

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver 
Executive Director

DATE: September 29, 2003

SUBJECT: Groundfish Management

ESTIMATED TIME 6 HOURS all D-1 items
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ACTION REQUIRED

Final action on BSAI and GOA Plan Amendments 48/48 to revise the TAC-setting process

Amendments 48/48 to revise the TAC-setting process

The proposed action under BSAI and GOA Plan Amendments 48/48 is to amend the process by which harvest specifications would be established in future years, eliminate certain TAC reserves, and update the fishery management plan language. Objectives for the revised process include managing the Alaska groundfish fisheries based on the best available scientific information and providing meaningful opportunity for useful public comment, provide additional opportunity for Secretarial review, minimize unnecessary disruption to fisheries and public confusion, and promote administrative efficiency.

Numerous versions have been previously reviewed by the Council as NMFS has responded to evolving legal and administrative environments. A September 17, 2003 letter from Dr. Balsiger provides a history on this action and notes that a preferred alternative has not been identified (Item D-1(e)(1)). The revised analysis was mailed to the Council on September 8, 2003. The executive summary is under Item D-1(e)(2). The alternatives are listed below. The Joint Plan Teams recommended Alternative 5 and Option C, if the status quo was no longer possible for legal reasons.

- Alternative 1. Status quo. (Publish proposed specifications, followed by interim and final specifications)
- Alternative 2. Eliminate publication of interim specifications. Issue proposed and final specifications prior to the start of the fishing year based on projections of TACs.
- Alternative 3. Issue proposed and final harvest specifications based on an alternative fishing year schedule (July 1 to June 30).
 - Option 1. Set sablefish TAC on a January through December schedule.
 - Option 2. Reschedule the December Council meeting to January.
- Alternative 4. Use stock assessment projections for biennial harvest specifications. Set the annual harvest specifications based on the most recent stock assessment for Year 1 and set harvest specifications for Year 2 based on projected overfishing level (OFL) and ABC values. Set PSC limits annually

Alternative 5. Establish 18 months harvest specifications (Year 1 and first half of Year 2) Option:
Annually set sablefish harvest specifications for all of Year 2.

Stand Alone Options:

Option A. Abolish certain TAC Reserves

Option B. Update FMPs to reflect current fishing participants and harvest specifications process.

Option C. Set biennial harvest specifications for certain GOA target species/complexes.



September 17, 2003

RECEIVED
SEP 29 2003
N.P.F.M.C

Mr. Dennis Austin, Interim Chairman
North Pacific Fishery Management Council
605 West Fourth Avenue, Suite 306
Anchorage, Alaska 99501-2252

Re: Amendments 48/48 to Fishery Management Plans (FMPs) for the Groundfish Fisheries of the Bering Sea and Aleutian Islands Management Area and the Gulf of Alaska and the 2004 Harvest Specifications

Dear Dennis,

In October 2002, the Council postponed final action on Amendments 48/48 to allow for additional analysis. These amendments would revise the current process for setting harvest specifications and related management measures for new fishing years. The Council delayed action because the Marine Conservation Alliance (MCA) presented two additional alternatives in addition to those analyzed in the environmental assessment/regulatory impact review/initial regulatory flexibility analysis (EA/RIR/IRFA) for this action. NMFS recommended and the Council agreed that these new alternatives should receive legal review before further analysis.

NOAA General Counsel (GC) completed its review of the MCA alternatives in context of the Administrative Procedure Act (APA) and Magnuson-Stevens Fishery Conservation and Management Act (MSA) requirements for rulemaking. They determined that one of the proposed alternatives could meet the requirements of these statutes. As a result, the MCA alternative that could meet the statutory requirements was added to the EA/RIR/IRFA as Alternative 5. The revised EA/RIR/IRFA was provided to the Council on August 28, 2003, and is scheduled for final action as agenda item D-1(f) for the October 2003, Council meeting.

The EA/RIR/IRFA does not identify a preferred alternative. All of the alternatives (see enclosure) have the problem of new information becoming available either after the proposed rule is submitted to NMFS Headquarters for review and publication and before the start of the fishery, or during the fishery. This primarily is a problem for ensuring that harvest amounts remain consistent with seasonal apportionments under the Steller sea lion protection measures and for ensuring that the level of fishing is appropriate for the latest biomass information. Alternative 4 is not recommended due to potential effects of managing the fisheries on two year projections. Alternative 2, and Alternative 3 with the sablefish option, meet the objectives of the action but include potential effects on short lived target species due to managing the fisheries on projected data. The simulation modeling of these alternatives suggests that for short lived species these alternatives may lead to reductions in harvest, increased biomass, and increased potential for exceeding the overfishing level. These results are not precise so the magnitude of the effects



are unknown. Alternatives 2 and 3 provide the best process for harvest specifications rulemaking, with Alternative 2 providing the most time for completing analysis and rulemaking.

Alternative 5 is similar to status quo, except a more difficult decision making and a potentially more difficult rulemaking process would be required in December. In order to reduce the likelihood of an additional proposed rule, the proposed specifications would need to be very detailed, including anticipating any potential adjustments that may occur in the final specifications. The final specifications would be compared to the proposed specifications to determine if the final specification could be considered a "logical outgrowth" of the proposed specifications. If not, a second set of proposed specifications may be required. The fisheries would be managed in the first three to six months of the year on projected values until the final specifications are effective. The administrative process in December and the beginning of the year would include completing final rulemaking and making any necessary adjustments to the first six months total allowable catches (TACs). The method of adjusting the first 6 months TAC would depend on the reason for the adjustment and may require additional rulemaking, either emergency or proposed and final rulemaking. In either case, the rulemaking may require an additional 2 to 3 months.

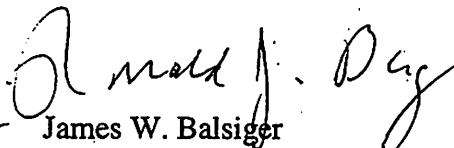
Alternative 5 is very similar to status quo in effects on target species and by not basing the proposed rulemaking on final Council action. If an additional proposed rule is required because the final specifications are not a "logical outgrowth" of the proposed specification, the effects on the fisheries would be similar to effects described for Alternative 3. Because the proposed rule is not based on final Council action, Alternative 5 would result in uncertainty each year in the method and timing of the final harvest specifications.

The EA/RIR/IRFA for Amendments 48/48 contains three options that could be recommended by the Council, independent of the harvest specifications process revisions. Option A would revise the harvest specifications process by eliminating certain TAC reserves that no longer are necessary for managing the fisheries. Option B would update language in the groundfish FMPs to accurately reflect the fisheries and the current harvest specifications process. Option C would provide for biennial harvest specifications for certain long lived GOA target species and GOA Atka mackerel.

For the 2004 harvest specifications, we will use the same process for developing harvest specifications as used for the 2003 harvest specifications: proposed specifications followed by interim and final specifications. The development of 2004 proposed harvest specifications will be projections from the 2002 Stock Assessment and Fishery Evaluation reports. These projections are adjusted for the 2003 projected catch for tier 1 through 3 species. Proposed 2004 specifications for tier 4 and 5 species are based on TACs, acceptable biological catches, and overfishing levels from 2003. The goals of this process are to develop proposed specifications that would be similar to the final specifications and to ensure the interim 2004 specifications would meet the seasonal apportionments objectives for pollock, Atka mackerel, and Pacific cod, as required by the Steller sea lion protection measures.

As seen in the EA/RIR/IRFA for Amendments 48/48, the use of projections for the 2003 proposed harvest specifications did not result in the final specifications mirroring the proposed specifications. TACs were adjusted between the proposed and final specifications for reasons that include the availability of new biomass information after the development of the proposed specifications and adjustment of TACs to maintain the harvest in the BSAI at less than the 2 million optimal yield. Ensuring that the final specifications are a logical outgrowth of the proposed specifications, as required under the APA, will be difficult for NMFS as long as proposed rulemaking is initiated before the Council's final action.

Sincerely,


James W. Balsiger
Administrator, Alaska Region

Enclosure

cc: D. Demaster, AFSC
L. Lindeman, GCAK

Harvest Specifications Process Revision

The objectives of revising the harvest specifications process are:

1. Manage fisheries based on best scientific information available,
2. Provide for adequate prior public review and comment to the Secretary on Council recommendations,
3. Provide for additional opportunity for Secretarial review,
4. Minimize unnecessary disruption to fisheries and public confusion, and
5. Promote administrative efficiency.

The five alternatives and three stand alone options analyzed in the EA/RIR/IRFA are:

Alternative 1: Status quo. (Publish proposed specifications, followed by interim and final specifications)

Alternative 2: Eliminate publication of interim specifications. Issue proposed and final specifications prior to the start of the fishing year based on projections of TACs. Harvest specifications are recommended in year 1 for the year 3 fishery.

Alternative 3: Issue proposed and final harvest specifications based on an alternative fishing year schedule (July 1 to June 30).

Option 1: Set sablefish TAC on a January through December schedule.

Option 2: Reschedule the December Council meeting to January.

Alternative 4: Use stock assessment projections for biennial harvest specifications. Set the annual harvest specifications based on the most recent stock assessment for Year 1 and set harvest specifications for Year 2 based on projected overfishing level (OFL) and ABC values. Set PSC limits annually

Alternative 5: Establish 18 months harvest specifications (Year 1 and first half of Year 2)

Option: Annually set sablefish harvest specifications for all of Year 2.

Stand Alone Options:

Option A: Abolish nonspecified TAC reserves in the BSAI and TAC reserves in the GOA.

Option B: Update FMPs to reflect current fishing participants and harvest specifications process.

Option C: Set biennial harvest specifications for certain GOA target species/complexes.

EXECUTIVE SUMMARY

Each year, normally in December, proposed groundfish harvest specifications for the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA) are published in the Federal Register. These proposed specifications are based upon total allowable catch (TAC), acceptable biological catch (ABC) and prohibited species catch (PSC) amounts, and apportionments thereof, which have been recommended by the North Pacific Fishery Management Council (Council) for the current year. Based on public comment on the proposed specifications and information made available at the December Council meeting, final specifications are published in the Federal Register during February or early March. So that fishing may begin January 1, regulations authorize the release of one-fourth of each proposed TAC and apportionment thereof, one-fourth of each PSC and apportionment thereof and the first seasonal allowance of BSAI and GOA pollock and Pacific cod and BSAI Atka mackerel. These interim specifications are based upon the proposed specifications and published in the Federal Register in December and are superseded by the final specifications.

The existing harvest specification process is problematic for several reasons. The public is notified and given opportunity to comment on proposed specifications that often are outdated by the time they are published because stock assessment revisions between approval of the proposed and interim specifications and the final specifications result in changes between the proposed and final specifications. The publication of proposed specifications each year can confuse the public, because incomplete and outdated information is provided due to the need to adhere to a strict time line in order to comply with all relevant regulations. Because the interim specifications are based on the proposed specifications, they do not take into account the recommendations contained in the Groundfish Plan Teams' final stock assessment and fishery evaluation (SAFE) reports, or the recommendations coming from public testimony, the Science and Statistical Committee (SSC), Advisory Panel (AP), and Council at its December meeting. One fourth of the initial TAC and PSC amounts have been found to be an inadequate amount for those fisheries that attract the greatest amount of effort at the beginning of the fishing year. As fisheries are seasonally apportioned to meet other management needs, interim TACs based on one fourth of the annual TAC increasingly compromise other management objectives. Under the current process, administrative inefficiency exists in taking the regulatory actions necessary to set interim, proposed, and final specifications. For these reasons, NMFS seeks to revise the harvest specification process.

The objectives of modifying the harvest specifications process are to manage fisheries based on best scientific information available, provide for adequate prior public review and comment to the Secretary on Council recommendations, provide for additional opportunity for Secretarial review, minimize unnecessary disruption to fisheries and public confusion, and promote administrative efficiency.

The alternatives for amending this process are:

- Alternative 1. Status quo. (Publish proposed specifications, followed by interim and final specifications)
- Alternative 2: Eliminate publication of interim specifications. Issue proposed and final specifications prior to the start of the fishing year based on projections of TACs.

- Alternative 3: Issue proposed and final harvest specifications based on an alternative fishing year schedule (July 1 to June 30).
 Option 1: Set sablefish TAC on a January through December schedule.
 Option 2: Reschedule the December Council meeting to January.
- Alternative 4: Use stock assessment projections for biennial harvest specifications. Set the annual harvest specifications based on the most recent stock assessment for Year 1 and set harvest specifications for Year 2 based on projected overfishing level (OFL) and ABC values. Set PSC limits annually
- Alternative 5: Establish 18 months harvest specifications (Year 1 and first half of Year 2)
 Option: Annually set sablefish harvest specifications for all of Year 2.

Stand Alone Options:

- Option A: Abolish certain TAC Reserves
 Option B: Update FMPs to reflect current fishing participants and harvest specifications process.
 Option C: Set biennial harvest specifications for certain GOA target species/complexes.

Section 4.11 gives the environmental summary and conclusions. The environmental components that may be affected by the proposed action are target groundfish species (including the State groundfish fisheries), prohibited species, Steller sea lions, State fisheries, IFQ fisheries, and AFA fisheries. State and AFA fisheries are potentially affected by the shifting of the fishing year under Alternative 3. Adjustment in the dates of State fisheries management may be needed, and possible difficulties in achieving the B season pollock TAC may be experienced by the AFA fisheries in years of high TAC. It is unknown if these effects may occur because of actions that may be taken by the State and the pollock industry that would mitigate the effects. Option 1 to Alternative 3 to set the sablefish TAC on a January through December schedule would allow the sablefish IFQ program to be managed concurrently with the halibut IFQ program, eliminating any potential effects on these programs from shifting the fishing year.

Table ES-1 provides a summary of the effects of the alternatives on certain environmental components compared to Alternative 1. Alternatives 1 and 5 are expected to have similar potential effects on groundfish and Steller sea lions because the use of information and timing of rulemaking are the similar under each of these alternatives. Results from simulation model and retrospective analysis indicated that under alternatives 2, 3, and 4, groundfish harvests would be less and several target species biomasses would be more than under alternatives 1 and 5. This was primarily due to uncertainty resulting from projecting harvest amounts further into the future than under Alternative 1. Alternative 3 is likely to provides less biomass variability and more likelihood of setting TAC below the OFL compared to alternatives 2 and 4. A number of factors are not part of the retrospective analysis and simulation model, including the full Council process, which can have a substantial effect on the final TAC and has historically been more conservative than the groundfish analysis in section 4.1 predicted. Potential overfishing and excessive seasonal harvest identified in the analysis are likely to be mitigated through the Council process and may also be mitigated by additional regulatory action, if new information becomes available during the current fishing year indicating the level of fishing is inappropriate. The effects on groundfish fishing mortality rates, biomass, and spatial and temporal harvest of groundfish from alternatives 2, 3, 4, and 5 are insignificant based on the results in section 4.1 and the significance criteria in the September 2003 revised draft programmatic supplemental environmental impact statement for the groundfish fisheries management in Alaska (PSEIS).

The only prohibited species that may be affected by the action is salmon under Alternative 3. The shifting of the fishing year provided less time to the pollock industry to harvest their B season apportionment which may result in more fishing during a period of higher salmon bycatch rates. This would be of more concern during years of high pollock TAC. The effect is unknown because of actions that the pollock industry may take to reduce the potential bycatch.

All of the alternatives may have temporal effects on the groundfish fisheries, posing difficulties in complying with Steller sea lion protection measures. These measures include the temporal dispersion of harvest of prey species to reduce the likelihood of competition between the groundfish fisheries and Steller sea lions. If biomass is falling, it is possible that the projected first seasonal apportionment may exceed the Steller sea lion protection measures. Inseason actions or emergency rulemaking may be used to reduce the first seasonal apportionment and possibly mitigate any potential effects on Steller sea lions. Because of the potential to mitigate the effects through conservative setting of TAC and regulatory action exists, the effects on the temporal harvest of prey on Steller sea lions is unknown. Under Alternative 3, current seasons may need to be adjusted for BSAI pollock and Pacific cod trawl fisheries to meet Steller sea lion protection measures and to coincide with the July 1 through June 30 fishing year.

Table ES-1 Effects on Environmental Components Comparison of Alternatives 2, 3, and 4 to Alternative 1 and 5

Environmental Component	Alt. 2	Alt. 3	Alt. 4
Groundfish Target species	Higher potential to set TAC over the OFL for short lived species. Higher biomass amounts over time.	Potential to set TAC over the OFL between Alt. 2 and Alt. 1. Biomass levels between Alt. 2 and Alt. 1. Similar to Alt. 5 if additional proposed rule required.	Potential to set TAC over the OFL higher than Alt. 2. Higher biomass amounts than Alt. 2 over time.
Prohibited Species	Same as Alt. 1 and 5	Possible increase in salmon bycatch in the BSAI pollock fishery	Same as Alt. 1 and 5
Steller sea lions	Unknown indirect effect on temporal dispersion of harvest of prey. Temporal harvest effects similar to Alt. 1 and 5	Less potential for indirect effect from harvest uncertainty than Alt. 2 but more than Alt. 1 and 5. Temporal harvest effects similar to Alt. 1 and 5.	More potential for harvest uncertainty than Alt. 2. Temporal harvest effects likely to be more than Alt. 2

Regulatory Impact Review

The Regulatory Impact Review (RIR) addresses the requirements of Presidential Executive Order (E.O.) 12866 for a benefit-cost analysis of the proposed action and its alternatives. A complete benefit-cost analysis was not possible. The information is not available to estimate dollar values for many of the benefits and costs. Moreover, the proposed action affects the conditions under which the Council and Secretary will make decisions about future TAC specifications. The actual benefits and costs will depend on the decisions made by the Council and Secretary, and those decisions cannot be predicted at this time. The RIR does examine a set of outcomes from this action that may affect the benefits and

costs. Three general categories of outcomes are identified: (1) impacts on the TAC setting process itself, (2) changes in the fishing year under Alternative 3, and (3) changes in harvests and biomass size under Alternatives 2, 3, and 4.

Alternatives 2, 3, 4, and 5 provide more time for the process of TAC setting. Each should provide more time for some combination of scientific analysis, peer review of scientific work, public notice and comment on the proposed specifications regulations, and consideration by the Council and the Secretary of Commerce. Since these alternatives will provide for public notice and comment on the specifications actually anticipated for the coming fishing year, comments received from the public will be more useful. Alternatives 2 and 4 provide the most time for this process; Alternative 3 increases the amount of time available, but not to the same extent. It may be difficult, moreover, to complete the entire rulemaking process in the time allotted under Alternative 3, especially with Option 2. Option 2 to Alternative 3 would provide additional time for stock assessment scientists to complete analysis but it may be administratively difficult to reschedule the December Council meeting to January. Alternative 5 provides additional time for notice and comment rulemaking and Secretarial decision, but not for scientific analysis of survey and other data.

Alternative 3 changes the fishing year to begin on July 1. A comparison of fishing seasons for different species with the proposed July 1 start date suggests that a shift from a January 1 to a July 1 start date would cause little disruption to many fisheries. The sablefish IFQ fishery in the GOA and BSAI is an important exception to this. A change in fishing year, and associated change in TAC, would be extremely disruptive in the middle of this fishing season, which currently runs from March 15 to November 15. It might be possible to delay the season, so that it started on July 1 with the start of the new fishing year. However, the administration of the individual quotas in this fishery requires a long closed period between the end of one fishing season and the start of the next. Currently the fishery is closed from November 15 to March 15. This closed period is best in the winter time since fishing conditions aren't as good, and there is less potential for bycatch conflicts with the related halibut fishery. However, a July 1 start for the year would mandate a closed period from March through June. Option 1 to Alternative 3, setting sablefish TAC on a January through December schedule, would eliminate this potential problem.

Alternatives 2, 3, and 4 lengthen the time between biomass surveys and the year in which specifications based on the surveys (specifications year) become effective. Under Alternative 1, the time between the survey information and implementation of the annual fishery based on that information is approximately 7 months, because the first three months of the year are managed under interim specification (which are based on the previous years TACs). Alternative 3 increases the period by three months, Alternative 2 increases the period by nine months, and Alternative 4 increases it by an average of 15 months per year (nine months for the first year of the biennial specifications, and 21 months for the second year). As the length of time between the biomass surveys and the specifications year increases, there is some evidence that biomass levels may vary more, ABCs and harvests may become smaller since lower harvest rates are triggered more often by the harvest control rule, mean spawning biomass levels become larger, and harvest variability increases. These results are extremely tentative.

If the harvest levels do decline as suggested by some modeling results, revenues to industry would also decline. Moreover, an increase in the year-to-year variability of harvest, also suggested by some model results, may impose increased interest and inventory carrying costs on industry.

Initial Regulatory Flexibility Analysis

The Initial Regulatory Flexibility Analysis (IRFA) identifies the numbers of small entities that may be regulated by the action, describes the adverse impacts that may be imposed on these small entities, and describes alternatives to the preferred alternative that may minimize the adverse impacts on the small entities and the reasons they weren't chosen. In this case a preferred action has not yet been identified. This IRFA addresses the statutory requirements imposed under the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Fairness Enforcement Act (SBREFA) of 1996.

The IRFA used the Small Business Administration (SBA) definitions of small entities. Small fishing entities were those that grossed less than \$3.5 million, small shoreside processing entities were those employing fewer than 500 persons. Non-profit entities were also considered small. The SBA also requires that an entity's affiliations be considered in determining its size. Large numbers of small entities may be regulated by this action. These include an estimated 1,211 small groundfish catcher vessel entities, 44 small groundfish catcher/processors, 36 shoreside groundfish processors, and six CDQ groups. The total numbers of entities regulated by this action include 1,228 groundfish catcher vessels, 80 groundfish catcher/processors, three groundfish motherships, 49 shoreside groundfish processors, and six CDQ groups.

There is some evidence that alternatives 2, 3, and 4 would lead to somewhat reduced revenues, cash flow, and profits for the small entities, although this result is uncertain. It was not possible to estimate the size of the impact on the small entities, although it was believed to be greatest for Alternative 4, less for Alternative 2, and least for Alternative 3. Increased year-to-year fluctuations in gross revenues may occur, and these also were expected to be greatest for Alternative 4, less for Alternative 2, and least for Alternative 3. Alternative 5 is not expected to have significant impacts on the level of variability of revenues compared to Alternative 1. The analysis was unable to determine whether or not there would be a disproportionate impact on small entities (compared to large entities). The analysis did identify additional impacts that were not adverse. Alternatives 2, 3, 4, and 5, provide better opportunities for small business input into decision making about specifications since they provide for more informed public notice and comment.

An important component of an IRFA is a review of the alternatives that have not been chosen, but that minimize the burden of the rule on regulated small entities, and an explanation of why each of these has not been chosen. In this case, a preferred alternative has not yet been chosen. Therefore it has not yet been possible to complete this portion of the IRFA.

Environmental impacts and socioeconomic impacts resulting from changing fishing patterns as a result of the preferred alternative would be assessed annually in the EA/RIR/IRFA that accompanies the final harvest specifications.

A preferred alternative has not been selected in this analysis. Table ES-2 compares the alternatives to the objectives of this action. Alternatives 2, 3, 4, and 5 include the projection of ABC to set harvest specifications which may cause increased variability and potentially less harvest of groundfish over time with the effects increasing the further the projections are made. Alternatives 1 and 5 have the least potential for environmental effects because of similar projections for only a few months at the beginning of the following year (interim specs. under Alternative 1 and January-March of year 2 under Alternative 5, if final rule can be issued after proposed rule). All of the alternatives have the problem of new

information becoming available after the harvest specifications are in place that may result in emergency or inseason adjustment to ensure harvests levels are appropriate for biomass levels and to ensure Steller sea lion protection measures are met. Alternatives 1, 2, 3 and 5 have similar potential for this type of adjustment based on new data and Alternative 4 poses the worst scenario because of the longer projections.

Alternatives 2 through 5 provide for adequate prior public review and comment to the Secretary on Council recommendations. Alternatives 2 through 5 provide for additional opportunity for Secretarial review with Alternatives 3 and 5 providing less opportunity than alternatives 2 and 4. More time is provided under Alternatives 2 and 4 to perform stock assessments, to develop Council recommendations and to allow NMFS to implement proposed and final rule making before the beginning of the fishing year. The shifting of the fishing year under Alternative 3 has the disadvantage of requiring changes to the Sablefish IFQ program to accommodate a new fishing year, potentially affects the State fisheries, and provides less time for the stock assessment and rulemaking processes compared to Alternatives 2 and 4. Option 1 to Alternative 3 would eliminate the potential problems with the sablefish fisheries. Alternatives 2, 3, and 4 provide less disruption to fisheries and public confusion because the proposed rule for the harvest specifications would be based on final Council action. Alternative 5 provides flexibility for implementing the specifications but results in uncertainty in timing and the method of rulemaking that may be used each year. With increased flexibility, the administrative process for implementing the regulations under Alternative 5 is less efficient than alternatives 1, 2, 3, and 4. The most administratively efficient alternatives are those with the proposed specifications based on final Council action, as in alternatives 2, 3, and 4, except Alternative 4 with annual PSC limits, requires annual rulemaking, reducing the administrative efficiencies that could have been realized with a biennial harvest specifications process.

Options A to eliminate certain TAC reserves and Option B to update the fishery management plan (FMP) language are housekeeping actions that have no effect on the environment and provide clarity and efficiency in managing the groundfish fisheries. Option C is not expected to have an impact on the environment and meets the objectives of this action. All of these options may be included with the alternative selected, except Option C with Alternative 4 which sets biennial harvest specifications for all species and areas.

Table ES-2 Do the Alternatives Meet the Objectives of the Action?

Objectives	Alternative 1	Alternative 2	Alternative 3 with sablefish option	Alternative 4	Alternative 5 with sablefish option	Option C, GOA Biennial Specs.
Manage fisheries based on best scientific information available	Yes for final specifications. Interim specifications based on previous year's SAFE documents. May be a problem for short lived species	Yes, at time of decision making. Final specifications based on previous year's SAFE documents. May be a problem for short lived species	Yes, at time of decision making. Second half of fishing year (Jan-June) projected from previous year's SAFE document. May be a problem for short lived species	No. Final specifications in second year based on SAFE documents over two years old. Less certainty in ABC projections compares to other alternatives	Yes for final specifications for the first year. First half of second year based on previous year's SAFE documents. May be a problem for short lived species.	Yes, Projections have no effect on species under this option.
Provide for adequate prior public review and comment to the Secretary or Council recommendations	No, proposed specifications are not an accurate reflection of final specifications	Yes	Yes	Yes	Yes	Yes, with alternatives 2,3,4, and 5
Provide for additional opportunity for Secretarial review	No, rulemaking time period is compressed.	Yes	Yes, but less time than Alternative 2 and 4.	Yes	Yes but less time than alternatives 2 and 4 if second proposed rule is not required.	Yes, with alternatives 2,3,4, and 5
Minimize unnecessary disruption to fisheries and public confusion	No. Proposed rulemaking is not an accurate reflection of final rule and not useful for planning purposes.	Yes, except new information after the establishment of specifications may result in adjustments. Proposed rule accurately reflects final rule.	Yes, except new information after the establishment of specifications may result in adjustments. Proposed rule accurately reflects final rule.	Yes, except new information after the establishment of specifications may result in adjustments. Proposed rule accurately reflects final rule.	No. Proposed rule is not based on Council final action and may require additional rulemaking beyond alternatives 2, 3, and 4, increasing uncertainty.	Yes, harvest levels are set for two years.
Promote administrative efficiency	No, three rule makings required for each year. Adjustment of interim specs. may be required based on new information.	Yes, proposed and final rulemaking follows Council final action. Adjustment of specs. may be required based on new information.	Yes, proposed and final rulemaking follows Council final action. Adjustment of specs. may be required based on new information.	Maybe, proposed and final rulemaking follows Council final action. Frequency for most specs. reduced, but PSC and DSR on annual basis. Adjustment of year 2 specs. are more likely based on new information.	No, Proposed rule is not based on Council final action making rulemaking much more difficult than alternatives 2-4. Decision making will be required each year for method of implementing current specifications and if adjustment of year 2 specs. may be required.	Yes, reduces rulemaking frequency and analytical workload

Harvest Specifications Process Revision Amendments 48/48

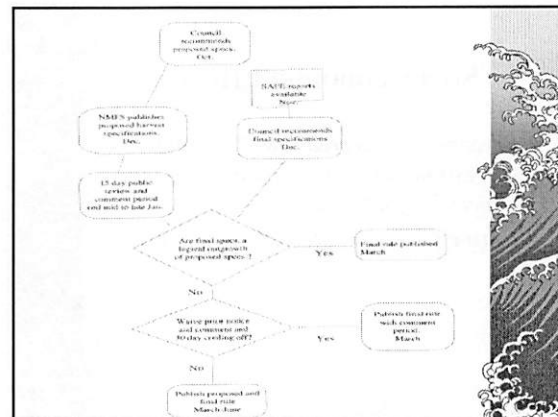
Presentation to
The NPFMC
October 2003

Objectives

- ▲ Base management on best scientific information available.
- ▲ Provide prior public review and comment on Council recommendations to the Secretary.
- ▲ Minimize unnecessary disruption to fisheries and public confusion.
- ▲ Provide additional opportunity for Secretarial review.
- ▲ Promote administrative efficiency.

The 5 Alternatives

- ▲ Alternative 1: Status Quo
- ▲ Alternative 2: Project harvest specifications one year forward
- ▲ Alternative 3: Shift fishing year to July-June
 - ▲ Option 1: Project sablefish to Jan-Dec.
 - ▲ Option 2: Jan. Council meeting
- ▲ Alternative 4: Project biennial specifications two years forward
- ▲ Alternative 5: 18 month specification period
 - ▲ Option: Project sablefish to Jan-Dec.



Three Stand Alone Options

- ▲ Option A: Eliminate certain TAC reserves in the BSAI and GOA
- ▲ Option B: Clean up the FMP language
- ▲ Option C: Biennial harvest specifications for certain GOA species

Effects on Groundfish Stocks

- ▲ Shorter lived species more likely to be affected by projected fisheries.
- ▲ The longer the projection, the greater the effects:
 - ▲ - More variability in biomass and harvest
 - ▲ - Less overall harvest
 - ▲ - Increased biomass
 - ▲ - Increased chance of exceeding OFL

Prohibited Species Effects

- ▲ *Pollock fishery may experience more salmon bycatch under Alternative 3.*

Steller Sea Lion Effects

- ▲ *All alternatives have unknown effects on the temporal harvest of prey species.*
- ▲ *New information may indicate that the TAC is too high.*
- ▲ *Fix with additional rulemaking.*

Socioeconomic Effects

- ▲ *Revenues may decrease with decreased harvests under alternatives that use projections for management.*
- ▲ *Least effects with Alternatives 5 and 3.*

Council Recommendation and Rulemaking

- ▲ *Regulations are normally proposed based on a Council's final recommendation*
- ▲ *Alternative 5 require proposed rulemaking on Council's **proposed** recommendations.*
- ▲ *Alternatives 2 and 3 allow for the proposed specifications to be based on the **final** Council recommendation.*

Fishery Start and Best Available Science

- ▲ *All alternatives either start the fisheries on older data or have new information available while the fisheries are under way.*
- ▲ *Alt. 5 come closest to having the entire fishing year conducted on the most recent information, but beginning of year is on old data.*

Best Available Science Cont.

- ▲ *Alt. 3 starts year on new data, but new information becomes available during the fishing year and before the Jan. fishery.*
- ▲ *Alt. 2 manages fisheries on older data. New information available before the fishing year.*

Administrative Process

- ▲ *Rulemaking based on final Council action is desirable. (Alt. 2 and 3)*
- ▲ *Rulemaking based on proposed Council recommendations complicates the process. (Alt. 5)*

Sablefish Option

- ▲ *Alternatives 3 and 5 have an option to manage sablefish concurrent with the halibut IFQ fishery.*
- ▲ *Concerns with managing with projections.*

Alternative 5 Sablefish Option

- ▲ *Separate rulemaking for hook and line and pot sablefish specifications, if necessary.*
- ▲ *Trawl sablefish specified with the rest of the target species.*

*DRAFT EA/RIR/IRFA
For Amending the Process by Which Annual Harvest Specifications
Are Established for Alaska Groundfish Fisheries
Implemented Under the Authority of the
Fishery Management Plans for the Groundfish Fishery of the
Bering Sea and Aleutian Islands Area and
Groundfish of the Gulf of Alaska*

*September 2003
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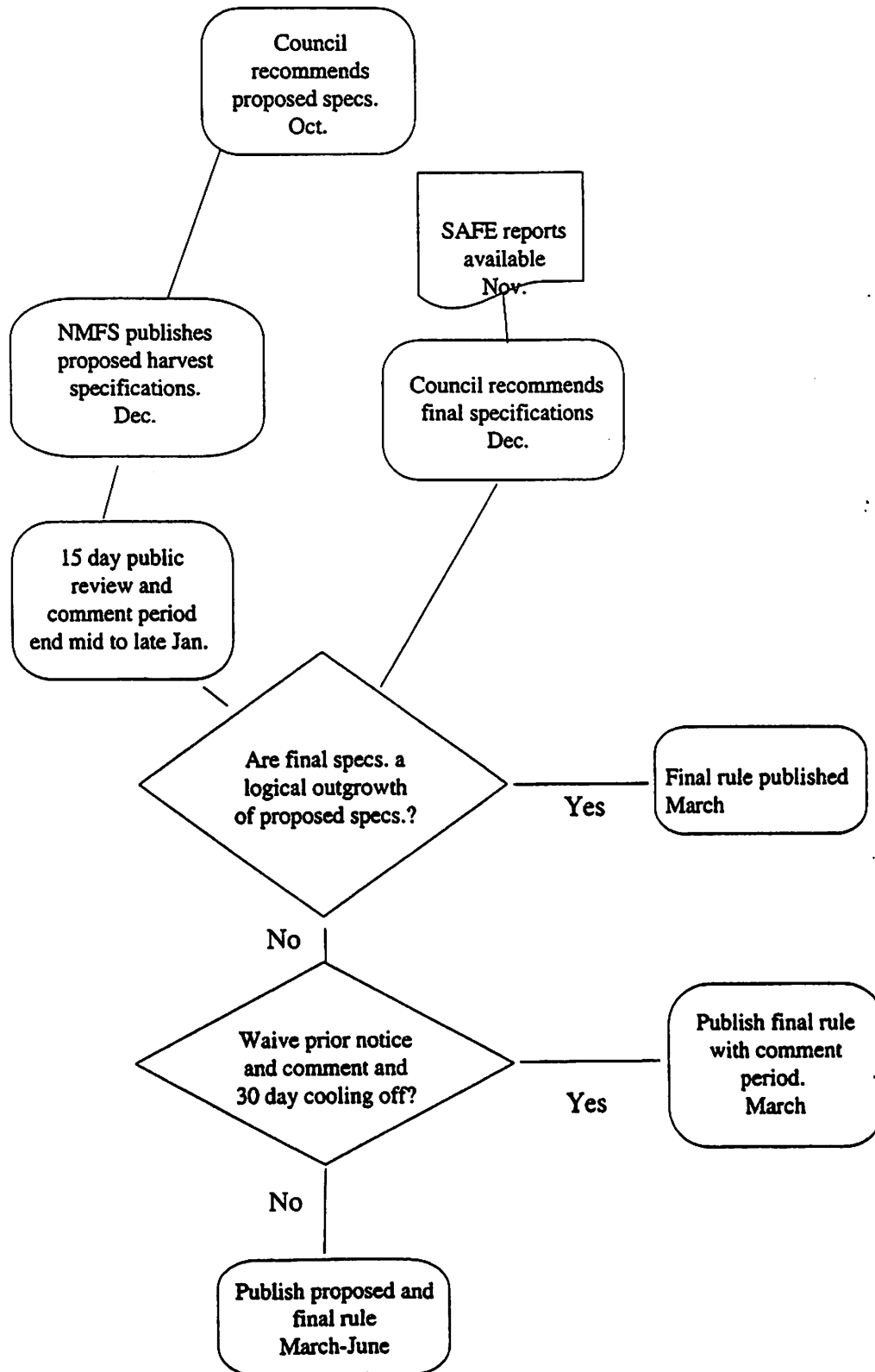


Figure 2.1

Alternative 5 Flowchart

D-1e

Errata for Amendment 48/48 Draft EA/RIR/IRFA
For Amending the Process by Which Annual Harvest Specifications Are
Established for Alaska Groundfish Fisheries Implemented Under the
Authority of the Fishery Management Plans for the Groundfish Fishery
of the Bering Sea and Aleutian Islands Area and Groundfish of the Gulf
of Alaska

September 2003

Replace the following pages with the attached corrected pages:

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ES-3

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Fig. 2.2, page 50

Fig. 2.3, page 51

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intro for Section 4.5 (pages 106 and 107)

FIGURES

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The only prohibited species that may be affected by the action is salmon under Alternative 3. The shifting of the fishing year provided less time to the pollock industry to harvest their B season apportionment which may result in more fishing during a period of higher salmon bycatch rates. This would be of more concern during years of high pollock TAC. The effect is unknown because of actions that the pollock industry may take to reduce the potential bycatch.

All of the alternatives may have temporal effects on the groundfish fisheries, posing difficulties in complying with Steller sea lion protection measures. These measures include the temporal dispersion of harvest of prey species to reduce the likelihood of competition between the groundfish fisheries and Steller sea lions. If biomass is falling, it is possible that the projected first seasonal apportionment may exceed the Steller sea lion protection measures. Inseason actions or emergency rulemaking may be used to reduce the first seasonal apportionment and possibly mitigate any potential effects on Steller sea lions. Because of the potential to mitigate the effects through conservative setting of TAC and regulatory action exists, the effects on the temporal harvest of prey on Steller sea lions is unknown. Under Alternative 3, current seasons may need to be adjusted for BSAI pollock and Pacific cod trawl fisheries to meet Steller sea lion protection measures and to coincide with the July 1 through June 30 fishing year.

Table ES-1 Effects on Environmental Components Comparison of Alternatives 2, 3, and 4 to Alternative 1 and 5

Environmental Component	Alt. 2	Alt. 3	Alt. 4
Groundfish Target species	Higher potential to set TAC over the OFL for short lived species. Higher biomass amounts over time.	Potential to set TAC over the OFL between Alt. 2 and Alt. 1. Biomass levels between Alt. 2 and Alt. 1. Similar to Alt. 5 if additional proposed rule required.	Potential to set TAC over the OFL higher than Alt. 2. Higher biomass amounts than Alt. 2 over time.
Prohibited Species	Same as Alt. 1 and 5	Possible increase in salmon bycatch in the BSAI pollock fishery	Same as Alt. 1 and 5
Steller sea lions	More potential for indirect effect from harvest uncertainty than Alt. 1, 3, and 5. Temporal harvest of prey effects similar to Alt. 1 and 5	Less potential for indirect effect from harvest uncertainty than Alt. 2 but more than Alt. 1 and 5. Temporal harvest effects similar to Alt. 1 and 5.	More potential for harvest uncertainty than Alt. 2. Temporal harvest effects likely to be more than Alt. 2

Regulatory Impact Review

The Regulatory Impact Review (RIR) addresses the requirements of Presidential Executive Order (E.O.) 12866 for a benefit-cost analysis of the proposed action and its alternatives. A complete benefit-cost analysis was not possible. The information is not available to estimate dollar values for many of the benefits and costs. Moreover, the proposed action affects the conditions under which the Council and Secretary will make decisions about future TAC specifications. The actual benefits and costs will depend on the decisions made by the Council and Secretary, and those decisions cannot be predicted at this time. The RIR does examine a set of outcomes from this action that may affect the benefits and

2.4

Implementation Process for Alternatives

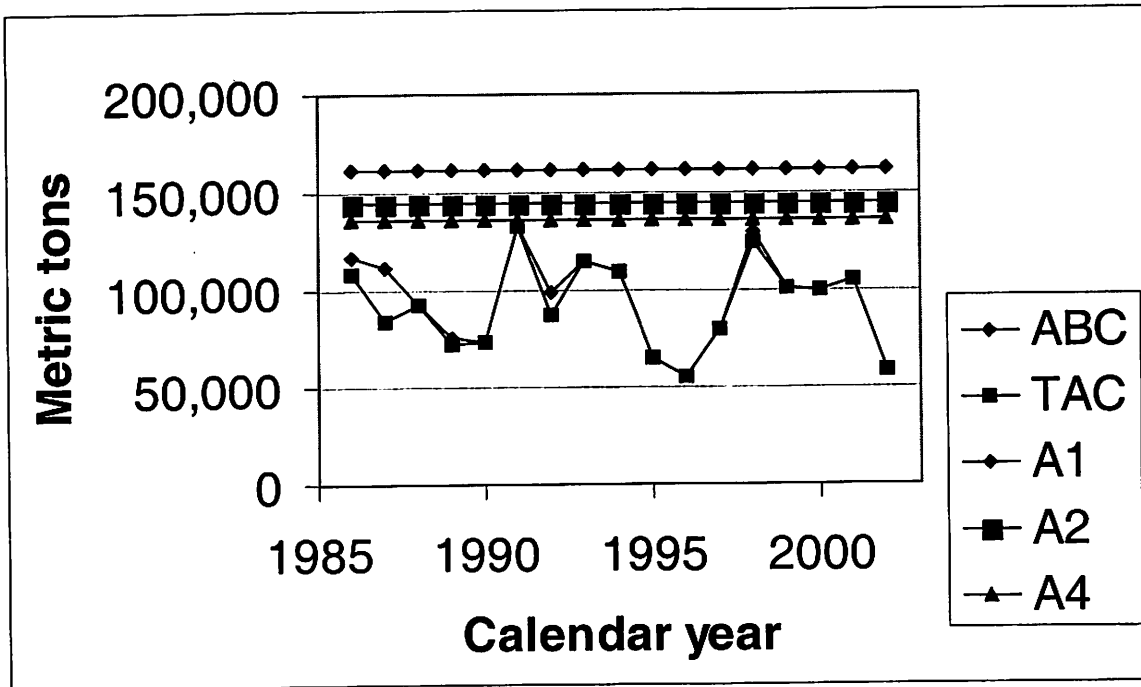
Figure 2.3 shows the implementation process for revising the FMPs and implementing Alternatives 2 or 4. In Figure 2.3, the Council makes a final recommendation in October 2003, proposed and final rule making for the harvest specifications process would need to be completed before April 2004 to allow the Council to make a final harvest specifications recommendation for 2005 (and 2006 for Alternative 4) under the new administrative procedure. At the same time, the 2004 harvest specifications would need to be implemented by proposed, interim, and final rulemaking as the new process is being put in place. Proposed and final rulemaking for 2005 harvest specifications would happen in June and October 2004, respectively so those specifications will be in place by January 2005.

In Figure 2.2, Alternative 3 would have a similar FMP amendment approval and rulemaking process as Alternatives 2 or 4 for revising the harvest specifications process. Regulatory action for implementing the FMP amendments may occur later in 2004 compared to Alternative 2 because harvest specifications under Alternative 3 need to be effective 6 months later than under Alternative 2. Establishing the harvest specifications for 2004 would be done by proposed, interim, and final rulemaking as currently specified in the regulations. FMP amendments and regulatory amendment for the harvest specifications process would be completed in 2004, including proposed and final rulemaking for harvest specifications for January through June 2005 and January through December 2005 for sablefish, with Option 1. In December 2004, the Council would recommend July 2005 through June 2006 harvest specifications, and January through December 2006 sablefish TAC, if Option 1 is implemented. Proposed and final rulemaking for the July 2005 through June 2006 harvest specifications would be completed in the first half of 2005.

Figure 2.2: Alternative 3: Amendments 48/48 Implementation Schedule

ID	Task Name	2004												2005										
		Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul
1	Council 1) Take final action on Amendment 48/48	10/03																						
2	Council 2) Recommend proposed & interim 2004 specs	10/6																						
3	NMFS publish proposed 2004 harvest specifications		11/11-12/11																					
4	Council recommed final 2004 harvest specifications & final action on Jan-June 2005 harvest specs. NMFS publish interim specs.				12/18																			
5	Interim 2004 specifications effective				Effective 1/1/04																			
6	Council transmits FMP amendment 48/48 package to NMFS					01/16																		
7	NMFS publish NOA of FMP Amendment 48/48 with 60 day comment period						2/23-4/25																	
8	NMFS publish 2004 harvest specs final rule							2/04																
9	Final 2004 specifications effective with 30 day delay of effectiveness							Effective 3/04																
10	NMFS Secretarial approval of FMP Amendment 48/48									5/25														
11	NMFS publish PR for Amendment 48/48 & Jan-June 05 harvest specs. 45 day comment period										6/2-7/17													
12	NMFS publish FR for Amendment 48/48 and Jan-June 2005 harvest specs												9/1-10/1											
13	Council final recommendation for July 05 - June 06 harvest specs																12/3							
14	Jan 2005 to June 2005 harvest specs effective																Effective 1/1/05							
15	NMFS publish July 05-June 06 proposed harvest specs																	2/16-3/15						
16	NMFS publish July 05-June 06 final harvest specs (effective 7/1)																							Effective 7/1/05

Figure 4.2 GOA pollock TAC and ABC, 1980 to 2002, compared to mean Alternative 1, 2, and 4 ABC projections from the simulation model



4.1.3 Results and Discussion

For the retrospective analysis, it was not always possible to obtain an ABC recommendation under Alternative 2 in exactly the same way as under Alternative 1. In some years the ABC recommendation was revised (e.g., by the SSC) for the coming year but not the subsequent year, as would be required under Alternative 2. For example, in one projection for EBS pollock the Alternative 2 ABC was 1.54 million tons whereas for Alternative 1 it was 1.13 million tons. In some years for some stocks, it was not possible to project the Council recommendations explicitly and only the projected ABC levels were possible. In these cases, it may have been possible to exceed the 2-million ton cap for the BSAI, consequently, the realized hypothetical catches would have been lower.

With these caveats in mind, the results are presented in Figure 4.3 and Table 4.1-1. For the four stocks where retrospective examinations were possible, the pattern of recommended catch levels are quite similar under the two alternatives but with a regular lag. Under Alternative 2, the declines and increases often follow similar trends found in Alternative 1, but one year later. The variability of catch is greater for two out of the four stocks under Alternative 2, while the average annual change in catch is greater for all four stocks.

Similar patterns were observed for the simulation model results. The variability in catch generally increases under Alternatives 2 and 4 relative to Alternative 1 (Figs. 4.4-4.9; Table 4.1-2). The Gulf of Alaska pollock, BSAI Pacific cod (although only slightly), and Atka mackerel catch simulations under Alternative 4 were less variable than under Alternative 2. This was presumably due in part to the fact

The following paragraphs replace the introductory paragraphs in Section 4.5, Effects on Steller sea lions pages 106 and 107:

4.5 Effects on Steller sea lions

The groundfish fisheries may have direct impacts on Steller sea lions by incidental catch and entanglement of the animals during groundfish harvest and illegal shooting of the animals. Indirect effects include competition for prey species over time and space, and disturbance of the animals. Because this action would not change fishing practices, there are no effects on incidental catch, entanglement, illegal shooting or disturbances expected. However, potential effects are possible over competition for prey resources under a couple of scenarios (see discussion below).

The direct and indirect effects of the pollock, Pacific cod, and Atka mackerel fisheries were analyzed in the Steller sea lion SEIS, Section 4.1.1 (NMFS 2001b). Alternatives 2, 3, 4, and 5 are expected to have insignificant effects on the western and eastern DPSs of Steller sea lions. The revised draft PSEIS (NMFS 2003b) established significance criteria for the harvest of prey species as a change of no more than 20 percent of the baseline fishing mortality rate. Alternatives 1, 2, and 4 were analyzed in section 4.1 for differences in fishery mortality rate over a 1,000 year simulation (Table 4.1-2). Neither alternatives 2 nor 4 resulted in more than 20 percent increase in fishing mortality rate compared to Alternative 1. Alternatives 3 and 5 are considered to have fishing mortality rates between Alternatives 1 and 2. All of the alternatives have considerations regarding temporal harvest of prey species. This is further explained below under each alternative.

The Steller sea lion protection measures address the competition between the groundfish fishery and the western DPS of Steller sea lions (see regulatory changes at 68 FR 204; January 2, 2003). The protection measures modify the existing harvest control rule to ensure that biomass levels (of important prey species for sea lions) are not adversely modified by fisheries. The strategy employs the protection of key foraging areas (i.e., 0-10 nm from rookeries and haulouts), distribution of catch seasonally, and in some cases catch limitations by area in order to avoid localized depletion of especially vulnerable prey species (e.g. Atka mackerel). None of the alternatives considered here would affect the spatial dispersion elements of the conservation strategy. Additional information on Section 7 consultations under the ESA for the groundfish fishery for Steller sea lions and all other listed species can be found in the 2001 BiOp (NMFS 2001b, appendix A) and in the FMP BiOp (NMFS 2000).

One potential for adverse impacts to Steller sea lions (from alternatives 2, 3, 4, and 5) would arise from a scenario in which the target species (e.g., pollock, Pacific cod, and Atka mackerel) showed a sharp decline that was not anticipated from the stock assessment. GOA pollock is an example of a stock with uncertain stock dynamics resulting in difficulties in obtaining accurate stock projections. In recent years, there has been a more rapid decline in stock size than projected by assessment, mostly due to an apparently strong 1994 year class that did not show up in large numbers in the fishery or in subsequent surveys. This resulted in actual fishery harvest rates higher than expected, nearly reaching the OFL limit in 2001. Although the assessment has numerous risk-averse approaches built in, historically this stock has been difficult to assess accurately. Recent reviews (i.e., CIE review, MSC draft report) support the argument that this fishery is assessed in a risk-averse manner, yet it is possible that poorly understood changes in the environment or the ecosystem are having an effect on stock dynamics not built into the assessment. Uncertainty in the ABC projection increases rapidly each further year that is projected forward.

Moving to a strategy that employs using stock assessment data that is older than one year and fishing on

TACs which are based on a two-year projection may result in an over-harvest of the target species in the first half of the year (under the scenario described above for GOA pollock), unless TACs are set conservatively. From a single-species fishery perspective, this may not pose a substantial problem unless the stock is being affected by high fishing rates on the spawning aggregation. Any overage in the first season would be "made up" by decreasing the harvest in the second half of the year. However, from a sea lion perspective this is not ideal as the current conservation strategy is to spread catch out through the year in an effort to reduce harvest rates in the first half of the year and avoid seasonally compressed fisheries. Additionally, directed fishing is not allowed for pollock, Pacific cod, or Atka mackerel when the female spawning biomass declines below 20% of the theoretical unfished level. We would be aware of this potential problem in November/December before the fishery starts in January of the next year. At this point we would have new survey information and new assessments which more accurately assess the appropriate harvest amount for the next year (based on the most recent information), or whether the stock was too low to allow a harvest.

In December, the Council and NMFS would have a couple of options. First, we would need to assess whether the change in the stock assessment is substantial and would require a change to the TACs. In other words, is the difference in the TAC from what is currently in place (from the two year projection) likely to adversely affect Steller sea lions based on the new information? Two scenarios are likely in which adverse impacts would accrue to the western DPS of Steller sea lions: (1) if the TAC is above the revised OFL limit from the new assessment, and (2) if the female spawning biomass is determined to be below the 20% level. If either scenario occurs (or any other scenario in which the Council or NMFS determine is substantially adverse), then NMFS would need to rapidly promulgate an emergency rule in order to modify the TAC for that particular stock in order to avoid causing negative effects to the western DPS of Steller sea lions. Under this scenario, the customary public comment period on the TAC modification would likely be waived for good cause as immediate implementation would be necessary to avert significant adverse effects on Steller sea lions and their critical habitat. Therefore, public comment is especially requested on this aspect of the proposed action. This process is a necessary fail-safe for the preferred alternative to insure that Steller sea lions are not jeopardized or their critical habitat is not adversely modified (as described under the conservation strategy in the 2001 BiOp). Without the ability by NMFS to rapidly respond to unpredictable changes in the natural environment, this action could potentially result in substantial adverse impacts to the endangered western DPS of Steller sea lions. Therefore, that ability is critical to the implementation of this action.

In summary, this action in itself does not result in any new adverse impacts to Steller sea lions that have not already been considered under the FMP BiOp and the 2001 BiOp (and supplement). However, unpredicted biomass declines might occur which could result in substantial adverse impacts to Steller sea lions or their critical habitat. In such circumstances, the emergency rule-making provision of the Magnuson-Stevens Act authorizes NMFS to alter the TAC sufficiently to avoid those adverse impacts.

* * * * *

PUBLIC TESTIMONY SIGN-UP SHEET FOR
AGENDA ITEM B-1(e) TAC setting

	NAME (PLEASE PRINT)	AFFILIATION
1	GERRY MERRIGAN	PVDA
2	Ron Clarke / ^{Paul MacGregor} CLARKE	Marine Conservation Alliance
3	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.

D-1 e
Paul MacGregor

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February 24, 2003

**VIA ELECTRONIC MAIL
AND ORIGINAL BY FEDERAL EXPRESS**

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**Re: MCA's Proposed Alternatives for the Gulf of Alaska/Bering Sea
Aleutian Islands ("GOA/BSAI") Harvest Specification Process in
Light of the Ninth Circuit's Opinion in *Natural Resources Defense
Council v. Evans***

Dear Ms. Lindeman:

As you know, we represent the Marine Conservation Alliance ("MCA")¹ with respect to the North Pacific Fishery Management Council's ("NPFMC" or "Council") consideration of if and how to alter the administrative processes for issuing GOA/BSAI groundfish fisheries annual specifications. We appreciate this opportunity to share with you our analysis of MCA's proposals in light of the Ninth Circuit's recent decision in *Natural Resources Defense Council, Inc. v. Evans*, 316 F.3d 904 (9th Cir. 2003) ("NRDC"), and prevailing Ninth Circuit law as to the notice and comment issues under the Administrative Procedure Act ("APA").

¹ The MCA is a broad-based coalition of Alaskan coastal communities, fisheries participants, vessel owners, processors, and many other stakeholders in Alaskan fisheries.

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As your concise memorandum to the NPFMC (dated January 30, 2003) correctly identifies, NRDC reaffirmed Ninth Circuit APA precedent. More specifically, NRDC relied heavily on its decisions in *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992), and *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993), both of which the MCA specifically took into consideration and then addressed in developing and explaining its proposals.²

In summary, the Ninth Circuit in NRDC based its decision on deficiencies in NMFS's invocation of good cause under the APA to waive prior notice and comment on the annual Pacific groundfish specifications. The major weakness that the Ninth Circuit found with NMFS's use of the "good cause" exception was its reflexive nature, i.e., that it was, by regulation, invoked as a matter of course each year without the "context-specific analysis of the circumstances giving rise to good cause." NRDC, 316 F.3d at 912.

Significantly, however, the Ninth Circuit vacated Magistrate Judge Larson's holding as to the Magnuson-Stevens Act ("MSA") notice and comment issue. *Id.* at 912, 913. Consistent with that holding, we direct your attention to District Court Judge Stearns' much more detailed (than Magistrate Judge Larson's decision below in NRDC) holding in *Conservation Law Foundation v. Evans* ("CLF"), 229 F. Supp.2d 29 (D. Mass. 2002), *appeal pending*,³ as to the MSA notice and comment issue. As you are likely aware, Judge Stearns in CLF held that, by the terms of the MSA, the notice and comment provisions of 16 U.S.C. § 1854(b)(1)(A) do not apply to framework actions initiated under regulations that implement a fisheries management plan.

With this background in mind, we would like to explain why the MCA proposals, with only minor reworking as an insurance policy, fit comfortably within the current legal framework extant in the Ninth Circuit.

I. The MCA Proposals and the NRDC Decisions

The MCA proposed two options: the first worked within the current regulatory framework, providing for enhanced notice and opportunities for comment during the specification promulgation process, and the second proposed a new framework system

² Throughout this letter we rely on the earlier work we have produced for MCA, specifically the September 25, 2002, comment letter to NPFMC Chairman David Benton and the "Memorandum of Law in Support of the Marine Conservation Alliance's Comments," which we have shared with Attorneys Pollard and Lepore in your office. We append these documents for your convenience.

³ By way of background, we are counsel for the defendant-intervenors in this case.

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which would set the annual total allowable catch ("TAC") and other specifications⁴ on a 15- to 18-month cycle. See attached letter to Chairman Benton, Parts III-IV. These proposals included enhanced opportunities for public input and notice specifically with pre-existing Ninth Circuit caselaw, particularly *Riverbend Farms*, in mind. Further, if MCA's initial proposal did not make this clear, the enhanced notice option set forth in MCA Option 1 is includable in MCA Option 2.

More specifically, MCA's Option 1, designed to work under current regulations, provided for an enhanced proposed rule that identifies a range of potential TACs and other specifications based on the best information available from the completed trawl surveys and other sources.⁵ This proposal was designed to make sure that the final rule was a "logical outgrowth" of the proposed rule and to reduce and minimize chances of public confusion about the proposed rule. As explained below, such notice also can and should be published as a notice of proposed rulemaking in the *Federal Register* as a component of MCA's Option 2.

In addition, as part of both of MCA's Options, the MCA proposed increasing the opportunities for public input by expanding the *Federal Register* notice for the NPFMC's October and December meetings, and the Plan Team's September and November meetings, to describe in greater depth the decisions to be made and soliciting input by those unable to attend. MCA further suggested that the decision documents considered at these meetings be posted on the Internet for prior public review to the extent practicable.

These features enhancing opportunities for notice and comment were developed, as explained in great depth in the Legal Memorandum, Part III.A, to meet three essential APA requirements the Ninth Circuit set out in *Riverbend Farms*. The first is that the APA "contemplates [*Federal Register*] notice to all members of the public," not just the regulated community. 958 F.2d at 1486. Second, the proposal must give some indication, even if imprecise so long as the imprecision is explained, of the rule being considered. *Id.* and *id.* n.5. And, finally, that the rule-recommending body (such as the NPFMC in this instance or the Navel Orange Advisory Committee in *Riverbend Farms*), should generally take written as well as oral comments on the proposed rule. *Id.*

⁴ Such as the overfishing levels ("OFLs"), acceptable biological catches ("ABCs"), prohibited species catch amounts, and seasonal apportionments, among others.

⁵ In certain respects, the process the MCA proposed is similar to that employed by the Council and NMFS in setting this year's specifications where the proposed rule (in contrast with past recent years' practice, which simply "rolled-over" existing specifications), actually anticipated the final rule. See, e.g., 67 Fed. Reg. 76362 (Dec. 12, 2002). NMFS's effort in this regard may be able to provide more precision in tailoring the notice of proposed rulemaking to the rule finally adopted.

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None of these predicates are in any way challenged by the Ninth Circuit's *NRDC* decision, which focused on the deficiencies in NMFS's good cause finding for waiving prior notice and comment. The MCA's proposal is premised on prior notice and comment and has ample opportunities for public input both at the Council level, as spelled out above, and at the Secretarial level through allowance for additional comment on what MCA termed an "interim final rule." Such opportunities make this a completely different situation than existed under the Pacific groundfish FMP at issue in *NRDC*.

That said, we are aware that the appellate court's decision in *NRDC* could raise two potential issues as to the MCA proposals, and we address those issues below.

II. Proposals for Modifications to MCA's Proposals in Light of NRDC

After reviewing *NRDC*, we discern two potential issues regarding MCA's proposals: (1) whether the *dictum* in *NRDC* regarding the apparent necessity of commenting to NMFS⁶ (as opposed to the Council) prior to the effective date of the specifications creates any serious issues, and (2) whether MCA's proposed use of what it termed an interim final rule ("IFR") approach – which shares the need for a good cause finding with the "final rule with comment" employed by the Pacific Council – would be inconsistent with *NRDC*. We believe that we can address any potential for concern (insurance, actually, as opposed to triage), with only modest adjustments to MCA's proposals. We will address these issues in turn:

a. Comment to the Council Meets APA Requirements

As an initial matter, it is evident that the Ninth Circuit's statement in *NRDC* about "formal opportunity to comment to NMFS" is *dictum*. In contrast, the court's holding actually and tersely stated, "[w]e simply hold that NMFS failed to make a sufficient showing that good cause existed for 2001" *Id.* at 912. The sufficiency of comment to a Fishery Management Council under the APA was never briefed or argued. If it were, it is more than likely the Ninth Circuit would uphold it as meeting the requirements of the law, for the following reasons:

First, as explained above, the Ninth Circuit in *Riverbend Farms* explicitly sanctioned comment to the rule-recommending body. See Legal Memorandum at 15-16. Secondly, in the MSA, Congress itself has delegated to the fishery management councils the duty of taking public comment on behalf of the Secretary – arguably exclusively – for any measures less than full-blown FMPs or amendments to FMPs. In other words, the MSA itself makes councils the primary body for receiving public

⁶ "On the other hand, under the process that has been in place there is *no notice or formal opportunity to comment to NMFS*, which is the final decision-maker." 316 F.3d at 911-12 (emphasis added).

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comment when developing framework actions. See Legal Memorandum at III.A.2. Finally, given that NMFS, in the form of the appropriate Regional Director, is statutorily a member of the councils, 16 U.S.C. § 1852(b)(1)(B), NMFS arguably "formally" receives public comment made to a fishery management council.

In conclusion, while we believe that were this issue put directly before a federal court in the Ninth Circuit, the prior direct precedent would be reaffirmed, the modifications suggested below obviate this issue for the purposes of MCA's proposal.

b. The Authority to Implement Specifications by IFR Should be Discretionary

As discussed in Part III.C of the MCA's Legal Memorandum, use of the IFR in MCA's proposal was designed as both an alternative to the current use of emergency MSA-based authority needed to insure that the fisheries opened each year and as a means by which NMFS could insure that the latest information was employed to govern the fishery at the earliest time possible in the fishing year. Because, generally speaking, use of an IFR requires a finding that waiving prior notice and comment is supported by a sufficient finding of good cause, however, the MCA thinks that its proposal (Option 2) can be adjusted modestly to better fit within the letter of the NRDC decision.

To step back first, though; routine good cause findings for waiver of prior notice and comment were not a linchpin for MCA's Option 2. Rather, MCA Option 2 was premised on the fact that there would be ample public input before this additional opportunity for post-publication notice and comment. The IFR was more discretely proposed as a way to, one, waive the 30-day "cooling off" period so that the newest information governs the fisheries sooner rather than later,⁷ while, two, still allowing yet another level of comment, this time at the secretarial level. Viewed this way, NRDC technically provides no barrier to our plan.

We believe, however, that by making minor revisions to MCA's Option 2, the same benefits (explained below) can be achieved without any significant threat of successful legal challenge to the procedure. To start with, the "anticipated rule," *i.e.*, the preliminary specifications (either in ranges as we suggest or actual figures based on the best information before the Council as was done this year) discussed in MCA Option 1, could and should be published as a "notice of proposed rulemaking" ("NPRM") in the

⁷ As detailed in the Legal Memorandum, at III.C.1, the Ninth Circuit recognizes a different and less rigorous standard for waiving the 30-day cooling-off requirement of the APA.

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Federal Register.⁸ In fact, the suite of steps in MCA Option 1 designed to enhance notice and comment opportunities can be integrated into MCA Option 2.

The second change would be to specifically give the Secretary the flexibility to take the final recommendations for TACs and related measures coming from the NPFMC at its December meeting, and publish them *either* as an IFR for immediate effectiveness *or* as a second proposed rule, depending on the individual circumstances of each year. In either case, there would be a 15 to 30 day public comment period, and a final rule would issue.

It is the addition of this choice, *i.e.*, a choice between publication of either the IFR or a second proposed rule, which represents a modification of MCA's Option 2 (along with the use of the NPRM). The basis for making the choice between a second proposed rule and an IFR would be a particularized determination by the Secretary, made in light of: (1) the most recent scientific information (such as the status of the groundfish stocks as outlined in the SAFE document, of the prohibited species, and of protected species such as Steller sea lions); (2) the Council's ultimate recommendation in December, including if and how it diverged from the NPRM; and (3) consideration of the impact on the fishery of continuing to govern it using existing regulations (from, for instance, 15 months to 18 months) if implementation of the Council's decision were delayed because a second proposed rule was published. Further, the Secretary would be required to assess his or her duties under the MSA, the Endangered Species Act, and other applicable law such as the APA, the National Environmental Policy Act, and the Regulatory Flexibility Act, in making such a decision.

If this context-specific inquiry leads the Secretary to conclude that the rule should become immediately effective, then the rule could issue without additional advance notice and comment under *NRDC*, provided the Secretary's exercise of discretion in that regard met applicable legal standards. We note that this second choice point as to waiver of prior notice and comment does not appear to be legally compelled; as explained above, no matter what choice were made (IFR or second proposed rule), a NPRM would already have been published, and public comment taken, thereby distinguishing MCA's proposals from *NRDC*, even without addition of this second choice point.

However, even if NMFS does not want to rely on comment to the Council alone in fulfilling APA requirements (or, for that matter, if the Council's final recommended rule

⁸ Legally speaking, under the APA, there is really no difference between a notice of proposed rulemaking and a proposed rule. So long as it contains enough information to allow for public comment and is sufficiently detailed so that such comment is informed, a final rule may issue upon either so long as it is a logical outgrowth of the proposal.

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diverges significantly from the anticipated rule), this type of analysis (IFR or second proposed rule set forth in ranges in the NPRM), by the Secretary is just the type of inquiry that the Ninth Circuit found in *NRDC* was contemplated by APA's good cause exception.

III. Conclusion

The MCA's proposal has many benefits, and any potential process-related issues are currently addressed, or can be addressed from year to year. For instance, considering MCA's Option 2 overall, a principal benefit is that stakeholders are not faced with the disruptions and uncertainties inherent in the need to rush a interim rule through by the beginning of the new fishing year (because the prior year's rule will be for 15 to 18 months). Thus, NMFS can take more time to analyze the Council's proposals and prepare either the IFR or second proposed rule outside of the crunch of the end of year business. Even if the Secretary decides to issue those proposed specifications as a proposed rule, so long as (as should be possible) it is done by mid-January for a 15-day comment period, a final rule should be in place at or before the time the final rule is currently issued.

MCA's Option 2 also provides a routine and regular channel for public comment on the final specifications following the Council process, and also insures that the Secretary has a process in place that can accommodate the issuance of specifications that are outside the range anticipated in the NPRM if conditions so warrant.

Finally, MCA's Option 2, as refined, can accommodate a decision (if any) by a court with jurisdiction over the NPFMC that a framework action is subject to MSA notice and comment: In any given year, comment can either be made to NMFS directly via a second proposed rule or else MSA-specific procedures for post-publication notice and comment can be employed.⁹

We hope this letter addresses any concerns your office might have about MCA's proposals. Please do not hesitate to call either Shaun Gehan or me at (202) 662-9700, if you have any questions or require additional information. Thank you again for this opportunity to provide additional explanation and modest refinement of MCA's proposals regarding this important matter.

⁹ Instead of choosing to use an IFR in a particular year, as suggested above and which works for APA purposes, the Secretary could use his MSA-based emergency authority, 16 U.S.C. § 1855(c), to implement the new specifications, if conditions warrant.

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Sincerely,



David E. Frulla

DEF/SMG;mlc

cc: Mr. Jonathan Pollard, Esquire (by electronic mail, w/ enclosures)
Mr. Dan Cohen, Esquire

D-1e
referred to
in PT by
P. MacGregor

September 25, 2002

FEDERAL EXPRESS

Mr. David Benton, Chairman
North Pacific Fishery Management Council
605 West 4th, Suite 306
Anchorage, Alaska 99501-2252

**Re: Draft Environmental Assessment/Regulatory Impact Review
("EA/RIR") for Amending the Annual Gulf of Alaska/Bering Sea-
Aleutian Islands ("GOA/BSAI") Harvest Specification Process**

Dear Mr. Benton:

We respectfully submit these comments on behalf of the Marine Conservation Alliance ("MCA") regarding the proposed revisions to the total allowable catch ("TAC")-setting process utilized by the North Pacific Fisheries Management Council ("NPFMC" or "Council") and National Marine Fisheries Service ("NMFS") to establish annual specifications for the Gulf of Alaska ("GOA") and Bering Sea/Aleutian Islands ("BSAI") groundfish fisheries management plans. This matter is agenda item D-1(b) for the Council's October 2002 meeting.

By way of introduction, the MCA is a broad-based coalition of Alaskan coastal communities, fisheries participants, vessel owners, processors, and many other stakeholders in Alaskan fisheries. MCA promotes the sustainable use of North Pacific marine resources by present and future generations, based on sound science, prudent management, and a transparent, open public process. The MCA seeks practical solutions to resource use questions that seek to protect the marine environment while ensuring a vital and viable North Pacific fishing community. MCA supports research and public education about the fishery resources of the North Pacific.

As will be discussed more fully below, it is MCA's belief that none of the alternatives laid out in the EA/RIR adequately address the problem statement. In an effort to better solve the issues raised in the problem statement, the MCA has had discussions with NMFS legal and program personnel and worked to develop improved alternatives. We set forth in these comments two new options on MCA's behalf that we believe should be evaluated before the Council makes a final decision on a course of action. Because neither of our new proposals precisely match those currently analyzed,

a brief delay in final council action would be required for their evaluation. However, such a delay should not interfere with an implementation schedule in time for next year's TAC-setting cycle.

I. Executive Summary

MCA's primary concern regarding the TAC-setting process is to ensure that harvest specifications continue to be based on the best scientific information available. To this end, the MCA has asked us to review the EA/RIR that has been prepared in connection with the TAC-setting amendment package and to address the following two questions that have arisen in connection with the proposals to change the TAC-setting process:

1. Does the recent court decision involving the Pacific groundfish annual specification process (*Natural Resources Defense Council, Inc. v. Evans*, 168 F. Supp.2d 1149 (N.D. Cal. 2001) ("NRDC")) or other applicable law compel the NPFMC and NMFS to make major revisions in the procedures that have been used to establish annual harvest specifications for the GOA and BSAI groundfish fisheries?
2. Are there ways in which the North Pacific Council's annual TAC-setting process (which is currently heavily dependent on the use of emergency rules) can be amended so as to more efficiently and expeditiously establish the annual fishing specifications for the GOA and BSAI groundfish fisheries without jeopardizing the goal of ensuring that those specifications are based on the best scientific information available?

As explained herein, the answer to the first question is that *NRDC* appears significantly flawed. While we certainly cannot predict with confidence the outcome of the Government's appeal in that case, neither that case nor applicable law necessarily mandate significant changes in the current TAC-setting procedures utilized in the North Pacific.

Given the legal uncertainties, and MCA's preference for the status quo, MCA's first option works within the current regulations, but enhances the proposed notice of rulemaking with current data and offers the public more opportunities for informed comment in the specification development process. The first option is a slightly modified version of the "status quo" TAC-setting process that can be accommodated under current regulations.

With regard to MCA's second option and the second question presented, we believe there are ways to streamline and enhance the current TAC-setting process without sacrificing the quality of the data utilized to set the annual specifications. In

short, MCA proposes that the Council and NMFS set annual specifications that run from January 1 of the first year through March [or June] of the second year. The Council and NMFS would set annual specifications in November and December, in much the same way as done now, except they would cover a longer period. After the December Council meeting, NMFS would forward the proposed specifications to Washington, D.C. for review and publication as an interim final rule to go into effect on publication. The interim final rule would supersede existing specifications, but also solicit public comments. The final step of the process will be the issuance of a final rule, after the close of the comment period, which addresses any public comments received.

The second option (the 15 [or 18]-month TAC) builds on a proposal that was identified in the EA/RIR, but rejected for reasons which are not entirely clear. See EA/RIR at pages 27-28.¹ As explained herein, MCA believes that the second option may actually have benefits over the current system—independent of any conclusion about NRDC's validity—but it has not been fully considered in the EA/RIR, so it requires fuller development and analysis.

Finally, in that it is not likely that any TAC-setting alternative could be implemented in time for the 2002 fishing year, the Council and NMFS have an opportunity to defer final action on the amendment package until there has been an opportunity to fully explore and analyze the options MCA proposes. No compelling reason exists to make a major, immediate change to the current TAC-setting process without careful analysis. The EA/RIR explains that it addresses an important issue, which has major potential ramifications for the quality of the scientific information used by the Council and NMFS, as well as the economic value of the fisheries. Either approach MCA suggests should be able to be in place in time for the 2004 fishing year—if it proves to offer significant advantages over the current TAC-setting process.

II. Given the Stated Goals of the EA/RIR, Magnuson-Stevens Act Requirements, and Needs of the Fisheries, MCA Finds All Proposed Alternatives Inadequate

According to the Executive Summary of the EA/RIR (see page ES-1), the "objectives of modifying the harvest specifications process" include the use of the best

¹ The reasons given for rejecting the proposal to create a 16-month quota were that it "would cause confusion to the public and difficulty in management of the fisheries as the harvest specifications would likely change halfway [sic] through the fishing year. Option 1 does not meet the objectives to minimize disruption of the fisheries and public confusion, and to promote administrative efficiency." These concerns are addressed below in Part IV.

scientific information which is available, to insure that the public has adequate notice of and opportunity to comment on the annual proposal, to provide more opportunity for secretarial review, to minimize the disruption of fisheries and "public confusion," and to increase administrative efficiency. The MCA agrees these are all laudable goals, but questions whether any of the proposals set forth in detail in the EAVRIR truly achieve them. In the broad sense, all of the proposals other than the status quo "disrupt" the fisheries.

As an initial matter, we draw attention in particular to the goal of increasing the opportunity for secretarial review. This goal appears to be driven by the *NRDC* decision and the questions it raised about the use of abbreviated notice and comment under the Pacific Fishery Management Council's framework process. Our legal analysis of this decision (which is currently under appeal to the Ninth Circuit Court of Appeals) is that it appears to cut strongly against the grain of established caselaw and relies on a very superficial reading of the quite intricate provisions of the Magnuson-Stevens Act. It is MCA's view that nothing in the Act requires a time-consuming and duplicative notice and comment process to be conducted at the secretarial level for annual specifications set by framework action pursuant to regulations implementing an FMP.²

More importantly, as both common sense and preliminary analysis show, introducing a time lag between data collection and the fishing year on which they are based leads to specifications based on "stale data." This will inevitably result in reduced quality of resource management by increasing uncertainty that may threaten conservation efforts and result in reduced quotas.

Furthermore, in terms of the actual substance of the TAC setting process, the Council must bear in mind that the role of the Secretary under the Magnuson-Stevens Act is defined by the National Standards. The Secretary is also bound by the requirements of the Endangered Species Act ("ESA"). Both of these sources of authority require the use of the best scientific information available, and the best way to meet that requirement is to have an effective rule in place at the earliest time administratively possible after the Council makes its recommendations in December. Most courts will – unlike that which decided *NRDC* – properly defer to the Secretary's

² To be clear, *NRDC* held that the Magnuson-Stevens Act, apart from the Administrative Procedure Act, required the Secretary to publish the TACs for a 15 to 60 day comment period after receiving the Council's recommendations. See *NRDC*, 168 F. Supp.2d at 1155-57. Briefly stated, we do not believe it was appropriate for court to apply the Magnuson-Stevens Act notice and comment provision, which is intended to govern regulations proposed to implement FMPs or plan amendments, to framework actions taken under those implementing regulations.

determination of his or her mandate under these laws. What follows, therefore, seeks to improve the current notice and comment process and administrative efficiency, while hewing more closely to both legal requirements and the Council's statutory mandates.

III. MCA's Option One: Minor Adjustments to Status Quo Not Requiring Regulatory Amendment

As an initial matter, the MCA is pleased with the TAC-setting process as it currently stands. The GOA/BSAI groundfish fisheries are managed by a state-of-the-art TAC development process. The existing specification process is a model of transparent decision-making that encourages public input, uses the best possible data, and puts that data to use in a timely fashion. Given the uncertainties, however, that the *NRDC* decision has introduced, we recognize the Council's and NMFS' desire for change, and therefore offer these suggestions which can be implemented with no changes to the current regulations.

More specifically, the established procedure for setting annual Alaska groundfish specifications uses the prior year's quota, prohibited species catch ("PSC"), and seasonal allocations as "place-keepers" until the final specifications proposed by the NPFMC in December are published. Claims have thus been made that the final rule is not, in essence, a "logical outgrowth" of the proposed (and interim) rule within the meaning of the Administrative Procedure Act ("APA").³ See, e.g., *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994). When a final rule differs materially from the proposed rule, a court may find that proposal did not provide adequate notice nor provide for meaningful comment within the meaning of the APA, 5 U.S.C. § 553(b) & (c). *Id.*

To address this allegation of legal insufficiency, it may not be necessary for NMFS to rewrite the regulations governing the quota setting process for the Alaska groundfish fisheries contained in 50 C.F.R. § 679.20(c). Rather, such concerns can be addressed by including in the proposed rule rough estimates of the specifications likely to be decided, and the basis of the information used to make the estimates (and, ultimately, the final rule). In the context of the GOA/BSAI groundfish specification process, this would simply involve adding to the proposed rule information on initial survey results, preliminary ranges of allowable biological catches ("ABCs"), estimated TAC ranges associated with those ABCs, and other preliminary data.

³ In litigation, NMFS has maintained that framework specifications are not "rules" subject to the APA. However, the MCA believes notice and informed comment are important to good fisheries governance, and will premise this discussion on the assumption that some level of notice and comment apply.

In order to avoid "public confusion," the notice can state that this new information will be refined and then considered in setting the final rule, and that the "anticipated final rule"⁴ is based on the best scientific information currently available. This notice should explain how the preliminary estimates will be used to generate the final rule and also discuss uncertainties that presently exist and the steps that will be taken to refine the estimates and resolve the uncertainties.

This proposal for status quo-plus would insure that the final specifications, when implemented, are a "logical outgrowth" of those proposed. As this process identifies the information upon which the final rule will ultimately be based, no one can claim to be deceived or "misled" by the proposed rule. Further, there is ample authority for use of estimates or ranges of possible specifications in the proposed rule. The Court of Appeals for the Ninth Circuit⁵ has concluded, in *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992): "The Secretary [of Agriculture, in that case] would not be bound by the proposed [rule] . . . but the agency would be required to give its best estimate based on the available information at the time notice is published."⁶ 958 F.2d at 1486 (emphasis added). In *NRDC*, Magistrate Judge Larson principally relied on this decision in *Riverbend Farms*.

⁴ To be clear, this proposed rule will, as now, recommend TAC levels based on the rule in place for the present year. What is new is that the notice will go on to "anticipate" the final rule by incorporation of survey data available at the time the notice is published.

⁵ Which is hearing the *NRDC* appeal and has Alaska in its jurisdiction.

⁶ *Riverbend Farms* is closely analogous to the Council's situation. The case involved a committee that issued weekly quota recommendations for the shipment of oranges. While the weekly meetings were noticed in the Federal Register, they did not contain proposed quotas, did not allow for written comments, and the final rule routinely waived the 30-day cooling-off period. The court found good cause for waiving the 30-day period, but required the council to (1) publish general quotas based on an annual estimate the Secretary issued and (2) to take comments by letter as well as at the meeting. It is important that the court found comment to the rule-recommending body sufficient (whereas *NRDC* stated comments to the Secretary were mandated by the APA). It also recognized that decision-makers may not have all the information they need at the proposed rule stage: "If, at the time the notice is published, it's too early to tell what the actual figures might be, the Secretary can say so in the notice" 958 F.2d at 1486 n.5. It also reiterated the common rule of law that "[t]here is no requirement that the rule contained in the notice of proposed rulemaking by the same as the final rule" *Id.* n.6.

MCA would also like to make another suggestion to insure the public has ample opportunity to provide informed comment on the annual specification setting process, and thereby address the concerns about the current process set forth in the EA/RIR and summarized above. Given modern technology, the notices published in the Federal Register for the September and November Plan Team meetings and the October and December Council meetings could be used as a means of soliciting public comment. Although it is not feasible to publish details of the alternatives being considered at those meetings, the purposes of the APA could be further advanced if these notices were to discuss the subject of discussion at these meetings, the issues they will address, and actions to be taken. To receive comment from members of the public unable to attend, written comments could be solicited and then be made available for the Council's deliberations. Further, in order for the notice and comment process to be "informed," the Council and NMFS could post all documents upon which decisions are to be made to the appropriate website with enough time prior to the meetings for the public to access them and make comment. The relevant notices would, of course, reference this web address.

Through this approach, the public would have ample opportunity to make comments, both to the Secretary and the Council, at key decision-making points, but no changes would appear to be needed for the implementing regulations. This approach also meets the objectives of NMFS.⁷ The Council should bear in mind the words of the Ninth Circuit Court of Appeals: "The APA was intended to impose procedural requirements on the adoption of rules; it is not a device by which an agency may be forced to adopt a less effective regulatory program in order to more effectively comply with notice and comment procedures." *Riverbend Farms, Inc.*, 958 F.2d at 1484. In other words, the goals of the Magnuson-Stevens Act – primarily to use the best available data, conserve the resource and achieve optimum yield on a continuing basis, and consider the impacts on the regulated fishing industry and their communities – ought not be sacrificed solely to meet rigid procedural requirements.

IV. MCA's Option Two: MCA's Proposed "Fifteen-Month Rule" Amendment to the TAC-Setting Regulatory Process

Given the importance of the need to manage groundfish fisheries on the basis of the most recent data, the MCA believes the proposal set forth below may actually improve the likelihood that the fishery will be managed by the most current information. It also addresses all of the objectives outlined in the EA/RIR. This proposal, however,

⁷ MCA recognizes that the status quo requires having the interim rule in place by January 1, a requirement that has been difficult to meet.

would require a change to the implementing regulations, and necessitate an analytical evaluation in a revised EAVRIR.

A. MCA's Proposal Detailed

In sum MCA's second proposed option is this: Each fall, the Plan Team will recommend annual specifications for the following year and also for the first three to six months of the next year,⁸ based on projections, if necessary. As with the status quo, the Plan Team and Council would meet and make their recommendations at their respective meetings in September/November and October/December. To ensure notice, as with MCA's Option 1, the Plan Team and Council could take and consider written comments at their respective meetings. Also as discussed above in Part III all "decision documents" could be made available in a timely manner prior to the meetings via the Internet so that informed public input is continuously considered at all key stages of the process.

In an effort to ensure that the fisheries are governed by the best scientific information available for the greatest amount of time each year and for other important reasons set forth below, MCA's Option 2 would require NMFS to issue an Interim Final Rule ("IFR") based on the Council's December meeting recommendations. The IFR would immediately implement the specifications for the above-described period of 15 to 18 months. As now, specifications would run from January 1 of the year following the meeting, but would carry over into and remain in effect during the first part of the following year. This would obviate the need to issue interim rules. Upon publication, each IFR would immediately supersede the specifications already in place. Additionally, the IFR would offer the public an opportunity to comment, and those would be taken into consideration in the Final Rule published after the close of the comment period. The Secretary may make adjustments to the IFR in the Final Rule, based on comments from the public and after consulting with the Council.

The purpose of issuing specifications which extend into the following year is to ensure that rules are in place every year on January 1, thus meeting the objective of avoiding disruption in the fishery and the need to constantly employ emergency rulemaking procedures. Use of an IFR to implement the annual specifications accomplishes three additional important objectives:

⁸ MCA offers a range because the details of TAC assessment and projection are highly technical and best left for NMFS' staff to evaluate for Council consideration. Three months is a minimum to insure the new specifications are in place, but a longer period may be desirable for other reasons.

- First, it insures that the annual specifications actually governing the fisheries for the overwhelming bulk of the year are based on the best scientific data available⁹;
- Second, it adds another level of public notice and comment based on actual specifications (*i.e.*, notice and opportunity for comment on the IFR), whereas presently only the prior year's specifications are put out for comment; and
- Third, it introduces administrative efficiency over the current process because there are only two levels of rulemaking, unlike now where there is publication of proposed, interim, and final rules.

Although MCA's Option 2 would have to be integrated into the existing management regime, the MCA is convinced that it would be a more overall effective approach – one that achieves all stated objectives. For example, under this process, the regulations would clearly state that each year's new specifications will supersede existing specifications retroactively to January 1st. The Plan Team, Council, and public would take this into account in the process, thereby avoiding public confusion. Further, with the exception of establishing the specifications for a longer period, the system would operate essentially as it has for the past few years, but without the extra administrative process necessitated by issuance of an interim rule.

B. Specific Issues Addressed

Given that MCA's proposal involves a new process for TAC specifications, we would like to address some specific potential concerns. The following elaborates on certain issues raised by the proposal:

1. Interim Final Rules Are Not Emergency Measures

As stated above, by issuing an interim final rule to implement the annual specifications, the Secretary would best meet the statutory obligations under both the MSA and the ESA to employ the best – most timely – scientific information available to manage fisheries and protect threatened or endangered species. The contemplated use of projections for a longer period of time under the options examined in depth in the

⁹ In fact, based on discussions with NMFS, the MCA estimates that this process will insure that specifications based on the most current scientific information are in place earlier in the year than presently accomplished. By eliminating the interim rule stage, Secretarial review of the December council proposal for issuance of an IFR may well be completed by early February. At present those specifications are not published until sometime in March.

EA/RIR does not accomplish this objective nearly so well. Further, by implementing a proposal that establishes, by regulation, the routine use of IFRs to implement the annual framework specifications, the Secretary could make an explicit finding that it is in the public interest to do so in order to ensure that the specifications are based on the best scientific information available and are otherwise consistent with the goals and objectives of the National Standards.

We note that use of the IFR approach would require a secretarial finding that "good cause" exists to waive the proposed rule stage. We believe that the need to utilize current scientific information would comfortably support such a good cause finding. Importantly, however, the use of an IFR is not the same as managing a fishery on the basis of emergency rules—even though IFRs are also subject to a showing of "good cause," the test may be less difficult to meet than the one required for emergency rules. Under the MCA's Option 2, the regulation itself would provide two important procedural safeguards that would help insulate this process from successful legal challenge: (1) it provides for four levels of informed public comment at the Council (*i.e.*, at both the Plan Team and Council levels) prior to implementation, and (2) it establishes the IFR approach by regulation, itself subject to notice and comment. Further, the IFR process itself allows for post-publication comment which the Secretary must take into account and address in the final rule. In the meantime, however, the new specifications would be in place.

Our review of the caselaw indicates that the approach we outline is consistent with established law and the bulk of applicable judicial decisions. For its part, *NRDC* did not fully take into account a long line of court decisions which more or less explicitly sanctioned the implementation of annual framework specifications without full-blown rule making procedures. It also misread the Magnuson-Stevens Act in applying the notice and comment rules of that Act – which apply to regulations implementing an FMP or plan amendment – to quotas and other catch level-based specifications issued pursuant to those regulations. Finally, and most importantly, it disregarded the admonition from the Ninth Circuit that procedural rules are not designed to create a less effective regulatory regime.

Most courts in this country will uphold the Secretary's reasonable interpretation of his agency's governing statutes (here the MSA and ESA as well as the APA), as well as the regulations and rules promulgated on the basis of the agency's specialized technical and scientific expertise and with the goal of meeting those statutory obligations. Such reasonable deference would extend to findings by the Secretary that it is in the public's interest to have a rule put into immediate effect, which is an element of the good cause standard. Congress itself, in passing the Sustainable Fisheries Act amendments to the Magnuson-Stevens Act reemphasized the importance of healthy fisheries to this nation, and the Act continues to underline the importance of the use of the best information possible to meet this objective. The rigor of the ESA's mandates likewise demonstrates

the overriding national importance of the use of current information. In short, it is definitely in the public's interest to have the best scientific information underlying the specifications that govern these important fisheries – and the protected species with which they interact – at the earliest possible time each year.¹⁰

Further, it would be difficult for anyone to make a sustainable claim that they were unable to make informed comment when comments are solicited at the four critical Council stages and again at the Secretarial level. This is why the MCA believes its proposal is superior to any now before the Council in meeting all objectives.

2. Additional Procedural Safeguards Can Be Built In to Prevent Overfishing or Harm to Steller Sea Lions and Other Endangered Species.

The second objection the MCA anticipates is that this proposal – by implementing measures based on projected quotas that carry over into the following fishing year – will not properly account for changes in the stock status. That is to say, information may arise during the year which might indicate the need for lower quota levels than set by the rule. The consultation process might, as well, indicate the desirability of changes to accommodate the needs of Steller sea lions or other protected species. Such objections, however, are even more applicable to the other options that have been identified in the EAVRIR.

To meet this concern, we would propose incorporating language in the specification setting process, which although possibly redundant, reaffirms and clarifies the Secretary's authority to implement emergency measures as necessary to prevent overfishing or to protect threatened and endangered species. Clearly, the Secretary already has such power under § 1855(c)(1) of the Magnuson-Stevens Act ("Emergency actions and interim measures"). Furthermore, in the event that use of the rule in months 13-15 [13-18] presents significant conservation issues, NMFS will be aware of this by October or November when survey results start coming in, Plan Teams start meeting, and the requisite ESA consultations begin. If necessary, the Council can take appropriate emergency rule action in December to adjust ABCs and TACs to be in place January 1.

¹⁰ Here again, the MCA pauses to point out that all present proposals, save for the status quo option, envision fisheries management on the basis of data which is considerably more dated than that which would govern the fishery under our proposal. To make matters worse, the other options would implement specifications based on aged data for an entire fishing year, as opposed to a very discrete and limited portion of the year, as we propose.

3. Any Process Chosen Should Be Premised on the Notion that the 30-Day "Cooling Off" Period Be Waived for Good Cause

There is no reason in law or common sense why the rule implementing the specifications should not be put into immediate effect. Presently, all proposals contained in the EA/RIR are premised on the notion that a "cooling off" period is necessary after a final rule is published. See EA/RIR at pages 20-21, 23. The Ninth Circuit recognizes, however, that there are different and less stringent criteria for waiving a post-publication waiting period than there are for waiving notice and comment, as in the case of an emergency rule.

In sum, as the *Riverbend Farms* court said, "the 30-day waiting period is intended to give affected parties time to adjust their behavior before the final rule takes effect." 958 F.2d at 1485. In that case, as here, the court found pressing reasons for waiving the waiting period. First of all, interested parties expect and most often very much want the new specifications to take effect sooner rather than later. Furthermore, these parties should have had the opportunity to participate in the specification setting process. More importantly, in the case of annual harvest specifications, the cooling off period only serves to defeat the statutory purposes of the MSA. As the court in *Riverbend Farms* said, use of the 30-day waiting period is not indicated when using it would "throw[] the entire regulatory program out of kilter." *Id.* In short, the law does not look with disfavor upon the routine waiver of this particular APA requirement when necessary to meet the underlying objectives substantive laws, here the MSA and ESA, to ensure prompt use of scientific information.

V. Conclusion

There is no compelling need to completely abandon the current TAC-setting process when the minor adjustments described above as MCA's Option 1 would suffice to address all legitimate concerns. On the other hand, if the Council believes that an entirely new system is called for, the MCA's alternative proposal (Option 2) should be added into the analysis before the Council makes a final decision on a preferred alternative. The delay associated with the analysis of MCA's proposal will not necessarily result in delayed implementation of the new TAC-setting regime since it is not expected that any changes to the TAC-setting regime would be implemented until the 2004 fishing year anyway.

Thank you for the opportunity to present these comments. If you have any questions concerning our comments or the proposals we have suggested herein, please give us a call.

Mr. David Benton
September 25, 2002
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Respectfully submitted,

David E. Frulla
Shaun M. Gehan
Counsel for the Marine Conservation Alliance

DEF/SMG:mlc

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