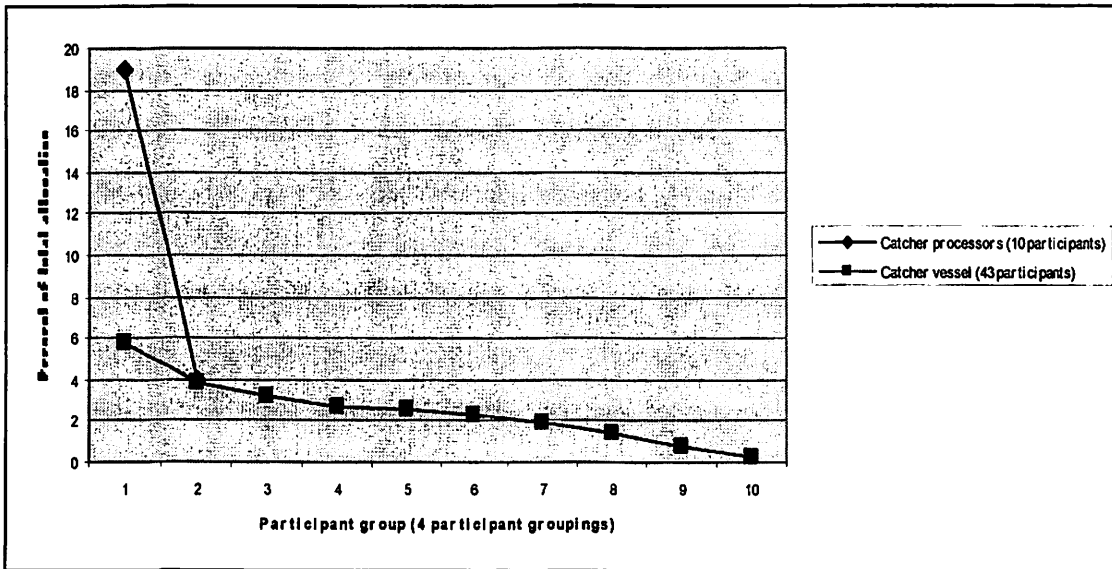


Figure 12. Allocations of secondary species and halibut PSC for catcher processors and catcher vessels using 2000-2006 (drop 2) year combination



Allocation of harvest shares to processors

Under one of the catcher alternatives, the catcher vessel harvest share allocation would be divided between eligible harvest sector participants and eligible processing sector participants. The Council would select a fixed percentage of the catcher vessel harvest share pool for allocation to harvesters based on their qualifying histories, with the remainder allocated to processors based on their qualifying processing histories. Under the alternative, allocations of target rockfish, secondary species and halibut PSC would be divided between the sectors at the prescribed percentages.

9.3 Option B - Processor allocation of harvest shares (CV – 3)

Allocation of the primary rockfish, secondary species, and halibut PSC to the CV sector shall be apportioned between harvesters (CV only) and shore based processors:

Option 1: 90/10

Option 2: 80/20

Eligible processors will be allocated target rockfish, secondary species, and halibut PSC from the processor pool of harvest shares in proportion to its qualifying processing history. Annual allocations will be of the same species and subject to the same allocation and harvest rules governing catcher vessel allocations.

The processor portion of the harvest share pool would be allocated to eligible processors based on individual processing histories in CGOA target rockfish during qualifying years. Two options could be used to define general processor eligibility. Under each, a processor would need to have purchased at least 250 metric tons of primary rockfish species in at least 4 years during a specific period – either 1996-2002 or 2000-2006. Allocations to eligible processors would be based on their relative processing histories during a specified qualifying period – either 1996-2002 (drop 1) and 2000-2006 (drop 2).

9.1 Processor eligibility (CV-3, 4, 5, and 6)

An eligible processor is a processing facility that has purchased:

Option 1_- 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish harvest per year, for 4 years, from 1996 to 2000.

Option 2_- 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish per year, for 4 years, from 2000 to 2006.

Suboption: (entry level fishery processor): 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish harvested from 2007 to 2008.

Processor qualifying years

Each eligible shore based processor is allocated processor catch history based on individual processor histories of CGOA target rockfish for the years:

Option 1 - 1996-2000 (drop 1 year)

Option 2 - 2000–2006 (drop 2 year)

Suboption 1: (entry level processors): 2007–2008

Table 13 shows the number of eligible rockfish processors along with average landings and the mean and median processor allocations of primary rockfish species for these two qualifying year options. The table also includes the 2009 mean and median allocations for the processors for each target rockfish species assuming the processors receive 10 percent, 20 percent and 30 percent of the harvest share pool.

Under the 1996-2002 (drop 1) option, 5 processors are eligible for an allocation, while under the 2000-2006 (drop 2) option 6 processors are eligible. Inclusion of an additional processor under the 2000-2006 (drop 2) option, in part, contributes to a lower median allocation under that option.

Table 14 shows the percent mean and median allocation and the 2009 allocation of secondary species and halibut PSC for eligible rockfish processors under the two different qualifying year options. Given the allocation of secondary species and halibut PSC is based on processing history of the primary rockfish species during the qualifying period, the allocation pattern of secondary species and halibut PSC is similar to target rockfish allocations. Using 1996-2002 (drop 1) qualifying period results in an allocation that is more evenly distributed across the five eligible processors, whereas 2002-2006 (drop 2) qualifying period again tends to favor the processors with more history resulting in larger allocations of secondary species and halibut PSC.

Table 13. Number of eligible shore based rockfish processors, average landings, mean and median allocations of primary rockfish species (as a percent and in metric tons based on 2009 catcher vessel allocations of primary rockfish species) by qualifying year option

Qualifying years	Species	Eligible processors	Average landings (mt)	Mean allocation (%)	Median allocation (%)	Allocation assuming processors receive 10% of the catcher vessel harvest share pool (in mt based on 2009 TAC)		Allocation assuming processors receive 20% of the catcher vessel harvest share pool (in mt based on 2009 TAC)		Allocation assuming processors receive 30% of the catcher vessel harvest share pool (in mt based on 2009 TAC)	
						Mean	Median	Mean	Median	Mean	Median
1996-2002 (drop 1)	Northern rockfish	5	1,356	20	24.1	25.5	30.7	51.1	61.5	76.8	92.2
	Pacific ocean perch		2,394		21.4	75.3	80.7	150.6	161.4	225.8	242.1
	Pelagic shelf rockfish		902		20.5	28.3	29.0	56.7	56.1	85.0	87.1
2000-2006 (drop 2)	Northern rockfish	6	2,093	17	13.9	21.7	17.7	43.4	35.5	43.4	53.2
	Pacific ocean perch		4,447		12.5	64.0	47.0	128.0	94.0	128.0	141.0
	Pelagic shelf rockfish		1,408		14.7	24.1	20.9	48.2	41.8	48.2	62.4

Source: Alaska Department of Fish and Game

Table 14. Number of eligible shore based rockfish processors, mean and median secondary species and PSC allocations (as a percent and in metric tons based on 2009 catcher vessel allocations) by qualifying year option

Qualifying years	Species	Eligible processors	Mean allocation (%)	Median allocation (%)	Allocation assuming processors receive 10% of the catcher vessel harvest share pool (in mt based on 2009 TAC)		Allocation assuming processors receive 20% of the catcher vessel harvest share pool (in mt based on 2009 TAC)		Allocation assuming processors receive 30% of the catcher vessel harvest share pool (in mt based on 2009 TAC)	
					Mean	Median	Mean	Median	Mean	Median
1996-2002 (drop 1)	Pacific cod	5	20	21.5	9.8	10.6	19.6	21.1	29.5	31.7
	Sablefish				6.3	6.7	12.5	13.5	18.8	20.2
	Thomyhead rockfish				1.9	4.1	3.7	8.3	5.6	12.4
	Halibut				2.3	2.5	4.6	4.9	6.9	7.4
					8.3	6.5	16.7	13.0	25.0	19.5
2000-2006 (drop 2)	Pacific cod	6	17	13.2	5.3	4.1	10.6	8.3	16.0	12.4
	Sablefish				1.6	2.6	3.2	5.1	4.7	7.7
	Thomyhead rockfish				2.0	1.5	3.9	3.0	5.9	4.6
	Halibut									

Source: Alaska Department of Fish and Game

Allocation of shares to licenses participating in the pilot program entry level fishery

Under the Council's motion, participants in the pilot program's entry level fishery could be included in the cooperative program. The motion provides that vessels that have registered for the entry level fishery in both 2007 and 2008 and have at least one landing during those years would qualify under this provision. Two vessels registered for the pilot program entry level trawl fishery and participated in at least one year. Each of these participating licenses would receive an allocation either based on its history in the entry level fishery or equal to some portion of the allocation to certain vessels that qualify for the program under the general qualifying criteria.

4.4 Entry level trawl qualification/allocations for the main program:

- 1) Vessels / LLPs that do not qualify for Cooperative quota (CQ) for the CGOA rockfish cooperative program.
- 2) The trawl LLP must have registered for the entry level fishery both in 2007 and 2008.
- 3) The trawl LLP must have made a landing of fish in the entry level fishery with trawl gear in either 2007 or 2008.

4.5 The qualified entry level trawl LLP would receive an allocation of QS for the primary rockfish species equivalent to:

- 1) Average of the lowest one-quarter to one-third of the qualified CV LLPs that actively fished in the RPP program in either 2007 or 2008.
- 2) Average of the lowest one-quarter to one-third of all qualified CV LLPs.
- 3) Actual catch history of the vessel/LLP in 2007 or 2008 (information would be withheld due to confidentiality restrictions unless the vessel(s) agrees to have the data released to the public).
- 4) Average of the qualified CV LLPs that actively fished in the RPP program in either 2007 or 2008
- 5) Average of all qualified CV LLPs

Note: secondary and halibut PSC allocations are calculated the same as the other qualified LLPs.

Each of these options requires some interpretation. Under the options based on allocations to qualified licenses, the distribution of the allocation among the three different primary rockfish species is not delineated. The most straightforward interpretation of the motion is to provide each of the qualified entry level vessels with an equal share of the pools of the different primary species (e.g., a one percent allocation would provide one percent of each of the primary species).

Allocations of secondary species and halibut PSC would be based on these primary species allocations, as is done for all other program participants.

One or two vessels meet the 'entry level' qualifying criteria, depending on the general qualifying criteria selected. If the qualifying years include recent years (up to 2006), only one vessel qualifies as an entry level vessel, as the other vessel that participated in the entry level fishery meets the general qualification. Table 15 shows the characteristics of the 'entry level' allocations under options based on the allocations to eligible licenses. Those options would result in allocations to entry level vessels that range from approximately 0.2 percent of each primary species pool to approximately 2.3 percent of the pool.⁵ These allocations would exceed the allocations of between 6 and 30 of the eligible licenses (or between approximately one-tenth and in excess of one-half of the eligible licenses), respectively.

Table 15. Allocations to entry level participants based on aggregate catch history of program participants.

Qualifying years	Number of licenses qualifying for an allocation	Mean allocation		Mean allocation of active licenses		Average allocation of licenses in lowest third	
		Allocation as percent of total	Number of qualifying licenses with smaller allocation	Allocation as percent of total	Number of qualifying licenses with smaller allocation	Allocation as percent of total	Number of qualifying licenses with smaller allocation
1996 - 2002 (drop 2)	52	1.9	30	2.9	38	0.3	7
1998 - 2006 (drop 2)	53	1.9	27	3.0	42	0.2	7
1998 - 2006 (drop 4)	53	1.9	26	2.9	41	0.2	7
2000 - 2006 (drop 2)	43	2.3	20	3.1	32	0.7	9

Qualifying years	Average allocation of active licenses in lowest third		Average allocation of licenses in lowest quarter		Average allocation of active licenses in lowest quarter	
	Allocation as percent of total	Number of qualifying licenses with smaller allocation	Allocation as percent of total	Number of qualifying licenses with smaller allocation	Allocation as percent of total	Number of qualifying licenses with smaller allocation
1996 - 2002 (drop 2)	1.4	24	0.3	6	1.2	21
1998 - 2006 (drop 2)	1.7	24	0.2	6	1.4	22
1998 - 2006 (drop 4)	1.7	26	0.2	6	1.4	21
2000 - 2006 (drop 2)	1.8	15	0.4	8	1.5	13

Source: ADFG Fish Tickets.

Note: Allocations are to a license holder based on vessel activity using that license.

The option to make allocations based on catches in the entry level fishery in 2007 or 2008 also requires interpretation. This could be interpreted as providing these entering licenses with the

⁵ These allocation percentages would be in addition to the allocations to licenses meeting the basic qualifying criteria. To allocate exactly 100 percent of the TACs of the primary species, all allocations would need to be standardized.

amount of their harvests in 2007 or 2008, or alternatively with an allocation based on catch histories based on those years (i.e., with a single year's history weighted against several years for other participants).

Although these allocations cannot be shown because of confidentiality limits, the approximate magnitude of the allocations can be determined. In both of these years, the entry level fishery received an allocation of 5 percent of the Pacific ocean perch available to the rockfish pilot program or 346 metric tons per year. No allocation of northern rockfish or pelagic shelf rockfish was made to the trawl entry level fishery. Crediting of catches from this allocation under the option is uncertain and again depends on interpretation. Perhaps most problematic is a pending enforcement investigation concerning all catches from the fishery in 2008. At the extreme, the investigation could result in all catches from the 2008 entry level fishery being determined to be illegal, which would prevent their consideration for determining allocations under the program.

If entry level participants receive an allocation equal to their 2007 and 2008 catches, with each vessel receiving its largest year's catch, the two eligible licenses could receive an allocation as large as 10 percent of the available Pacific ocean perch (assuming that one vessel harvested the entire entry level Pacific ocean perch allocation in 2007 and the other harvested that allocation in 2008).⁶ The allocation would likely be smaller, as this catch distribution is unlikely, but could be as large as 4 percent of the Pacific ocean perch allocated to the program. Four percent of the Pacific ocean perch would be approximately 2.5 percent of the total primary rockfish allocation under the program (or approximately 5 percent of the catcher vessel allocation of primary species) based on the 2009 TACs (which would then be divided between the two licenses based on their relative catch histories). This allocation could be larger than all but the largest allocations to catcher vessels generally eligible under the program.

If the Council were to consider a single year's catch history of each of these licenses basing the allocation on the relative catch histories of the vessels in comparison to the catch histories of vessels that qualify under the general qualifying provision, the allocations would be reduced substantially, to an amount between one-half and three-fourths of a percent of the Pacific ocean perch allocation (or approximately one-third to one half of the aggregate primary rockfish species allocation based on the 2009 TAC).

Under any of these options, the Council will need to balance the equities of the allocations to these additional licenses that fail to meet the general qualifying criteria against the lost allocations licenses that meet qualifying criteria. If the Council elects to extend the qualifying criteria to 2006, the additional entry level license would have had no history in the rockfish fisheries for the seven years preceding implementation of the pilot program. Making an allocation to this license that is larger than allocations to licenses that meet the qualifying criteria for the program could be viewed as inequitable by some licenses that met the qualifying criteria. As is typical in the development of share-based programs, the Council must balance the competing interests of vessels that have historic participation and those that have shown an interest in entering the fishery.

The Council could take one of a few different approaches to defining allocations to licenses participating in the pilot program entry level trawl fishery. One approach could be to use the

⁶ Small amounts of the other primary species could be allocated based on incidental catches by these 'entry level' licenses. These allocations would be necessary, as vessels cannot fish without unused allocations of all species.

information presented here (and any additional information that might be requested) to identify a specific allocation to licenses used in the pilot program trawl entry level fishery. Using this approach will add certainty to the allocations avoiding a potentially inequitable entry level allocation, if contingencies (such as the pending enforcement action) are resolved in a manner that is not expected. Alternatively, the Council could choose to work to more specifically define the options that are currently proposed. This latter approach could lead to a protracted process that would absorb considerable Council and staff time, without firmly resolving uncertainties.

Allocation of shares to processors participating in the pilot program entry level fishery

In the event that the Council elects to include processors in the allocation of harvest shares in the program, it has included an option that would make allocations to processors that participated in the entry level fishery.

9 Catcher vessel/shore based processor provisions (CV – all)

9.2 Processor eligibility (CV-3, 4, 5, and 6)

An eligible processor is a processing facility that has purchased:

Option 1 - 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish harvest per year, for 4 years, from 1996 to 2000.

Option 2 - 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish per year, for 4 years, from 2000 to 2006.

Suboption: (entry level fishery processor): 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish harvested from 2007 to 2008.

Processor qualifying years

Each eligible shore based processor is allocated processor catch history based on individual processor histories of CGOA target rockfish for the years:

Option 1 - 1996-2000 (drop 1 year)

Option 2 - 2000-2006 (drop 2 year)

Suboption 1: (entry level processors): 2007-2008

Suboption 2: (entry level processors) Eligible entry level processors will be allocated target rockfish, secondary species, and halibut PSC from the processor pool of harvest shares that are derived from those trawl LLPs that graduate from the entry level trawl fishery into the main program.

To be eligible to receive an allocation, a processor that participated in the entry level fishery would need to have received delivery of 250 metric tons of primary rockfish in 2007 and 2008 combined.⁷ In the first two years of the program, approximately 1,400 metric tons of rockfish were allocated to the two entry level fisheries (i.e., trawl and non-trawl). Although harvest amounts cannot be reported because of confidentiality limitations, it can be reported that in both years of the program, the trawl fishery closed on TAC. The entry level fixed gear participants harvested less than 30 metric tons of primary rockfish in the first two years of the program. Its allocation comes available to entry level trawl participants on September 1st. In the first year of the program trawl vessels prosecuted these fall fisheries, with the northern rockfish fishery closing on TAC. In the second year, trawl vessels did not attempt to harvest the remaining portions of the fixed gear entry level allocations. In sum, between 850 metric tons and 1,000

⁷ The suboption is worded differently from the general processor qualification options in that it omits the requirement that the amount be received "per year".

metric tons of rockfish were harvested from the entry fishery in the first two years of the program. Since very little of these harvests were from the fixed gear fisheries, only processors receiving deliveries from the trawl fisheries could reach the eligibility threshold. Only two processor received deliveries from the trawl entry level fishery in the first two years of the program. Consequently, only one or two processors could qualify under this provision.

The Council advanced two options for defining the allocations to processors that participated in the pilot program entry level fishery. Under the first, processors would receive allocations based on their processing histories during 2007 and 2008. This provision could be implemented by crediting the former entry level processors with their histories in those years, effectively giving the processors zero processing history in other years. Yet, substantial uncertainty will exist concerning the effects of the provision. As noted earlier, a large portion of the entry level trawl allocation may be subject to a possible enforcement action. The harvester in question asserts that the catch was not from the Central Gulf. These circumstances raise a question of whether the landings of that catch can or should be credited to the processor that received the landings. AT the time of the landing, the receiving processor likely was unaware that the landings were from the entry level fishery. Notwithstanding this uncertainty, the allocation to entry level processors cannot be revealed because of confidentiality limits. Despite that confidentiality limits, it can be revealed that between 850 and 1,000 metric tons of rockfish were harvested from the entry level fisheries in 2007 and 2008 combined. Qualified pounds of processors meeting the general eligibility criteria are roughly between 34,000 metric tons and 48,000 metric tons (depending on the qualifying year option selected). If all of the entry level landings are by processors that eligible under the entry level processor provision, these processors would receive between 2 and 3 percent of the processor allocation. Whether all landings are by processors eligible under the entry level provision cannot be revealed. In addition, this allocation could be divided between two processors, if two processors are found to meet the entry level eligibility requirement.

Under the second option, entry level processors would receive the processor portion of the harvest allocation made to entry level harvesters (i.e., 10 or 20 percent, as would be allocated to processors meeting the general eligibility criteria). Under this option, the allocation to processors from the pilot program entry level fishery would be wholly dependent on the allocation to entry level harvesters. The options for those allocations could result in each allocation being as small as less than one-quarter of one percent of the catcher vessel harvest share pool or as large as approximately five percent of the catcher vessel harvest share pool. With between one and three allocations to these entry level participants, the total allocation could be as small as one-quarter of one percent or as large as 15 percent of the catcher vessel pool. As noted in the discussion of those allocations, the allocation under any of the computational options is very uncertain because of the vagueness of the options and the potential enforcement action concerning catches from the entry level fishery.

The uncertainty of entry level allocations to processors could be resolved by the Council specifying those allocations. Using the information presented here (or information from future Council requests) the Council could choose an appropriate percentage allocation to processors eligible under the entry level provision. The most straightforward approach would be to simply make the allocation that would be equal to all eligible entry level processors. Such an allocation would avoid any uncertainty (and potential inequity) that might arise under a computed allocation (including any effect of the outcome of the potential enforcement action concerning harvests from the entry level fishery). Specifying an allocation for each eligible entry level processor would also

provide each processor with a certain allocation that would not be dependent on (or affected by) the number of processors receiving entry level eligibility.

In developing an allocation, the Council should consider the allocations to processors that have general eligibility under the program, who have longer participation and greater historical dependence on the fishery, and the potential for a processor to increase its market share under the program structure adopted. Alternatives that provide a processor with greater entry opportunities and the ability to compete for landings might merit less of an allocation to pilot program entry level processors.

Reallocation of halibut PSC to non-rockfish fisheries

In the rockfish pilot program, unused portions of the halibut PSC allocated to rockfish cooperatives are reallocated to the last seasonal apportionment. This reallocation is not included in the Council's motion, but could be considered, if the Council wishes this practice to continue. The following provision could be incorporated into the motion for this purpose:

Any allocation of halibut PSC that has not been utilized by November 15 or after the declaration to terminate fishing will be added to the last seasonal apportionment for trawl gear during the current fishing year.

In the first two years of the program, 128 metric tons (2007) and 135 metric tons (2008) of halibut PSC were reallocated under the pilot program provision. This reallocation was possible because annual halibut catch and mortality in the CGOA rockfish fishery declined under the pilot program (see Table 16). In the years leading up to the pilot program, vessels in the rockfish fishery averaged in excess of 20 pounds of halibut mortality for each metric ton of primary rockfish species harvested. In the first two years of the program, vessels fishing in cooperatives and the limited access fishery under the program cut halibut mortality rates substantially. Vessels in the catcher processor limited access fishery reduced their catch to approximately 13 pounds of halibut per ton of primary rockfish catch in 2007, while in 2008 the halibut mortality rate was 16.5 pounds per ton of primary rockfish catch.⁸ The single vessel fishing in a catcher processor cooperative in 2007 reduced its halibut mortality to less than 9 pounds of halibut per metric ton of primary rockfish catch, while the two participating vessels in 2008 had a halibut mortality of 10.5 percent. The catcher vessel sector reduced its halibut mortality to slightly more than 4 pounds of halibut per ton of primary rockfish species catch in 2007, while the halibut mortality in 2008 for this sector was roughly 8 pounds per metric ton of primary rockfish.⁹

⁸ In assessing the change in catch rate in the catcher processor limited fishery access, it should be borne in mind that (although not fishing as a cooperative) the vessels fishing in that fishery did not compete for the allocations of pelagic shelf rockfish, reducing the pressure to race for fish.

⁹ These calculations include all halibut mortality of vessels fishing allocations under the program, including mortality in trips targeting Pacific cod and sablefish.

Table 16. Halibut mortality of vessels in the Central Gulf rockfish pilot program (2007 and 2008)

Year	Fishery	Vessels	Halibut PSC mortality (pounds)**	Catch of primary rockfish (tons)	Pounds of halibut PSC mortality per ton of primary rockfish catch	Allocation including transfer of halibut PSC mortality (pounds)	Unused allocation (pounds)
2007	Catcher processor limited access	3	26,312.8	2,063.3	12.8	NA	NA
	Catcher processor cooperative*	1	16,623.3	1,933.1	8.6	77,760.7	61,137.3
	Catcher vessel cooperative	25	32,710.1	7,746.0	4.2	309,816.8	277,106.7
	Total	29	75,646.3	11,742.4	6.4	387,577***	338,244+
2008	Catcher processor limited access	4	47,624.4	2,892.1	16.5	NA	NA
	Catcher processor cooperative*	2	19,332.0	1,836.4	10.5	44,092.0	24,760.0
	Catcher vessel cooperative	23	60,622.0	7,446.7	8.1	331,906.9	271,284.9
	Total	29	127,578.4	12,175.2	10.5	375,998.9***	296,044.9+

Source: NMFS Catch Accounting Data

*Data are not confidential because of disclosure in cooperative reports.

** Includes all halibut mortality under the primary program (i.e., excludes entry level fishery).

*** Includes allocation to catcher processor cooperative that did not fish. No allocation is made to the limited access fishery.

+ Includes all allocations and only catches by vessels subject to those allocations.

The drastic reduction in halibut mortality (particularly in the catcher vessel sector) likely arises from several factors. First, vessels have exclusive allocations, allowing them to move from areas of high halibut catch without risking loss of catch of the primary rockfish. Second, exclusive allocations also increase the incentive for participants to communicate with each other concerning catch rates, improving information concerning areas of high halibut incidental catch in the fleet, and preventing repeated high halibut mortality among vessels exploring fishing grounds. Third, several vessels have begun employing new pelagic gear that limits bottom contact and halibut incidental catch. These gear changes are apparent when comparing the percentage of catch using pelagic trawl gear and non-pelagic gear in the first two years of the program with catch by those gear types in the preceding years (see Table 17). In the second year of the program over 40 percent of primary rockfish catch was with pelagic trawl, in comparison to less than 25 percent in 2006 and 6 percent or less in the preceding years. In the second year of the program, nearly 85 percent of the catcher vessel fleet used pelagic gear for some of its catch, in comparison to slightly more than half of that fleet in 2006 and less than 20 percent in the preceding years. In the catcher processor sector, two of the four active vessels used pelagic gear in the first year of the program, in comparison to no pelagic trawl gear prior to implementation of the program. Catch data by gear type cannot be revealed for the catcher processor sector because of confidentiality protections. Participants in the program report that a primary motivation for these changes in gear types is constraining halibut allocations, which could jeopardize cooperative catches in the event that halibut bycatch exceeds allocations.

Table 17. Catch by gear by sector in the Central Gulf of Alaska rockfish fishery (2003-2008)

Year	Catcher processors		Catcher vessels					
	Non-pelagic trawl	Pelagic trawl	Non-pelagic trawl			Pelagic trawl		
	Number of vessels	Number of vessels	Number of vessels	Catch of primary rockfish species (in metric tons)	Percentage of catch of primary rockfish species	Number of vessels	Catch of primary rockfish species (in metric tons)	Percentage of catch of primary rockfish species
2003	5	0	31	9,396.6	99.0	1	95.6	1.0
2004	6	0	28	7,875.0	100.0	0	0.0	0.0
2005	6	0	24	6,702.4	94.0	4	429.2	6.0
2006	4	0	23	5,153.2	76.4	13	1,590.0	23.6
2007	4	2	24	4,813.0	62.1	19	2,933.0	37.9
2008	6	1	26	4,230.2	56.8	22	3,216.5	43.2

Source: NMFS Catch Accounting.

The incentive for halibut mortality reductions is increased by the reallocation of saved halibut mortality to other fisheries late in the year, allowing the trawl sector as a whole (including vessels that did not qualify for the pilot program) to benefit from these halibut mortality reductions. In both years of the program, the reallocation of halibut PSC from the rockfish pilot program to the

GOA trawl fisheries allowed the trawl GOA groundfish fisheries to remain open until December 31. In the five years previous to implementation of the rockfish pilot program, the trawl GOA groundfish fisheries were closed to directed fishing prior to the end of the season so as not to exceed the halibut PSC limit (see Figure 13). In two of those years, 2004 and 2005, the trawl GOA groundfish fishery was closed to direct fishing on October 1.

Figure 13. Season duration of the trawl Central Gulf of Alaska groundfish fisheries from October 1 to December 31, 2000 to 2008

Year	October				November				December				
	Week 1	Week 2	Week 3	Week 4	Week 5	Week 6	Week 7	Week 8	Week 9	Week 10	Week 11	Week 12	Week 13
2000	[Shaded]												
2001	[Shaded]												
2002	[Shaded]												
2003	[Shaded]												
2004	[Shaded]												
2005	[Shaded]												
2006	[Shaded]												
2007	[Shaded]												
2008	[Shaded]												

Source: NOAA Fisheries status reports and groundfish closure summaries

Catch of groundfish late in the year has fluctuated both before and after implementation of the rockfish pilot program. Table 18 below shows vessel count, total catch, and halibut PSC by target for trawl vessels during the October 1 to December 31 period from 2000 to 2008. As seen in the table, in the two years preceding the program, no harvest of groundfish occurred, as all fisheries were closed because no halibut PSC was available. In earlier years, halibut PSC was primarily used in the shallow-water flatfish, Pacific cod, and arrowtooth flounder fisheries. Smaller amounts of halibut PSC were used in the rex sole and flathead sole fisheries. In years since the rockfish pilot program, halibut PSC was primarily used in the shallow-water flatfish fishery, while a smaller amount of halibut PSC was used in the Pacific cod and arrowtooth flounder fisheries. The rollover, 128 metric tons in 2007 and 135 metric tons in 2008, has clearly supported additional fishing activity, but the degree of the change is uncertain and appears to depend on target preferences, which have varied year-to-year.

Table 18. Vessel count, total catch, and halibut PSC by target for trawl vessels in central and western GOA during the 5th season (Oct 1 – Dec 31) from 2000 - 2008

Species Complex	Target	2000	2001	2002	2003	2004	2005	2006	2007	2008	
Shallow-water	Shallow-water flatfish	Vessel Count	16	9	26	2	0	0	7	7	7
		Target catch	1,711	183	3,518	*	0	0	1,776	3,204	5,773
		Halibut PSC	82	9	213	*	0	0	210	208	238
	Pacific cod	Vessel Count	1	53	9	3	0	0	3	6	9
		Target catch	*	10,166	170	*	0	0	*	710	2,170
		Halibut PSC	*	437	6	*	0	0	*	15	56
	Flathead sole	Vessel Count	2	4	2	2	0	0	1	0	2
		Target catch	*	194	*	*	0	0	0	0	*
		Halibut PSC	*	4	*	*	0	0	0	0	*
Deep-water	Rex sole	Vessel Count	4	1	2	1	0	0	1	1	0
		Target catch	1,353	*	*	*	0	0	*	*	0
		Halibut PSC	38	*	*	*	0	0	*	*	0
	Arrowtooth	Vessel Count	2	1	8	13	0	0	7	6	8
		Target catch	*	*	2,702	6,700	0	0	2,095	1,808	2,025
		Halibut PSC	*	*	70	186	0	0	122	38	45
	Deep-water flatfish	Vessel Count	2	0	0	0	0	0	0	0	0
		Target catch	*	0	0	0	0	0	0	0	0
		Halibut PSC	*	0	0	0	0	0	0	0	0
	Rockfish	Vessel Count	0	0	0	1	0	0	3	7	5
		Target catch	0	0	0	*	0	0	*	973	1,392
		Halibut PSC	0	0	0	*	0	0	*	9	23
Days open during 5th season**		92	20	16	14	0	0	7	82	82	

Source: Target catch was from Blend data/Catch Accounting, while halibut PSC was from NMFS PSC data

* Withheld for confidentiality

** All closures during the 5th season were to prevent exceeding halibut PSC limit

Pacific cod and Sablefish Management

Currently in the pilot program, the catcher vessel sector receives allocations of Pacific cod and sablefish; the catcher processor sector receives an allocation of sablefish, while its Pacific cod catch is managed under a reduced MRA of 4 percent. The sector allocations of Pacific cod and sablefish are based on the average annual percentage of total CGOA retained catch in the rockfish fishery during the qualifying years.

At the June 2009 Council meeting, the Council adopted for consideration, the following two options that would modify management of Pacific cod and sablefish catches in the program:

Option 1: No directed fishing for secondary species Pacific cod and sablefish.

Option 2: Manage Pacific cod and sablefish under a modified MRA.

A prohibition on directed fishing is likely to decrease the value of any sablefish and Pacific cod harvested from the rockfish fishery. One of the benefits of exclusive allocations is that participants are able to pattern their fishing to receive the greatest benefit from these allocations. As a result, several times in the first two years of the program, catcher vessels took trips targeting Pacific cod and sablefish (see Table 19). By limiting their catch of rockfish in these trips, harvesters are able to both reduce costs of traveling to the different grounds and increase quality of catch and sorting costs needed to limiting the extent of mixing of Pacific cod and sablefish with rockfish, the spines of which can damage more fragile fish. Over 75 percent of the Pacific cod and over 50 of the sablefish caught during non-rockfish target trips, during these non-rockfish target trips few primary rockfish were harvested.¹⁰ Although the catch of sablefish and Pacific cod in this manner may be viewed by some as beyond the scope of the rockfish fishery, harvests

¹⁰ Some primary rockfish are harvested during these trips that are non-rockfish targets, as MRAs for shortraker and rougheye rockfish use only catch of primary rockfish as the basis for determining the MRA poundage.

of these species have remained at, or below, their historic levels in the rockfish fishery. In addition, these practices bring additional value to catch. It is unclear whether any benefit could come from a prohibition on targeting Pacific cod and sablefish in the absence of other changes.

Table 19. Catcher vessel trips and catch by trip target (2007 and 2008).

Target	Vessels with at least one trip in the target		Total trips in the target		Species caught in the target	Catch (in metric tons)		Percent of total catch of the species	
	2007	2008	2007	2008		2007	2008	2007	2008
Pacific cod	10	12	11	13	Pacific Ocean Perch	5.2	13.2	0.1	0.3
					Northern Rockfish	0.9	2.2	0.0	0.2
					Pelagic Shelf Rockfish	0.4	13.5	0.0	0.8
					Pacific Cod	207.1	429.9	74.7	75.7
					Sablefish	30.5	53.6	6.6	13.5
Rockfish	25	26	130	112	Pacific Ocean Perch	4,145.3	4,477.5	99.5	99.4
					Northern Rockfish	2,000.1	1,343.7	100.0	99.7
					Pelagic Shelf Rockfish	1,577.0	1,578.1	99.9	98.9
					Pacific Cod	54.5	137.3	19.6	24.2
					Sablefish	205.7	128.2	44.2	32.4
Sablefish	14	13	16	17	Pacific Ocean Perch	16.1	12.9	0.4	0.3
					Northern Rockfish	0.0	1.8	0.0	0.1
					Pelagic Shelf Rockfish	0.9	3.6	0.1	0.2
					Pacific Cod	15.7	0.7	5.7	0.1
					Sablefish	229.1	214.3	49.2	54.1

Source: NMFS Catch Accounting Data.

In addition to a possible prohibition on targeting Pacific cod and sablefish by vessels fishing rockfish program allocations, the Council included an option to manage these secondary species under a modified MRA (which in addition to affecting the manner and amount of harvests would also operate as an effective prohibition on targeting). Under MRA management, rockfish vessels exceeding the MRA at any point in a trip would be required to discard catches above the MRA. While MRA would limit directed fishing for these species, MRA management may have some undesirable effects. MRAs can contribute to discards. As currently applied in the Gulf, an MRA requires discards of each that exceed the prescribed level at any time. So, a vessel that catches an unexpected amount of an MRA species early in a trip may be forced to discard, even if the catch would be retainable at a later time in the trip. For valuable species, an MRA may induce a vessel to catch up to the maximum amount, knowing that overharvest of the MRA by be discarded without risk of penalty. These added discards are avoided under species allocations, since all catch counts against the allocation.

MRAs can also contribute to excessive harvests of a species. Since an MRA limits only retention, requiring vessels to discard above the retainable amount, they do not limit harvest of a species. For species of value that are fully utilized, establishing an MRA in a fishery prosecuted with exclusive allocations and an extended season could increase harvests relative to MRA harvests in a limited access race for fish. Persons able to harvest the MRA in conjunction with exclusive allocations may be under less time pressure to harvest the MRA species than persons fishing in a limited access race for fish, where harvest of the basis species could be constrained.

As written, the option does not include a modified MRA level. Under the LLP, the MRA for Pacific cod was 20 percent in rockfish fisheries, while the MRA for sablefish was 7 percent. The catcher processor sector and the catcher vessel limited access fishery operate under a reduced MRA of 4 percent for Pacific cod and both sectors' limited access fisheries operate under a reduced MRA of 3 percent for sablefish. Table 20 provides catch rates of Pacific cod and sablefish relative to the primary rockfish allocations for the catcher vessel and catcher processor

sectors. These rates show catches of Pacific cod and sablefish relative to the cooperative rockfish allocations; or the effective retention rates of Pacific cod and sablefish relative to rockfish allocations, which would be considered basis species under an MRA.¹¹ In the catcher vessel sector, Pacific cod catches have been substantially below the historic MRA (of 20 percent) and are below Pacific cod catch rates observed in the qualifying years (which averaged between 8.6 percent and 10.7 percent of rockfish catch). Sablefish catch rates under the program also appear to be slightly lower than qualifying year rates, which averaged between 5.5 percent and 6.2 percent of rockfish catches (see Table 21).

Table 20. Cooperative Catch and catch rate of Pacific cod and sablefish relative to primary rockfish allocations in the CGOA rockfish fisheries (2007 and 2008)

Year	Sector	Species	Catch* (in metric tons)	Allocation of primary rockfish**	Catch rate of secondary species relative to rockfish allocations including transfers
2007	Catcher vessel	Pacific Cod	271.9	8,436.4	3.2
	Catcher vessel	Sablefish	453.8		5.4
	Catcher processor	Sablefish	78.2	2,125.0	3.7
2008	Catcher vessel	Pacific Cod	568.0	8,192.5	6.9
	Catcher vessel	Sablefish	396.1		4.8
	Catcher processor	Sablefish	66.7	1,986.0	3.4

Source: NMFS Catch Accounting data

* Catch and allocation amounts for the catcher processors sector does not include catch or allocation amounts from the limited access fishery.

** Allocations for the catcher vessels include transfers, while allocations for catcher processors exclude transfers.

Table 21. Retained catch and current retainable percentages for vessels targeting Central Gulf of Alaska rockfish for three qualifying periods

Qualifying Years	Sector	Target rockfish catch (metric tons)	Pacific cod				Shortraker/rougheye			
			Catch (metric tons)	Percent of target rockfish	Retainable percentage	Maximum retainable amount	Catch (metric tons)	Percent of target rockfish	Retainable percentage	Maximum retainable amount
1996-2002	CV	41,063.9	4,401.4	10.7	20.0	8,212.8	261.3	0.6	15.0	6,159.6
	CP	40,653.0	617.5	1.5	20.0	8,130.6	2,573.9	6.3	15.0	6,098.0
	Total	81,717.0	5,018.8	6.1	20.0	16,343.4	2,835.2	3.5	15.0	12,257.5
1998-2006	CV	66,882.1	8,157.0	10.0	20.0	13,376.4	305.1	0.4	15.0	10,032.3
	CP	51,334.7	982.3	1.2	20.0	10,266.9	2,573.6	3.1	15.0	7,700.2
	Total	118,216.7	9,139.3	11.2	20.0	23,643.3	2,878.7	3.5	15.0	17,732.5
2000-2006	CV	55,847.7	7,022.4	8.6	20.0	11,169.5	246.3	0.3	15.0	8,377.2
	CP	36,733.4	584.6	0.7	20.0	7,346.7	1,882.9	2.3	15.0	5,510.0
	Total	92,581.1	7,607.0	9.3	20.0	18,516.2	2,129.2	2.6	15.0	13,887.2

Qualifying Years	Sector	Thornyhead				Sablefish			
		Catch (metric tons)	Percent of target rockfish	Retainable percentage	Maximum retainable amount	Catch (metric tons)	Percent of target rockfish	Retainable percentage	Maximum retainable amount
1996-2002	CV	333.7	0.8	15.0	6,159.6	2,528.3	6.2	7.0	2,874.5
	CP	641.4	1.6	15.0	6,098.0	1,924.1	4.7	7.0	2,845.7
	Total	975.1	1.2	15.0	12,257.5	4,452.4	5.4	7.0	5,720.2
1998-2006	CV	396.4	0.6	15.0	10,032.3	3,680.3	5.5	7.0	4,681.7
	CP	1,128.8	2.2	15.0	7,700.2	2,231.2	4.3	7.0	3,593.4
	Total	1,525.2	1.3	15.0	17,732.5	5,911.5	5.0	7.0	8,275.2
2000-2006	CV	280.9	0.5	15.0	8,377.2	3,065.9	5.5	7.0	3,909.3
	CP	953.7	2.6	15.0	5,510.0	1,575.1	4.3	7.0	2,571.3
	Total	1,234.6	1.3	15.0	13,887.2	4,641.0	5.0	7.0	6,480.7

Source: CP data from WPR and CV data from ADF&G Fish Tickets

If the Council elects to use a modified MRA, it should consider several factors, beginning with its purpose for reverting to MRA management. A reduced MRA may be used to constrain targeting (or intentional incidental catch). The extent to which pilot program participants have used allocations to target Pacific cod and sablefish (rather than to support incidental catches) suggests

¹¹ Catch and allocation amounts for the catcher processors sector does not include catch or allocation amounts from the limited access fishery.

that those species could be avoided, if the Council adopts management measures to create an incentive for avoidance. This reduced MRA would benefit other fisheries that harvest Pacific cod and sablefish, shifting catches from the rockfish fishery to other target fisheries, but could be argued to be unfair to participants in the rockfish fishery who have a long history of reliance on Pacific cod and sablefish catches to support their rockfish operations. Given the high value of Pacific cod and sablefish (relative to rockfish), a substantial reduction in permitted retention of Pacific cod and sablefish would have a notable effect on the economics of the rockfish fishery.

In the current rockfish program, discards of allocated species are prohibited. Consequently, no discards of Pacific cod or sablefish by catcher vessels or sablefish by catcher processors are permitted. Under MRA management, discards of these species would be permitted and may be required, if the MRA is exceeded. This discard requirement applies at all times, so a vessel could be required to discard Pacific cod or sablefish, if a tow early in a trip yields a disproportionate amount of those species, regardless of whether the vessel has substantial basis species catches later in the trip.¹² The potential of an MRA to contribute to discards, together with the increase in sorting costs to prevent mixing of Pacific cod and sablefish with rockfish in the hold, suggest that changing to MRA management or a prohibition on targeting may not be the best way to constrain harvests of Pacific cod and sablefish by the rockfish fishery.

¹² If the Council elects to develop MRA management of these species, it could consider a provision that would apply an MRA only at the end of a trip (or week, in the case of catcher processors). Such an approach might be more suitable to an allocated fishery, in which the availability of basis catches to support MRA retention is more certain than in a limited access derby.

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Global Seafoods North America

North Pacific Fisheries Management Council
194th Plenary Session — For the Record by Fax to 907-271-2817
October 3 – 9, 2009 Anchorage, Alaska
From: Global Seafoods North America (GSNA)

re C2 GOA Rockfish Pilot Program

GSNA is a U.S. owned company that operates a small processing facility in Kodiak, and we would like the NPFMC and NOAA Fisheries to discontinue the RPP and return to status quo. We consider the RPP an ongoing restraint on trade that has protected a few large competitors at the expense of over \$2 million in lost contribution to our firm and employees.

We have provided you before with the evidence of the fleet boycott principle. Enacting this restraint was a collusive predetermined goal of the Alaska Groundfish Data Bank, Alaska Draggers, and the largest shoreside processors in Kodiak. These are the same parties who lobbied an extension of the RPP into law, unfairly, through the Pombo Amendment to the Magnuson-Stevens and Sustainable Fisheries Acts. These parties continue to meet in secret and have undue influence over the outline of the entire RPP amendment package to the exclusion of competitors.

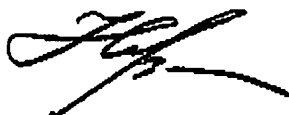
The allocation of prohibited species catch and other non-target fish has caused fleet behavior that in turn serves to further harm GSNA and its prospects for participation as a buyer, as well as precludes us from a business model that adequately recovers fixed overhead by having full access to a multi-species fishery. We do not believe that the RPP has been a successful demonstration program, unless you are one of the co-conspirators, but that it is strictly a pathway to further dominant firm market powers through GOA Rationalization (privatization for the few). Added to the advantages large shoreside processors already gained in pollock and crab privatizations, RPP serves as a final death knell to all other competition.

Again, the RPP protects select competitors at the expense of competition itself, excluding GSNA from future growth as well as current participation. The RPP's cooperative system linked to major processors should be reviewed by the Justice Antitrust Division as a *de facto* antitrust violation and means of price-fixing. As you know, the Council and NOAA Fisheries are required by law to make available to Justice Antitrust and the Federal Trade Commission the information needed to evaluate the antitrust and restraint of trade effects of the RPP. Such a report and anticompetitive review must take place before any further action by the council extending or modifying the RPP, except for a default (or immediate) return to status quo (Alternative 1) whereby open competition would be restored.

We too would like a complete halt of all agenda action on the RPP until it is clear that both the Council has the authority and Congressional intent allows this or any similar program. The plenary powers granted by rationalization schemes primarily to the largest competitors unfairly distributes the opportunities in USA fisheries, largely to foreign-owned entities who dominate the Kodiak processing sector.

Sincerely,

GLOBAL SEAFOODS NORTH AMERICA, LLC

A handwritten signature in black ink, appearing to read 'Oleg Nikitenko', with a stylized flourish at the end.

Oleg Nikitenko- President and Owner

September 28, 2009

Eric Olson, Chair
North Pacific Fishery Management Council
605 W. Fourth Ave.
Anchorage, AK 99501

RE: Agenda Item C-2 GOA Rockfish Program

Dear Chairman Olson,

My name is Leonard Carpenter and together with my wife Anita and family we own and operate a 36' foot fishing vessel. We longline and jig P. Cod in the federal/parallel and State fisheries, and also fish for rockfish and crab.

Entry level alternative 2- Fixed gear

The RPP has worked fairly well for the fixed gear sector. Under the RPP we have guaranteed access to a year-round rockfish fishery, although the number of participants has remained low. The low participation may be due to several factors, such as low ex-vessel prices, inexperience within the fleet, (as this is essentially a developing jig fishery), and most importantly, confusing and complicated regulations due to the delivery restrictions. We support the entry level alternative 2 as the preferred alternative, and feel increased participation would occur if some slight modifications could be made to ease the delivery restrictions in the current program.

As markets and processing capacity cannot always be guaranteed by the entry level processors, we ask that the Council remove all delivery restrictions on the entry level fixed gear sector. The current requirement of delivery to a entry level processor is burdensome, and requires that a vessel surrenders their LLP and FFP, and only fish in parallel waters (inside three miles), in order to deliver to qualified processors. Often this is the only market available, so participants need the flexibility to deliver to any market without surrendering their LLP or FFP.

Entry level alternative 3 - Entry level fixed gear only fishery

In light of the fact that the entry level trawl, open access trawl and trawl catcher vessels with harvest shares have failed to fully harvest their own allocations of pelagic rockfish in any given year of the RPP makes us question why any reductions in the fixed gear allocation is justified. The total harvest of pelagic rockfish for all gear types under the RPP has been 71% for 2007, and 75% for 2008. Therefore we ask the Council to leave the allocations set under the RPP intact.

If the Council is impelled to adjust the fixed gear allocation, we feel that the set-aside of 10- 30 metric tons for pelagic rockfish is too low, and ask that Council increase the starting entry level set aside to minimum of at least 50 metric tons, with a stair step provision to increase the allocation to the 2.5% cap under the RPP.

Again, we ask that the Council remove all delivery restrictions imposed on the entry level fixed gear sector in an effort to foster increased participation in this fishery.

Thank you for your consideration.

Sincerely,

Leonard and Anita Carpenter
F/V Fish Tale
fishtalerutz@yahoo.com



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

September 30, 2009

MEMORANDUM FOR: North Pacific Fishery Management Council
Eric Olson, Chair
Chris Oliver, Executive Director

FROM: Lisa L. Lindeman, Regional Counsel
NOAA General Counsel, Alaska Region

SUBJECT: Council's Authority to Develop Management Measures
For the Central Gulf of Alaska Rockfish Fishery

STATEMENT OF THE ISSUES

The North Pacific Fishery Management Council (Council) requested the preparation of a Legal Memorandum examining whether it has the authority to proceed with certain alternatives to develop a program to manage the Central Gulf of Alaska rockfish fishery upon the expiration of the Gulf of Alaska Rockfish Demonstration Program (Rockfish Program), as outlined in a letter from the Council's Executive Director to Lisa L. Lindeman, NOAA's Alaska Regional Counsel, dated July 2, 2009 (Attachment 1). The Council also requested answers to several subsidiary questions.

SHORT ANSWERS

1. Does the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA), authorize requiring a harvester to deliver his or her catch to a specific shore-based processor (i.e., "fixed linkages" between harvesters and shore-based processors)?

No. Requiring fixed linkages between harvesters and shore-based processors is similar to issuing processor quota, which is not authorized by the Magnuson-Stevens Act except for the Crab Rationalization Program.

2. Does the Magnuson-Stevens Act authorize allocation of harvesting privileges to shore-based processors? If so, does the Magnuson-Stevens Act authorize specifying that such harvest privileges cannot be used on vessels affiliated with the shore-based processor?



Yes and yes. Harvesting privileges can be issued to shore-based processors if other requirements of the Magnuson-Stevens Act are met. Also, the Magnuson-Stevens Act does not prevent specifying that harvest privileges issued to a shore-based processor must be used on vessels not affiliated with that shore-based processor if the record supports that such a requirement is necessary to achieve a legitimate objective and complies with national standard 5.

3. Does the Magnuson-Stevens Act authorize forfeiture of harvesting privileges for recipients who choose not to join cooperatives with specific shore-based processor linkages?

No. The Magnuson-Stevens Act does not authorize specific shore-based processor linkages; therefore, there is no authority to require a recipient to forfeit privileges for choosing not to participate in an activity that is not authorized. However, requiring forfeiture of harvesting privileges (or a portion thereof) for choosing not to participate in an authorized activity is allowed if the record supports that such a requirement is necessary to achieve a legitimate objective.

4. Does the Magnuson-Stevens Act authorize the Council to establish an exclusive class of shore-based processors that would be the recipients of all, or a specific portion of all, landings from a fishery? Would the transferability of the exclusive privilege of receiving landings affect that authority, if it exists?

The answers are dependent on the purpose of the action and the record developed by the Council. The Magnuson-Stevens Act does not authorize placing a limit on the number of shore-based processing sites if the purpose is to allocate shore-based processing privileges. Transferability of those privileges would not change the conclusion that the Magnuson-Stevens Act does not authorize such an action. However, if the Council developed an adequate record demonstrating that an action, which had the practical effect of limiting the number of sites to which deliveries could be made, was necessary for legitimate management or conservation objectives (e.g., protection of processing sector employment or protection of fishing communities that depend on the fisheries) and not a disguised limited entry program, then there could be a legal basis for such an action.

BACKGROUND

The Rockfish Program, developed under the authority of the Magnuson-Stevens Act and section 802 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004 (CAA-2004), is scheduled to expire in 2011. The Rockfish Program has cooperatives that were modeled after American Fisheries Act (AFA) cooperatives, and

require harvesters that are members of a cooperative to land all their catch to a specific shore-based processor. According to a Memorandum from Lisa L. Lindeman, NOAA's Alaska Regional Counsel to the Council, dated February 3, 2005 (2005 Opinion) (Attachment 2), the "fixed linkage" between harvesters and shore-based processors, i.e., AFA-style cooperatives, was authorized by "section 802 and the legislative history" to section 802. The 2005 Opinion provides the legal basis for this conclusion (see Attachment 2). The Council is currently evaluating alternatives for a program to manage rockfish upon the expiration of the Rockfish Program. The Council must use the authority of the Magnuson-Stevens Act to develop the new program, as the authority of CAA-2004 will no longer be available to the Council after the expiration of the Rockfish Program in 2011. The Council provided in a letter to Lisa L. Lindeman, NOAA's Alaska Regional Counsel (Attachment 1) its current alternatives for a program to manage rockfish and several subsidiary questions in order to determine its authority in developing that program.

ANALYSIS FOR QUESTION 1

1. Does the Magnuson-Stevens Act, as amended by the MSRA, authorize requiring a harvester to deliver his or her catch to a specific shore-based processor ("fixed linkages" between harvesters and shore-based processors)?

Unlike the current Rockfish Program, the Council's proposals must depend exclusively on authority under the Magnuson-Stevens Act. According to a Memorandum from Lisa L. Lindeman, NOAA's Alaska Regional Counsel to the Council, dated September 20, 1993 (1993 Opinion) (Attachment 3), the Magnuson-Stevens Act does not authorize the Council or the Secretary of Commerce (Secretary) to allocate shore-based processing privileges. This conclusion was based on the Magnuson-Stevens Act's definition of fishing, which was found to not include shore-based processing. In the 1993 Opinion, the shore-based processing program being evaluated would have issued Individual Processing Quota (IPQ). Two important questions must be resolved before the conclusion of the 1993 Opinion can be considered relevant to the Council's current rockfish proposals. First, has Congress changed the Council's or Secretary's authority under the Magnuson-Stevens Act to allow the allocation of shore-based processing privileges? Second, would requiring a fixed linkage between harvesters and shore-based processors, as contemplated by the Council, be considered an allocation of a shore-based processing privilege?

Has Congress changed the Council's or the Secretary's authority under the Magnuson-Stevens Act to allow the allocation of shore-based processing privileges?

As recently as October 30, 2007, Eileen M. Cooney, NOAA's Northwest Regional Counsel, in a letter to the Chairman of the Pacific Fishery Management Council (2007 Letter) (Attachment 4),

stated that the Magnuson-Stevens Act did not authorize the allocation of shore-based processing privileges. This determination was made with full recognition of the recent reauthorization of the Magnuson-Stevens Act by MSRA in 2006. The letter relied on the 1993 Opinion and further provided that:

“The recent Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) does not change our 1993 legal analysis. While section 303A of the Magnuson-Stevens Act adds specific consideration of processors among other sectors or participants in several paragraphs, it does not make any modifications to the basis for NOAA’s 1993 opinion. Significantly, section 303A specifically establishes the requirements for a ‘limited access privilege program to *harvest* fish.’ 16 U.S.C. §1853a (emphasis added).”

Nothing has occurred since the 2007 Letter to change NOAA Office of the General Counsel’s opinion that the Magnuson-Stevens Act, with one exception¹, does not authorize the creation or allocation of shore-based processing privileges.

Would requiring a fixed linkage between harvesters and shore-based processors, as contemplated by the Council, be considered an allocation of a shore-based processing privilege?

The 2007 Letter looked at a proposal by the Pacific Fishery Management Council that is similar to the Council’s proposals for the Central Gulf of Alaska rockfish fishery. The Pacific Council’s proposal would have obligated catcher vessels that were members of shore-based cooperatives to deliver their catch to specific shore-based processors that were also members of the cooperative. The connection to the shore-based processor was based on landing history. This description of the Pacific Council’s proposal seems similar to the Council’s description for “fixed linkages” between harvesters and shore-based processors, including the landing history basis for the connection between catcher vessels and shore-based processors. In the Council’s proposal, the landing history of a catcher vessel would be the basis for the obligation to deliver to a specific shore-based processor.

The 2007 Letter describes the Pacific Council’s proposal in detail, including two provisions that are relevant to the issues being addressed by this opinion. One provision would allow, through

¹ Section 313(j) of the Magnuson-Stevens Act required the Secretary to implement “the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003.” That program included individual processing quota (IPQ). However, the same Congressional Act (CAA-2004) that amended the Magnuson-Stevens Act to include the above requirement also contained the following provision: “A Council or the Secretary may not consider or establish any program to allocate or issue an individual processing quota or processor share in any fishery of the United States other than the crab fisheries of the Bering Sea and Aleutian Islands.”

mutual consent of the shore-based processor and the catcher vessel, delivery to an entity other than the shore-based processor to which the catcher vessel was obligated. The other would allow a person to choose not to join the cooperative; however, the result would be fishing in a derby-style opening with all other participants who choose not to join a cooperative.

The conclusion of the 2007 Letter was that these two provisions did not change the status of the proposal as a shore-based processing privilege. Obligating a catcher vessel to deliver to a shore-based processor (i.e., a “fixed linkage” between a harvester and shore-based processor) had the effect of allocating a shore-based processing privilege. According to the 2007 Letter, the two provisions may have eliminated the unauthorized requirement in the particular circumstances described but it did not eliminate the effect of allocating a shore-based processing privilege, an activity that was found not to be authorized by the Magnuson-Stevens Act.

Another key point in the 2007 Letter is that when Congress intended to authorize the allocation of shore-based processor privileges in a fishery management program, Congress enacted specific legislation to authorize that allocation. This included the Rockfish Program,² the very program the Council is planning to replace with this action, and other programs specifically authorized by statute (e.g., AFA Pollock Cooperatives and Bering Sea Crab Rationalization Program).³

CONCLUSION FOR QUESTION 1

Based on the answers to the two questions above, the conclusion of the 1993 Opinion is relevant to the Council’s proposals. The Magnuson-Stevens Act does not authorize requiring a harvester to deliver his or her catch to a specific shore-based processor (i.e., “fixed linkages” between harvesters and shore-based processors).

ANALYSIS TO QUESTION 2

2. Does the Magnuson-Stevens Act authorize allocation of harvesting privileges to shore-based processors? If so, does the Magnuson-Stevens Act authorize specifying that such harvest privileges cannot be used on vessels affiliated with the shore-based processor?

The 1993 Opinion provides a step-by-step analysis for why the Magnuson-Stevens Act authorizes fishing (i.e., harvest) privileges but not shore-based processing privileges (see Attachment 3). The 1993 Opinion also indicates that harvest privileges can be issued to persons other than harvesters if such allocations are consistent with national standard 4 and other

² The current Rockfish Program is set to expire, by statute, in 2011.

³ The CAA-2004 authorized the Crab Rationalization’s Individual Processing Quota and the Rockfish Program’s “AFA-style” cooperatives with “fixed linkages.” The AFA authorized Cooperatives with “fixed linkages.”

applicable law. In 2005, the Pacific Fishery Management Council asked NOAA's Northwest Regional Counsel what legal issues or constraints were posed by allowing IFQ (harvest privileges) to be issued to, or held by, fish processors. In a letter dated June 10, 2005 (2005 Letter) (Attachment 5), Eileen M. Cooney, NOAA's Northwest Regional Counsel responded that "[t]he Council has considerable leeway in making the decision about who may be issued or hold IFQ [or harvest privileges]; processors as well as other groups or persons could be issued or hold IFQs [or harvest privileges]." The 2005 Letter goes on to say that any such action must be consistent with national standard 4, other applicable provisions, and "must have a record developed to support it."

The Magnuson-Stevens Act, as reauthorized by the MSRA in 2006, still supports the position of the 1993 Opinion and the 2005 Letter. The specific limits on who may be initially issued limited access privileges to harvest fish are in section 303A(c)(1)(D), which limits eligibility to United States citizens, corporations, partnerships, or other entities established under the laws of the United States or any State, and permanent resident aliens, and in section 303A(c)(4)(A)(v), which provides that Regional Fishery Associations (RFAs) are not "eligible to receive an initial allocation of a limited access privilege but may acquire such privileges after initial allocation."

Therefore, the Magnuson-Stevens Act authorizes the allocation of harvest privileges to shore-based processors if other requirements of the Act are met, e.g., eligibility requirements for limited access privileges found at sec. 303A(c)(1)(D), allocation requirements of national standard 4 found at sec. 301(a)(4), allocation requirements for limited access privilege programs found at sec. 303A(c)(5), and other applicable provisions. The record developed by the Council and the Secretary must support the allocation and demonstrate compliance with these requirements.

Furthermore, the Magnuson-Stevens Act provides discretion in developing authorized programs if the record demonstrates that a legitimate management or conservation objective is served by the requirements included in an authorized program. According to the 2005 Opinion, the Council and Secretary can include a requirement in a program if they articulate a rational reason why that requirement is necessary to meet a legitimate management or conservation objective and all other requirements of the Magnuson-Stevens Act are met. Therefore, if the Council adequately explains in the record a legitimate management or conservation objective for requiring that harvest privileges issued to shore-based processors be used only on vessels that are not affiliated with the shore-based processor, and takes into consideration that national standard 5 prohibits management measures that "have economic allocation as its sole purpose," then such a requirement could be included in the program.

CONCLUSION FOR QUESTION 2

The Magnuson-Stevens Act authorizes issuing harvesting privileges to shore-based processors if other requirements of the Act and other applicable laws are met. Also, the Magnuson-Stevens Act does not prevent specifying that harvest privileges issued to a shore-based processor must be used on vessels not affiliated with that shore-based processor if the record adequately explains that such a requirement is necessary to achieve a legitimate objective.

ANALYSIS FOR QUESTION 3

3. Does the Magnuson-Stevens Act authorize forfeiture of harvesting privileges for recipients who choose not to join cooperatives with specific processor linkages?

As explained in ANALYSIS FOR QUESTION 2, the Council has the authority to include requirements in a program if they articulate a rational reason why the requirements are necessary to meet a legitimate management or conservation objective. However, when the Council does not have the authority to take an action, requiring persons to conform to an activity that is not authorized could not be considered necessary to meet a legitimate management or conservation objective. Therefore, based on the conclusion that the Magnuson-Stevens Act does not authorize “fixed linkages” between harvesters and shore-based processors (see ANALYSIS FOR QUESTION 1 above), it follows that the Magnuson-Stevens Act does not authorize the Council to penalize a person for not engaging in an activity that is not authorized.

The above conclusion is consistent with the 2005 Opinion (see Attachment 2). In 2005, the Council asked whether it had the authority to reduce the limited access rockfish allocations to eligible applicants who chose not to join cooperatives. The 2005 Opinion concluded that if the Council chose to reduce the allocation for those participants that decided not to join a cooperative, the Council would need to articulate a rational reason why that determination was consistent with the requirements of the Magnuson-Stevens Act, including national standard 4. However, the 2005 Opinion was responding to a question where the combined authorities of the Magnuson-Stevens Act and CAA-2004 formed the legal basis for the use of “AFA-style cooperatives” for the Rockfish Program. This allowed “fixed linkages” between harvesters and processors that are not allowed under the authority of the Magnuson-Stevens Act alone. The reauthorization of the Magnuson-Stevens Act did not change that conclusion. The Council, in determining what harvest allocations are issued to eligible applicants, has the discretion to modify those allocations to meet management and conservation objectives if it considers the relevant criteria outlined in section 303A(c)(5), it articulates a rational reason why the determination is fair and equitable to all eligible applicants and reasonably calculated to promote conservation, and, most importantly, it has the statutory authority to take the action. The

Council's current statutory authority distinguishes the present circumstances from the circumstances the Council faced in 2005 where it was relying on the combined authorities of the Magnuson-Stevens Act and CAA-2004.

CONCLUSION FOR QUESTION 3

The Council cannot require forfeiture of harvest privileges for not joining cooperatives with specific shore-based processor linkages in the present circumstances because the Council does not have the authority under the Magnuson-Stevens Act to establish cooperatives with specific shore-based processor linkages.

ANALYSIS FOR QUESTION 4

4. Does the Magnuson-Stevens Act authorize the Council to establish an exclusive class of shore-based processors that would be the recipients of all, or a specific portion of all, landings from a fishery? Would the transferability of the exclusive privilege of receiving landings affect that authority, if it exists?

This question, like Question 2, is similar to a question asked by the Pacific Fishery Management Council in 2005. In a letter to the Chairman of the Pacific Fishery Management Council dated June 10, 2005 (2005 Letter) (Attachment 5), Eileen M. Cooney, NOAA's Northwest Regional Counsel opined that "under the [Magnuson-Stevens Act], no program that amounts to an allocation of shore-based processing privileges can be implemented (except for one recent exception for specific Alaska fisheries)." The program referenced as the exception is the Crab Rationalization Program, which is a program that has specific and exclusive authorization for Individual Processing Quotas (IPQs). The 2005 Letter also stated:

"In general, a limit could not be placed on the number of processing sites if the purpose were to allocate shoreside [shore-based] processing privileges. However, the licensing or permitting of processor sites could be allowed for enforcement or monitoring purposes, as long as the requirements were necessary for conservation and management of the fishery and not a disguised limited entry program. Incidental allocation consequences could be permissible depending on the record. Provisions that have the practical effect of limiting the number of ports or sites to which deliveries could be made could be defensible if the record is clear that they are designed for biological, conservation or management purposes."

The Magnuson-Stevens Act, as amended by MSRA, provides that "[i]n developing a limited access privilege program to harvest fish a Council or the Secretary shall consider the basic cultural and social framework of the fishery, especially through the development of policies to

promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend of the fisheries, including regional or port-specific landing or delivery requirements.” Sec. 303A(c)(5)(B)(i). It also provides that when such a limited access privilege program is developed, procedures should be established to ensure fair and equitable initial allocations through consideration of “employment in the harvesting and processing sectors [and] the current and historical participation of fishing communities.” Sec. 303A(c)(5)(A)(ii) and (iv).

The above cited provisions of the Magnuson-Stevens Act, added by the MSRA, indicate that the advice provided in the 2005 Letter is still sound. If the Council or the Secretary provides adequate justification in the record of a legitimate objective for limiting the number of sites to which deliveries can be made, and the other criteria found in sec. 303A(c)(5) are considered, then provisions that have the practical effect of limiting the number of sites to which deliveries can be made could be defensible. Port specific and regional specific landing or delivery requirements are explicitly contemplated in the language of the Magnuson-Stevens Act as a way “to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on fisheries.” Sec. 303A(c)(5)(B)(i). However, site specific landing or delivery requirements are not mentioned in the Magnuson-Stevens Act. This alone does not necessarily preclude site specific landing or delivery requirements; however, as discussed below, establishing a sufficient record to support such an approach could be difficult. The Council and the Secretary would have to demonstrate that provisions that have the practical effect of limiting the number of sites to which deliveries could be made are needed to meet a legitimate objective—such as promoting the sustained participation of fishing communities that depend on the fisheries—and are not merely a means to allocate shore-based processing privileges. A discussion of fishing communities and processors found in the Senate Commerce Committee Report for S. 2012 (which became MSRA), S. REP. 109-229 (2006), supports this interpretation.

“The bill also contains specific provisions that would authorize the issuance of quota to fishing communities and for the creation of regional fishing associations (RFAs). These provisions were created in response to the concerns of communities and shoreside [shore-based] businesses around the country over the economic harm that could result from consolidation of quota in IFQs [individual fishing quotas] and similar programs. Many of these concerns were reflected in hearings and expert reports, including the 1999 National Research Council report required under the SFA [Sustainable Fisheries Act of 1996]. While some groups argued that allocating specific shares of processing privileges (“processor shares”) would provide economic stability to communities, other groups believed that no special status should be granted to processors. *The Committee chose to take a broader, community-based view and allow allocation of harvesting privileges to communities, and the inclusion of processors and other shore-based business in*

*RFAs with LAPP holders which would allow for the designation or linkage to a region or community.*⁴ S. REP. 109-229, pg. 25. (Emphasis added)

The linkage endorsed by the Committee Report is to a region or community, and not to a specific shore-based processor or an exclusive class of shore-based processors. The linkage referred to in the Committee Report corresponds to the explicit language in the Magnuson-Stevens Act (sec. 303A(c)(5)(B)(i)). Nevertheless, the statutory language in sec. 303A(c)(5)(B)(i) is not exclusive—it contemplates that measures other than regional or port specific landing requirements could be used to promote legitimate management or conservation objectives. Therefore, if the Council could build a record justifying an exclusive class of shore-based processors as a means to meet a legitimate management or conservation objective (i.e., protection of processing sector employment or protection of fishing communities that depend on the fisheries), then there could be a legal basis for including such provisions. It is beyond the scope of this letter to comment on whether as a logical or factual matter such a record could be developed.

Finally, allowing transferability could help overcome some of the difficulties in developing a record to justify limiting landings or deliveries to shore-based processors in specific ports or regions, depending on how the transferability provisions were established. However, transferability alone would not eliminate the need to show that site specific landing or delivery requirements are necessary to a legitimate management or conservation objective, nor would it eliminate the hurdle of showing that the establishment of an exclusive class of shore-based processors is not just a means to issue exclusive shore-based processing privileges.

CONCLUSION FOR QUESTION 4

The Magnuson-Stevens Act does not authorize placing a limit on the number of shore-based processing sites if the purpose is to allocate shore-based processing privileges. Transferability of those privileges would not change the conclusion that the Magnuson-Stevens Act does not authorize such an action. However, if the Council developed an adequate record demonstrating that an action that had the practical effect of limiting the number of sites to which deliveries

⁴ The Report goes on to say: “In an RFA, the quota would be allocated to the harvester but classified for use in a specific region in order to maintain a relative balance between the harvesting sector receiving the quota and the communities, processors, and other fishery-related businesses that have become dependent on the resource entering the port. Establishment of such RFAs would allow for mitigation of any impacts of a LAPP on a variety of community and fishery-related business interests, without allocation to individual companies of an exclusive right to process fish. The bill would also allow a Council to consider regional or port-specific landing requirements to maintain a relative balance of the commercial industry sectors, such that fishermen, processors, and communities could participate in and benefit from the rationalized fishery.” S. REP. 109-229, pp. 27-28.

could be made was necessary for legitimate management or conservation objectives (e.g., protection of processing sector employment or protection of fishing communities that depend on the fisheries) and not a disguised limited entry program, then there could be a legal basis for such an action.

Attachments

cc: Jane H. Chalmers
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July 2, 2009



Ms. Lisa Lindeman
NOAA General Counsel
P.O. Box 21109
Juneau, AK 99802

Dear Lisa:

As you are aware, the current management program for the Central Gulf of Alaska rockfish fisheries is set to expire after the 2011 season. In the absence of the development of a follow on management program, the fishery will revert to limited access management. To address this contingency, the Council is considering alternative management programs for the fisheries intended to continue the benefits of the existing management. Given the reauthorization of the Magnuson Stevens Act, and the attendant provisions for LAPPs, the Council seeks your assistance in discerning the scope of its authority to develop management programs under its MSA authority. Specifically, the Council is considering a variety of alternatives derivative of the current management program intended to protect processor investment and dependence on these fisheries. To that end, the Council requests NOAA GC's interpretation of the Council's authority to develop the management measures described below. We request an opinion on these options in time for review at our October 2009 meeting.

The current program – fixed harvester/processor linkages

Among the alternatives proposed for analysis is the current management program. The current program was established under Section 802 of the Consolidated Appropriations Act of 2004, which provided:

SEC. 802. GULF OF ALASKA ROCKFISH DEMONSTRATION PROGRAM. The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) and historic participation of fish processors (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in Central Gulf of Alaska. Such a pilot program shall (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historical harvesting of such bycatch species. The pilot program will sunset when a Gulf of Alaska Groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from date of implementation, whichever is earlier.

Under this authority (together with the more general authority provided by the Magnuson Stevens Act), the Council developed, and the Secretary approved, a management program under which each harvester with history during the statutorily designated vessel participation period may access an exclusive allocation of rockfish by joining a cooperative. The allocation to each cooperative is based on the harvest histories of its members during the statutorily designated vessel participation period. Each harvester is eligible to join a single cooperative that is associated with the processor to which it delivered the most

pounds of rockfish during the statutorily designated processor participation period. The terms of that association are subject to the negotiation between the cooperative and the processor, but are generally expected to include obligations for the harvester to deliver certain catches to the processor. Harvesters that choose not to join a cooperative are permitted to fish in a limited access fishery (without exclusive allocation). The allocation to the limited access fishery is based on the harvest histories of vessels participating in that fishery. All catch from the limited access fishery must be delivered to one of the processors which qualifies for association with a cooperative, based on harvester landing histories. The program provides no latitude for harvesters to move among cooperatives (or change processor associations).

An allocation of harvest shares to processors

A second alternative under consideration would divide the harvest share allocation between historic harvest sector participants and historic processing sector participants. Under this alternative, a fixed percentage of the harvest share pool (i.e., exclusive harvest share allocations) would be divided among harvester sector participants based on harvest histories during a specified time period. The remaining portion of the harvest share pool would be divided among processing sector participants based on processing histories during a specified time period.

The allocations of harvest shares to processors in this alternative would be intended to protect processor investments and dependences on the fishery and processor employment; however, some stakeholders have argued that while a harvesting privilege may provide indirect financial remuneration to a processor, it does little protect the processing operation on which the processor and its employees rely. Similarly, the harvest share allocation to processors may impinge on the protection to harvesters by the program depriving members of that sector of a portion of the harvest share allocation, as well as create an incentive for processors to vertically integrate by developing harvest capacity. To mitigate against this potentiality, the Council has included an option in this alternative that would require that a processor's allocation of harvest shares be harvested by a vessel that is not affiliated with the processor.¹ This provision is intended to lead processors to use the harvest share allocation to negotiate for landings from harvesters, rather than develop or expand a processor's interest in the harvest sector. In addition, the Council has elected to examine alternative structures that may more directly protect the interests of processors and their employees, without depriving harvesters of the interests they have developed.

Severable harvester/processor association – one time forfeiture

This alternative parallels the current program by establishing a system of cooperatives that harvesters must join to access exclusive harvest privileges. At the outset, a harvester is eligible to join a cooperative in association with the processor to which it delivered the most pounds during a specified time period. If a harvester elects not to join that cooperative, it may move to another cooperative (and processor association) by forfeiting a portion of its harvest allocation. The forfeiture would be made either directly to the processor losing the harvester association or to the cooperative associated with that processor. The Council is examining two options defining the harvest share forfeiture. Under the first, the forfeiture would be a permanent transfer of the long term harvest share privilege. Under the second, the forfeiture would be a short term (i.e., one or two year) forfeiture of a portion of the harvest share privilege. After the forfeiture, the harvester would be eligible to join a cooperative in association with any processor in the

¹ It is unclear whether this provision can be effectively implemented, as tracking of individual share usage in a cooperative management program may be infeasible. It is possible that a variant of this provision could be developed that would prevent processors using these allocations to expand harvest sector activity in a manner that does not impose an unreasonable administrative burden.

community to which it delivered the most pounds in a designated time period.² As a result, all cooperatives would be required to maintain a processor association. Although the terms of harvester/cooperative associations are subject to negotiation, it is anticipated that these associations will include harvester delivery obligations. The processor leverage in negotiating those obligations would be expected to be greater for the processor identified for the original association with a harvester that has not severed that original association, since harvesters that have severed the original association can negotiate with several processors, all of which will be on equal footing. Perpetuating the processor associations in this manner is believed to be an important component for maintaining stability in the processing sector.

When evaluating this alternative, a few characteristics should be considered. ~~First, no limit on processor entry is provided; any processor may choose to compete for deliveries.~~ Second, although a harvester must associate with a processor that is based in the community to which it delivered the most pounds during a specific period, the program may (or may not) include a requirement that deliveries be made in that community.³ Third, although a processor association is required, after the first association is severed, no preference is given to any processor over any other processor (including any new entrant) provided the processor operates in the community in which the harvester historically delivered the most pounds. And lastly, in the event harvesters elect to sever their initial associations and incur the forfeiture of shares, the result is a harvest share distribution that is very similar to the direct allocation of harvest shares to processors proposed in the previous alternative.

Severable harvester/processor linkages – ongoing forfeitures

This alternative is identical to the previous alternative except with respect to the forfeiture of shares by a harvester when severing a processor association. Each time a harvester severs a processor association (moving to a cooperative that associates with another processor) that harvester would forfeit a portion of its annual allocation for one or two years to either the processor (or the associated cooperative). The alternative would use a harvester's landing histories to identify the original processor association, which may be severed at any time, subject to the forfeiture requirement. Once the initial association is severed, the harvester would be permitted to associate with any processor in the community to which it delivered the most pounds in the qualifying period. Each subsequent association could be severed, but would be subject to the same forfeiture as the initial association severance. As with the preceding alternative, the ongoing associations are intended to increase stability in the processing sector. The ongoing forfeitures would contribute to greater long run stability (as harvesters sever their first associations). As with the preceding alternative, no explicit processor delivery requirement would be established by the program, but delivery requirements could be included in the negotiated associations. A community delivery requirement is being considered, and no limit on processor entry would be included in the program.

If it is determined that either of the two program options described above are allowable, a related question is whether there is a limit on the magnitude of the forfeiture which can be established by the Council. Currently, the Council is considering forfeitures of between 0 and 30% of a harvester's quota (of either QS or annual IFQ).

Additional questions

During Council discussion of these issues at the June 2009 meeting, a more generic question was raised relative to the Council's authorities for managing or limiting processing activities. Specifically, the Council would like to know the bounds of its authority for establishing a 'closed class' of processors, or

² Based on preliminary analyses, all harvesters in the program have made a plurality of deliveries to processors based in Kodiak. That community is currently home to at least 8 processors that have received deliveries from the rockfish fishery.

³ If a community landing requirement is incorporated in the program, it is likely that all landings would be required to be made to Kodiak, which may raise concerns for geographic overconsolidation of processing.

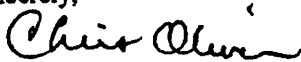
an exclusive class of processors for particular fisheries. Expressed somewhat differently, the question could be posed as whether a limited entry program could be established for processors under which qualified processors would:

- 1) be the exclusive markets for delivery of landings in a fishery, or
- 2) be exclusive markets for delivery of a specific portion of the landings in a fishery.

An ancillary question arises, which is, would development of a means for transfer of processor limited entry permits (or privileges) affect the determination of whether authority exists for establishing such a limited entry system for processors.

The Council appreciates the ongoing advice of NOAA GC relative to these and other issues. In this instance we request a specific legal opinion so that we can proceed with consideration of viable alternatives under a constrained timeline for implementation. Please contact me or Dr. Mark Fina if you have any questions regarding this request.

Sincerely,



Chris Oliver
Executive Director

CC: Council members



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

February 3, 2005

MEMORANDUM FOR: Stephanie Madsen, Chair
North Pacific Fishery Management Council

Chris Oliver, Executive Director
North Pacific Fishery Management Council

FROM: Lisa L. Lindeman
Alaska Regional Counsel

SUBJECT: Rockfish Demonstration Program

This memorandum responds to the request of the North Pacific Fishery Management Council (Council), including requests from Council staff,¹ for guidance from NOAA General Counsel on the appropriate construction of section 802 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations, 2004 (CAA-2004).²

The specific questions include:

- (1) What is the scope of section 802?
- (2) Whether the Council has authority to change the years specified in section 802 for recognizing the historic participation of fishing vessels and processors? Whether a processor must have processed in each of the years 1996 to 2000 to be eligible for the Central Gulf of Alaska (CGOA) Rockfish Demonstration Program (Rockfish Program)?
- (3) Whether the Rockfish Program includes West Yakutat?
- (4) Whether a person who is eligible under the Rockfish Program has authority to exercise an option not to participate in the Rockfish Program and instead participate in the five percent set-aside?
- (5) Whether the Council has authority to reduce limited access rockfish allocations to eligible applicants who choose not to join cooperatives?

¹ Letters from Chris Oliver, Executive Director, North Pacific Fishery Management Council, to Lisa Lindeman, NOAA-GC, dated February 25, 2004, and December 29, 2004.

² Pub. L. No. 108-199, 118 Stat. 110.



(6) What management programs for shoreside processors are authorized by section 802 (e.g., processor shares, "AFA-style" cooperatives³, or limited licenses for shoreside processors)?

We have reviewed the statutory language, legislative history and relevant case law, and a summary of our responses to these six questions follows.

Summary Conclusions:

(1) Section 802 requires the Secretary of Commerce (Secretary) and the Council to recognize the historic participation of fishing vessels and fish processors for specific time periods, geographical areas, and rockfish species when establishing the Rockfish Program.

(2) Section 802 does not authorize recognition of the historic participation of fishing vessels or processors in years other than those specified in section 802. Further, Section 802 defines the range of years, but does not specify that a processor must have actually processed in each of those years in order to be eligible to participate in the Rockfish Program.

(3) Section 802 does not authorize the inclusion of West Yakutat in the Rockfish Program. Section 802 specifically uses the phrase "Central Gulf of Alaska" as the geographical area for the Rockfish Program. The CGOA as defined in the Fishery Management Plan for the Groundfish of the Gulf of Alaska and in regulations at 50 CFR part 679 does not include West Yakutat. The use of catch history from the CGOA and West Yakutat to qualify a person for a Central Gulf endorsement under the License Limitation Program for Groundfish has no impact on the Rockfish Program authorized under section 802.

(4) Section 802 does not authorize any person who is eligible to participate in the Rockfish Program to exercise an option not to participate in the program and participate in the five percent set-aside. Section 802 explicitly states that the five percent set-aside is for "catcher vessels *not eligible* to participate in the [Rockfish Program]," and not for an eligible person who chooses not to participate (*emphasis added*).

³ The phrase "AFA-style cooperatives" is not further defined in the letter. We interpret the phrase to mean cooperatives authorized by and formed under provisions of the American Fisheries Act (AFA), Div. C, Title II, Pub. L. No. 105-277, 112 Stat. 2681 (1998), 16 U.S.C. 1851mt. Under the AFA, NOAA Fisheries allocates individual quotas of the inshore Bering Sea (BS) pollock total allowable catch (TAC) to inshore catcher vessel cooperatives that form around a specific inshore processor and agree to deliver at least 90 percent of their pollock catch to that processor. This interpretation is consistent with the common understanding of the phrase as used by the Council, which is to allow the formation of harvesting cooperatives that are allocated a percentage of the TAC and are formed around a particular processor. The cooperatives engage only in harvesting activities and may include processor-owned catcher vessels. The Council has not interpreted the phrase, and we do not interpret the phrase, to mean cooperatives that automatically enjoy antitrust immunity under the Fishermen's Collective Marketing Act, 15 U.S.C. 521 (FCMA).

(5) The Council has authority to reduce limited access rockfish allocations for eligible applicants who choose not to join cooperatives. Section 802 does not distinguish between fishing vessels that choose to participate in cooperatives under the pilot program and those that choose not to participate in cooperatives. However, under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Council and the Secretary are authorized to make such a distinction as long as the administrative record includes support demonstrating why such a distinction would be fair and equitable to all eligible applicants and reasonably calculated to promote conservation.

(6) Section 802 authorizes the Council and Secretary to develop a program that would establish "AFA-style" cooperatives or a program that would establish limited entry licenses for processors in the CGOA rockfish fishery. However, section 802 does not authorize the establishment of processor shares since they are prohibited under section 804 of the CAA. The legislative history supports the position that the Council is authorized to consider a broad range of "appropriate" management schemes, including "AFA-style" cooperatives, which are specifically mentioned in the legislative history. Appropriate management tools would be those that meet applicable legal standards (i.e., decisions cannot be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law) and that are not specifically prohibited. Antitrust concerns also must be taken into consideration in creating a program under section 802.

Discussion and Analysis:

(1) What is the scope of section 802?

Section 802 provides:

The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) and the historic participation of fish processors (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in the Central Gulf of Alaska. Such a pilot program shall: (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; and (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historic harvesting of such bycatch species. The pilot program will sunset when a Gulf of Alaska Groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from the date of implementation, whichever is earlier.

What this language authorizes is discussed in detail in our response to question 6. This response

deals only with the scope of the provision.

First, section 802 requires the Council and the Secretary to establish a Rockfish Program for CGOA rockfish with specific provisions. Other than for management of the rockfish fisheries specified in section 802 (i.e., pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in the Central Gulf of Alaska), section 802 does not affect the existing authorities of the Council and the Secretary under the MSA relative to management of fisheries under their jurisdiction.

Second, section 802 provides very specific instructions about the Rockfish Program, including what years to recognize for historic participation of fishing vessels and processors, what fish to include, a set-aside for persons not eligible to participate in the program, and a time limit on the program. It does not provide any other authority beyond what can be read or reasonably construed from its plain language.

Third, section 802 and the MSA must be read to give effect to both, to the maximum extent possible. Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (quoting United States v. Freeman, 3 How. 556, 564 (1845)). However, giving effect to both also “‘assumes that the implications of a statute may be altered by the implications of a later statute.’ This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.” FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) (quoting United States v. Fausto, 484 U.S. 439, 453 (1987)). Thus, the Secretary and the Council must comply with both section 802 and the MSA, but where section 802 makes specific provisions for the CGOA rockfish fishery, the more specific provisions govern.

(2) Does the Council have authority to recognize the historic participation of fishing vessels and processors in years other than those specified in section 802? Must a processor have processed in each of the years 1996 to 2000 to be eligible for the Rockfish Program?

Section 802 does not merely authorize the Secretary of Commerce, in consultation with the Council, to manage the CGOA rockfish fishery in accordance with its terms, it requires the Secretary to manage that fishery in accordance with its terms. This specific requirement overrides any other options that might have otherwise been available under the MSA.

Section 802 specifies what years the Council must use to recognize the historic participation of processors (i.e., 1996 to 2000, best 4 of 5 years). To recognize other years would be inconsistent with the plain language of section 802, which clearly sets out the years Congress requires the Council to use when recognizing historic participation of processors for the Rockfish Program. Further, Congress specified a range of years, but did not specify that a processor must have actually processed fish in each of the years. Therefore, a processor that processed in some but not all of the years 1996 to 2000 would be eligible for the Rockfish Program. However, being determined as eligible under the Rockfish Program under criteria developed by the Council precludes the possibility of participating in the five percent set-aside (see discussion and analysis

under question 4).

(3) Does the Rockfish Program includes West Yakutat?

The language in section 802 requires that the Rockfish Program established by the Secretary in consultation with the Council recognize the historic participation for "pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in the *Central Gulf of Alaska*" (emphasis added). ~~The Central Gulf of Alaska, as defined in the Fishery Management Plan for the~~ Groundfish of the Gulf of Alaska and regulations at 50 CFR part 679, does not include West Yakutat. Therefore, the Rockfish Program does not include West Yakutat.

(4) Does a person who is eligible under the Rockfish Program have authority to exercise an option not to participate in the Rockfish Program and instead participate in the five percent set-aside?

Pursuant to section 802, the Rockfish Program must "provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program . . ." The language of section 802 clearly provides that the set-aside is for catcher vessels and shore-based processors not eligible to participate in the Rockfish Program. Although it could be argued that under the Council's and Secretary's MSA authority to manage *catcher vessels*,⁴ they could develop a program that would allow an eligible catcher vessel to exercise an option not to participate, such an argument would conflict with the specific provision of section 802 that provides: "[s]uch a pilot program shall: (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program." Therefore, if a person is eligible under the Rockfish Program developed by the Council and the Secretary, that person cannot opt out and participate in the set-aside.

(5) Does the Council have authority to reduce limited access rockfish allocations to eligible applicants who choose not to join cooperatives?

Section 802 provides that the Secretary and Council "shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) . . . for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in the Central Gulf of Alaska." The language in section 802 does not distinguish between fishing vessels that choose to participate, and those that choose not to participate, in cooperatives. This, in and of itself, does not mean that the Secretary and Council could not distinguish between those two group of vessels, it only means that section 802 does not require the Secretary and Council to distinguish between

⁴ This would not apply to shoreside processors, since the MSA does not authorize such action. Memorandum for the North Pacific Fishery Management Council from Lisa L. Lindeman, NOAA General Counsel—Alaska Region, on Magnuson Act authority to allocate fishing and processing privileges to processors, September 20, 1993.

those two groups. Limited access programs, by their very nature, exclude or limit certain groups. Alliance Against IFOs v. Brown, 84 F.3d 343 (9th Cir. 1996). However, if the Council and Secretary choose to make such a distinction, they would still be required to abide by the national standards of the MSA, including the requirements of national standard 4, which provides that “[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.” Therefore, if eligible applicants were penalized for not choosing to join cooperatives, the Council would need to articulate for the record a rational reason why such action was fair and equitable to all eligible applicants, and why it is reasonably calculated to promote conservation.

(6) What management programs for shoreside processors are authorized by section 802 (e.g., processor shares, “AFA-style” cooperatives⁵, or limited licenses for shoreside processors)?

Legislative Intent

The legislative history of section 802 shows that Congress’ primary purpose was to provide the Council and the Secretary limited discretion to develop a pilot program for management of CGOA rockfish. Congress chose to do so by requiring in the statute that the Council recognize the historic participation of fishing vessels and fish processors. Congress also chose to specify in the statute the range of years for eligibility. Congress did not, however, define specifically what it meant by “historic participation.” However, as Senator Stevens explained during Senate debate on CAA-2004,⁶ “the ‘historic participation of fish processors’ under this pilot program should be considered pursuant to the cooperative model under the American Fisheries Act, or any other manner the North Pacific Council determines is appropriate” as long as the Council does not include processor quotas.⁷ As a statement of one of the legislation’s sponsors, Senator Stevens’

⁵ The phrase “AFA-style cooperatives” is not further defined in the letter. We interpret the phrase to mean cooperatives authorized by and formed under provisions of the American Fisheries Act (AFA), Div. C, Title II, Pub. L. No. 105-277, 112 Stat. 2681 (1998), 16 U.S.C. 1851nt. Under the AFA, NOAA Fisheries allocates individual quotas of the inshore Bering Sea (BS) pollock total allowable catch (TAC) to inshore catcher vessel cooperatives that form around a specific inshore processor and agree to deliver at least 90 percent of their pollock catch to that processor. This interpretation is consistent with the common understanding of the phrase as used by the Council, which is to allow the formation of harvesting cooperatives that are allocated a percentage of the TAC and are formed around a particular processor. The cooperatives engage only in harvesting activities and may include processor-owned catcher vessels. The Council has not interpreted the phrase, and we do not interpret the phrase, to mean cooperatives that automatically enjoy antitrust immunity under the Fishermen’s Collective Marketing Act, 15 U.S.C. 521 (FCMA).

⁶ Congressional Record Online, January 22, 2004 (Senate) [Page S152].

⁷ Section 804 of CAA-2004 specifically prohibits processor quota shares in any fishery other than the BSAI crab fishery.

statement "deserves to be accorded substantial weight in interpreting the statute."⁸ The legislative history does not further define an AFA-style cooperative or indicate whether Congress intended a cooperative that requires a catcher vessel to deliver to a particular processor or a cooperative that also enjoys antitrust immunity under the FCMA.⁹ It also does not further define what other manner of management would be appropriate.

It can be reasonably assumed that in crafting section 802, Congress was familiar with the circumstances surrounding the CGOA rockfish fishery and management tools that could be used to better conserve and manage the rockfish in the Central GOA. The Council's discretion to choose a management system is bounded by the authorities granted by section 802 and the MSA. Hence, based upon section 802 and the legislative history, the Council may develop a management program that includes AFA-style cooperatives (authorized by section 802's legislative history—"cooperative model under the American Fisheries Act") and harvesters quota issued to onshore processors (authorized by section 802 or the MSA). The Council also could develop other appropriate management systems, which could include limited licenses for processors (authorized by section 802's legislative history—"any other manner the North Pacific Council determines is appropriate"¹⁰), but not processor quota (processor quota is specifically prohibited, as explained below). Although the cooperative model under the AFA was the management program that was specifically mentioned in the legislative history, the Council should analyze other programs that would be based on processors' historic participation as reasonable alternatives to cooperatives.

Individual processor quotas are not authorized for CGOA rockfish, as there is no authority to issue processor quota under the MSA except for BSAI crab fisheries, and in his floor statement, Senator Stevens specifically stated that "[t]he Gulf of Alaska rockfish pilot program does not authorize individual processing quota share for processors in this fishery."¹¹ Section 802 was passed concurrently as part of the same appropriations legislation as section 804. Section 804 provides:

⁸ *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1975).

⁹ Cf. footnote 3, *supra*. We interpret "cooperative model under the American Fisheries Act" consistent with our interpretation of "AFA-style cooperatives."

¹⁰ The Council and Secretary have recognized the historic participation of fishing vessels under the MSA through license programs, such as the North Pacific License Limitation Program (LLP) for groundfish (50 CFR 679.4(k)). Under the LLP, the Council recognized historic participation by requiring, among other things, that a vessel must have fished during certain years and had a minimum number of landings to show some sustained level of participation. Under section 802, we believe the Council could recognize the historic participation of shoreside processors by similarly requiring that they must have processed a minimum level of fish during 1996 to 2000 to show a sustained level of participation in the processing sector. For example, the Council could require that a processor have processed one pound of rockfish during the specified years if the administrative record demonstrates that was a reasonable level of historic participation, or they could require that a processor have processed 10,000 tons of rockfish during each of those years to show historic participation.

¹¹ Congressional Record Online, January 22, 2004 (Senate) [Page S152].

"A Council or the Secretary may not consider or establish any program to allocate or issue an individual processing quota or processor share in any fishery of the United States other than the crab fisheries of the Bering Sea and Aleutian Islands."¹² Individual sections of a statute should be construed together. Erlenbaugh, at 244. If Congress had intended to allow processing quota or shares in the Rockfish Program, Congress could have specifically exempted it along with the BSAI crab fisheries from the prohibition on processing quota or shares.

Antitrust Concerns

We are concerned about potential antitrust implications if the Council recommends a program that allows catcher vessels owned or affiliated with shoreside processors to join "AFA-style cooperatives" in the CGOA rockfish fishery. A similar question arose in connection with processor-affiliated vessels participating in cooperatives in the BSAI pollock fishery. At the request of the Department of Commerce General Counsel, in 1999, DOJ reviewed the question of whether under the AFA, catcher vessels owned by shoreside processors could participate in inshore fishery cooperatives in the BSAI pollock fishery and enjoy the antitrust immunity specifically provided to fishery cooperatives under the FCMA and the Capper-Volstead Act, 7 U.S.C. 291.¹³ Section 210 of the AFA established a framework for the formation of fishery cooperatives in the BSAI pollock fishery. Section 210(b) set out the precise criteria for the formation of inshore catcher vessel cooperatives. Section 210(a) referred to fishery cooperatives implemented under the FCMA. DOJ looked at whether the reference to the FCMA in section 210(a) effectively incorporated into the AFA the limits of the FCMA so as to preclude the participation of processor-owned catcher vessels in the AFA cooperatives. DOJ analyzed the existing case law interpreting the scope of the FCMA and the Capper-Volstead Act exemptions, which it found had not dispositively resolved the question. However, taking into account the specific language of the statute and the legislative history, DOJ determined that given the structure of the BSAI pollock fishery, Congress must have intended to allow participation by processor-affiliated catcher vessels, because the specific requirements for co-op eligibility could not be met without including such vessels. Interpreting the AFA to exclude processor-owned catcher vessels would have defeated the primary purpose of the Act. Because the participation of integrated catcher vessels in such cooperatives was critical to achieving Congress' purposes, DOJ concluded Congress must have intended that such vessels could be included in cooperatives that would enjoy antitrust immunity under the FCMA.

¹² Although the prohibition in section 804 expires at the end of the 2004 fiscal year because it is part of an appropriation act that expires at the end of the fiscal year (unless Congress passes a continuing resolution for that appropriation) and because it does not amend a permanent statute or have any words of futurity (e.g., hereafter, or for 2 years), it still provides legislative intent, along with the legislative history of section 802, that the authority granted in section 802 does not include the authority to issue individual processing quota or processor shares.

¹³ Memorandum for Andrew Pincus, General Counsel, Department of Commerce, from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, December 10, 1999 (DOJ Memo).

Here, unlike the AFA, the statute does not include statutory language establishing a specific structure for fishery cooperatives and does not refer to the FCMA. Neither the statute nor the legislative history clearly indicates that Congress' intent can only be achieved with AFA-style cooperatives. In fact, the floor statement indicates Congress' intent to provide broad discretion to the Council to recognize the historic participation of fish processors pursuant to the AFA co-op model or any other manner the Council deems appropriate. Based solely on the legislative history, we believe an argument can be made to support the Council's developing a program under which catcher vessels form cooperatives to receive a guaranteed allocation of rockfish TAC and deliver their catch to a particular shoreside processor. However, unlike DOJ's determination with respect to the AFA cooperatives, we do not believe a credible argument can be made that FCMA antitrust immunity would extend to such cooperatives in the CGOA rockfish fishery. After reviewing DOJ's AFA opinion, we believe section 802 does not provide a solid basis upon which to conclude that FCMA immunity could extend to cooperatives in the rockfish fishery that include processor-owned catcher vessels. The factors DOJ relied upon to determine that AFA cooperatives that include processor-affiliated catcher vessels could enjoy antitrust immunity under the FCMA are not present in this case.

Notwithstanding the lack of antitrust immunity, harvesting cooperatives established pursuant to section 802 that include processor-owned or affiliated vessels may be able to avoid antitrust problems to the extent they operate consistent with the "Antitrust Guidelines for Collaboration Among Competitors," issued by DOJ and the Federal Trade Commission (FTC) in August 2000. The Guidelines state DOJ's and FTC's antitrust enforcement policy with respect to competitor collaborations. As NOAA-GC has explained with respect to harvesting cooperatives under the crab rationalization program,¹⁴ generally, if the activity of the cooperative does not have an anticompetitive effect and promotes efficiency, it is unlikely DOJ would determine the activity violates the antitrust laws. However, some activities by members could, under certain circumstances, violate the antitrust laws.

We stress that while this memorandum provides a credible basis for the Council to develop AFA-style cooperatives, it does not provide a basis for arguing such cooperatives would have antitrust immunity. As with crab harvesting cooperatives, we strongly recommend that counsel for non-FCMA cooperatives consider seeking a business review letter from DOJ before commencing any activity if they are uncertain about the legality of their clients' proposed conduct under the antitrust laws.

cc: Jane Chalmers
Sam Rauch
John Lepore
Jim Balsiger

¹⁴ Memorandum for James W. Balsiger, Administrator, Alaska Region, from Lisa L. Lindeman, Alaska Regional Counsel, "Harvesting Cooperatives under the Crab Rationalization Program," December 4, 2004.



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September 20, 1993

MEMORANDUM FOR: North Pacific Fishery Management Council

FROM: Lisa L. Lindeman *Lisa Lindeman*
NOAA General Counsel--Alaska Region

SUBJECT: Magnuson Act authority to allocate fishing and processing privileges to processors

BACKGROUND

The North Pacific Fishery Management Council (NPFMC) is currently reviewing potential elements and options for the Comprehensive Rationalization Plan (CRP) in the North Pacific groundfish and crab fisheries. One of the elements, initial assignment of quota share, currently contains five options for consideration by the NPFMC. One option is described as initially allocating a portion of the harvesting quota share to processors under a limited access system. Another option, known as the two-pie system, is described as allocating Individual Processor Quota (IPQ) to processors, creating a limited access system for processing in addition to a limited access system for harvesting. Proponents of an initial allocation to processors contend that allocations of fishing privileges must be fair and equitable and must consider past and current participation in the fisheries. They argue that allocating fishing privileges only to the harvesting fleet fails to recognize the participation and capital investments made by the processing sector of the fishing industry.

You have requested a legal opinion from NOAA General Counsel as to whether the NPFMC and the Secretary of Commerce (Secretary)

As of June 28, 1993, there are five recommended options for the initial assignment of quota share:

- (A) to vessels or vessel owners at the time IPQ is issued;
- (B) to vessel owners at time of landings activities, considering two general types of recipients: (1) those still in the fisheries and (2) those who have exited the fisheries;
- (C) assign harvesting quota share to other fisheries investors including processors, skippers, and crew;
- (D) coastal communities; and
- (E) assign separate processor quota share (the two-pie system).



have the statutory authority under the Magnuson Fishery Conservation and Management Act (Magnuson Act or the Act) to implement either of these two options. This memorandum answers these questions first by analyzing what types of allocations are authorized under the Act and then analyzing whether the Act requires that all allocations be allocated among harvesters. The third section of the memorandum presents a summary of issues that may arise when a Council considers making allocations to persons other than harvesters.

SUMMARY OF FINDINGS

1. There is authority under the Magnuson Act to allocate fishing privileges. The Magnuson Act requires the Councils and the Secretary to implement measures regulating fishing that are necessary and appropriate for the conservation and management of the fishery. The Councils and the Secretary also have the authority to limit access to one or more fisheries. Access to these fisheries is limited by the allocation of fishing privileges.

2. The Magnuson Act defines "fishery" as one or more stocks of fish and any fishing for such stocks. The term "fishing" under the Magnuson Act includes harvesting activities and operations at-sea in support of or in preparation for harvesting activities. At-sea processing is an operation at-sea in support of harvesting. On-shore processing is not "fishing."

²In a memorandum from Chris Oliver dated August 13, 1993, a third question was also asked: If there is authority under the Magnuson Act to allocate harvesting or processing privileges to processors, are there any legal obstacles to allocating those privileges to foreign-owned processors? The answer to this question will require more legal analysis than time permits before the September Council meeting. However, a memorandum addressing this question can be prepared and presented at the December Council meeting if the Council is still interested in the answer to this question. Mr. Oliver's memorandum is attached to this memorandum.

³For purposes of this memorandum, "on-shore processor" means processors that are located landward of the baseline of the United States and "on-shore processing" means processing activities conducted at facilities located landward of the baseline. It is important to note that the definition of "on-shore" for purposes of this memorandum differs from the definition of "inshore" used in 50 CFR 672.2 and 675.2. The definition of inshore includes more than on-shore processors.

3. Because the Councils and the Secretary have the authority to allocate fishing privileges, an IPQ system that allocates Individual At-Sea Processing privileges is authorized under the Act. Allocations of other fishing privileges, such as at-sea transshipping privileges and at-sea supplying privileges are also authorized. However, an IPQ system that purports to create and allocate individual on-shore processing privileges is not authorized under the Magnuson Act.

4. There is authority under the Magnuson Act to allocate fishing privileges to harvesters, processors and to other persons or groups as long as such allocations are consistent with the national standards, including national standard 4, other provisions of the Magnuson Act and other applicable law.

5. Any allocation scheme considered by the Councils and the Secretary that allocates fishing privileges to persons other than harvesters will encounter fairness and equity questions that must be addressed in the administrative record.

CAVEAT

The reader should keep in mind that this memorandum does not address the adequacy of any record developed by any Council to support the creation and allocation of at-sea processing privileges or to support an allocation of fishing privileges to on-shore processors. The analysis is completely theoretical; Secretarial approval and legal defense of any measure that establishes at-sea processing privileges or that initially allocates fishing privileges to on-shore processors would depend on the existence of a record justifying the measure and demonstrating the net benefits to be derived from implementation.

DISCUSSION

When Congress charges an agency with the responsibility of carrying out a statute, such as the Magnuson Act, questions concerning Congressional delegations of authority to that agency may arise. Judicial review of an agency's interpretation of statutory authority is governed by the test set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. The first part of the Chevron test requires a determination of "whether Congress has directly spoken to the precise question at issue" and "whether the intent of Congress is clear." If not,

⁴467 U.S. 837 (1984). In this case, the Environmental Protection Agency issued regulations based on its interpretation of the Clean Air Act's statutory language concerning treatment of pollution sources within a single plant.

the second prong of the Chevron test is applied and a reviewing court must decide whether the agency's interpretation is based on a reasonable construction of the statute.⁵ In applying this deferential standard of review, the court should uphold an agency's interpretation of a statute it administers as long as the interpretation is permissible.⁶ If Congress was not "clearly averse" to the agency's interpretation, and if the interpretation is "not manifestly contrary to the statute," it should be upheld.⁷ Finally, courts should be most deferential in cases involving complex regulatory schemes. Since a reviewing court would apply the Chevron test to determine whether the Secretary has the authority to develop and implement an IPQ system, the Chevron test will be used in responding to the NPFMC's questions.

There is no explicit language in the Magnuson Act authorizing the Councils and the Secretary to establish an IPQ limited access system for processors or to allocate harvesting privileges to processors. Moreover, Congress' intent concerning the Councils' and the Secretary's authority, or lack thereof, to establish either of these two systems is not clearly stated. Failing to resolve the issue using the first prong of the Chevron test, an examination of the statutory language and the legislative history of the Magnuson Act, past legal opinions and case law is necessary to determine whether the Act contains implicit authority to establish such systems.

I. Allocations that are authorized under the Magnuson Act.

Fundamental to answering the question of whether the Councils and the Secretary have the authority to allocate processing privileges are the answers to the questions of what types of allocations are authorized by the Magnuson Act and whether the Act requires that all allocations be allocated among harvesters.

⁵ 467 U.S. at 842-43.

⁶ National Fisheries Institute v. Mosbacher, 732 F. Supp. 210, 217 (D.D.C. 1990).

⁷ Stinson Canning Co., v. Mosbacher, 731 F. Supp. 32, 37 (D. Me. 1990).

⁸ Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1447 (9th Cir. 1990).

- a. The Councils and the Secretary have the authority to allocate fishing privileges.

The only specific reference in the Magnuson Act for allocating privileges appears in subsection 301(a)(4), or national standard 4. National Standard 4 states:

Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

. . . (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(Emphasis added.) Although national standard 4 contains the only specific reference to allocating fishing privileges, many other sections of the Magnuson Act focus on the Councils' and the Secretary's authority to regulate fishing and the fishery. Subsections 303(a) and (b) authorize the Councils and the Secretary to prepare fishery management plans (FMPs) for "fisheries."¹⁰ Additionally, subsection 303(a) contains a list of those provisions Congress, through the Magnuson Act, requires the Councils and the Secretary to include in each FMP. Subsection 303(a)(1)(A) states that any FMP prepared must "contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States which are (A) necessary and appropriate for the conservation and management of the fishery to prevent overfishing and to protect, restore, and promote the long-term health and stability of the fishery." (Emphasis added.) Subsection 303(a)(2) requires a description of the fishery including all vessels involved, fishing gear used, actual and potential revenues from the fishery, recreational interest in the fishery, and nature and extent of foreign fishing and native American treaty fishing.

⁹16 U.S.C. 1851(a)(4).

¹⁰"Fishery" is defined by the Act as "(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks." 16 U.S.C. 1802(8) (Emphasis added.)

rights. The remaining subsections of 303(a) continue to focus on other aspects of the "fishery" or "fishing."

Other support can be found in subsection 303(b), and specifically subsection 303(b)(6). Subsection 303(b)(6) authorizes the Councils and the Secretary to establish systems for limiting access to the fishery in order to achieve optimum yield. Factors that need to be considered by the Councils and the Secretary ~~all focus on the fishery to which limited access would apply:~~ present participation in the fishery; historical fishing practices in and dependence on the fishery; the economics of the fishery; the capability of fishing vessels used in the fishery to engage in other fisheries; and the cultural and social framework relevant to the fishery.

Given the Magnuson Act's emphasis on the Councils' and the Secretary's authority to regulate "fishing," it logically follows that, in order to limit access, the Councils and the Secretary would allocate fishing privileges to fish for one or more stocks of fish.

b. "Fishing" does not include on-shore processing.

Although it is clear that the Councils and the Secretary have the authority to allocate fishing privileges, the next question is what constitutes "fishing." "Fishing" is defined in the Magnuson Act at subsection 3(10) as:

(A) the catching, taking or harvesting of fish; (B) the attempted catching, taking, or harvesting of fish; (C) any other activity that can reasonably be expected to result in the catching, taking or harvesting of fish; or (D) any operations at-sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C). Such term does not include any scientific research activity which is conducted by a scientific research vessel.¹²

In 1978, NOAA General Counsel prepared a legal opinion analyzing the Secretary's statutory authority to deny applications for permits that would authorize foreign vessels to operate in the EEZ. The Secretary wanted to know whether she had the authority to deny those permits on the basis that U.S. fish

¹¹Some other sections of the Act are 2(b)(1) and (3) (purposes of the Act are to conserve and manage the fishery resources off the coasts of the United States and to promote domestic commercial and recreational fishing.) 16 U.S.C. 1801(b)(1) and (3).

¹²16 U.S.C. 1802(10).

processors had the capacity or intent to receive and process the fish concerned. Although the 1978 legal opinion addresses a different question than the ones before the NPFMC now, its analysis of the term "fishing" and conclusion that the term "fishing" included processing conducted at-sea but did not include processing conducted on-shore are relevant to this discussion.¹³

First, the 1978 opinion interpreted subsection 3(10)(D) as including processing as a support or preparation activity described in subparagraphs (A) through (C) but only if the processing is "at-sea." Second, it interpreted subsection 3(10)(C) as not including on-shore processing as "fishing:"

In our view, the logical interpretation of section 3(10)(C) would restrict its application to activities at-sea which directly result in the catching of fish. An activity on land which merely provides an incentive to catch fish is insufficiently related to the catching of fish to constitute "fishing" under section 3(10)(C). This conclusion is consistent with the legislative history of the FCMA which at no point indicates that the term "fishing" was intended to include on-shore processing. It is also consistent with section 2(b)(1) which refers to the need to manage the fishery resources off the coasts of the U.S.¹⁴

The 1978 opinion concluded that the Secretary did not have sufficient authority under the Magnuson Act to disapprove the applications on the basis that U.S. fish processors had the capacity or the intent to receive and process fish harvested from the EEZ. This conclusion led Congress to amend the Magnuson Act later that same year to provide the Secretary with the necessary statutory authority. That amendment¹⁵ became known as the processor preference amendment.

Most relevant to the immediate question of whether "fishing" includes on-shore processing are the changes that were not made to the Magnuson Act by the processor preference amendment. Congress contemplated amending the definition of "fishing" by deleting subsection (D) in order to separate "processing" from the harvesting aspects of "fishing."¹⁶ The term "processing" would have been defined, thus clearly separating the two

¹³General Counsel Opinion No. 61, at 12 (1978).

¹⁴Id., at 10 (1978).

¹⁵Authorization, Appropriations--Fishery Conservation and Management Act of 1976, Pub. L. No. 95-354, 92 Stat. 519 (1978).

¹⁶S. Rep. No. 935, 95th Cong., 2d Sess. 2-3.

activities. As finally passed, however, the amendment did not change the definition of "fishing" or define "processing." Representative Murphy provided the following explanation for the decision to leave the definitions unchanged:

In the end, we decided to leave the [Magnuson Act] definitions unchanged on this point while, at the same time, making clear the act was intended to benefit the entire fishing industry. I want to emphasize that, even though the final bill does not include the House clarification, it is the understanding of the House that "fishing" in section 3 of the [Magnuson Act] does include "processing" and that, for that reason, the proposed clarification is unnecessary.

124 Cong. Rec. H8265-66 (August 10, 1978) (statement of Rep. Murphy). Although Representative Murphy stated that the definition of "fishing" includes "processing," he did not clarify whether his use of the term "processing" included only at-sea processing or both at-sea and on-shore processing.

Despite Representative Murphy's lack of clarification, the definition of "fishing" in the Magnuson Act continues to exclude on-shore processing. The 1978 legal opinion concluded that subsection (C) did not include any processing activities, and that subsection (D) included processing activities but only those conducted at-sea. Congress' contemplated changes would only have deleted subsection (D) from the fishing definition in order to keep the entire definition of "fishing" related to catching, taking, or harvesting, and not to processing. When Congress chose not to amend the definition, but clarified that the definition included processing, it had to be referring only to subsection (D). Even with the knowledge that NOAA General Counsel interpreted subsection (D) as applicable only to at-sea processing, Congress did not delete the phrase "at-sea" from the definition. Therefore, only processing at-sea is considered fishing under the Magnuson Act. On-shore processing does not constitute "fishing" as that term is defined by the Magnuson Act.

- c. The Councils and the Secretary do not have the authority to create and allocate on-shore processing privileges.

If "fishing" does not include on-shore processing, then can the Councils and the Secretary establish an IPQ limited access system that creates and allocates on-shore processing privileges? Based on the preceding discussion, the Councils and the Secretary do not have the authority to allocate on-shore processing privileges or establish a system that contained such allocations. Assuming that the two-pie system is one that includes allocations of on-shore processing privileges, it would most likely fail under the Chevron test as an unreasonable agency interpretation of statutory authority. Therefore, this memorandum concludes

that the portion of the IPQ option that allocates individual on-shore processing quota would be an invalid extension of the Councils' and the Secretary's statutory authority.

The NPFMC may be presented with the argument that subsection 303(b)(10) of the Act would provide the Councils and the Secretary with the authority to allocate on-shore processing quota. Subsection 303(b)(10) states:

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may--(10) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

Proponents of the two-pie system may argue that an IPQ system is necessary and appropriate for the conservation and management of the fishery because conservation and management measures include the promotion of economic and social goals included in the Magnuson Act. Establishing an IPQ system would achieve the Magnuson Act's economic and social goals because on-shore processors would not be at a competitive disadvantage and possibly driven out of business as the at-sea processing sector drove up the price of fish. An IPQ system would balance the playing field so that on-shore processors and the communities that benefit economically, socially and culturally from the existence of an on-shore processor would be protected.

This argument fails to withstand scrutiny on two grounds. First, subsection 303(b)(10) was not included by Congress as a means for the Councils and the Secretary to circumvent any limits on their statutory authority contained in other sections of the Magnuson Act. Subsection 303(b)(10) provides the Councils and the Secretary with the discretionary ability to develop necessary and appropriate conservation and management measures not enumerated in subsections 303(a) or (b). To interpret 303(b)(10) in such a sweeping manner would swallow up the other provisions of the Act. Second, there is nothing within the subsection to expand the definition of fishing.

¹⁷ See Attachment (memorandum from Chris Oliver dated August 13, 1993).

¹⁸ Id.

- d. The Councils and the Secretary have the authority to allocate fishing privileges which include harvesting privileges, at-sea processing privileges, or privileges to conduct operations in support of or in preparation for harvesting.

Using the same statutory analysis presented earlier, the Councils and the Secretary have the authority to allocate fishing privileges. Since "fishing" includes at-sea processing, a system that allocates at-sea processing privileges would most likely be deemed a reasonable interpretation of statutory authority. Therefore, that portion of the two-pie system that allocates Individual At-Sea Processor Quota, or that allocates at-sea processing privileges, is authorized. Although the two-pie system currently envisioned by the NPFMC would be beyond the Councils' and the Secretary's authority to implement, a system that allocates at-sea processing privileges based on at-sea processing history would indirectly allocate a portion of the total allowable catch for on-shore processing. Such indirect allocation to on-shore processors has been recognized as a legitimate exercise of statutory authority.¹⁹ It must be stressed that such a system would have to be supported by an adequate record and a Secretarial finding that the system is consistent with the Magnuson Act and other applicable law.

It is important to note that, in addition to the Councils' and the Secretary's authority to allocate at-sea processing privileges, it is also within the Councils' and the Secretary's authority to allocate privileges for activities conducted at-sea that are in support of, or in preparation for, the catching, taking or harvesting of fish. Such at-sea activities could include transshipping, fueling, or crew provisioning to list just a few examples. To repeat, the Councils and the Secretary would have to provide a record that justify such an allocation under the Magnuson Act and other applicable law.

- II. Does the Magnuson Act require that all fishing privileges be allocated among harvesters?

Although it is within the Councils' and the Secretary's discretionary authority to allocate fishing privileges among only harvesters, does the Magnuson Act actually limit the Councils' and the Secretary's authority to making allocations only to persons that have a harvesting history or are currently

¹⁹ See Memorandum dated December 1, 1989, for the North Pacific Fishery Management Council from Margaret H. Frailey and Craig R. O'Connor re: Limitations on Roe Stripping (concluding that on-shore processors could only be regulated indirectly as an incidence of managing "fishing.")

harvesting fishery resources? Statutory language and past allocations demonstrate that the Magnuson Act authorizes the Councils and the Secretary to allocate fishing privileges to a wide range of individuals or groups, and does not limit those allocations to only harvesters.

The Act authorizes the Councils and the Secretary to establish FMPs that contain measures applicable to fishing that are necessary and appropriate for the conservation and management of the fishery and that promote the long-term health and stability of the fishery.²⁰ Drawing from the previous discussion, harvesters, along with at-sea processors, transshippers, suppliers, and other persons involved in at-sea support activities, are all fishing. Because the Councils and the Secretary are authorized to regulate fishing by making allocations of fishing privileges, these "fishermen" are all examples of persons to whom the Councils and Secretary can allocate fishing privileges. This analysis alone demonstrates that authority to allocate fishing privileges under the Magnuson Act extends beyond the harvester.

Previous allocations made by the Secretary also support the interpretation that the Magnuson Act authorizes the Councils and the Secretary to allocate fishing privileges to various persons and groups and not solely to harvesters. One of the most well-known allocations is the surf clam and ocean quahog ITQ system. In this plan, the Mid-Atlantic Council chose to allocate surf clam and ocean quahog quota initially to vessel owners. Initial allocations of harvesting privileges were made to vessel owners based on the vessel's reported landings between January 1, 1979, and December 31, 1988.²¹ The regulations also provide for the transfer of allocation percentage or cage tags to "any person eligible to own a documented vessel under the terms of 46 U.S.C. 12102(a)."²² By selecting vessel owners for initial allocation and anyone who can document a vessel under 46 U.S.C. 12102(a) for transfers of allocation percentage or cage tags, the Mid-Atlantic Council clearly chose to allocate ITQ to persons that may or may not have ever harvested fish.²³ While the specific question of

²⁰16 U.S.C. 1853(a)(1)(A).

²¹50 CFR 652.20(a) (1992).

²²50 CFR 652.20(f)(1) (1992).

²³This allocation decision was raised in Sea Watch International v. Mosbacher. Plaintiffs claimed that the allocation to vessel owners was unfair and inequitable because it "ignored the high rate of vessel turnover in the industry, excluding individuals with a substantial catch history who recently sold a vessel, and award[ed] a "windfall" to individuals

whether the Councils and the Secretary had the authority to allocate fishing privileges to vessel owners was not raised, a reviewing court found that the Secretary had the authority to establish an ITQ system and that the surf clam and ocean quahog ITQ system was supported by an administrative record that justified the Secretary's decision to approve it.

Another example is the Community Development Quota (CDQ) allocation made by Amendment 18 to the FMP for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (BSAI). As stated in the regulations, "one half of the pollock TAC placed in the reserve for each subarea will be assigned to a Western Alaska CDQ for each subarea. . . . Portions of the CDQ for each area may be allocated for use by specific western Alaska communities in accordance with the community fishery development plans"²⁵ The purpose behind the allocation was "to help develop commercial fisheries in western Alaska communities" and one of the eligibility requirements was that a community not have previously developed harvesting or processing capability sufficient to support substantial fisheries participation in the BSAI.²⁶

An argument that the language in national standard 4 limits the Councils and the Secretary to allocating fishing privileges to U.S. fishermen has not been supported by a reviewing court. In AFTA v. Baker, Intervenor-Plaintiff American Independent Fishermen (AIF) challenged the Secretary's allocation of pollock and Gulf of Alaska Pacific cod to the inshore component, claiming that such allocations were outside of the Secretary's statutory authority. Arguing that because the inshore component included on-shore processors and national standard 4 authorizes allocations only to U.S. fishermen, which does not include on-shore processors, AIF asked the court to find the allocation invalid. The judge disagreed with AIF, finding that "national standard 4 does not express 'clear Congressional intent' to

with little or no [catch] history who recently purchased a vessel." Ruling on whether the allocation was fair and equitable under national standard 4, rather than an unauthorized extension of the Secretary's authority, the court did not agree with plaintiffs' claim and found that the record supported the Mid-Atlantic Council's use of vessel, rather than individual, catch data. Sea Watch Int'l v. Mosbacher, 762 F. Supp. 370, 377 (D.D.C. 1991).

²⁴Id., at 375-76.

²⁵50 CFR 675.20(a)(3)(1) (1992).

²⁶57 FR 46139, 46139, 46140 (1992). (codified at 50 CFR part 675) (proposed October 7, 1992).

prohibit the allocation which AIF challenges" and found that the challenged regulations allocated fishing privileges among fishermen. Judge Rothstein continued by stating that "[the regulations] in effect regulate offshore catcher-processors, which would otherwise preempt the coastal sector of the fishing industry."²⁷

Based on this analysis, there is no explicit or implicit statutory requirement that the Councils and the Secretary allocate, either initially or by subsequent transfer, fishing privileges only to harvesters. To the contrary, the Magnuson Act has been construed as authorizing the Councils and the Secretary to make allocations of fishing privileges to harvesters as well as other persons or groups. Relying on the authority established by this interpretation, the Councils and the Secretary have allocated fishing privileges among various "fishermen," harvesters as well as others. And as long as an allocation is consistent with the Magnuson Act and other applicable law, a reviewing court is not likely to determine that such an interpretation is "manifestly contrary" to Congressional intent.

III. Allocations of fishing privileges must be consistent with national standard 4.

It is important to keep in mind that any allocation of fishing privileges must be consistent with national standard 4. National standard 4 requires that allocations be fair and equitable, reasonably calculated to promote conservation and carried out such that no particular individual, corporation or other entity acquires an excessive share of fishing privileges. Any allocation scheme that a Council selects must demonstrate how it complies with these three requirements.

Recognition of capital investment and past participation of processors, specifically on-shore processors, in the initial allocation of quota share raises several fairness and equity difficulties. First and foremost is the fact that allocations of fishing privileges that benefit one group to the exclusion or detriment of another must be justified in the administrative record developed by the Councils and the Secretary. If a Council adopts an allocation scheme that allocates fishing privileges to vessel owners, leaseholders and on-shore processors, for example, it will have to explain why other participants, such as skippers and crewmembers, were excluded from receiving an allocation.

²⁷ American Factory Trawler Ass'n v. Baker, Civ. No. 92-870R, Order at 17 (W.D. Wash. July 24, 1992).

²⁸ Id., at 18.

Compounding the difficulties in developing such a justification is determining how much quota to allocate to persons that do not have a documented catch history. Can on-shore processor investment in buildings and equipment be equated to catch histories and investments in vessels for harvesters such that the allocations would result in a fair and equitable distribution of fishing privileges? If a Council can devise a method of determining the appropriate allocation of quota shares for on-shore processors, would it be able to devise a method for determining the appropriate allocation of quota shares for skippers and crewmembers. It is a question whether the Councils and the Secretary would be able to adequately justify an allocation scheme that allocates fishing privileges to some participants that cannot document a catch history but excludes other participants that cannot document a catch history. It must be remembered that the Councils and the Secretary clearly have the authority to allocate fishing privileges among those persons dependent on the fishery. However, the Councils and the Secretary must be able to justify the allocation scheme as fair and equitable and not arbitrary and capricious.

A third problem is that any initial allocations of fishing privileges to persons other than harvesters may represent a reduction to quota available for harvesters. The allocation "pie" is a finite resource; an allocation of fishing privilege to one person represents a loss of fishing privileges to another. Finally, an initial allocation of fishing privileges to vessel owners or skippers results in an allocation of fishing privileges to U.S. citizens due to U.S. Coast Guard documentation laws and manning requirements. Allocations to some crewmembers or on-shore processors may result in allocations to alien crewmembers or foreign owners.

Because of the implications of each allocation scheme, it is important for a Council to examine the goals and objectives to be attained by allocations of fishing privileges and determine which allocation scheme will achieve the desired results.

CONCLUSION

In conclusion, an allocation scheme that allocates at-sea processing privileges is permissible under the Magnuson Act. As long as the Councils and the Secretary allocate fishing privileges to achieve a purpose recognized under the Act and that furthers the achievement of optimum yield and is consistent with the national standards, other provisions of the Magnuson Act and other applicable law, NOAA General Counsel concludes that such an allocation scheme is authorized under the Act. However, it must be stressed that the more complex the allocations and the basis used for dividing those allocations among participants, the more

difficult it could be to defend under an arbitrary and capricious standard and the more costly it would be for the National Marine Fisheries Service to implement.

cc: Meredith J. Jones
Jay S. Johnson
Margaret F. Hayes

Attachment



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel, GCNW
7600 Sand Point Way N.E.,
Seattle, Washington 98115-6349

October 30, 2007

Donald K. Hansen
Chairman
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR 97220-1384

Dear Mr. Hansen:

This letter is in response to the Council's request for legal review of the Trawl Individual Quota alternatives that have been preliminarily adopted for analysis. We have not concluded our review of the entire program, which will continue during the development and consideration of the program. We do, however, have several comments at this stage of development.

First, we stress that a proper written record, including a detailed explanation and justification for the various alternatives and their major components, is required for agency decision making. NMFS needs a clear record of the rationale in order to make (and defend if necessary) a reasoned decision on approval and implementation. We will continue working with Jim Seger and Merrick Burden to ensure that the rationale and justification are sufficiently documented as part of the Environmental Impact Statement and associated documents.

Next, we have determined that several provisions of the shoreside cooperative proposal are not consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. §§1801 *et seq.* As you will recall, GCNW's letter of June 10, 2005, which is enclosed, stated our opinion that "under the MSA, no program that amounts to an allocation of shorebased processing privileges can be implemented (except for one recent exception for specific Alaska fisheries)." Additionally, we stated that "a limit could not be placed on the number of processing sites if the purpose were to allocate shoreside processing privileges." We also stated that "requiring that fishermen sell their fish only to specific processors that hold IFQ is the equivalent of allocating on-shore processing privileges and thus is not authorized by the MSA."



The following provision of the alternative entitled "Co-ops for Catcher Vessels Delivering to Shoreside Processors" adopted by the Council at its June 2007 meeting limits the number of processing sites in order to provide those sites with processing privileges and therefore is beyond the agency's authority under the MSA:¹

--In the first two years of the program, the only shoreside processors that are eligible to get Shoreside Processor (SSP) Permits and receive fish from whiting harvesting cooperatives are those that processed at least 1,000 mt of whiting in each of any two years from 1998 through 2004.

The following provisions of the June 2007 shoreside co-operative alternative obligates catcher vessel deliveries to a specific processor and thus establish a specific amount of whiting that must be delivered to specific shoreside processors. These provisions have the effect of allocating shoreside processing privileges and therefore are beyond the agency's authority under the MSA.

--During the first two years of co-op formation, permit owners that join a co-op shall be required to deliver their whiting catches to the co-op qualified processors that were the basis of their landing history during the period **Years Option 1, 2001; Years Option 2, 2000; Years Option 3, 2000-2003**. Determination of the processor(s) to which a permit holder is obligated will take into account any successors in interest (see following paragraph). Transfers may take place within the co-op between permit holders to allow a permit holder to make deliveries exclusively to one processor so long as the total allocation received by the co-op, based on the permit holders that are members thereof, is distributed between the various co-op qualified processors on a pro rata basis based on the landing history of the members of the co-op during the period **[SAME YEAR(S) SELECTED IN THE FIRST SENTENCE]**.

--After the first two years: (Option 1: catcher vessels are "released from delivery obligations to the processor(s) that were the basis of its history.") **Option 2:** Thereafter any catcher vessels participating in a co-op is linked indefinitely to the processor they are delivering to under the initial linkage requirement. The permit can sever that linkage by participating in the non-co-op fishery for a period of **[Options: 1 to 5 years]**. After completing their non co-op obligation, the permit is then free to reenter the co-op system and deliver to a processor of their choosing. Once the vessel reenters the co-op system and elects to deliver their fish to a processor, a new linkage is then established with that processor. Should the permit later choose to break the new linkage, the non-co-op participation requirements again apply.

--Co-op allocation: Each year NMFS will determine the distribution to be given to each co-op based on the landing history calculation of catcher vessel permits

¹We are working from a draft prepared by the Council following the Council meeting, dated July 11, 2007, which incorporates revisions by the Council to earlier drafts.

registered to participate in the co-op that year. In addition, NMFS will determine the landing history linking each co-op to each processor, if any.

-Mutual agreement exception: By mutual agreement of the catcher vessel permit owner and shoreside processor to which the permit's catch is obligated, a catcher vessel may deliver to a shoreside processor other than that to which it is obligated. The transfer may be temporary or permanent. In either case the vessel's catch taken under that permit will continue to be obligated to its permanent processor (which is the transferor processor if the transfer is temporary or the transferee processor if the transfer is permanent) subject to the terms of the transfer agreement. To make an additional change from its processor link (a change that is not by mutual agreement) the permit will need to be used in the non-co-op fishery for the prescribed time.

-Inter- or intra- co-op transfers by limited entry permit owners must deliver co-op allocation (shares) to the shoreside processor to which the shares are obligated unless released by mutual agreement.

-If a shoreside processor transfers its SSP permit to a different shoreside processor or different owner, the catcher vessel's obligation remains in place unless changed by mutual agreement for participation in the non-co-op fishery.

We are aware that the alternative contains provisions that proponents may suggest eliminate the allocation of processing privileges: the shoreside processor limitation is for only the first two years of the program; the catcher vessel- processor linkage or obligation is for only the first two years of the program under one of the options; catcher vessels are not obligated to join a co-op and thus be obligated to a processor (instead they would fish in the non-co-op fishery where the quota is available to all catcher-vessels in the non-co-op fishery); and the obligation can be extinguished by mutual agreement of the processor and the catcher vessel. These provisions do not, however, eliminate the allocation, under certain circumstances, of the shoreside processing privilege. In general, the portions of the shoreside proposal that are not just a continuation of an existing management system include one or more of the elements that are beyond the MSA authority.

As we noted in our June 10, 2005, letter, it is "NOAA's longstanding opinion that the MSA does not provide the legal authority to establish a 'processor quota' system for shorebased processors," because shorebased processing is not "fishing" as that term is defined in the statute. The legal basis for this opinion is detailed in the enclosed Memorandum for North Pacific Fishery Management Council from Lisa Lindeman, NOAA Regional Counsel, Alaska Region, Magnuson Act authority to allocate fishing and processing privileges to processors, September 20, 1993. Nothing in any subsequent legislation changes our legal analysis. In recognition of this legal opinion, Congress specifically passed legislation to authorize processor quotas in the American Fisheries Act, Div. C, Title II, Subtitle II, Pub. L. 105-277, and in the Consolidated Appropriations Act of 2004, Pub.L. 108-199, section 801, which amended section 313(j) of the Magnuson-Stevens Act (the crab rationalization program). The recent Magnuson-

Stevens Fishery Conservation and Management Reauthorization Act (MSRA) does not change our 1993 legal analysis. While section 303A of MSRA adds specific consideration of processors among other sectors or participants in several sections, it does not make any modifications to the basis for NOAA's 1993 opinion. Significantly, section 303A specifically establishes the requirements for a "limited access privilege program to harvest fish". 16 U.S.C. §1853a (emphasis added).

We are available to work with the staff, the TIQC and the GAC to modify the alternative such that it is consistent with the MSA and, to the extent possible, meets the goals of the original language.

We are aware that the Council has asked specific questions about any potential anti-competitiveness implications of the alternatives, including the processor linkage in the mothership coop and the issue of excessive shares. We have initiated informal discussions on the alternatives with the Department of Justice, with the intent of notifying the Council of any issues in a timely manner.

We look forward to continuing to work with you as you move forward on this important rationalization program.

Sincerely,



Eileen M. Cooney
NW Regional Counsel

Agenda Item C.5.c
Supplemental General Counsel Letter
June 2005



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel, GCNW
7600 Sand Point Way N.E.,
Seattle, Washington 98115-6349

June 10, 2005

Donald K. Hansen
Chairman
Pacific Fishery Management Council
7700 NE. Ambassador Place, Suite 200
Portland, Oregon 97220-1384

Dear Mr. Hansen:

This letter is in response to your letter, dated January 27, 2005, in which you requested a NOAA General Counsel opinion on any legal issues or constraints posed by several alternatives under consideration during the ongoing development of a possible individual fishing quota (IFQ) program for the West Coast limited entry trawl groundfish fishery. Mariam McCall, representing NOAA General Counsel, provided oral responses to the letter at the February 23-24, 2005, meeting of the Ad Hoc Groundfish Trawl Individual Quota Committee. Her responses have been incorporated in the Draft Summary Minutes of that meeting and are summarized below.

Questions 1 and 2: What are the legal issues or constraints posed by "allowing IFQ to be held (owned) by fish processors, at any time," and "issuing IFQ to fish processors at the time of initial allocation of shares?"

Response: The Council has considerable leeway in making the decision about who may be issued or hold IFQ; processors as well as other groups or persons could be issued or hold IFQs. Any allocation decision must have a record developed to support it. As part of the record, the requirements of Magnuson-Stevens Fishery Conservation and Management Act (MSA) National Standard 4 and section 303(b)(6), among other provisions, must be considered.

Question 3: What are the legal issues posed by requiring fishermen to sell their fish to particular processors by establishing a license limitation system for processors or an individual processing quota (IPQ)? The Council also requests information on other legal issues that might be associated with limiting the processors to whom a harvester might sell fish.

Response: As you are aware, it is NOAA's longstanding opinion that the MSA does not provide the legal authority to establish a "processor quota" system for shorebased processors. See Memorandum for North Pacific Fishery Management Council from Lisa Lindeman, NOAA General Counsel, Alaska Region, Magnuson Act authority to allocate fishing and processing privileges to processors, September 20, 1993 (enclosed). Thus, under the MSA, no program that amounts to an allocation of shorebased processing privileges can be implemented (except for one recent exception for specific Alaska fisheries). As for any potential legal issues, providing a legal opinion on a hypothetical program that assumes new authority to establish limited entry

systems for processors is difficult because the parameters of the hypothetical program have not been developed. I understand you are interested in having the antitrust questions referred to the Department of Justice, however, it is unlikely that DOJ could provide meaningful advice at this point in the process. As you are aware, DOJ provided comments on a proposed Alaska crab IPQ program in August of 2003. At that time, the crab program had been developed in detail by the Council, and legislation authorizing it was anticipated shortly. Enclosed is a copy of that letter from DOJ to the NOAA General Counsel.

Question 4: What are the legal issues posed by requiring that fishermen sell their fish to processors that hold IFQ? The primary difference between this and an IPQ program would be that the processors and fishers would purchase their individual quota from a single IFQ pool rather than pools split into IPQ and IFQ.

Response: Requiring that fishermen sell their fish only to specific processors that hold IFQ is the equivalent of allocating on-shore processing privileges and thus is not authorized by the MSA.

Question 5: What are the legal issues posed by limiting or restricting in any way the number of fish processors that may purchase fish from fishermen?

Response: In general, a limit could not be placed on the number of processing sites if the purpose were to allocate shoreside processing privileges. However, the licensing or permitting of processor sites could be allowed for enforcement or monitoring purposes, as long as the requirements were necessary for the conservation and management of the fishery and not a disguised limited entry program. Incidental allocation consequences could be permissible depending on the record. Provisions that have the practical effect of limiting the number of ports or sites to which deliveries could be made could be defensible if the record is clear that they are designed for biological, conservation or management purposes.

Question 6: What are the legal issues posed by accumulation caps, including whether there are legal issues to be considered in developing options with different caps for different types of entities and how the legal considerations may change on whether caps are applied to amounts used on a vessel, amounts owned and amounts controlled (leased or owned).


Response: The response will depend on the record and the rationale developed to support proposed caps, and the justification to support the measures as necessary conservation and management measures. Once the Council has identified the accumulation caps to be considered, and adequate analysis and background information is available, it may be possible to request a Department of Justice opinion on antitrust or related issues. In general, while it is possible to ascertain and monitor the ownership of quota as recorded with NOAA Fisheries, it would be very difficult to ascertain and monitor the control of quota.

You also forwarded some questions that the IQ Committee included in the report of its October 2004 meeting. The report included two basic questions. First, if a rebuilding OY is exceeded, would the IQ fishery need to be shut down? And second, could quota overages or underages be rolled over to the next year?

Response: There is not a legal prohibition on doing this if the overall plan is structured such that this makes biological sense. For example, the rebuilding plans, and the FMP itself, would need to be structured to ensure that a variable OY (as a result of overages and underages) would meet the rebuilding targets and the OY requirements. You would also have to deal with how this affected the rest of the groundfish fishery. Finally, there would need to be a conclusion that it would not be so complex that in reality it couldn't be tracked.

As always, Mariam McCall and I are available to discuss these issues further.

Sincerely,



Eileen M. Cooney
NW Regional Counsel

Enclosures

PUBLIC TESTIMONY SIGN-UP SHEET

Agenda Item: C-2 GOA ROCKFISH PROGRAM

	NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1	Susan Robinson	Fishermen's Finest
2	Bob Krueger	Alaska Whitefish TRAWLER ASSOC
3	John Jani	Central GOA Processors
4	Julie Brown	AGDB
5	Heather McCarty, Mike Okoniewski	Island Sleetwoods
6	Dariusz Koprzak	FIW Malaga
7	Chuck W. Hartman	Luksa & Peninsular
8	Guyle A. Vick	GENCO3
9	JOE PLESNA	TRIDENT
10	Stephen Taufen	Groundswell (group- 6 min pls)
11	LORI SWANSON	GFF
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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

Handout

North Pacific Fishery Management Council
604 West 4th Avenue; Suite #306
Anchorage, Alaska 99501

194th Plenary Session – October 5, 2009
Hilton Hotel – Anchorage, AK

Re: C-2 Gulf of Alaska — Rockfish Pilot Program Review
Public Comment for the Record: Stephen Taufen, Groundswell Fisheries Movement

Mr. Secretary, Chairman Olson & Council Members:

I'm Stephen Taufen of the Groundswell Fisheries Movement, a public advocate in North Pacific fisheries on behalf of citizen-taxpayers' rights.

In testimony today, several in the industry expressed surprise at the recent legal opinion prohibiting processor linkages and quotas, but that's pretty amazing when you consider that these opinion have been known for many years. Many of the same firms involved here were also involved on the West Coast whiting issues during the last few years and had copies of these opinions from a year ago at the Pacific council.

As to the issue of the Rockfish program's success it depends on your point of view — for large companies, they are happy; but the smaller corporations consider it far from a success. Getting left out of the profits tends to bring home such reality.

Groundswell has several concerns:

There is the issue of Competition versus Efficiency as the ultimate goal in Antitrust, but preserving competition (not particular competitors) often serves as an adequate mediate goal, sufficient for a court ruling for dissolution of a bad combine of firms.

We're concerned with the fleet cooperatives, as in Antitrust there is "Rule of reason," which for such coordinated catch management systems —along with their 'shopping lists' for secondary species— appear to be a clear case of prohibited "covenants not to compete."

As to Congressional Intent: we believe that it was the intent of Congress to only reach Processors by LAP programs through Communities and Regional Fisheries Associations, not directly. Therefore, all the criteria regarding 'fair and equitable' distributions applies, especially the matters of crews and transparency.

I'll remind you again, processors do not create jobs, unless they enhance the products in ways employing more skilled production. It is the fish itself — because each pound in a TAC that is landed requires a certain number of handling hours by labor. And the opportunities for more labor occur because of value-added and operating on margins, in niche markets, etc. And small processors with creativity and new energies perform this role, better.

We are concerned that the purpose of Rockfish Rationalization is to Suppress Competition, and the Council must be diligent in ensuring program designs do not meet the “effect of” suppression. The section 3 Clayton act prohibitions against “tying and exclusive dealing”, and section 7 rules about “substantially lessening competition” should be considered.

We are also concerned that the true purpose of the plan is to fish other species, and that Rockfish is just a façade for the award of secondary species of far greater value. Table 3 and Table 9 illustrate this, and the new options for moving qualifying years seem designed especially to allow, for example, the trawl take of another \$8 to \$11 million worth of Sablefish annually. Halibut additional take should also be computed in ex-vessel value terms.

Summary:

One problem area is that of Collective Dominance in most of the options, preventing rivals from gaining “competitive access” to multi-species in the fishery. The problem is also with Exclusionary Abuse, specifically of two kinds: (1) foreclosure of small plants through the use of fleet capturing tactics (already harming, e.g. Global Seafoods North America by pre-planned fleet boycott); and (2) segregation (of vessel operators from owners, and of captains from crew on deck) and the resultant disenfranchisement of crew labor.

For Rockfish, we now have the example of Crab Ratz to look to for defining Economic Data Report information collection and should get to work on it, and incorporate crew options into the program design. Crews, through “lay share” contract rights under federal law, traditionally received between 30% and 40% of the trip settlement value (adjusted gross revenues after specific trip expenses such as fuel, groceries)

The EDR data must be collected, along with settlement data and accounting reconciliations for trips on fish caught, which must already be prepared before CPAs handle the rest of the accounting for the firms. If the program must sunset and we have a few years hiatus before any new program (if at all), then fine. After all, the program was for “demonstration” purposes, so let’s find out now what pre- and post-RPP means, collect data, and if that requires a stand down then so be it. We must know whether or not the purposes of the current program were necessary and served, before granting such a general exemption, when it is clear other management tools could have worked as well or better, preserving a fair market.

In closing, our choice in the alternatives on all levels is for Status Quo – revert to LLP management, and removing LLP restrictions on the Fixed Gear sectors would be good.

Thank you.



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Groundswell Fisheries Movement

