

Public Testimony Sign-Up Sheet

Agenda Item C-1(a) CGOA Rockfish

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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.

**Description of Alternatives
Central Gulf of Alaska Rockfish Program
June 2009 Discussion Paper**

In 2003, the U.S. Congress directed the Secretary of Commerce to establish, in consultation with the North Pacific Fishery Management Council (the Council), a pilot program for management of the Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish fisheries (the target rockfish fisheries) in the Central Gulf of Alaska. Specifically, Congress passed the following legislation:

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

Following this directive, in 2005, the Council adopted a share-based management program under which the total allowable catch is apportioned as exclusive shares to cooperatives based on the catch history of the members of those cooperatives. Although originally subject to a sunset after 2 years, the 2007 reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (the MSA) extended the term of the program to 5 years. Under this extension, the program is scheduled to sunset after the 2011 season. The reauthorization also developed new requirements for share-based management programs, now referred to as Limited Access Privilege Programs (or LAPPs) by the MSA.

After review of the program, at its October 2008 meeting, the Council requested staff to develop a discussion paper addressing certain concerns with the program by stakeholders. On receiving that discussion paper in February 2009, the Council elected to consider a process to develop comprehensive management for the fishery that could include modifications to address shortcomings in the existing program. This comprehensive management program could be implemented at the time the pilot program expires. To begin this process, the Council tasked staff to provide a description of four alternatives that range from taking no action and allowing the program to redesigning elements of the existing program to satisfy concerns expressed by stakeholders. These alternatives specifically include:

1. no action, under which the fishery would revert to management under the License Limitation Program,
2. the current rockfish pilot program,
3. a variation on the existing program with changes to address issues that arise under the new MSA limited access privilege program requirements, and
4. a variation on the existing program with changes to address concerns of various interests.

This paper provides a description of these alternatives. Elements and options defining Alternatives 2, 3, and 4 are set out in Appendix A. In preparing the range of elements and options, staff utilized the June 2005 final Council motion as the basis for this proposed action. New elements and options are underlined and are referenced based on the associated alternative. In those cases where there is no proposed modification to the June 2005 motion, the existing language would apply to Alternatives 2, 3, and 4.

Purpose and need

In the development of the program, the Council will need to adopt a purpose and need statement describing its rationale for considering and its goals for the action. The MSA includes general requirements for a LAPP, including that the program:

1. promotes fishing safety,
2. promotes fishery conservation and management,
3. promotes social and economic benefits, and
4. if a fishery is determined by the Secretary or Council to be overcapacity, reduces capacity in the fishery (see Sec. 303A(c)).

The Council will fashion a program to address the first three of these requirements. The fourth requirement is conditional on a Secretarial or Council finding of 'overcapacity'. In April of 2008, a technical report submitted to Congress by NOAA Fisheries on behalf of the Secretary concluded that the rockfish fishery suffered from overcapacity based on the 2004 performance of the fishery.¹ NOAA Fisheries implemented the program in 2007. The program allocated shares in the main fishery, alleviating capacity concerns by preventing additional entry and allowing participants to fish more efficiently through share allocations. As a result, the fishery in its current form is not believed to be overcapacity and any potential overcapacity problem would be addressed by the implementing a follow on management program by this action.

For the adoption of the pilot program, the Council identified the following purpose and need statement:

The present management structure of the CGOA rockfish fishery continues to exacerbate the race for fish with:

- *Increased catching and processing capacity entering the fishery,*
- *Reduced economic viability of the historical harvesters (both catcher vessels and catcher processors) and processors,*
- *Decreased safety,*
- *Economic instability of the residential processor labor force,*
- *Reduced product value and utilization,*
- *Jeopardy to historical groundfish community stability,*
- *Limited ability to adapt to Magnuson-Stevens Act (MSA) requirements to minimize bycatch and protect habitat.*

While the Council is formulating GOA comprehensive rationalization to address similar problems in other fisheries, a short-term solution is needed to stabilize the community of Kodiak. Kodiak has experienced multiple processing plant closures, its residential work force is at risk due to shorter and shorter processing seasons and the community fish tax revenues continue to decrease as fish prices and port landings decrease. Congress recognized these problems and directed the Secretary in consultation with the Council, to implement a pilot rockfish program with the following legislation:

¹ National Marine Fisheries Service, "Excess Harvesting Capacity in U.S. Fisheries A Report to Congress Mandated under Section 312(b)(6) of the Magnuson-Stevens Fishery Conservation and Management Act," April 28, 2008.

[cited legislation SEC. 802. GULF OF ALASKA ROCKFISH DEMONSTRATION PROGRAM shown in full above.]

The fishing fleets have had little experience with cooperative fishery management and need to begin the educational process. For the fishery to be rationalized all aspects of the economic portfolio of the fishery need to be recognized. To stabilize the fishery economy all the historical players – harvesters (both catcher vessels and catcher processors) and processors need to be recognized in a meaningful way. The demonstration program is designed as a short-term program for immediate economic relief until comprehensive GOA rationalization can be implemented.

Since this purpose and need statement is based on the legislation directing the development of the program, it is clearly inapplicable to the development of a long term program. Several elements of the purpose and need statement could be incorporated into a purpose and need statement for this action, if the Council believes those elements identify applicable concerns and goals. As such, the purpose and need statement could be used as the basis for the development of a purpose and need statement for this action.

Alternative descriptions

Following is a description of the alternatives suggested by the Council.

Alternative 1 – (no action) The Rockfish Fishery Management Reverts to the License Limitation Program

Under this alternative, management of the Central Gulf of Alaska rockfish would revert back to the License Limitation Program used prior to the implementation of the rockfish program in 2006. The fisheries would open to fixed gear participants on January 1. The trawl season would open in early July. Ongoing catch would be monitored by managers with fishery closures timed to coincide with harvest of the TAC. Trawl participants would be subject to an aggregate limit on the amount of halibut that can be caught, all of which must be discarded as prohibited species catch (PSC). Incidental catch species would be managed under “bycatch status”, with a maximum retainable allowance (MRA), which would limit their retention to a percent of the retained target harvest. Harvest would be monitored in-season and each of the target rockfish fisheries would be closed when managers estimate that the TAC was harvested. Directed fishing allowances would be set to accommodate incidental catch of the rockfish species in other fisheries during the remainder of the year. After closure of the directed fishery, Pacific ocean perch, pelagic shelf rockfish, and northern rockfish would be managed on a bycatch basis and would be subject to MRAs in other target fisheries, limiting the retention of these rockfish relative to target species.

Alternative 2 – Existing Rockfish Program

Under this alternative represents the existing rockfish program in its current form. This alternative is included primarily for comparative analytical purposes as certain elements of the program may be beyond the Council’s current authority under the MSA as reauthorized.

Currently, the Central Gulf of Alaska rockfish program establishes a cooperative fishery that is open to holders of Central Gulf of Alaska trawl LLP licenses that have qualifying history in the rockfish fisheries. Prior to making the allocations to the cooperative fisheries, two set asides of the target rockfish are made. The first of these set asides allocates 5 percent of the TAC for each target rockfish species, the aggregate of which is divided equally between two entry level fisheries (one for trawl fishermen and the other for non-trawl fishermen). Both entry level fisheries are prosecuted as a competitive fishery open to any applicant. The second set aside is an incidental catch allowance to support incidental catch of the rockfish by participants in other directed fisheries. The set aside is based on the incidental catch needs of other fisheries, which are estimated using rockfish incidental catch rates from those fisheries in recent years.

After removal of the two set asides, the remainder of the target rockfish are divided between the catcher vessel sector and the catcher processor sector. The allocations are based on historic catches of the participants in these respective sectors. In addition to target rockfish allocations, each sector is also allocated important incidental catch species (i.e., sablefish, Pacific cod, shortraker rockfish, rougheye rockfish, and shortspine thornyhead rockfish) based on the historic harvests of the sector. Exceptions are Pacific cod, which is not allocated to catcher processors cooperatives, and shortraker rockfish and rougheye rockfish, which are not allocated to catch vessel cooperatives, but are instead managed under MRAs. These species are not allocated because the sectors have limited historic catch, which could lead to allocations that are inadequate to support catch of target rockfish. Each sector is also allocated halibut PSC based on historic catch of halibut in the target rockfish fisheries.

Participants in each sector can either fish as part of a cooperative or in a competitive, limited access fishery. Each cooperative receives allocations of target rockfish, secondary species, and halibut PSC from the sector's allocation based on the target rockfish catch histories of its members. The limited access fishery receives an allocation of target rockfish based on the target rockfish catch histories of sector members that choose not to join a cooperative. Secondary species catch is limited by an MRA that is reduced from the historic level to maintain total catch at a level comparable to a corresponding cooperative allocation and to reduce the incentive to fish in the limited access fishery.

Cooperatives manage and coordinate fishing of their allocations. Target rockfish and secondary species are subject to a full retention requirement to minimize discards. All allocations to a cooperative are constraining, so a cooperative must manage and monitor members' catch of target rockfish, allocated secondary species, and halibut PSC, to ensure that it is able to fully harvest its allocations without overage.

To protect processors, each catcher vessel in the program is eligible for membership in a cooperative associated with the processor to which it delivered the most rockfish catch during a processor qualifying period. These cooperative/processor associations are intended to ensure that a cooperative lands a substantial portion of its catch with its member's historic processor. Note that processor association requirement for eligible catcher vessels may be beyond the general authority granted the Council under the MSA. No clear MSA authority authorizes a requirement that a harvester associate with a specific processor to access an exclusive harvest privilege. There are references in the MSA for the development of policies to promote fishing communities that depend on the fisheries by including regional or port-specific landing or delivery requirements that could address the harvester/processor associations. Despite the potential for processor associations to be beyond the authority granted to the Council by the MSA, it is the intent of staff to continue to include processor associations in the analysis of Alternative 2 for comparison of other potential processor protection options included in Alternatives 3 and 4.

Under this alternative, the main program cooperative fishing season would continue to open May 1st and close November 15th. The limited access fishery in the main program would continue to open in the beginning of July and would close when its participants are estimated to have fully harvested the allocation in that fishery.

Long term privileges in the fishery are associated with a qualified LLP license and transfer with the license (along with all other fishing privileges associated with the license). Long term quota in the program that is derived from a license is not severable from the license or divisible. Annual allocations can be transferred within a cooperative and among cooperatives, but catcher vessel cooperatives are not permitted to transfer annual allocations to catcher processor cooperatives.

Under this alternative, sideboards will continue to limit encroachment of participants in the rockfish program on other fisheries. Since the CGOA rockfish fishery was historically prosecuted in July,

sideboards limit program participants to their historic harvests in other fisheries during July only. Sideboards for GOA fisheries that are historically constrained by halibut PSC would continue to be limit eligible participants in each sector to their historic halibut mortality in the month of July, in the aggregate under this alternative. NOAA Fisheries would continue to apportion halibut sideboards between the deep water complex and the shallow water complex. These July halibut sideboards will continue to be administered by ending fishing in halibut limited fisheries in a complex by sector members eligible for the rockfish program when the sector halibut limitation is reached in that complex.

Alternative 3 – The Existing Program modified to address Limited Access Privilege Program requirements of the Magnuson Stevens Act Requirements

The Council requested staff to develop Alternative 3 by modifying the existing CGOA rockfish limited access program with changes necessary to address the requirements of the new Magnuson Stevens Act limited access privilege program requirements. So, except for differences described here, Alternative 3 would maintain the same cooperative program previously described as Alternative 2.

§303A of the MSA provides the Council and Secretary with authority to establish LAPPs. In the interest of brevity, salient provisions from that section and their effects as viewed by staff are summarized here. Since the MSA provisions are subject to interpretation, a copy of section 303A is attached as Appendix B.

As the Council begins developing alternatives, it should note that the process is defined by the MSA (as reauthorized). Under that process, the Council is required to consider a variety of factors in the development of certain aspects of the program. Only after consideration of identified factors (with a supporting record) can the Council decide certain aspects of the program. In many cases, these requirements do not dictate that the Council adopt changes to the program, but instead require that the Council consider various factors in determining whether to maintain an existing element or some other element. For example, the legislation directing the development of the pilot program required that the program recognize historic participation of fishing vessels (1996 to 2002, best 5 of 7 years). This requirement largely superseded other considerations for determining the basis of harvest allocations under the program. In developing a new management program for the fisheries, the Council may choose to rely on harvest histories from these years for determining share allocations, but in doing so, the Council must undertake a process consistent with the MSA, which requires the consideration of a variety of factors, such as fishery harvests, employment, investments, and dependence. **If, at any time after due consideration, the Council determines that an element is not appropriate for the program, it need not include the provision in the program or an alternative. Most importantly, the Council must demonstrate for all such elements, through its deliberations, that it has given the element due consideration. For some elements, this may require simple discussion by the Council; for others, the Council may not believe that it has adequately considered an element until it has received an analysis of the element.**

The discussion that follows attempts to address these procedural requirements and considerations and identifies program elements that may be affected. In addition, the elements and options outlined at the end of the paper include notes identifying pertinent considerations arising under the new LAPP requirements, where appropriate. The more straightforward (and therefore less discretionary) requirements are simply identified as elements in the outline of alternatives at the end of the document.

Allocations

The legislation directing establishment of the rockfish pilot program dictated harvest histories to be recognized by the program. Clearly, the Council must consider whether the allocations made under the

pilot program satisfy the MSA requirements for allocations when developing a program. The MSA at §303A(c)(5)(A) requires the Council to:

establish procedures to ensure fair and equitable initial allocations, including consideration of

- (i) current and historical harvests
- (ii) employment in the harvesting and processing sectors
- (iii) investments in, and dependence, upon the fishery; and
- (iv) current and historical participation of fishing communities.

At a minimum, the Council is required to revisit the qualifying years for the program to determine whether those years (including the drop year provision) appropriately weight these considerations. In addition, the Council could consider whether allocations give adequate consideration to current and historical participation of fishing communities and processing sector employment. These determinations may depend on whether those interests are adequately represented by other aspects of the program, such as cooperative/processor associations that the Council may wish to consider incorporating in the program.

Harvester/Processor Linkages

Under the pilot program, processor and community participation is arguably recognized through the harvester/processor linkages, under which a harvester is eligible for a cooperative that associates with the shore-based processing plant to which it made the most deliveries during a processor qualifying period specified by the authorizing legislation. The program allows no flexibility for a harvester to change cooperatives (effectively locking in processor associations). If the Council wishes to incorporate this rigid structure into its program, it will need to establish its consistency with both its goals for the program and the MSA authority for establishing the program. In addition, potential antitrust issues with this rigid structure will need to be examined. As with harvest share allocations, the Council will need to revisit the processor qualifying years of any processor component included in the program to ensure that selected years adequately recognize employment in the processing sector, fishery investments and dependency, and current and historic participation of fishing communities.

Alternatively, the Council could consider other, less rigid, cooperative/processor associations or other mechanisms altogether to recognize processor and community interests. Again, the authority for a different structure would need to be established, based on the Council's rationale for its action and a demonstration of the connection between the action, its purpose, and the Council's authority under the MSA. Depending on its goals, the Council might consider a structure of cooperative/processor associations, which may be severed subject to a harvest share penalty. The Council could also examine structures that allocate harvest shares to processors. A cooperative structure could be superimposed on these allocations to improve coordination of harvesting and processing efforts in the fishery.

Cooperatives/Regional Fishery Associations

The Council's authority to establish cooperative allocations in a fishery was implicit in its ability to make allocations of shares in fisheries prior to authorization of the program. This authority likely continues to exist, provided those allocations continue to satisfy the general requirements for share allocations under the Council's LAPP authority. The MSA revision, however, supplements the Council's authority with new authority to establish regional fishery associations. Regional fishery associations are voluntary associations of the holders of quota designated for use in a region that meet criteria established by the Council. In developing participation criteria the Council must consider:

1. traditional fishing and processing practices and fishery dependence,
2. the cultural and social framework relevant to the fishery,

3. economic barriers to access to the fishery,
4. projected economic and social impacts of the program on harvesters, captains, crew, processors, and fishery dependent businesses in the region,
5. the administrative and fiduciary soundness of the association, and
6. the expected effectiveness, operational transparency, and equitability of the fishery association plan (see §303A(c)(4)).

If the Council believes that the regional fishery association provides a more desirable structure for its allocations, it could choose to undertake the development of a system of regional fishery associations, as an alternative to a system of cooperatives.

Owner-Operated Vessels

The MSA at §303A(c)(5)(B) requires the Council to consider the basic cultural and social framework of the fishery, emphasizing two aspects of that framework. The development of policies promoting sustained participation of owner-operated vessels is the first emphasized aspect. The current program contains no preferences or requirements for owner-operators. Whether any provisions for sustaining owner-operator participation in the fishery are appropriate depends on the Council's view of the cultural and social framework of the fishery and whether maintaining that fleet characteristic is consistent with the goals of the Council for the fishery. In any case, the Council is directed by this section to consider this possible aspect of the fishery in development of the program.

Fishery Dependent Communities

The sustained participation of communities dependent on the fishery is the second aspect of cultural and social framework that is emphasized. The establishment of cooperative/processor associations could be argued to support sustained participation of communities in the fishery, as those associations are plant specific, and thereby, grounded in their home communities. The Council may also include regional or port specific landing requirements to address community interests. The Council is also directed to consider procedures to prevent excessive geographic consolidation in the harvesting and processing sectors as a part of its efforts to consider the cultural and social framework of the fishery. The current program contains no provision to address concerns over geographic consolidation of either harvesting or processing. On their face, these provisions appear intended to ensure that Council considers historic community interests in the fisheries, but not to a level that leads to excessive geographic consolidation.

Allocative Set Asides

The MSA at §303A(c)(5)(C) requires the Council, where necessary and appropriate, to include measures to assist entry level and small vessel owner-operators, captains, crew, and fishing communities through set asides of harvest allocations or economic assistance in the purchase of shares. Entry level interests are recognized in the current program through an entry level set aside of 5 percent of the TAC of target rockfish, which is split equally between trawl and fixed gear vessels that are ineligible for the main program. Continuation of one or both of these allocations could be advanced to address entry level concerns, as appropriate.

The pilot program includes no direct provisions recognizing the interests of captains or crew. These aspects were likely omitted, in part, because they did not fit well in the temporary structure of the program. The Council should consider whether these protections are appropriate and necessary in this program. Maintaining a licensed based system may mitigate some effects on captains and crew, as vessels in the rockfish fishery participate in a variety of fisheries other than the rockfish fishery. Specifically, the rockfish program alone is unlikely to affect the number of crew employed, as it is unlikely to lead to

substantial vessel retirement. Historically, Central Gulf rockfish revenues were a minor part of a vessel's revenue. To obtain reasonable returns from a license, that license would likely need to be used in several fisheries. Only if, the returns from a license across all fisheries, including the rockfish fishery, are negligible would the license be retired, although vessels could be removed from the rockfish fishery. In determining whether to include captain and crew protections, the Council should also consider the effects of the program on crew shares. In other fisheries, share allocations have affected crew shares. Generally, average crew compensation has increased, but crew payments as a percentage of gross vessel income has declined. The Council should consider the potential for these effects and whether to take action to mitigate any negative effect in developing this program. The MSA specifically suggests that set asides or economic assistance (such as a loan program) could be used to address these effects, if found to be necessary and appropriate. Specific authority for a loan program is provided in §303A(g), under which a Council adopt a loan program that reserves up to 25 percent of cost recovery² fees collected under the program.³

No specific set aside is established for communities under the existing program. Some aspects of the program may indirectly protect community interests, particularly the cooperative/processor associations, which are on a shore plant basis. Whether additional community measures (including a set aside) should be included in the program should be considered. If the Council elects to proceed with a community allocation, eligible communities would need to meet criteria adopted by the Council, consist of residents who are active in commercial or recreational fishing, processor or fishery support businesses, and must develop a community sustainability plan demonstrating how the plan will address social and economic development needs of coastal communities, including those that have not historically had the resources to participate in the fishery. In developing participation criteria for communities the Council is required to consider traditional fishing and processing practices and fishery dependence, the cultural and social framework in the fishery, economic barriers to fishery access, the existence and severity of projected economic and social impacts of LAPPs on harvesters, captains, crew, processors and other businesses substantially dependent on the fishery, and the potential for improving economic conditions in remote coastal communities lacking resources to participate in harvesting and processing in the fishery (see §303A(c)(3)).

Eligibility to Hold Shares and Share Limits

The Council must also define eligibility to hold and use shares under the program. This eligibility must authorize persons who substantially participate in the fishery to hold shares (see §303A(c)(5)(E)). The Council is also required to define a policy and criteria for transfers consistent with the Council's policy concerning allocation and make up of the fishery (see §303A(c)(5)(D)). These two requirements interact, as the eligibility to acquire shares may effectively define the transfer criteria. The program currently limits transfers of long term privileges through the limitations on transfers of LLP licenses and the limits on excessive consolidation of shares. LLP licenses may only be transferred to persons eligible to document a fishing vessel and may not cause the recipient to exceed the rockfish share limit or result in the person holding more than 10 LLP licenses. Leasing is limited to cooperatives in the program. In addition, to protect shoreside interests, catcher vessel shares may not be transferred to a catcher processor cooperative. A process for monitoring transfers (including sale and lease of shares is also required) (see §303A(c)(7) and its reference to §303A(c)(5)). LLP license transfers and leases of shares between cooperatives are monitored by the Restricted Access Management Division. The Council could continue

² The requirement of the Council to establish a cost recovery program to cover administrative expenses of program is discussed below.

³ The Council should note that these loan programs require a Congressional appropriation of funds. In the crab fishery, implementation of loan program has been delayed (since implementation of that program in 2005), in part, because of the delay in Congress in providing that appropriation.

these measures, if they believe that they are consistent with their policies for the fishery (including policies intended to affect the cultural and social framework of the fishery).

The program must also ensure no share holder acquires an excessive share of harvest privileges by establishing a maximum share (or percent of the share pool that may be held, or used by any person) and to establish any other limitation necessary to prevent an inequitable concentration of shares under the program (see §303A(c)(5)(D)). In addition, the Council is required to consider procedures to address concerns over any excessive consolidation of harvesting and processing in the fishery (see §303A(c)(5)(B)(ii)). The current rockfish program includes a prohibition on any person holding or using in excess of 5 percent of the aggregate target rockfish catcher vessel share pool. In addition, no cooperative may hold or use more than 30 percent of the aggregate target rockfish catcher vessel share pool. In addition, no shoreside processor is permitted to process in excess of 30 percent of aggregate target rockfish landings from the catcher vessel sector. Similar limitations apply to the catcher processor sector, in which no person may hold or use more than 20 percent of the aggregate target rockfish catcher processor share pool and no cooperative may hold or use more than 60 percent of the aggregate target rockfish catcher processor share pool. If the Council believes that these limitations are appropriate, they could be continued in any future program.

The MSA requires a limit period on shares, under which all privileges (or shares) under the program must be issued for a limited period (not to exceed 10 years). Shares are required to be reissued at the end of the period, unless revoked, limited, or modified. The Council is required to establish terms for the revocation, limitation, or modification of shares. The Council also may provide for the redistribution of any shares revoked or for the reacquisition of shares limited under this provision (see §303A(f)). The current program contains no provisions defining a term for shares under the program. The Council could elect to define certain actions or violations as possible grounds for revocation, limitation, or modification of an allocation under the program. Any such change in status of the allocation will occur only after notice and opportunity for a hearing. The authority for deciding whether a revocation, limitation, or modification occurs will remain at the discretion of NOAA Office of Law Enforcement and NOAA General Counsel. The redistribution could be as simple as proportional redistribution to current share holders. Alternatively, the Council could choose another method of reallocation.

Auctions

The MSA requires the Council to consider, if appropriate, an auction system or other program to collect royalties for the initial (or any subsequent distribution of) allocations. If the Council wishes to develop an auction system, the distribution of shares arising from the auction must meet the requirements for allocations set out above. The MSA requires any revenues generated from an auction or other royalty collect program to be deposited in a Limited Access System Administration Fund. Funds are available to the Secretary to administer a central registry of permits and to implement management in the fishery in which the fees were collected. The central registry is intended, in large part, to establish a system of permit registration to allow the establishment of security interests in fishing permits.

Cost Recovery

The Council is also required by the MSA to develop a cost recovery program to cover management, data collection and analysis, and enforcement costs for the program (see §303A(e)). Fees under the program may not exceed 3 percent of the ex vessel value of fish harvested under the program. Up to 25 percent of these fees may be set aside to support a loan program for purchase of shares by fishermen who fish from small vessels and first-time purchases of shares under the program. If the Council wishes to establish such a loan program, it is directed to recommend loan qualify criteria (defining small vessel participants and first-time purchasers), as well as the portion of fees to be allocated for loan guarantees.

The cost recovery requirement includes a requirement that the Council develop a methodology and means to identify and assess the management, data collection and analysis, and enforcement of the program. The current management system defines both management and enforcement requirements and included a review of the program. The Council should discuss whether existing data collection and analysis of the program are defined adequately for examining the program in the future. Assessing those aspects of the program in an ongoing manner might be accomplished through a review that also satisfies the requirement for a periodic review of the program.

Program Review

The Council is required to undertake a formal detailed review of the program 5 years after implementation of the program to determine the progress of the program in achieving the goals of the program and the MSA. Additional reviews will be conducted every 7 years there after coinciding with the fishery management plan review⁴ ((see §303A(c)(1)(G)). As a part of these reviews, the Council could assess whether management, data collection and analysis, and enforcement needs are adequately met.

Alternative 4 – Existing Program with Changes to Address Concerns of Various Interests

Alternative 4 is a variation on the existing program with changes to address concerns of various interests. These changes, which were presented in a February 2009 discussion paper on CGOA rockfish program revisions, are included as options for consideration in the elements and options presented in Appendix A. Suggested changes included:

- a possible amendment to qualify persons with CGOA rockfish history who acquired a license to remain eligible to fish in the CGOA fisheries
- measures to control effort in the entry level trawl fishery
- modification of the entry level fixed gear fishery to avoid leaving the allocation unharvested
- a change in the management of shortraker rockfish in the catcher processor sector
- a change in the management of maximum retainable amount under the program to include catch of allocated secondary species in the basis for determining the MRA of a species that is not allocated
- a change in the management of halibut PSC in the entry level trawl fishery.

On reviewing the potential for measures to effectively limit effort in the entry level trawl fishery, it was perceived that no such measures would have the desired effect. As an alternative, this alternative includes an option to admit participants in the entry level trawl fishery to the main program.

In addition, Alternative 4 includes two additional options. The first option is to eliminate the limited access fisheries. The elimination of these fisheries would reduce management costs and reduce the potential for participants to exert undue leverage in negotiations. Alternative 4 also includes an option to remove catcher processor rockfish program sideboards limits for WYAK and WGOA primary rockfish species and 3rd season halibut PSC since these same vessels are already limited by the Amendment 80 sideboards. The removal these sideboards will simplify management of the sideboard limits for both NMFS staff and industry and increase the incentive for catcher processors to join a cooperative. For the catcher vessel sector, an option was added to prohibit directed fishing for WYAK and WGOA primary

⁴ The review could be scheduled to coincide with the fishing management plan policy review, which is conducted on an annual basis.

rockfish species given that the current sideboard limits are too small to accommodate a directed fisheries.

APPENDIX A

Elements and options defining the Rockfish Program Alternatives

ICA Set Aside

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

Entry-level Set Aside

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

Trawl and fixed gear entry level fisheries

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

Set-asides shall be apportioned at 50% for trawl gear and 50% for fixed gear

The trawl sector's allocation by weight (based on the aggregate TAC for Pacific Ocean perch, Northern and pelagic shelf rockfish) shall first be Pacific Ocean perch.

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

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

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

Halibut PSC Limit Allocation

Option 1 – (Alt. 2) Prosecution of the entry level fishery will be supported by general allowance of halibut PSC to the gear type and the general allocations of secondary species. If sufficient halibut PSC is not available at the start of the trawl gear fishery (May 1), the start date will be on the next release of halibut PSC.

Option 2 – (Alt. 4) Prosecution of the entry level fishery will be supported by general allowance of halibut PSC to the gear type and the general allocations of secondary species. If sufficient halibut PSC is not available at the start of the trawl gear fishery (May 1), halibut usage will be deducted against the following quarter's halibut PSC allowance.

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

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

Entry level fixed gear sector are exempt from VMS requirements.

Fixed gear only entry level fishery (Alt. 4)

The annual set aside will be;

- ___ percent of the POP TAC
- ___ percent of the northern rockfish TAC
- ___ percent of the pelagic shelf rockfish TAC.

If the entry-level fishery harvests 90% or more of their allocation of a species, the set-aside would increase ___ percent, up to a maximum set-aside of 5 percent.

The entry level fishery will be managed as an limited entry fishery

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

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

Any holder of a CGOA fixed gear LLP may enter a vessel in the entry level fishery. Before the beginning of each fishing year an application must be filed with NMFS by the interested vessel.

Entry level fixed gear sector are exempt from VMS requirements.

Notes: Provisions concerning processor qualification are omitted, as those requirements may be inapplicable under this structure.

In addition, no provision is made for reallocations of unharvested amounts, as it is assumed that the allocation to the entry level sector will be set based on harvest performance of the fishery.

Options for cooperative management, individual allocations, and lotteries are not included, as those options appear unable to address problems cited with the entry level fishery. If the Council wishes to pursue an entry level trawl fishery under cooperative management, additional effort could be devoted to that management structure.

The provision for an entry level fishery might satisfy the requirement of §303A(c)(5)(C) for the consideration of a set aside for entry level and small vessel owner-operators, where necessary and appropriate.

Program eligibility

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

Options (Alt.4) - In addition, the following participants would be eligible to entry the program:

Option 1 - Those persons whose vessel had one targeted landing of POP, Northern rockfish or PSR caught in CGOA during the qualifying period with interim trawl CGOA license that was later determined to be an invalid trawl CGOA endorsement, but who acquired a valid CGOA trawl license prior to December 31, 2003, which is still assigned to that vessel.

Option 2 - Eligible entry level CGOA trawl LLPs that participated in the entry level program.

Qualified catch

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

Option (Alt. 4) – For licenses qualified based on catch of a vessel using an interim license, the basis for the allocation will be the catch history of such vessel, notwithstanding the invalidity of the interim Central Gulf trawl LLP endorsement under which the vessel operated during the qualifying period. History allocated under this provision shall be assigned to the LLP license.

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

- 1) 1996-2002 (drop two) Alt. 2
- 2) _____
- 3) _____

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

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

To include participants in the pilot program entry level fishery, pilot program years (i.e., 2005-2008) could be considered qualifying years.

Sector definitions

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

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

Rationalized areas

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

Sector allocations

Target rockfish species

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

Sector allocations of target rockfish species are based on individual qualified vessel histories

applying any applicable drop year provision at the vessel level.

Full retention of the target rockfish species required

Secondary species

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

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

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

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

Option 1 (Alt. 2) - Only primary allocated rockfish species

Option 2 (Alt. 4) - All allocated species

Except as otherwise provided below, secondary species allocations will be based on:

The sector's average annual percentage of retained catch of the secondary species by the rockfish target fisheries during the qualifying period. For each qualifying year calculate the sector's retained catch of the species in the target rockfish fisheries divided by the retained catch of all CGOA fisheries. Sum these percentages and divided by the number of qualifying years. The calculated average annual percentage is multiplied by the secondary species TAC for that fishery year and allocated to each sector in the cooperative program.

Exceptions:

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

For shortraker and roughey:

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

Option 1a (Alt. 2): 30.03 percent

Option 1b (Alt. 4): 50 percent

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

Option 2 (Alt. 4): shortraker and roughey will be managed with a combined MRA of 2%.

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

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

Prohibited species (halibut mortality)

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

Allocation from sector to vessel

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

Target Species

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

Secondary Species

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

PSC (Halibut Mortality)

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

Allocations are revocable privileges

The allocations under this program:

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

Domestic processing

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

Alt. 3 – required by Section 303A(c)(1)(E)

Shore based processor provisions – Apply to catcher vessel sector only

Processor eligibility

An eligible processor is a processing facility that has purchased:

Option 1 (Alt. 2) - 250 MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish harvest per year, for 4 years, from 1996 to 2000.

Option 2 (Alt. 3) - _____ MT of aggregate Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish from ____ to ____.

Harvesters can participate in a:

Option 1 (Alt. 2): cooperative or LLP/open access. The LLP's share will be fished in a competitive fishery open to rockfish qualified vessels that are not members of a cooperative and must be delivered to one of the qualified processors.

Option 2 (Alt. 4): cooperative

This option can be modified to consider years other than those provided in the rockfish legislation.

Option A - Processor allocation of harvest shares (Alt. 3/4)

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

Option 1: 90/10

Option 2: 80/20

Option 3 - _____

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

Processor qualifying years

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

Option 1 - 1996-2000 (drop 1 year)

Option 2 - _____

Option 3 - _____

This option can be modified to consider years other than those provided in the rockfish legislation.

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

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

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

Option B – Harvester cooperatives with processor associations (Alt. 2)

Voluntary cooperatives may form between eligible harvesters in association with the processing facility to which the harvester delivered the most pounds of the three rockfish species combined during the processor qualifying years. If an LLP holder has no deliveries to a qualified processor, the LLP holder may join a cooperative with any one of the qualified processors, but its membership would not be considered in determining whether the threshold is met for cooperative formation.

Harvester cooperative/processor association qualifying years are:

1996-2000 (drop 1 year)

Drop year is selected by the processor and applied to all LLP licenses when determining associations.

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

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

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

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

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

Processors are limited to 1 co-op per plant.

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

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

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

Option C – Modified harvester cooperatives with initial processor association (Alt. 3/4)

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

Harvester cooperative/processor association qualifying years are:

Option 1 - 1996-2000 (drop 1 year)

Option 2 - _____

Option 3 - _____

Drop year is selected by the processor and applied to all LLP licenses when determining associations.

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

Option 1 - 10 percent

Option 2 - _____

Option 3 - _____

of its qualified catch history to the identified processor. After this forfeiture, the harvester may elect to enter and exit any cooperative in the fishery without share forfeiture.

If an LLP holder has no deliveries to a qualified processor, the harvester may join a cooperative

associated with any processor in the community to which it delivered the most pounds of the three rockfish species during the harvester cooperative/processor qualifying years. After the first year, the harvester will make a forfeiture of qualified catch history on changing processor associations, as if the processor were identified by the harvester's landings history.

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

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

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

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

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

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

Catcher processor cooperatives

More than one co-op may form within the sector

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

Participants would have a choice of participating in:

Option 1 (Alt. 4): a co-op or opt out of the rockfish program,

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

Under the LLP/open access fishery option, the LLP's historic share will be fished in a competitive fishery open to rockfish qualified vessels who are not members of a cooperative.

General cooperative provisions – apply to both sectors

Duration of cooperative agreements is 1 year.

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

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

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

The cooperative agreement must have a monitoring program. Cooperative members are jointly and severally responsible for cooperative vessels harvesting in the aggregate no more than their

cooperative's allocation of target rockfish species, secondary species and PSC mortality, as may be adjusted by inter-cooperative transfers.

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

Option (Alt. 2) - Cooperative membership agreements shall allow for the entry of other eligible harvesters into the cooperative under the same terms and conditions as agreed to by the original agreement.

Cooperatives will report annually to the Council as per AFA.

Sector Transfer provisions

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

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

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

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

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

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

Cooperative Harvest Use Caps

CV cooperatives (Alt. 2)

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

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

CP cooperatives (Alt. 2)

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

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

Shoreside Processor Use Caps

Shoreside processors shall be capped at the entity level.

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

Eligible processors will be grandfathered.

At the time of implementation, the Council expressed an intent to reconsider use caps for share holdings and vessels, in the event this program has a duration of more than 2 years. The Council could consider whether to modify use caps by changing cooperative or individual use cap levels or by including vessel use caps.

Whether processor use caps are necessary might depend on the processor provisions that are incorporated into the program.

Harvesting provisions

The cooperative season start date is May 1 and a closing date of November 15.

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

Full retention of all allocated species is required.

Program review

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

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

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

Alt. 3 – required by Section 303A(c)(1)(J) – note, this is required in any program, but its scope will be based on the program selected – further scoping can be provided after consultation with NOAA GC, NMFS, and other agencies (such as the Department of Justice)

Share duration(Alt. 3)

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

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

Cost recovery (Alt. 3)

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

Sideboards

General Provisions

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

WYAK and WGOA Primary Rockfish Species

Option 1 (Alt. 2) For fisheries that close on TAC in the GOA, the qualified vessels in each sector (trawl CV and trawl CP) would be limited, in aggregate, in the month of July to the historic average catch of those vessels based on the retained catch as a percentage of the retained catch in the fishery in the month of July during the qualification years 1996 to 2002. Fisheries that this sideboard provision would apply to include West Yakutat rockfish and WGOA rockfish.

Option 2 (Alt. 4) For catcher processors, remove sideboard limits for WYAK and WGOA primary rockfish species.

Option 3 (Alt. 4) For catcher vessels, prohibit directed fishing for WYAK and WGOA primary rockfish species.

Halibut PSC

Option 1 (Alt. 2) For flatfish fisheries in the GOA that close because of halibut bycatch, the qualified vessels in each sector (trawl CV and trawl CP) would be limited, in the aggregate, in the month of July to the historic average halibut mortality taken by those vessels in the target flatfish fisheries in the month of July by deep and shallow complex as a Gulf-wide cap.

Option 2 (Alt. 4) For catcher processors, remove sideboard limits for WYAK and WGOA 3rd season halibut PSC.

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

IFQ halibut and sablefish are exempt from sideboard provisions

CP Specific Sideboard Provisions

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

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

CPs that opt out of the rockfish cooperative program will be prohibited, for two weeks following the start of the traditional July rockfish fishery, from entering other GOA fisheries in which they have not previously participated. Participation shall be defined as having been in the target fishery during the first week of July in at least two of the qualifying years. For purposes of

qualifying under this provision, history from area 650 (SEO) will be considered the same as history from area 640 (WY). The following weekending dates will be used for determining participation in a target fishery:

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

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

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

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

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

To the extent permitted by the motion, history may be leased between vessels that are not members of a cooperative. Each non-member of a cooperative that transfers its history to another CP or CV must still refrain from operating in any other GOA groundfish fishery until the earlier of:

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

Members of a cooperative will be subject to all limitations and restrictions described in the general sideboard provisions and CP specific sideboard provisions except that cooperative members shall not be subject to any standdown in the GOA groundfish fisheries.

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

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

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

CV Specific Sideboard Provisions

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

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

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

APPENDIX B

Magnuson-Stevens Fishery Conservation and Management Act

Sec. 303A. Limited Access Privilege Programs.

P.L. 109-479, sec. 104(b), MSA § 303 note

16 U.S.C. 1853 note

EFFECTIVE DATES; APPLICATION TO CERTAIN SPECIES.—The amendment made by subsection (a)(10)¹⁶—

(1) shall, unless otherwise provided for under an international agreement in which the United States participates, take effect—

(A) in fishing year 2010 for fisheries determined by the Secretary to be subject to overfishing; and

(B) in fishing year 2011 for all other fisheries; and

(2) shall not apply to a fishery for species that have a life cycle of approximately 1 year unless the Secretary has determined the fishery is subject to overfishing of that species; and

(3) shall not limit or otherwise affect the requirements of section 301(a)(1) or 304(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851(a)(1) or 1854(e), respectively).

109-479

SEC. 303A. LIMITED ACCESS PRIVILEGE PROGRAMS.

16 U.S.C. 1853a

(a) **IN GENERAL.**—After the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.

(b) **NO CREATION OF RIGHT, TITLE, OR INTEREST.**—Limited access privilege, quota share, or other limited access system authorization established, implemented, or managed under this Act—

(1) shall be considered a permit for the purposes of sections 307, 308, and 309;

(2) may be revoked, limited, or modified at any time in accordance with this Act, including revocation if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen;

(3) shall not confer any right of compensation to the holder of such limited access privilege, quota share, or other such limited access system authorization if it is revoked, limited, or modified;

(4) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested by the holder; and

(5) shall be considered a grant of permission to the holder of the limited access privilege or quota share to engage in activities permitted by such limited access privilege or quota share.

¹⁶ Section 104(a)(10) of P.L. 109-479 added section 303(a)(15).

(c) REQUIREMENTS FOR LIMITED ACCESS PRIVILEGES.—

(1) IN GENERAL.—Any limited access privilege program to harvest fish submitted by a Council or approved by the Secretary under this section shall—

(A) if established in a fishery that is overfished or subject to a rebuilding plan, assist in its rebuilding;

(B) if established in a fishery that is determined by the Secretary or the Council to have over-capacity, contribute to reducing capacity;

(C) promote—

(i) fishing safety;

(ii) fishery conservation and management; and

(iii) social and economic benefits;

(D) prohibit any person other than a United States citizen, a corporation, partnership, or other entity established under the laws of the United States or any State, or a permanent resident alien, that meets the eligibility and participation requirements established in the program from acquiring a privilege to harvest fish, including any person that acquires a limited access privilege solely for the purpose of perfecting or realizing on a security interest in such privilege;

(E) require that all fish harvested under a limited access privilege program be processed on vessels of the United States or on United States soil (including any territory of the United States);

(F) specify the goals of the program;

(G) include provisions for the regular monitoring and review by the Council and the Secretary of the operations of the program, including determining progress in meeting the goals of the program and this Act, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program and thereafter to coincide with scheduled Council review of the relevant fishery management plan (but no less frequently than once every 7 years);

(H) include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems;

(I) include an appeals process for administrative review of the Secretary's decisions regarding initial allocation of limited access privileges;

(J) provide for the establishment by the Secretary, in consultation with appropriate Federal agencies, for an information collection and review process to provide any additional information needed to determine whether any illegal acts of anti-competition, anti-trust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges under the program; and

(K) provide for the revocation by the Secretary of limited access privileges held by any person found to have violated the antitrust laws of the United States.

(2) WAIVER.—The Secretary may waive the requirement of paragraph (1)(E) if the Secretary determines that—

- (A) the fishery has historically processed the fish outside of the United States; and
- (B) the United States has a seafood safety equivalency agreement with the country where processing will occur.

(3) FISHING COMMUNITIES.—

(A) IN GENERAL.—

(i) ELIGIBILITY.—To be eligible to participate in a limited access privilege program to harvest fish, a fishing community shall—

- (I) be located within the management area of the relevant Council;
- (II) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;
- (III) consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the Council's management area; and
- (IV) develop and submit a community sustainability plan to the Council and the Secretary that demonstrates how the plan will address the social and economic development needs of coastal communities, including those that have not historically had the resources to participate in the fishery, for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(ii) FAILURE TO COMPLY WITH PLAN.—The Secretary shall deny or revoke limited access privileges granted under this section for any person who fails to comply with the requirements of the community sustainability plan. Any limited access privileges denied or revoked under this section may be reallocated to other eligible members of the fishing community.

- (B) PARTICIPATION CRITERIA.—In developing participation criteria for eligible communities under this paragraph, a Council shall consider—
- (i) traditional fishing or processing practices in, and dependence on, the fishery;
 - (ii) the cultural and social framework relevant to the fishery;
 - (iii) economic barriers to access to fishery;
 - (iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;
 - (v) the expected effectiveness, operational transparency, and equitability of the community sustainability plan; and
 - (vi) the potential for improving economic conditions in remote coastal communities lacking resources to participate in harvesting or processing activities in the fishery.

(4) REGIONAL FISHERY ASSOCIATIONS.—

- (A) IN GENERAL.—To be eligible to participate in a limited access privilege program to harvest fish, a regional fishery association shall—
- (i) be located within the management area of the relevant Council;
 - (ii) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;
 - (iii) be a voluntary association with established by-laws and operating procedures;
 - (iv) consist of participants in the fishery who hold quota share that are designated for use in the specific region or subregion covered by the regional fishery association, including commercial or recreational fishing, processing, fishery-dependent support businesses, or fishing communities;
 - (v) not be eligible to receive an initial allocation of a limited access privilege but may acquire such privileges after the initial allocation, and may hold the annual fishing privileges of any limited access privileges it holds or the annual fishing privileges that is [sic]¹⁷ members contribute; and
 - (vi) develop and submit a regional fishery association plan to the Council and the Secretary for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(B) FAILURE TO COMPLY WITH PLAN.—The Secretary shall deny or revoke limited access privileges granted under this section to any person participating in a regional fishery association who fails to comply with the requirements of the regional fishery association plan.

¹⁷ So in original.

(C) PARTICIPATION CRITERIA.—In developing participation criteria for eligible regional fishery associations under this paragraph, a Council shall consider—

- (i) traditional fishing or processing practices in, and dependence on, the fishery;
- (ii) the cultural and social framework relevant to the fishery;
- (iii) economic barriers to access to fishery;
- (iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;
- (v) the administrative and fiduciary soundness of the association; and
- (vi) the expected effectiveness, operational transparency, and equitability of the fishery association plan.

(5) ALLOCATION.—In developing a limited access privilege program to harvest fish a Council or the Secretary shall—

(A) establish procedures to ensure fair and equitable initial allocations, including consideration of—

- (i) current and historical harvests;
- (ii) employment in the harvesting and processing sectors;
- (iii) investments in, and dependence upon, the fishery; and
- (iv) the current and historical participation of fishing communities;

(B) consider the basic cultural and social framework of the fishery, especially through—

- (i) the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on the fisheries, including regional or port-specific landing or delivery requirements; and
- (ii) procedures to address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery;

(C) include measures to assist, when necessary and appropriate, entry-level and small vessel owner-operators, captains, crew, and fishing communities through set-asides of harvesting allocations, including providing privileges, which may include set-asides or allocations of harvesting privileges, or economic assistance in the purchase of limited access privileges;

(D) ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program by—

- (i) establishing a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use; and
- (ii) establishing any other limitations or measures necessary to prevent an inequitable concentration of limited access privileges; and

(E) authorize limited access privileges to harvest fish to be held, acquired, used by, or issued under the system to persons who substantially participate in the fishery, including in a specific sector of such fishery, as specified by the Council.

(6) PROGRAM INITIATION.—

(A) LIMITATION.—Except as provided in subparagraph (D), a Council may initiate a fishery management plan or amendment to establish a limited access privilege program to harvest fish on its own initiative or if the Secretary has certified an appropriate petition.

(B) PETITION.—A group of fishermen constituting more than 50 percent of the permit holders, or holding more than 50 percent of the allocation, in the fishery for which a limited access privilege program to harvest fish is sought, may submit a petition to the Secretary requesting that the relevant Council or Councils with authority over the fishery be authorized to initiate the development of the program. Any such petition shall clearly state the fishery to which the limited access privilege program would apply. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the limited access program shall be eligible to sign a petition for such a program and shall serve as the basis for determining the percentage described in the first sentence of this subparagraph.

(C) CERTIFICATION BY SECRETARY.—Upon the receipt of any such petition, the Secretary shall review all of the signatures on the petition and, if the Secretary determines that the signatures on the petition represent more than 50 percent of the permit holders, or holders of more than 50 percent of the allocation in the fishery, as described by subparagraph (B), the Secretary shall certify the petition to the appropriate Council or Councils.

(D) NEW ENGLAND AND GULF REFERENDUM.—

(i) Except as provided in clause (iii) for the Gulf of Mexico commercial red snapper fishery, the New England and Gulf Councils may not submit, and the Secretary may not approve or implement, a fishery management plan or amendment that creates an individual fishing quota program, including a Secretarial plan, unless such a system, as ultimately developed, has been approved by more than 2/3 of those voting in a referendum among eligible permit holders, or other persons described in clause (v), with respect to the New England Council, and by a majority of those voting in the referendum among eligible permit holders with respect to the Gulf Council. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the individual fishing quota program shall be eligible to vote in such a referendum. If an individual fishing quota program fails to be approved by the requisite number of those voting, it may be revised and submitted for approval in a subsequent referendum.

(ii) The Secretary shall conduct a referendum under this subparagraph, including notifying all persons eligible to participate in the referendum and making available to them information concerning the schedule, procedures, and eligibility requirements for the referendum process and the proposed individual fishing quota program. Within 1 year after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, the Secretary shall publish guidelines and procedures to determine procedures and voting eligibility requirements for referenda and to conduct such referenda in a fair and equitable manner.

(iii) The provisions of section 407(c) of this Act shall apply in lieu of this subparagraph for an individual fishing quota program for the Gulf of Mexico commercial red snapper fishery.

(iv) Chapter 35 of title 44, United States Code, (commonly known as the Paperwork Reduction Act) does not apply to the referenda conducted under this subparagraph.

(v) The Secretary shall promulgate criteria for determining whether additional fishery participants are eligible to vote in the New England referendum described in clause (i) in order to ensure that crew members who derive a significant percentage of their total income from the fishery under the proposed program are eligible to vote in the referendum.

(vi) In this subparagraph, the term 'individual fishing quota' does not include a sector allocation.

(7) **TRANSFERABILITY.**—In establishing a limited access privilege program, a Council shall—

(A) establish a policy and criteria for the transferability of limited access privileges (through sale or lease), that is consistent with the policies adopted by the Council for the fishery under paragraph (5); and

(B) establish, in coordination with the Secretary, a process for monitoring of transfers (including sales and leases) of limited access privileges.

(8) **PREPARATION AND IMPLEMENTATION OF SECRETARIAL PLANS.**—This subsection also applies to a plan prepared and implemented by the Secretary under section 304(c) or 304(g).

(9) **ANTITRUST SAVINGS CLAUSE.**—Nothing in this Act shall be construed to modify, impair, or supersede the operation of any of the antitrust laws. For purposes of the preceding sentence, the term 'antitrust laws' has the meaning given such term in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.

16 U.S.C. 1853a
MSA § 303A

(d) **AUCTION AND OTHER PROGRAMS.**—In establishing a limited access privilege program, a Council shall consider, and may provide, if appropriate, an auction system or other program to collect royalties for the initial, or any subsequent, distribution of allocations in a limited access privilege program if—

(1) the system or program is administered in such a way that the resulting distribution of limited access privilege shares meets the program requirements of this section; and

(2) revenues generated through such a royalty program are deposited in the Limited Access System Administration Fund established by section 305(h)(5)(B) and available subject to annual appropriations.

(e) **COST RECOVERY.**—In establishing a limited access privilege program, a Council shall—

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 304(d)(2), for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities.

(f) **CHARACTERISTICS.**—A limited access privilege established after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 is a permit issued for a period of not more than 10 years that—

(1) will be renewed before the end of that period, unless it has been revoked, limited, or modified as provided in this subsection;

(2) will be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of title 5, United States Code, to have failed to comply with any term of the plan identified in the plan as cause for revocation, limitation, or modification of a permit, which may include conservation requirements established under the plan;

(3) may be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of title 5, United States Code, to have committed an act prohibited by section 307 of this Act; and

(4) may be acquired, or reacquired, by participants in the program under a mechanism established by the Council if it has been revoked, limited, or modified under paragraph (2) or (3).

(g) LIMITED ACCESS PRIVILEGE ASSISTED PURCHASE PROGRAM.—

(1) IN GENERAL.—A Council may submit, and the Secretary may approve and implement, a program which reserves up to 25 percent of any fees collected from a fishery under section 304(d)(2) to be used, pursuant to section 53706(a)(7) of title 46, United States Code, to issue obligations that aid in financing—

(A) the purchase of limited access privileges in that fishery by fishermen who fish from small vessels; and

(B) the first-time purchase of limited access privileges in that fishery by entry level fishermen.

(2) ELIGIBILITY CRITERIA.—A Council making a submission under paragraph (1) shall recommend criteria, consistent with the provisions of this Act, that a fisherman must meet to qualify for guarantees under subparagraphs (A) and (B) of paragraph (1) and the portion of funds to be allocated for guarantees under each subparagraph.

(h) EFFECT ON CERTAIN EXISTING SHARES AND PROGRAMS.—Nothing in this Act, or the amendments made by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, shall be construed to require a reallocation or a reevaluation of individual quota shares, processor quota shares, cooperative programs, or other quota programs, including sector allocation in effect before the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006.

(i) TRANSITION RULES.—

(1) IN GENERAL.—The requirements of this section shall not apply to any quota program, including any individual quota program, cooperative program, or sector allocation for which a Council has taken final action or which has been submitted by a Council to the Secretary, or approved by the Secretary, within 6 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, except that—

(A) the requirements of section 303(d) of this Act in effect on the day before the date of enactment of that Act shall apply to any such program;

(B) the program shall be subject to review under subsection (c)(1)(G) of this section not later than 5 years after the program implementation; and

(C) nothing in this subsection precludes a Council from incorporating criteria contained in this section into any such plans.

(2) PACIFIC GROUND FISH PROPOSALS.—The requirements of this section, other than subparagraphs (A) and (B) of subsection (c)(1) and subparagraphs (A), (B), and (C) of paragraph (1) of this subsection, shall not apply to any proposal authorized under section 302(f) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 that is submitted within the timeframe prescribed by that section.

16 U.S.C. 1853a note, 1854
MSA §§ 303A note, 304

P.L. 109-479, sec. 106(e), MSA § 303A note
APPLICATION WITH AMERICAN FISHERIES ACT.—Nothing in section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), as added by subsection (a) [P.L. 109-479], shall be construed to modify or supersede any provision of the American Fisheries Act (46 U.S.C. 12102 note; 16 U.S.C. 1851 note; et alia).

16 U.S.C. 1853a note

P.L. 104-297, sec. 108(i), MSA § 303 note
EXISTING QUOTA PLANS.—Nothing in this Act [P.L. 104-297] or the amendments made by this Act shall be construed to require a reallocation of individual fishing quotas under any individual fishing quota program approved by the Secretary before January 4, 1995.

SEC. 304. ACTION BY THE SECRETARY

16 U.S.C. 1854

104-297

(a) REVIEW OF PLANS.—

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall—

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall—

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6).

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify—

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

May 27, 2009

RECORDED
MAY 27 2009

To: Chairman Olsen and Members of the Council

N.P.M.C.

Re: Alternatives for CGOA Rockfish Program

My name is Patrick O'Donnell. I have worked as a fisherman in Kodiak for the past 19 years and have made Kodiak my home for 16 of those years. I would like to advocate for a revision of the qualifying years for the RPP as well as allocations that reflect both historical and active participation within the Rockfish fishery.

Having been part of the Rockfish fishery since its early development, first as a deckhand and shortly thereafter as a skipper on the F/V Topaz, I moved to invest in the vessel I was operating with the understanding that I would be able to purchase the vessel outright over a period of time. To help me build the equity I would need to secure a loan to purchase the vessel, it was agreed that I would buy into the vessel small and affordable percentages each year over a period of time.

In 1996 I purchased my first 5%, followed by another 5% in 1997 and again in 1998 gaining me a total of 15% ownership of the vessel. When talk of Gulf Rationalization began to circulate, I was told that no more shares in the vessel would be sold to me. The possibility of a rationalized fishery would mean the product could potentially be worth 3 to 4 times its current value.

In 2002 I was financially in a position to once again invest in owning my own boat while still retaining 15% ownership in the F/V Topaz. With Gulf Rationalization a possibility in my future, I wanted to secure my own catch history as an operator/owner rather than make that history for someone else simply as an operator. I went on to purchase a rundown vessel, the F/V Caravelle, in September of 2002 and began working towards building my own future and creating my own catch history within the Gulf of Alaska.

At the time, there was no way of knowing that the Rockfish Pilot Program would come into play, or that the last year to qualify would be in 2002, the year I purchased the vessel. Once in play, the RPP became a handicap for me, in that it did not reflect my personal catch history and performance with the F/V Caravelle from 2002 onward.

Based on the qualifying history of the vessel prior to my owning it, the F/V Caravelle was allocated 198,000 lbs. For the years that I ran the F/V Caravelle, from 2002 onward, I averaged around 500,000 lbs. Being allocated less than half of my yearly average, this was a substantial financial loss for me. I was opposed to the program and given two options: take the quota the vessel qualified for or choose to opt out and get nothing at all.

The original RPP was only to be in place for 2 years, something we all thought we could live with. Figuring that it was only a trial run of how a rationalized program might

work, many of us thought that we would, after those 2 years, be able to come up with a program that worked for everyone involved. As you know, the program was extended to 5 years. In those 5 years I would continue to be linked with a debilitating catch history, barely breaking even, while the F/V Topaz benefitted from a catch history based on years that I operated the boat - a boat I thought I was working towards owning.

As a result of the current RPP, I have lost a significant amount of income that I depend on. I am tied to a cannery that I do not ordinarily deliver to, and have absolutely no negotiating power when it comes to set price for fish I am required to deliver to them. It is my understanding that one of the objects of the program was to increase the value of the product by slowing the fishery down, which so far has not happened. I am being paid less for my fish now than before the program was put into place.

If there is to be a quota system in place, let it be one that not only reflects its historical participants, but one that acknowledges those who have remained active within the fishery throughout. I would like to propose 2002-2006 as qualifying years as a means to better reflect current participation within the fishery. There are roughly 47 LLPs that qualify based on the original RPP and only 24 of those vessels currently fish and depend upon the fishery- nearly half of the qualifying fleet.

I would like to see a revised program where allocations are made to historical participants who have remained active throughout the entire life of the rockfish fishery and who depend upon it financially. Historical participants should not only include processors and vessels, but also the handful of skippers who have remained dedicated and active throughout. Thank you for your time and consideration.

Sincerely,

Patrick O'Donnell
P.O. Box 3075
Kodiak, Alaska 99615

(907) 539-5296 Cell
(907) 486-2683 Home



April 16, 2009

Doug Mecum
Acting Regional Administrator
Alaska Region, National Marine Fisheries Service
PO Box 21668
Juneau, AK 99802

RECEIVED
APR 20 2009
N.P.F.M.C.

Dear Mr. Mecum:

I write regarding the Rockfish Pilot Program (RPP) on behalf of Island Seafoods, one of the three seafood processors in Kodiak that did not qualify to participate in the RPP as "eligible" processors, and that cannot buy rockfish from eligible harvesters. Island is termed an "entry-level" processor, able to buy rockfish from entry-level harvesters, and has participated in this part of the program for the two years since it was implemented. Last year, the second year of the program, two unfortunate circumstances prevented the meaningful participation of Island Seafoods and the entry-level harvesters; one of these circumstances was the unavailability of halibut PSC, forcing the entry-level fishery to remain closed during the optimum harvesting time. Only 30,000 pounds of rockfish were delivered by an entry-level harvester to Island's dock, from an available allocation of approximately 350 metric tons.

(See the attached timeline of 2008 rockfish fishery events.)

During the one-year Council review of the RPP, Island Seafoods and other entry level participants pointed out several aspects of the entry-level portion of the program that simply do not work, including the lack of a dedicated amount of halibut bycatch allowance for the entry level. The halibut PSC for the entry level comes off the deepwater trawl complex, in which vessels take a large amount of halibut bycatch and often reach the limit. The Council analysis further defined this problem and others, and recommended that the Council consider either the exemption of the entry level from the halibut bycatch limit, or the allocation of a very small amount of halibut PSC to the entry level to ensure that the fishery can be prosecuted, as intended by Congress and the Council.

The irony is that Island Seafoods testified to the Council during the development of the Rockfish Pilot Program several years ago that the entry level fishery was almost certain to run short of halibut bycatch, and asked the Council to allocate a small amount of halibut to the entry level. The eligible harvesters and processors opposed the provision, and the Council did not include it.

Following the one-year review and analysis, Island Seafoods requested of the AP in December and the Council in February that a solution to the halibut bycatch issue be part of a revision of the rockfish management program. While we acknowledged the practicality of the Council beginning a process to formulate a new rockfish management program to replace the pilot program at the end of its five-year life in December 2011, we also asked that the Council and NMFS investigate a shorter-term solution to



the halibut bycatch problem. The Council did not honor that request, and the entry level is now left with three more years of trying to deal with the problems inherent in what is clearly a failed fishery management program.

This year – the third of the RPP – we anticipate that there may again be a problem with halibut bycatch, such that the entry level fishery may not be able to be undertaken in May when the harvesters and the plants have the ability to catch and process the fish. If this is the case, Island would like the option to buy unprocessed rockfish from the eligible processors – fish caught by eligible harvesters and delivered to eligible processors. This fish would only be available to Island Seafoods if the eligible processors are over capacity or face market constraints and opt to reduce their market exposure. We have asked your management staff if the regulations allow such a business transaction, which we believe is outside the scope of the RPP. The interpretation so far has been that the regulations do not allow such a transaction.

We ask that you request the NOAA General Counsel for a legal opinion regarding the ability of entry level processors to buy fish from eligible processors.

We also ask that your staff undertake a review of the possibility of a short-term solution to the entry level halibut bycatch problem. Given the inadequacies of the entry level program, their acknowledgment by Council analysts, and the severe hardships suffered by the entry level participants, we believe developing a temporary, emergency rule to allow the harvest of entry level rockfish is consistent with Congressional and Council intent in setting aside 5% of the TAC for that sector.

Thank you for your consideration.

Best regards,

John Whiddon
General Manager
Island Seafoods
Kodiak, AK
The Pacific Seafood Group

Cc: NPFMC members
Congressional delegation
Sam Rauch



TIMELINE OF EVENTS FOR 2008 ENTRY LEVEL RPP

May 1: Rockfish Pilot Program opened for eligible and "entry level" harvesters and processors.

On or about week of May 1: NMFS published notice that Entry Level RPP would not open due to insufficient halibut PSC remaining in the Deepwater Complex.

1 July: NMFS published notice re-opening Entry Level RPP using halibut PSC from third quarter allocation to the Deepwater Complex.

On or about week of 1 July: NMFS closed Entry Level RPP by emergency order when it was determined the possibility existed that the entire quota had been taken by a vessel that had illegally fished the quota.



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

October 30, 2007

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

Dear Mr. Hansen:

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



Eileen M. Cooney
NW Regional Counsel



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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7600 Sand Point Way N.E.,
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June 10, 2005

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

Dear Mr. Hansen:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



Eileen M. Cooney
NW Regional Counsel

Enclosures



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September 20, 1993

MEMORANDUM FOR: North Pacific Fishery Management Council

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

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

BACKGROUND

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

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

¹As of June 28, 1993, there are five recommended options for the initial assignment of quota share:

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



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

SUMMARY OF FINDINGS

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

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

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

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

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

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

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

CAVEAT

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

DISCUSSION

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

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

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

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

I. Allocations that are authorized under the Magnuson Act.

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

⁵467 U.S. at 842-43.

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

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

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

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

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

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

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

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

⁹16 U.S.C. 1851(a)(4).

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

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

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

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

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

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

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

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

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

¹²16 U.S.C. 1802(10).

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

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

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

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

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

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

¹⁴Id., at 10 (1978).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸Id.

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

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

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

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

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

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

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

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

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

²⁰ 16 U.S.C. 1853(a)(1)(A).

²¹ 50 CFR 652.20(a) (1992).

²² 50 CFR 652.20(f)(1) (1992).

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

whether the Councils and the Secretary had the authority to allocate fishing privileges to vessel owners was not raised, a reviewing court found that the Secretary had the authority to establish an ITQ system and that the surf clam and ocean quahog ITQ system was supported by an administrative record that justified the Secretary's decision to approve it.²⁴

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

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

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

²⁴Id., at 375-76.

²⁵50 CFR 675.20(a)(3)(i) (1992).

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

prohibit the allocation which AIF challenges" and found that the challenged regulations allocated fishing privileges among fishermen.²⁷ Judge Rothstein continued by stating that "[the regulations] in effect regulate offshore catcher-processors, which would otherwise preempt the coastal sector of the fishing industry."²⁸

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

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

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

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

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

²⁸Id., at 18.

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

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

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

CONCLUSION

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

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

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

Attachment

North Pacific Fishery Management Council

Richard B. Lauber, Chairman
Clarence G. Pautzke, Executive Director

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Anchorage, Alaska 99501



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MEMORANDUM

TO: Lisa Lindeman
NOAA General Counsel

FROM: Chris Oliver
Deputy Director

DATE: August 13, 1993

SUBJECT: Processor Quota Shares

Per your request of this morning, I will try to summarize the intent of the Council's proposal to consider Individual Processor Quotas (IPQs) as part of the comprehensive limited entry plan. I will also try to summarize the Council's concerns regarding the legalities of this proposal.

First, there has been discussion of allocating processors a portion of the harvesting QS, based on the argument that they have an equal investment in the fisheries. Though it is no secret that this proposal has little or no chance of happening, the Council does want to know if there is a legal basis for doing so. Is there anything in the Magnuson Act or National Standards which would preclude them from doing so? What kind of justification would be necessary for such a proposal to be approved? Would allocation of harvesting privileges to foreign owned processing entities be a problem?

Secondly, there has been proposed the 'two-pie' system whereby separate processor shares (IPQs) would be created which would mirror the harvesting shares. Under this system harvest shares would not be diluted but it would, theoretically at least, balance the playing field so that the processing sector would not be unfairly disadvantaged as they would (again, theoretically) under the original proposal. The theory is that they would be at a competitive disadvantage and would eventually be driven out of business as the at sea processing sector drove the price of fish up. The way the program would work is still fairly unclear. For example, whether the IPQs would be species-specific has not been discussed. The mechanism for initial allocation to processors of those shares has not been discussed very fully, though it would likely be based on relative processing activities during some specified period of time in the past. What is sure is that each processor would have a specific amount, and harvesters could only deliver their fish to a processor if that processor had adequate IPQ to cover that delivery. The harvesting sector is not completely enamored with this idea as it could dictate, to some extent, where they deliver their fish.

I guess the fundamental question to be answered is whether the Magnuson Act allows the Council the authority to create IPQs. The Act specifically addresses fishing activities and mandates, for example, consideration of past participation, current participation, and dependence on the fishery of the participants in the fisheries. Does this include processors? To the extent that the inshore/offshore amendment mandates a set percentage of fish be delivered onshore, would this be an extension of that logic? Would the Council (i.e., analysts) be required to quantify net benefits related to the IPQ proposal?

I believe the Council is concerned that we not go down a road of pursuing this proposal and then find out down the line that it is something they cannot do for legal reasons. Finally, there is considerable concern that even if IPOs themselves are legal, would it be a problem to allocate them to foreign owned entities? I think this about covers it Lisa, though I realize it may seem a bit vague at this point. Please call me after you review this memo.



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

October 31, 2008

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

Dear Mr. Hansen:

This letter is based on relevant facts, applicable legal rules and informal consultations with the Antitrust Division of the Department of Justice (DOJ) about antitrust issues related to the Trawl Individual Quota program under development by the Council. This letter provides the conclusions of NOAA General Counsel, Northwest Region (GCNW), and does not reflect the official position of DOJ.

The first issue is whether the Magnuson-Stevens Fishery Conservation and Management Act¹ (MSA) provides either express or implied immunity from federal antitrust laws.² The recent amendments to the MSA added an "antitrust savings clause" that states:

Nothing in this Act shall be construed to modify, impair, or supersede the operation of the antitrust laws. For purposes of the preceding sentence, the term 'antitrust laws' has the meaning given such term in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.³

¹16 U.S.C. §§ 1801 et seq.

²For example, the Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-522, expressly provides immunity when participants in the fishing industry engage in certain specified activities. In general, "implied antitrust immunity is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory scheme." National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 388 (1981)(citations omitted).

³16 U.S.C. § 1853a(c)(9)

The validity and application of a nearly identical statutory savings clause in the Telecommunications Act of 1996 was examined by the Supreme Court in Verizon Communications Inc. v. Trinko.⁴

The Court found, among other issues, that the statute's savings clause⁵ barred a finding of implied immunity, and that while the "1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards."⁶

It is not possible to predict with certainty the outcome of litigation about whether the MSA savings clause also bars the application of the doctrine of implied immunity; however, given the similarity of the MSA savings clause with the savings clause at issue in Trinko, it is likely that a court would reach the same conclusion. Thus, it is important that all fishery participants remain aware of their obligations under the antitrust laws.

We advise that fishery participants should consult three documents published by DOJ and the Federal Trade Commission (FTC). The Horizontal Merger Guidelines⁷ and the Commentary on the Horizontal Merger Guidelines⁸ provide detailed guidance on the current enforcement policy of DOJ and the FTC concerning horizontal acquisitions and mergers subject to section 7 of the Clayton Act,⁹ to section 1 of the Sherman Act,¹⁰ or to section 5 of the FTC Act.¹¹ The Antitrust

⁴540 U.S. 398 (2004).

⁵The savings clause in the 1996 Act stated that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152, note.

⁶Trinko, 540 U.S. at 407.

⁷Horizontal Merger Guidelines, issued April 2, 1992; revised April 8, 1997; available at <http://www.ftc.gov/bc/docs/horizmer.shtm>.

⁸Commentary on the Horizontal Merger Guidelines, issued March 2006, available at <http://www.ftc.gov/bc/guidance.shtm>.

⁹15 U.S.C. § 18 (1988). As stated in the Guidelines, "mergers subject to section 7 are prohibited if their effect 'may be substantially to lessen competition, or tend to create a monopoly.'"

¹⁰15 U.S.C. § 1 (1988). As stated in the Guidelines, "mergers subject to section 1 are prohibited if they constitute a 'contract, combination..., or conspiracy in restraint of trade.'"

¹¹15 U.S.C. § 45 (1988). As stated in the Guidelines, "mergers subject to section 5 are prohibited if they constitute an 'unfair method of competition.'"

Guidelines for Collaborations Among Competitors¹² explain how DOJ and the FTC analyze antitrust issues raised by collaborations among competitors. In addition, we advise that any fishery participants that are uncertain about the legality under the antitrust laws of the United States of any of their anticipated activities should consult legal counsel prior to commencing those activities.

The Council asked specifically about the antitrust implications of the accumulation limits under consideration. Section 303A of the MSA requires that the Council, in order to prevent limited access privilege holders from acquiring an excessive share of the total limited access privileges in the program, specify maximum allowable shares and establish any other measures necessary to prevent an inequitable concentration of limited access privileges.¹³ This raises two separate but related questions. First, could the approval and implementation of specific limits be a per se violation of antitrust law by NOAA? Second, does the establishment of a limit mean that an entity that is in compliance with limits would also be in compliance with antitrust law?

In answer to the first question, establishment of a limit by NOAA would not in itself establish a violation of antitrust law, nor would it require any participant to violate antitrust law. In response to the second question, merely staying within the limits would not guarantee against violation of antitrust laws, as violations could arise from a number of factors in addition to the number of shares held by an individual or entity. Some of the factors that could be relevant include agreements between parties, the geographic market of the product, market substitution, product differentiation, concentration, effects of past actions, and likely future effects of current actions. The Guidelines and Commentary referred to above provide detail on these factors. These are the issues that DOJ would examine if it became aware of evidence of an antitrust violation.¹⁴ DOJ obtains information in various ways, such as complaints from members of the public or information contained in general or trade press. It is the responsibility of each fishery participant, therefore, present and future, to ensure that his or her activities are consistent with the antitrust laws. Participants should also be aware that the MSA requires that any limited

¹²Antitrust Guidelines for Collaborations Among Competitors, issued April 2000. Available at <http://www.ftc.gov/opa/2000/04/collguidelines.shtm>.

¹³16 U.S.C. § 1853a(c)(5)(D).

¹⁴ DOJ initiates a preliminary investigation if “(a) there are sufficient indications of evidence of an antitrust violation; (b) the amount of commerce affected is substantial; (c) the investigation will not needlessly duplicate or interfere with other efforts of the [Antitrust] Division, the FTC, a United States Attorney, or a state attorney general; and (d) resources are available to devote to the investigation.” Antitrust Division Manual, Antitrust Division, U.S. Department of Justice, updated September 2008; available at http://www.usdoj.gov/atr/public/divisionmanual/chapter3.htm#_1_3. In the event that the future activity involves proposed mergers, DOJ would evaluate proposed mergers under the statutory requirements of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, the Clayton Act, 15 U.S.C. § 18, and the Sherman Act, 15 U.S.C. § 1.

access privilege program "provide for the revocation . . . of limited access privileges held by any person found to have violated the antitrust laws of the United States."¹⁵

In summary, the Council's adoption and NOAA's approval of any specific limit would not establish a per se violation of antitrust laws. In addition, as the above discussion makes clear, it is not possible for the Council to select accumulation limits that, if complied with, would avoid the possibility that participants might be in violation of antitrust law. The Council's consideration of the accumulation limits must be based on the record and must comply with the requirements of the MSA, specifically determining why certain limits would be excessive and what is necessary to prevent inequitable concentration of limited access privileges.¹⁶

The Council also asked specifically about the "linkage" requirement in the whiting mothership sector cooperative alternative.¹⁷ The alternative requires that each permit holder that chooses to participate in the cooperative must deliver a specified amount to a specific licensed mothership -- in the first year of the program, to the mothership to which the permit holder delivered the majority of whiting catch in certain previous years, and in subsequent years, to the mothership to which the permit holder was obligated the previous year. Based on our review, this linkage requirement appears to raise significant and complex legal issues that call into question whether it complies with antitrust laws and, therefore, whether it could be approved by the agency.

As we have stated previously, under the MSA a proper written record, including a detailed explanation and justification for the alternative, is required for agency decision making. Consideration of the antitrust issues would, of course, be informed by this detailed record containing the rationale for and the details of the linkage provision. Should the Council decide to adopt this provision, we advise, for both MSA and antitrust purposes, that the Council should ensure that the record addresses the rationale, especially why the linkage is necessary for the conservation and management of groundfish. Due to the complexity of the issues, it has not been possible to date to obtain definitive legal advice from DOJ to resolve this particular issue. As you are aware, NOAA can approve an FMP provision only if it is consistent with the MSA and other applicable law, including antitrust law. If the Council elects to forward this alternative to the agency, the agency will have to take into consideration the significant issues raised above in determining approvability of the provision.

¹⁵16 U.S.C. § 1853a(c)(1)(K).

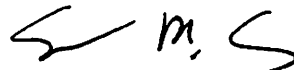
¹⁶ See U.S.C. § 1853a(c)(5)(D).

¹⁷The shoreside cooperative alternative also contains linkage requirements that NOAA GC previously stated are not authorized under the MSA. See Letter to Donald K. Hansen from Eileen M. Cooney, October 30, 2007. Since implementation of that provision would require additional legislative authority, this letter addresses only the linkage requirements in the mothership cooperative alternative.

The final issue is the formation of fishing cooperatives. As discussed above, the Fishermen's Collective Marketing Act¹⁸ (FCMA) provides express immunity from the antitrust laws. One issue that is not clearly settled under case law is whether certain types of processing entities or integrated entities with both fishing and processing abilities can form cooperatives and maintain the FCMA immunity from antitrust laws.¹⁹ As mentioned above, we advise that any fishery participants that are uncertain about the legality under the antitrust laws of the United States of their anticipated activities in forming cooperatives should consult legal counsel prior to commencing those activities.

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

Sincerely,



Eileen M. Cooney
NW Regional Counsel

¹⁸15 U.S.C. §§ 521-522.

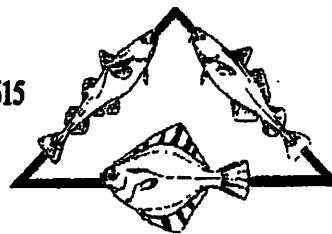
¹⁹See United States v. Hinote, 823 F.Supp. 1350 (S.D. Miss., 1993)(fully integrated catfish processors do not get FCMA immunity, relying on National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978), which held not all entities are "farmers" under the Capper-Volstead Act, also known as the Cooperative Marketing Ass'ns Act, 7 U.S.C. § 1, § 291, and thus they do not have immunity from the requirements of § 1 of the Sherman Act).

Groundfish Data Bank

Alaska

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Julie Bonney, Executive Director jbonney@gei.net
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Entry Level - Fixed Gear Allocation:

Table 1 Entry level fixed gear TACs and catch (2007 and 2008) in metric tons

		2007	2008*
POP	TAC	17	54
	Catch	0	0
	Percent caught	0.00	0.00
Northern rockfish	TAC	169	115
	Catch	1	1
	Percent caught	0.59	0.87
Pelagic shelf Rockfish	TAC	161	176
	Catch	11	14
	Percent caught	6.83	7.95

Harvest through August 29, 2008

Source: Rockfish Pilot Program Amendment Package Discussion Paper, November 2008.

Note: Dark rockfish was removed from the pelagic shelf Rockfish complex for the GOA FMP in 2009. Dark rockfish was turned over to the State of Alaska for management purposes. The majority of the Dark Rockfish biomass is found inside three miles. The PSR harvests for 2007 and 2008 include both Dark and Dusky rockfish harvests.

In the present RPP program the trawl and fixed gear sectors receive equal allocations of the aggregated TACs of primary rockfish species available to the entry level fishery. Because of operational differences, the trawl sector receives its portion of the aggregated TACs first from the entry level TAC of Pacific ocean perch. If the POP TAC is less than the total allocation to the trawl sector, the sector receives proportional shares of the northern rockfish and pelagic shelf rockfish TACs, such that entry level TAC is divided equally between the two gear types. The rationale for allocating POP first to the entry level trawl sector is that the entry level fixed gear sector has no harvest history of the species and targeting of POP with fixed gear is primarily experimental at this time. The overall allocation to the Trawl and Fixed gear entry level fishery combined is 5% of the TAC of each of the primary rockfish species.

Global Seafoods North America, LLC
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Pres by C-1(a)
Stephan Jansen


Global Seafoods North America

North Pacific Fishery Management Council
193d Plenary Session — Anchorage, AK — June 3-9, 2009
For the Official Record: re C-1(a) GOA Groundfish Issues
Review Alternatives for CGOA Rockfish Program

Secretary Locke, Chairman Olson & NPFMC members:

We support Alternative 1 “no action”— allowing management to revert to the License Limitation Program (LLP), just as before wrongful legislation implemented the Rockfish Pilot (Demonstration) Program.

We wholly agree with the discussion paper’s statement that since the existing purpose and needs statement “is based on the legislation directing the development of the program, it is clearly inapplicable to the development of a long term program.”

The Council should reject the attempts by existing players to place band-aids on the deep wounds of the failing RPP. They’ll be making false statements — unsubstantiated self-serving conclusions about the program — and acting as if that meets the requirements for respecification of the purpose, needs and goals of the program under MSA Reauthorized. It will not.

Equally, we agree that the “processor association requirement for eligible catcher vessels may be beyond the general authority granted the Council under the MSA.” We believe it was a restraint of trade upon Global Seafoods in violation of federal antitrust laws. The benefits of joint harvesting for coordinated catch management are legally outweighed by *per se* antitrust conditions.

If the day ever comes that overfishing or legitimate reason means a new program is considered, it should follow the legal due process of MSA Reauthorized. In any case, the Council is required to establish Authority based on its Rationale for Action and demonstrate a Connection between Action, Purpose and Authority — and that starts with revisiting the entire process. Alternatives 2 and 4 will not meet the requirements for a fair and equitable long-term program.

When and if allocations might occur, MSA §303(c)(5)(a) requires a fair and equitable allocation based on a supporting record for the employment in processing sectors and investments and dependence upon the fishery. In previous testimony Global Seafoods had provided you with clear cut evidence that our investment of over \$8 million was injured by the RPP. We clearly demonstrated that harm was about \$750 thousand in annual losses to our company (to date, over \$2 million), and caused job losses for our employees in Kodiak. We and they got nothing!

We also provided on the federal record sound evidence of a plan devised in January 2000 by some of the architects of the RPP to enact a fleet boycott of Global Seafoods in order to deliberately cause harm to us as a competitor. The Council should call for a Justice Department and Federal Trade Commission review of the antitrust and restraint of trade consequences of RPP, which was wholly allocative in its design. Federal laws demand protecting competition itself, not specific competitors.

While in fact RPP should end today and compensation be made to Global Seafoods for its unwarranted losses, the Council should at minimum allow the RPP to expire and revert to LLP management. This program was never intended to be a pilot program at all. It is a precedent setting measure to implement allocations to a specific gear group, in order to favor certain trawl vessels and the larger closed-class processors against whom businesses like ours compete. It will have further foreclosure effects upon our business if this RPP or a similar anti-competitive program continues.

Sincerely,

Oleg Nikitenko, President and owner
Thomas Hennessey, Chief Financial Officer



Pres. by Stephen
Jansen (C-1A)

North Pacific Fishery Management Council
193d Plenary Session — Anchorage, AK — June 3-9, 2009

For the Record: re C-1 GOA Groundfish Issues

Public Comment – Ludger Dochtermann, Kodiak AK — F/V North Point, Stormbird

Mr. Secretary, Chairman Olson & NPFMC members:

I favor a return to License Limitation Program management for the Rockfish in the Central Gulf of Alaska, per Alternative 1 in the discussion paper. In fact, this RPP should cease immediately. I hear from participants throughout the fishing community how it has not worked out for vessels or for processing workers, especially because **it has restrained trade and harmed our smaller processors** in Kodiak. It is easy to see the antitrust harms, if only you'll look. **As such, it adversely affects the fisheries I engage in, as well.**

The reason this occurred was that a select group got to specify a mythical problem in the absence of any declared condition of “overfishing” – and they pieced together a loose set of unverified assumptions about the benefits of alleged conservation and coordination of catch harvests. They did so to push out other competitors and privatize a fishery for themselves. And in the process, they used corrupt politicians through the well-known process of “briberization” (a term from Joseph Stiglitz, Nobel Prize winning economist).

Bad purpose and needs statements start with getting the problem statement process right in the first place. As you well know, we have too often seen Problem Statements, purposes, needs and goals get revised, and re-revised, as participants in the policy-making run into roadblocks and feel the need to make fickle, self-serving changes.

A primary example of this cycle of ill revisions was for GOA Rationalization, which remains relevant today. **The Rockfish Pilot Program now suffers from a “clearly inapplicable” Purpose and Needs statement (Council staff’s conclusion in the C-1(a) discussion paper).** Now, in the face of an alleged need for a long-term program, they would like to cobble together the old and rotting foundations of the RPP by declaring it a success – absent sufficient scientifically verifiable evidence – just so they can continue their grab for private ownership of our public resources.

At the Portland NPFMC meeting in February 2007, I engaged ADF&G Commissioner Denby Lloyd, a Council member, about the need for Problem Statements to be based on facts, properly designed, justifiable and warranted before the Council is allowed to proceed on staff tasking and policy development. I have submitted much of this (below) to you before.

Again, this PS issue (& purpose and needs) is central to ensuring that any LAPP, RFA or similar program, amendment, or policy-making under MSA Reauthorized (2006) proceeds with full public input with opportunity to participate in the actual design of Problem Statements. If any relevant CSOP or protocols or known practices already exist for

the NPFMC, I am unaware of them. But it may be possible to find other regional fishery councils who already have a CSOP or can assist on this matter.

Again, here are my thoughts and outline to assist you:

RE: NPFMC PROTOCOL NEEDED FOR 'PROBLEM STATEMENTS'

There is a central need for a Council Standard Operating Procedure (CSOP), i.e. for the development of an official protocol that ensures Problem Statements are developed in conjunction with economic analysis and scientific justification.

And that they are **publicly reviewed prior to acceptance as a Problem Statement**, and only after that may the Council decide during Staff Tasking, and when and where to insert the item on the Agendas.

The subsequent requirement is that no one group of industry participants may specify a problem and draft its statement to the exclusion of or without the combined input of other sectors and species groups in the affected region or fishery, and rush it forward into policy making without general public awareness. That is, better use of the Council website is highly recommended.

The basic elements of the protocol for Problems Statements should be 1) submission, 2) proposal contents, 3) review and approval. Here are my basic ideas for each:

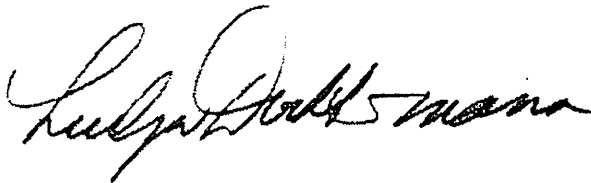
- 1) **Submission**: In order to submit a Problem Statement **there must be sufficient information for the Council to determine if the alleged problem actually exists**, if it is something that warrants Council action, and that it recites adequate justification, backed by supportive data. It should also have been reviewed by the chair of the SSC and NOAA GC regarding basic scientific reasoning and legal reasoning. Once submitted, it must be posted on the Council website under current issues for public notice and input for a sufficient period. The Council may also engage in special workshops to ensure only needed management changes occur.
- 2) **Proposal Contents**: The Problem Statement must be typed on an official Council Problem Statement form (as exists for the NPFMC) with all sections filled in, as well as:
 - a. contain sufficient information to outline all affected fisheries and disclosure of the interrelationship of a proposed policy between gear groups and among species or within a multispecies complex;
 - b. consider each of the National Standards, and outline relevant legal aspects of their application or how the standards would apply in the policy making, as well as outline potential litigation factors;

- c. examine biological, social, and economic aspects and include each in the Problem Statement outline; and specifically include projected areas of effect on the Optimum Yield (including economic wealth maximization); and where appropriate, outline effects regarding the State of Alaska constitutional requirement to maximize net economic benefits from common use resources;
 - d. provide essential scientific facts that form the baselines, and prove the problem exists, and cover the rationale for developing the statement and policy at this time; and
 - e. include identification of the individuals who are proponents of the proposal and letters of their intentions and recommendations.
- 3) **Review and Approval:** each Problem Statement has to be scheduled for public consideration at the SSC and AP levels and reviewed in full transparency before it can be accepted by the Council, and when the Council reviews it for acceptance, public comment must be allowed.

The Problem Statement must be approved in public session, before agenda-setting and staff tasking may proceed. However, it may be that the chair of the SSC or NOAA GC requests initial staff assistance to summons up the basic preliminary data and analysis to justify their positions before submitting the PS to the Council, in the first place.

Again, the a priori requirement is that any proposed Problem Statements must either the result of problems noted by actual fisheries participants based on supportive facts, from best science research, or results from regulatory language inconsistencies or similar needs noted by legal counsel or the States. The Problem Statements and purposes, needs and goals should not result merely from the greed and propaganda of those who alone stand to financially benefit from the solutions that are pre-determined by their false assumptions and PS definitions.

Respectfully,



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C-1(a)



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TESTIMONY TO
THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL
JUNE 3, 2009
Regarding: C1- GOA GROUNDISH ISSUES
CENTRAL GULF ROCKFISH PILOT PROGRAM
REVIEW

Chairman Olson and members of the Council:

My name is Gale Vick and I am the Executive Director of the Gulf of Alaska Coastal Communities Coalition (GOAC3.)

I am addressing, under C1 (a), the discussion of the Central Gulf of Alaska Rockfish Program. I will be reading our testimony but not the attached footnotes that reference several supporting documents. I am providing the Council with written copies for the record.

The GOAC3 supports the intent of the AP Minority Report to establish a work group to report to the Council at its October 2009 meeting regarding MSA requirements for consideration of sufficient community protections, including allocative set-asides, for communities in the Central Gulf of Alaska.

The GOAC3 further recommends that this committee be comprised of a sufficient cross section of stakeholders and representatives, including the GOAC3.

The Rockfish Pilot Program was developed and implemented prior to the 2006 passage of the Magnuson-Stevens Reauthorization Act (MSRA or MSA.) The reauthorized MSA reinforced existing national standards and particularly strengthened the intent of Congress under National Standard #8 by establishing directives for the consideration of community impacts under any new Limited Access Privilege Program, or LAPP.

It is clear from the U.S. Senate Report 109-229, April 4, 2006 in establishing LAPP provisions that the Senate was concerned about fishing communities and how they had been treated under prior limited access programs. There had been a great deal of inconsistency. In order to provide specific protections to communities, the Senate created language for:

- (1) Preventing limited access programs that tended to reward current actual participants and ignore entry-level or future participants¹ who would be forever priced out of the fishery.
- (2) Providing a mechanism for communities to hold quota²
- (3) Allowing for the sustained participation of local fishing communities³
- (4) Making sure Councils always took into account the importance of fisheries to local fishing communities⁴
- (5) Offsetting the impacts of consolidation of fishing effort by providing quota share mechanisms for communities⁵
- (6) Providing for meaningful consideration of retaining economic stability for fishing communities⁶
- (7) Providing especially for “small, poor, coastal communities.... That have been overlooked in the allocation decisions” and that lack the resources to enter into LAPP fisheries⁷
- (8) Cautioning councils not to use the requirements of Section 106⁸ to prevent these communities from being fully included in the allocation of these resources.”⁹
- (9) Providing for a complete understanding of the nature of “combination fishing” in small, isolated fishing communities¹⁰
- (10) Considering as “traditional” those uses that pre-date contemporary commercial fishing in the smaller, isolated communities that can demonstrate historic dependence on combination fisheries or participation in the fishery during years that may not fall within the qualifying period for individual LAPPs.¹¹

At the February 2009 NPFMC meeting, Council “elected to consider a process to develop comprehensive management” for the proposed Rockfish Program “that could include modifications to address short comings to the existing program.” The slightly revised Purpose and Need Statement of the AP further expresses the *need* to address the application of new MSA requirements.

As the June 2009 “Description of Alternatives” discussion paper states, there is currently no community set-aside in the proposed alternatives. There are no other sufficient community protections. It is more than a stretch to say that cooperative/processor associations on a shore plant basis will provide for “community protections” over the life of the program. They will not. *The only true community protection is a community allocation.*

The intent of Congress was to not circumvent the community protection options but to strengthen them. Meeting the intent of Congress and the provisions of MSA Section 303A(c)(3) to consider “the potential for improving economic conditions in the remote coastal communities lacking resources to participate in harvesting and processing in the fishery,” will require consideration of a community allocation.

There are many other critical issues that call for a more inclusive and cautionary approach to determining items for analysis:

- (1) Making the Rockfish Pilot Program a permanent IFQ program is the first time that a LAPP program must be considered under the new MSA rules in the North Pacific. There

is no precedence for this which means it is not just a question of “tweaking” the existing program but critically applying appropriate measures to ensure that the MSA LAPP provisions are satisfied

- (2) This is a fully “rationalized” pilot program that did not have benefit of the review it might have had if it had been considered a permanent IFQ program. Therefore the Pilot should definitely not be considered a template for a permanent program without sufficient consideration of community participation
- (3) The LAPP provisions are complex but the rule making for the LAPP provisions has not yet been completed
- (4) The RFA (regional fishing association) applications are complex and represents a new and unknown component
- (5) Kodiak is not the only community impacted by the Rockfish program. When a closed class of both fishermen and processors occurs, it affects *all* the fishermen of the area, particularly those of the smaller communities. The most important impact is the immediate increased economic barrier of entry to the rationalized fishery but the downstream impacts could affect other fisheries as well.
- (6) There has not been significant stakeholder dialogue for community impacts and options
- (7) There has not been sufficient investigation of effectiveness of the current 5% set-aside for new entrants

There are a lot of missing pieces in attempting to understand the full import of creating a permanent Rockfish IFQ program under the new MSA rules and the long-term affects on both large and small communities of the Central Gulf of Alaska. In order to be as equitable as possible to both the existing participants and affected communities, the GOAC3 respectfully requests that the North Pacific Fishery Management Council create a work group of stakeholders for the specific purpose of recommending options for sustained communities participation in a permanent rockfish IFQ program.

Thank you.

¹ P 9 U.S. Senate Report 109-229, April 2006

² IBID

³ p. 13

⁴ p. 17

⁵ p. 25

⁶ p 25

⁷ p.26

⁸MSA

⁹ p. 26

¹⁰ p.27

¹¹ p 27