

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *CO*
Executive Director

DATE: January 15, 2003

SUBJECT: Demersal shelf rockfish retention

ESTIMATED TIME 4 HOURS (all D items)
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ACTION REQUIRED

Final action on revised GOA Groundfish FMP Amendment 53

BACKGROUND

Full retention of demersal shelf rockfish (DSR) in the hook-and-line and jig gear fisheries in the Southeast Outside regulatory area of the Gulf of Alaska has been an issue for several years. In February 1999, the Council adopted full retention requirements for DSR as Amendment 53. In June 1999, the Council reconsidered its original motion, and adopted a revised Amendment 53, as a way to address long-term legal issues regarding disposal of DSR in excess of the amount that may be sold. The legal issue is that there is no authority under the Magnuson-Stevens Act to regulate the sale proceeds from legally harvested fish. These issues are detailed in the September 27, 2002 letter from NMFS (Item D-1(d)(1)). NMFS has revised the analysis to include additional alternatives for Council consideration. Alternative 3 is a modification of the Council's June 1999 preferred alternative. Alternative 4 would implement an observer program on all hook-and-line fisheries in the Southeast Outside area of the Gulf of Alaska. The public review draft of the analysis was mailed to you on January 10. The executive summary is attached as Item D-1(d)(2).



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

September 27, 2002

AGENDA D-1(d)(1)

JANUARY 2003

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N.P.F.M.C.

Mr. David Benton, Chairman
North Pacific Fishery Management Council
605 West 4th Avenue
Anchorage, Alaska 99501

Dear Dave,

During the past few years, NMFS staff have struggled to develop a draft proposed rule to implement the Council's June 1998 action that would require full retention of demersal shelf rockfish (DSR) in the hook-and-line gear fisheries in the Southeast Outside District of the Gulf of Alaska (SEO). NMFS staff worked with staff from the Alaska Department of Fish and Game to develop a proposed rule that met Council intent, and responded to legal issues as we understood them. A summary of the Council's proposed action as it would be implemented in the draft proposed rule is provided in Attachment 1.

Although NOAA-GC initially advised us that the management scheme proposed by the Council was within the rulemaking authority of the Magnuson-Stevens Act, on review of the proposed rule developed by NMFS to implement the DSR measures, NOAA-GC identified serious legal concerns with Option 1 and its extension of MSA authority to the regulation of sale proceeds. A summary of these legal issues is attached (Attachment 2). According to NOAA-GC, NMFS cannot require relinquishment to the State of Alaska of proceeds, in excess of a fixed percentage, from sale of legally landed DSR caught in the SEO. This is true even if the fishermen have other options for disposing of the excess fish. NOAA-GC found no precedent in case law for federal regulation of sale proceeds from legally harvested fish, and believes that such regulation would be outside NMFS' authority under the Magnuson-Stevens Act.

We asked NOAA-GC whether NMFS could promulgate a rule requiring full retention of DSR caught in the SEO but remain silent on the disposition of DSR or the sale proceeds, while allowing the State to regulate disposition of DSR and sale proceeds. NOAA-GC advises that preemption problems would result from this Federal-State approach.

Consequently, we are unable to proceed with a proposed rule to implement the DSR program as recommended by the Council. Other alternatives to achieve the desired objectives might be feasible, but any of these would require further Council action. We have



had discussions with ADF&G and the Attorney General's office on this issue.

Potential alternative actions include:

1. We could work with the State to develop an application for an exempted fishing permit and design a full retention program under that permit. When we suggested this approach to the Council last year it was rejected, but it could provide a legal way of instituting a program to collect data on incidental catch mortality. Such an experiment would outline clear procedures, would set a time limit for obtaining the information, and would enroll vessels that wished to participate. This would result in less data but perhaps more accurate data than under the proposed rule, and that information could then be used to develop assumed mortality rates in the H&G gear fisheries. This option would require the least attention from NOAA Enforcement.
2. We could institute an observer program. This option is analyzed in the draft EA/RIR/IRFA, which concluded that although an observer program might supply good data, the costs of carrying observers to the smaller vessels involved would be relatively higher than the costs to larger vessels and might be too high to make such a program practical. However, such a program might be more feasible if adopted as part of a broader, long term change to the North Pacific Groundfish Observer Program that is under consideration by the Council to address cost equity, coverage levels, conflict of interest, and other issues facing the Program.
3. We could require full retention of DSR and allow the sale of DSR in amounts up to ten percent of the weight of other retained catch landed during the same fishing trip. The sale, barter or trade of any DSR in excess of that 10% sale limit would be prohibited. Any excess fish could be kept for personal use or donated. This option differs from the draft proposed rule in that it precludes relinquishment of proceeds to the state. Because fishermen would need to dispose of the excess fish without selling it, this option could result in increased discards on land. Also, NOAA Enforcement has concerns with its ability to enforce this option, in the absence of measures to ensure that fish retained for personal use or donation do not enter the market.

We have tried unsuccessfully to craft a rule that would implement the Council's recommended DSR policy in the SEO and would also

pass muster with NOAA-GC. At this point, proceeding with rulemaking without the Council's consideration of options that would address NOAA-GC concerns would result in agency disapproval of this action.

Sincerely,



James W. Balsiger
Administrator, Alaska Region

Attachments:

1. Summary of Draft Proposed Rule
2. Summary of Legal Issues

Attachment 1: Summary of Draft Proposed Rule Requiring Full Retention of Dermersal Shelf Rockfish in SEO Hook-and Line Fisheries

Brief History

In 1996, NMFS and State stock assessment scientists identified the unreported mortality of DSR as a potential problem in preparing the annual DSR stock assessments. Strong anecdotal evidence pointed to a high level of unreported DSR mortality in the Pacific halibut hook-and-line gear fishery, which is the primary fishery that encounters incidental catch of DSR in the SEO. Accurate estimates of DSR fishing mortality are important to avoid overfishing of DSR. These rockfish are very susceptible to overexploitation and are slow to recover once driven below the level of sustainable yield. DSR grow slowly, are extremely long-lived, and have a very low natural mortality rate.

Existing regulations require mandatory retention of DSR in the IFQ halibut and sablefish fisheries up to 10 percent by weight of DSR as measured against a vessel's retained catch of halibut and other targeted species. Any catch in excess of 10 percent must be discarded at sea. However, anecdotal information from commercial fishermen suggests that in some places the incidental catch rate of DSR is much higher than 10 percent and that the 10 percent limit forces fishermen to discard and waste DSR that they cannot avoid catching. The mortality rate for rockfish discarded at sea is assumed to be 100 percent because they have a closed swim bladder that expands when they are brought to the surface and typically cannot be contracted again.

Council Action and Objectives

In June 1998, the Council approved a proposal from the State to require full retention of DSR in the SEO for the purpose of improving estimates of DSR mortality and estimates of the incidental catch rate of DSR in other fisheries. The proposal was intended to complement a similar proposal to the Alaska Board of Fish to govern retention of DSR caught in State waters. The Council's objectives in recommending this regulatory amendment were essentially fourfold:

1. To improve the gathering of information on the incidental catch of DSR in the halibut hook-and-line fishery and other fisheries in the SEO in order to more accurately estimate DSR fishing mortality, improve DSR stock assessments, and evaluate whether 10 percent is the appropriate maximum

- retainable percentage limit for DSR in the SEO;
2. To avoid, in the process of implementing a full retention program, either increasing incentives to target on DSR or increasing incentives to discard DSR that is harvested in excess of the amount that can legally be sold for profit;
 3. To minimize waste to the extent practicable while meeting objectives 1 and 2; and
 4. To maintain consistency between State and Federal regulations that govern the retention and disposition of DSR harvested in the SEO.

Draft Proposed Rule

The draft proposed rule would amend 50 CFR part 679 as follows:

1. Operators of federally-permitted vessels fishing for IFQ Pacific halibut or engaging in directed fishing for groundfish with hook-and-line or jig gear in the SEO would be required to retain all DSR, and to ensure that all DSR is landed, weighed, and reported on State of Alaska fish tickets.
2. Fishermen would be allowed to sell or otherwise dispose of retained incidental catch of DSR as follows:
 - (a) Fishermen could keep the revenues from the sale of DSR of up to ten percent of the aggregate round weight of IFQ Pacific halibut and groundfish species that were landed during the same fishing trip.
 - (b) DSR retained in excess of that ten percent limit could be disposed of in one of two ways:
 - (i) The excess DSR could be sold, and the proceeds relinquished to the State of Alaska within 60 days.
 - (ii) The excess DSR could be retained for any use except sale, barter, or trade.
3. The maximum retainable incidental catch limit for DSR that is currently in effect would be eliminated.

Attachment 2: Explanation of Legal Issues with Council's Preferred Action on DSR

Prepared by GCF and GCAK

The following describes the legal issues identified by NOAA General Counsel in reviewing the draft proposed rule to require full retention of demersal shelf rockfish (DSR) onboard Federally-permitted vessels participating in the hook-and-line and jig fisheries within Federal waters of the Southeast Outside District (SEO) of the Gulf of Alaska.

The subject regulatory amendment seeks to improve the information collected on the incidental catch of DSR in the hook-and-line and jig fisheries conducted within the SEO of the Gulf of Alaska. According to the draft proposed rule, improved information collection will be used to "more accurately estimate DSR fishing mortality, improve DSR stock assessments, and evaluate whether 10 percent is the appropriate maximum retainable percentage limit for DSR in the SEO." In order to improve the accuracy of the data concerning DSR incidental catch, the draft proposed rule requires full retention and the landing, weighing, and reporting (on State of Alaska fish tickets) of all DSR incidentally caught by federally-permitted vessels fishing for IFQ Pacific halibut or engaged in directed fishing for groundfish with hook-and-line or jig gear in the SEO. Furthermore, to avoid unwanted directed fishing incentives for DSR, the draft proposed rule permits fishermen to sell and keep sale proceeds for retained DSR up to an amount that is equivalent to 10 percent of the aggregate round weight of IFQ halibut and groundfish species open to directed fishing that are landed during the same fishing trip (hereinafter referred to as the "10 percent sale limit"). Amounts of retained DSR that are in excess of the 10 percent sale limit could be disposed of in one of two ways: (1) sell the excess DSR and relinquish all sale proceeds from such excess DSR to the State of Alaska within 60 days, or (2) retain the excess DSR for any use except sale, barter or trade. This second option could include personal use or donation to a non-profit charitable organization.

Although NOAA GC initially thought that the management scheme proposed by the Council was within the rulemaking authority of the Magnuson-Stevens Act (MSA), on review of the draft proposed rule developed by NMFS to implement the DSR measures, serious legal concerns were identified with Option 1 and its extension of MSA authority to the regulation of sale proceeds. While there is no caselaw regarding the extent of MSA authority to regulate the disposition of sale proceeds from legally harvested fish, NOAA GC has determined that such a provision likely exceeds the rulemaking authority provided by the MSA.

The MSA authorizes NMFS to take conservation and management measures "applicable to foreign fishing and fishing by vessels of the United States." 16 U.S.C. 1853(a). The MSA defines "fishing" to include the actual or attempted catching, taking or harvesting of fish, "any other activity which can reasonably be expected to result in the catching, taking or harvesting of fish, or any operations at sea in support of, or in preparation for" the harvesting of fish (emphasis added). 16 U.S.C. 1802(15). Based on these and other provisions, the MSA is focused on harvesters. The Councils and NMFS have interpreted the MSA as providing authority to regulate what a fisherman can do with legally harvested fish as long as conservation and management reasons exist for such regulation. Regulations have been implemented by NMFS that regulate

processing activities by harvesters and at-sea processors, such as the roe-stripping and forage fish regulations in the North Pacific, and regulations that prohibit the sale of legally harvested fish.¹ These activities have been determined to fall within the MSA authority to regulate "fishing." However, regulation of activities that occur after the fish has left the harvester's control is less related to "fishing" and to the MSA's conservation and management goals than to "the business arrangements between processors and harvesters."² The draft proposed rule's regulation of proceeds from the sale of legally harvested fish is one step beyond the MSA's fishing focus and the authority granted to NMFS to regulate fishing.

Additionally, if the excess DSR is allowed to be sold to the processor via an ability to relinquish the harvester's proceeds to the State of Alaska, more DSR than contemplated by the 10 percent sale limit could enter the stream of commerce, and could create incentives for arrangements between harvesters and processors that would undermine the rule's objective of discouraging fishermen from targeting on DSR or fishing in areas where high DSR incidental catch is anticipated.³

Therefore, Option 1 for the disposal of DSR in excess of the 10 percent sale limit appears to exceed the rulemaking authority of the MSA and should not be part of the draft proposed rule.

Possible modification of the draft proposed rule to circumvent the identified legal issues

NMFS staff asked NOAA GC whether the draft proposed rule could be modified such that the Federal regulations would require full retention of DSR caught in the SEO but contain no provisions as to the disposition of DSR and sale proceeds. Under this Federal regulatory scheme, State of Alaska regulations would require that proceeds from the sale of DSR caught in the EEZ that are in excess of a 10 percent sale limit be relinquished to the State of Alaska. With this modification, NOAA GC examined whether, under the Supremacy Clause of the United States Constitution, the regulatory scheme implemented by the State of Alaska would be preempted by the Federal regulatory scheme in the EEZ.

The Supremacy Clause of the United States Constitution, Article IV, cl. 2, "nullifies state laws that 'interfere with, or are contrary to' federal law." Louisiana Seafood Management Council.

¹See National Fisheries Institute, Inc. v. Mosbacher, 732 F. Supp. 210, 216 (D.D.C. 1990) (upholding NMFS prohibition against sale of legally harvested billfish finding that billfish were in need of conservation and that no-sale provision was rational way to achieve conservation objective).

²1989 Memorandum entitled "Limitations on Roe-Stripping," co-authored by GCF and GCAK for the North Pacific Fishery Management Council, at 13.

³Compare National Fisheries Institute, Inc. v. Mosbacher, 732 F. Supp. at 216 (Secretary of Commerce reasonably determined that "no-sale" provision would discourage harvest of Atlantic billfish by preventing development of commercial billfish market.)

Inc. et al. v. Foster, 917 F. Supp 439, 442 (E.D. La. 1996) (quoting Gibbons v. Ogden, 22 U.S. 1 (1824)).

State law is found to conflict with an FMP regulation either when dual compliance with the state and federal laws is impossible⁴ or when the state law “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”⁵ The former test is broad, including literal impossibility of dual compliance as well as scenarios where state standards are more stringent than their federal counterparts. In Vietnamese Fishermen Ass’n of America v. California Department of Fish and Game, 816 F. Supp. 1468 (N.D. Ca. 1993), the court held that a California law prohibiting the use of gill or trammel nets for taking rockfish in federal waters off the coast of California was preempted by a Pacific Council FMP prohibiting the use of such nets only in waters north of 38 degrees north latitude. The court found that, by its silence regarding waters south of this line, the FMP intended to allow gill and trammel nets in this area. The California law, establishing a stricter standard, was thus in conflict with the FMP and therefore preempted by it. Vietnamese Fishermen Ass’n of America, 816 F. Supp at 1475. However, the mere existence of federal regulations in the relevant subject matter does not automatically establish preemption.⁶ The existence of an FMP regulation merely opens the way for further analysis of whether state and federal laws conflict.

As explained above, a modified Federal proposed rule would require only that all DSR caught in the EEZ be retained, landed, weighed and reported and there would be no limitations placed on the disposition of such fish or how much of the proceeds from the sale of such fish could be retained by the fisherman. Furthermore, there is an extensive administrative record that demonstrates Federal consideration but rejection of a limitation on the amount of sale proceeds that can be retained by the fisherman that could be used to help interpret any ambiguity as to what the Federal regulatory scheme intended, thus creating an even stronger presumption that no limitations be placed on the disposition of sale proceeds under the Federal regulatory scheme. However, State regulations would require that proceeds from the sale of DSR caught in the EEZ that are in excess of a 10 percent sale limit be relinquished to the State of Alaska. This scenario creates a situation wherein fish that would be required to be retained in the EEZ without any other limitation under Federal law would be required to be sold and the proceeds relinquished to the State of Alaska under State law. A reviewing court may find that the Federal law supersedes the State law because the State law of limiting receipt of sale proceeds could be found to interfere with and be contrary to the Federal law which sets no limit on receipt of sale proceeds and has an administrative record that considered but rejected such a limitation.

This situation is similar to the facts in State v. Sterling, 448 A. 2d 785, 787 (R.I. 1982). In State

⁴Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

⁵Hines v. Davidowitz, 312 U.S. 52 (1941).

⁶See State of Alaska v. Painter, 695 P. 2d 241, 243 (Ct. App. Alaska 1985) (no preemption where trial court found state and federal regulations to be “substantially the same.”)

v. Sterling, a Rhode Island law purported to impose a landing-possession limit on yellowtail flounder of 3,000 pounds per boat per trip, without regard to the area of capture. An FMP regulation governing the fishing of yellowtail flounder in the same region established no per-trip possession or landing limits. Finding the Rhode Island statute in conflict with the FMP regulation, the court held that the state law was preempted.

Given the above, there could be preemption problems with the suggested Federal-State approach to limiting sale proceeds of DSR retained in excess of a specified amount. However, should the Council and NMFS ultimately adopt the modified draft proposed rule as suggested, it would be up to the State of Alaska to determine the defensibility of state regulations that placed limits on the disposition of sale proceeds.

EXECUTIVE SUMMARY

State and Federal fisheries managers believe that a high level of unreported mortality of demersal shelf rockfish (DSR) is occurring in the incidental catch fisheries for DSR in the eastern Gulf of Alaska (GOA), particularly in the halibut longline fisheries. Currently, fishermen are limited to keeping 10 percent by weight of DSR caught in Federal waters, as measured against the catch of their target species. Any poundage in excess of that 10 percent maximum retainable percentage limit¹ (retention limit) must be discarded at sea.

Under State regulations enacted in July of 2000, all DSR caught in State of Alaska (State) waters must be retained, brought to port, weighed, and reported on fish tickets. All DSR caught over 10 percent of the landed catch of other species is kept for personal use or sold, with the proceeds from the sale forfeited to the State. The State's primary purpose in requiring full retention is to improve estimates of total mortality of DSR. The improved data in turn should allow biologists to better estimate the total fishing mortality. The State's secondary objective in enacting these regulations is to reduce waste in the DSR fishery.

The North Pacific Fishery Management Council in February and June of 1999 took action to require full retention of DSR caught in the Federal fisheries of the Southeast Outside District (SEO²). NMFS prepared a proposed rule which was similar to the State's regulations. However, the proposed rule ran into legal obstacles in the spring of 2002; NOAA General Counsel determined that NMFS's regulatory authority over fishing likely does not extend to the disposition of sale proceeds; and therefore that section of the rule dealing with the disposal of DSR over the amount that could be legally sold was not viable.

This Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) is a revision of the draft EA prepared for the proposed rule; the purpose of this revision is to identify feasible alternatives in light of the legal problems with the Council's 1999 preferred alternative. The revision adds additional alternatives for solving the problem of collecting better data on DSR rockfish bycatch.

Four alternatives are examined:

Alternative 1: No Action

Under this alternative the maximum retainable percentage limit as set out in 50 CFR 679(e) and 50 CFR 679.20, Table 10, would continue to apply. There would be no change in the 10 percent retention limit for

¹The term "maximum retainable percentage" replaces "maximum retainable bycatch" (MRB) due to a recent change in Alaska Region NMFS definitions (FR67 4141) to accord with Magnuson-Stevens Act definition of "bycatch."

"Bycatch" is defined in the Act as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. . ." (Sec. 3. 104-297)

"Regulatory discards" are defined as "fish harvested in a fishery which fishermen are required by regulation to discard whenever caught, or are required by regulation to retain but not sell." (Sec. 3 104-297)

The Act's definition of waste has a gray area, in that although it includes regulatory discards, it precludes fish for personal use from being labeled as "waste." In general in this EA, DSR caught in another directed fishery and not discarded at sea is referred to as "incidental catch," but the term "bycatch" is sometimes used in its more generally understood meaning of fish caught while targeting other fish, so that the terms "incidental catch" and "bycatch" are used somewhat interchangeably.

²This area is identical to Federal Regulatory Area 650.

DSR for fishermen using hook-and line and jig gear in the SEO. Fishermen could retain any DSR caught, so long as the weight of the retained DSR was less than 10 percent of the weight of their target species; they are required to discard any DSR harvested which was over that limit.

Alternative 2: Require full retention of DSR in the hook-and-line and jig gear fisheries in the SEO.³

This alternative requires full retention of DSR, allows for sale of up to 10% of landed catch, and provides ways to dispose of other rockfish. It has four parts:

1. Eliminate the retention limit for incidental catch of DSR caught by federally-permitted vessels using hook-and-line and jig gear in the SEO;
2. Require that all DSR caught by federally-permitted vessels using hook-and-line and jig gear in the SEO be retained, landed, weighed and reported on State of Alaska fish tickets;
3. Limit fishermen to retaining the revenues of incidental catch of DSR of no more than 10 percent of the aggregate round weight of IFQ Pacific halibut, and other groundfish species open to directed fishing, that are landed during the same fishing trip;
4. Provide two methods for disposal of any DSR in excess of the amount that may be sold:
 - a. sell the excess DSR and relinquish the proceeds to the State of Alaska;
 - b. retain the excess DSR for any other use except sale, barter, or trade.

This was the Council's preferred alternative, which NMFS has rejected because NOAA General Counsel determined that NMFS's regulatory authority over fishing does not extend to the disposition of sale proceeds (see Appendix A).

Alternative 3: Require full retention of DSR in the hook-and-line and jig gear fisheries in the SEO; don't allow DSR over 10 % sales limit to enter the stream of commerce

Alternative 3 is identical to Alternative 2 except that any DSR caught in excess of the 10% sale limit would not be allowed to enter the stream of commerce, but could be retained for any other use, including personal use or donation to a charity. Alternative 3 would:

1. Eliminate the retention limit for incidental catch of DSR caught by federally-permitted vessels using hook-and-line and jig gear in the SEO;
2. Require that all DSR caught by federally-permitted vessels using hook-and-line and jig gear in the SEO be retained, landed, weighed and reported on State of Alaska fish tickets;

³This option was previously the preferred alternative, which NMFS has determined has legal obstacles that prevent it from being approved.

3. Limit the sale of incidental catch of DSR to no more than 10 percent of the aggregate round weight of IFQ Pacific halibut, and other groundfish species open to directed fishing, that are landed during the same fishing trip.
4. Allow retention of any DSR in excess of the amount that may be sold for any use except for sale, barter, or trade.

Adopting Alternative 3 would improve the collection of DSR mortality data, but because of the reduced options for disposing of excess incidental catch in comparison with Alternative 2, fishermen may have less incentive to comply with the regulations.

Alternative 4: Observer program on halibut longline and other hook-and-line vessels in the SEO to estimate mortality of DSR in non-target fisheries.

Under this alternative, the 10 percent maximum retention limit would be retained. Fishermen would still be required to discard DSR over that limit. This alternative would extend existing regulations requiring observer coverage for 30 percent of fishing days on catcher vessels from 60 to 125 feet length overall (LOA) to apply to catcher vessels fishing for groundfish and halibut in the SEO. The RIR/IRFA concludes that although an observer program might supply good data, the costs of carrying observers to the smaller vessels involved would be relatively higher than the costs to larger vessels and might be too high to make such a program practical. However, such a program might be more feasible if adopted as part of a broader, long term change to the North Pacific Groundfish Observer Program that is under consideration by the Council to address cost equity, coverage levels, conflict of interest, and other issues facing the Program.

The EA did not find any significant impacts to the environment from adopting any of these alternatives.

The Regulatory Impact Review

A directed DSR fishery from January 1 to March 15 and from November 16 to December 31 targets DSR, and primarily yelloweye rockfish, for domestic markets for quality fresh round product. Halibut fisheries and other groundfish fisheries harvest DSR from March 15 to November 15 as incidental catch. Some of this fish is high quality product that goes to the fresh round market and some is poorer quality product that is directed into lower-priced markets for fillets.

In 2000, there were an estimated 543 vessels fishing in the halibut and groundfish fisheries in the Federal waters of the SEO. Almost all of these were catcher vessels. Only five of the 543 were catcher/processors. Most took at least some halibut. Only 18 caught groundfish without showing deliveries of at least some halibut. These were generally small vessels, that is, vessels under 60 feet in length. Only 56 were over 60 feet; almost all of these fell into the length range of 60 to 125 feet.

This fleet generated an estimated \$36 million in gross revenue from its harvests in the SEO during 2000. Average gross revenues were about \$66,000 per vessel. Almost all of the revenues from the SEO were generated by halibut and sablefish. Sablefish revenues were about \$21 million, while halibut revenues were about \$15 million. The SEO fisheries were only part of the fishing activity by these vessels. Gross revenues for these vessels, from all groundfish and halibut fisheries off Alaska in 2000, were \$112 million, or about \$207,000 per vessel. In addition to significant statewide revenues from sablefish (\$54 million) and halibut (\$47 million), these vessels obtained large revenues from Pacific cod (\$9 million). DSR bycatch revenues for 2000

(estimated in Table 9) were about \$170,000; total statewide DSR revenues (from bycatch and directed harvests) were about \$793,000 (estimated from Tables 7 and 9). These revenue estimates are only estimates of revenues from groundfish and halibut. These entities would also have earned revenues from other fisheries, of which Alaska's salmon and herring fisheries were probably particularly important. DSR bycatch revenues were about 0.14% of the fleet's total groundfish and halibut revenues, and about .44% of its groundfish and halibut revenues from the SEO.

In 2000, 41 catcher vessels, fishing with hook-and-line gear and with some jig gear, participated in the directed fishery in Federal waters in the SEO. These vessels harvested 183 metric tons and grossed an estimated \$617,000 (or about \$15,000 per vessel).

Because no cost information is available for this fishery, and because there were no models that would have allowed projections of fishing behavior changes under the rules, and no models of the DSR markets, the RIR analysis is primarily qualitative. The impacts of the alternatives on resource management, the benefits, the costs, the extent to which the alternatives would accomplish program objectives, and the significance of each alternative under the criteria of E.O. 12866, are summarized in the following table.

Summary of the cost and benefit analysis (Table 10 in the RIR)

	Alternative 1	Alternative 2	Alternative 3	Alternative 4
	<i>Status quo. Continue 10% retention limit prohibiting retention above that level.</i>	<i>Required retention. Fishermen must retain all DSR and dispose of it onshore without commercial compensation for excess.</i>	<i>Required retention. Fishermen must retain all DSR and dispose of it onshore without commercial compensation for excess. DSR may not enter "stream of commerce."</i>	<i>Observers. Implement 30% observer coverage on halibut and groundfish fishing vessels in the SEO.</i>
Impacts on resource management (See section 4.8)	None	Better information on bycatch mortality, potential source of funds for DSR management, fishermen may change behavior to avoid DSR	Better information on bycatch mortality, fishermen may change behavior to avoid DSR	Better information on bycatch mortality
Benefits (See Section 4.8)	No change in benefits	Resource management improvements may lead to increased value of stock to commercial fishermen, distribution system, and consumers. Non-compliance could compromise the confidence that can be placed in this data source. Less frustration for fishermen over perceived DSR discard waste. Reduced conflict between State and Federal retention regulations.	Resource management improvements may lead to increased value of stock to commercial fishermen, distribution system, and consumers. Non-compliance could compromise the confidence that can be placed in this data source. Reduces the conflict between State and Federal retention regulations, but not to the extent of Alternative 2.	Resource management improvements may lead to increased value of stock to commercial fishermen, distribution system, and consumers.
Costs (see Section 4.9)	No change in costs	Costs to fishermen for storage, handling and delivery of DSR. Some additional cost to processors for additional weighing and grading. Potential costs for enforcement.	Costs to fishermen for storage, handling and delivery of DSR. Some additional cost to processors for additional weighing and grading. Disposal costs higher than Alt 2 since there are fewer options. Potential costs for enforcement.	Additional observer costs of \$330 per day, plus transportation costs. Reduced work room for crew on vessels. Changes in operating patterns of vessels may be necessary to accommodate the observers.
Net benefits	No change in net benefits	Impossible to quantify with the available information.	Impossible to quantify with the available information.	Impossible to quantify with the available information.
Program objectives (See Section 4.4)	Does not address issues of bycatch mortality, waste, and conflict between State and Federal regulations.	Improves bycatch mortality estimates, does not increase incentives to target DSR, reduces DSR waste, reduces conflict between State and Federal regulations. This alternative has legal difficulties.	Improves bycatch mortality estimates, does not increase incentives to target DSR. Reduces conflict between State and Federal regulations, although not to the extent of Alternative 2. Does not address waste issue.	Improves bycatch mortality estimates, does not increase incentives to target DSR. Does not address the issues of waste or of conflict between State and Federal regulations
E.O. 12866 significance (see Section 4.11)	Does not appear to be significant	Does not appear to be significant	Does not appear to be significant	Does not appear to be significant
Notes: Alternative 1 (status quo) is the no action alternative and provides the baseline against which the costs and benefits for action alternatives have been estimated.				

The Initial Regulatory Flexibility Analysis

The directly regulated entities are those vessels taking DSR as incidental catch in halibut and groundfish fisheries in Federal waters of the SEO district. NMFS estimates that 543 vessels participated in these fisheries in 2000. Most of these vessels were less than 60 feet in length, fishing with hook-and-line gear and jig gear. Average gross revenues for these vessels from the fisheries in this area were about \$66,000. Average gross revenues from all fisheries for these entities are undoubtedly higher, since these vessels participate in other fisheries in Alaska. NMFS estimates that these were all small entities within the meaning of the Regulatory

Flexibility Act. This action would not directly modify the DSR TAC, directly modify the amount of incidental catch of DSR for sale, or immediately affect the allocation between target and incidental catch fisheries.

The Council's preferred alternative is Alternative 2. Under Alternative 2, small entities may experience increased costs associated with handling the additional DSR, of storing them on the vessel until it reaches port, and of unloading and disposing of the fish. Some fishermen may incur additional costs by changing their fishing patterns for their target species in order to avoid DSR bycatch. Handling and delivery costs would take the form of increased work effort required on the vessel, but would not affect the operation's cash flow. Costs may be higher on smaller vessels using refrigerated sea water (RSW) which lack deck space for special DSR totes, or on vessels that would otherwise have filled their holds with their target fish, but that are unable to given the need to retain a larger amount of DSR. It has not been possible to monetize these costs.

The Council's preferred alternative does not impose any new recordkeeping requirements on regulated entities. NMFS has not been able to identify any relevant Federal rules that may duplicate, overlap, or conflict with the preferred alternative.

This EA/RIR/IRFA has evaluated four alternatives: (1) the status quo, (2) full retention allowing excess DSR to enter the stream of commerce, (3) full retention prohibiting excess from entering the stream of commerce, and (4) use of an observer program. As noted, the Council has chosen Alternative 2 as its preferred alternative. NOAA General Counsel has identified serious legal issues with Alternative 2 that are described in Appendix A to this EA/RIR/IRFA. Alternative 1 imposes no adverse impacts on small entities, but fails to advance the action objectives of providing new information on DSR, reducing DSR wastage, and reducing conflict between state and federal regulations. Alternative 2, the Council's preferred alternative, is discussed above. Under Alternative 3 fishermen face additional costs of storage, reduced space for target species, delivery, unloading, weighing and disposal. This alternative provides new information on status of DSR stocks, but does not reduce waste of DSR. It partially reduces conflict between State and Federal regulations. Under Alternative 4, fishermen face additional costs for observer, including travel and logistical expenses for observers, and an additional cost of about \$330/day for 30% of days at sea. This alternative does provide new information on the status of DSR stocks. But it does not reduce waste of DSR or reduce conflict between State and Federal regulations.

Full Retention of DSR in Southeast Outside Area Issues for Consideration

North Pacific Fishery Management
Council Meetings
February 2003

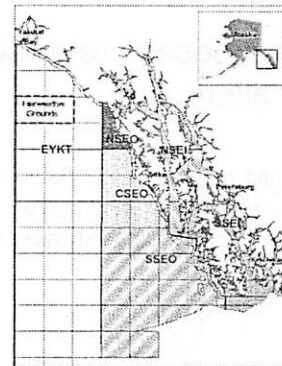
Topics

- The development of this issue
- Pros and cons of the Alternatives

The development of this issue



Photo courtesy Eric Comradt



Directed DSR in SEO

- Fishery takes place January to March and November to December
- An estimated 45 vessels in 2001
- This is primarily a fleet of small (< 60 foot), longline catcher vessels

DSR taken as bycatch

- DSR are taken as bycatch primarily in the halibut IFQ fishery, to some extent in the groundfish fishery
- An estimated 423 vessels in federal waters affected by this action in 2000
- About 85% of these were small (< 60 feet), longline CVs

Problem Statement

- Current regulations require retention of DSR equivalent to 10% of targeted catch. The rest must be discarded. The discarded fish creates two problems:
 - Some of the discards are not reported, creating an unacceptable level of uncertainty for DSR TAC-setting and other fishery management purposes.
 - Discard Mortality is 100% - the floating fish creates a visible waste problem.

GOALS

- Improved gathering of information on bycatch
- Avoid increasing incentives to target DSR or increasing bycatch discard
- Minimize waste
- To maintain consistency between State and Federal regulations

Council chooses preferred alternative

- In February and June, 1999, the Council took action to require full retention of rockfish in the hook and line fisheries in the SEO.

Alt 2 – Council's preferred alternative

- The alternative in its final form requires all incidental catch of DSR to be retained, landed and weighed. It allows for sale of up to 10% of landed catch, and provides two ways to dispose of excess rockfish:
 - sell the excess DSR and relinquish the proceeds to the State of Alaska;
 - retain the excess DSR for any other use except sale, barter, or trade.

State program implemented

- State program for full retention became effective in July 2000
- Requires fishermen to turn revenues of excess DSR that they sell over to state
- Allows processors to sell excess DSR

"All rockfishes in excess of allowable bycatch limits shall be reported as bycatch overage on an ADF&G fish ticket and any proceeds from the sale of excess rockfish bycatch shall be surrendered to the state."

NOAA GC legal opinion

- NOAA GC identified "serious legal concerns" on reviewing the draft proposed rule in 2002.
- These were summarized in a NOAA GC memo sent to the Council in Sept. 2002.

No delegated authority

- The Magnuson-Stevens Act authorizes NOAA Fisheries to take conservation and management measures to regulate "fishing."
- The Act defines fishing to include the actual or attempted catching, taking or harvesting of fish, or activity *at sea* in support of or in preparation for those activities (16 U.S.C. 1802(15))
- Alt 2 regulates the proceeds from the sale of fish, which goes beyond the Act's fishing focus and likely exceeds NOAA Fishery's rulemaking authority.

Pros and cons of the alternatives

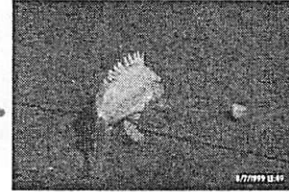


Photo courtesy: Tory O'Connell

Status quo

- | | |
|---|---|
| <ul style="list-style-type: none">• Pros<ul style="list-style-type: none">- No additional cost or burden on the fishermen or processors | <ul style="list-style-type: none">• Cons<ul style="list-style-type: none">- Continued uncertainty over total DSR removals from SEO- Continued waste of DSR- Continued discrepancy between State and Federal DSR regulations |
|---|---|

Alternative 2

- | | |
|---|---|
| <ul style="list-style-type: none">• Pros<ul style="list-style-type: none">- With compliance, will allow us to learn more about total DSR bycatch- Less waste- Achieves goals without increasing incentive to target DSR- Federal and state regulations would match- Council's preferred alt | <ul style="list-style-type: none">• Cons<ul style="list-style-type: none">- Additional costs for fishermen and processors- Might not adequately address need for accurate data- Additional enforcement burden- possibility of market developing- Serious legal issues have been raised by NOAA GC |
|---|---|

Alternative 3 - Modified Council

- Same as alternative 2
- But excess DSR could not enter stream of commerce
- Processors could not sell the fish

Alt 3 – Modified Council

- | | |
|---|---|
| <ul style="list-style-type: none">• Pros<ul style="list-style-type: none">- With compliance can learn more about total DSR bycatch- If good donation program developed, would help solve waste problem- Solves the legal problem- Not likely to encourage DSR targeting among fishermen*reconsider after a few yrs? | <ul style="list-style-type: none">• Cons<ul style="list-style-type: none">- Fewer ways to dispose of excess – could lead to lower compliance and increase costs over Alt 2- could lead to less data, harder to enforce- If donation program did not develop, could involve more waste than Alt 2- Less consistency with state regs |
|---|---|

Alt 4 - Observers

- Would establish an observer program on halibut and groundfish hook and line vessels in the SEO, to estimate mortality of DSR in non-target fisheries.
- In analysis, assumed that existing regulations which require 30 percent of fishing days on catcher vessels from 60 to 125 feet LOA would be extended to vessels under 60 feet.

Alt 4 - Observers

- Pros
 - With enough coverage, could provide more statistically reliable estimates of DSR bycatch mortality than status quo or a full retention program.
 - Over long term, could fit into an observer program with other goals such as tracking seabird catch.
- Cons
 - Increased cost for fishermen, unless program could be subsidized
 - Rockfish occur patchily and require large coverage
 - Doesn't address waste or relationship between Federal and State regulations

Sources:

- NOAA Fisheries. "EA/RIR/IRFA for a Proposed Regulatory Amendment to the Fishery Management Plan for the Groundfish Fisheries of the Gulf of Alaska. Full Retention of Demersal Shelf Rockfish in Longline Fisheries in the Southeast Outside District." January 2003

Contacts

- Nina Mollett, Ben Muse
 - Sustainable Fisheries Division
 - Alaska Region
 - NOAA Fisheries

Draft Errata for DSR EA/RIR/IRFA
2-1-03

page 47, paragraph 2:

In 2000, an estimated 423 vessels fished in the halibut and groundfish fisheries in the Federal waters of the SEO in which DSR was taken as incidental catch. Almost all of these were catcher vessels. Only five of the 423 were catcher/processors. Most took at least some halibut. Only 80 caught groundfish without showing deliveries of at least some halibut. These were generally small vessels, that is, vessels under 60 feet in length. Only 51 were over 60 feet; almost all of these fell into the length range of 60 to 125 feet (estimates based on NMFS Catch by Vessel Database and RAM halibut fishing statistics).

Page 47, paragraph 3 and page 69, paragraph 1, starting with line 4:

This fleet generated an estimated \$33 million in gross revenue from its harvests in the Federal waters of the SEO during 2000. Average gross revenues were about \$79,000 per vessel. Almost all of the revenues from the Federal SEO waters were generated by halibut and sablefish. Sablefish revenues were about \$21 million, while halibut revenues were about \$12 million. Fishing in the SEO was only a part of the fishing activity by these vessels. Gross revenues for these vessels, from all groundfish and halibut fisheries off Alaska in 2000, were \$110 million, or about \$262,000 per vessel. In addition to significant statewide revenues from sablefish (\$54 million) and halibut (\$45 million), these vessels obtained large revenues from Pacific cod (\$9 million). DSR incidental catch revenues for 2000 in the SEO (estimated in Table 9) were about \$176,000; total statewide DSR revenues (from incidental catch and directed harvests) were about \$793,000 (estimated from Tables 7 and 9). These revenue estimates are only estimates of revenues from groundfish and halibut; many of these entities would also have earned revenues from other fisheries, of which Alaska's salmon and herring fisheries were probably most important. DSR incidental catch revenues were about 0.16% of the fleet's total statewide groundfish and halibut revenue; if probable herring and salmon revenues are also considered, DSR incidental catch revenues are even a smaller percentage of overall revenues. DSR incidental catch revenues in the SEO were about 0.53% of the fleet's groundfish and halibut revenues from Federal waters in the SEO.

Page 68, second complete paragraph:

As noted in the RIR, an estimated 423 vessels were active in the halibut and groundfish fisheries in the Federal waters of the SEO in 2000...

Page 69, paragraph 4:

The primary effect of Alternatives 2 and 3 would be on the operations of these entities during their halibut fishing operations in Federal waters in the SEO. As noted, this fleet earned about \$12 million (about \$28,000 on average) of its \$110 million (about \$262,000 on average) halibut and groundfish total statewide gross revenues from this part of its activities. The actual average statewide fishing revenues were almost certainly larger than \$110 million since many of these vessels are likely to be active in Alaska's salmon and herring fisheries. Thus about 11% ($\$28,000/\$262,000$) is a high estimate of the percentage of the total gross revenues these operations obtain from halibut fishing in Federal waters in the SEO. While it is impossible to estimate the costs imposed on fishermen by this operation, as noted in the paragraph above these are expected to be small.

BC's Groundfish Longline Fisheries

An Overview of Management and Monitoring Activities

Presented by:
Howard McElderry, M. Sc.
Archipelago Marine Research Ltd.

Groundfish Longline Fisheries

	Halibut	Rockfish
Jurisdiction		
Resource	Federal	Federal
Commerce	Provincial	Provincial
Licenses		
Total	435	262
Active	214	252
Season	3/15-11/15	year round
Landing Events	1,000	1,200
Catch (million lbs)		
Halibut	12.0	0.0
Rockfish	1.0	3.0
Other	1.0	0.5

Background

- Current management systems began 1991 (halibut) and 1994 (rockfish)
- **Players:**
 - Fisheries and Oceans Canada (DFO)
 - Fishery advisory boards and fishing associations (e.g. Pacific Halibut Management Association)
 - Service providers (e.g., Archipelago)
- **Process:**
 - Consultative
 - In some cases co-management

By-Catch Control

- **Via Management System**
 - Implicit to management plan - fishing vessels are only to keep fish within their permit limits.
 - No mandatory retention requirement.
 - By-catch control attempted with a management system designed to limit targeting and allow sufficient quota for fish to be legally landed.
- **Via Monitoring System**
 - At-sea monitoring
 - Offload monitoring required

Rockfish Fishery Management

- **Fishery Options**
 - Live rockfish (copper/quillback)
 - Directed yelloweye
 - Offshore (rougheye/shortraker, redbanded, etc.)
 - Combination for halibut/rockfish fishing
- **Time-Limited Fishing Permits**
 - Poundage limit for target species
 - By-catch limits (% of target) for other species
- Fishing permit underage/overage carry-over
- Mandatory offload monitoring
- At-sea monitoring

Halibut Fishery Management

- Individual quota for both halibut and rockfish by-catch
- Additional rockfish from rockfish combination option (~80 licenses)
- Quota transferability (halibut and rockfish) with species holdings caps
- Species trip limits (e.g., yelloweye 20% of halibut)
- Underage/overage carry-over (year-end)
- Mandatory offload monitoring
- At-sea monitoring

Overage Forfeiture

- When offload monitoring programs began, overages were forfeited.
- Overage forfeiture has been replaced by carryover provisions.
- Problems with overage forfeiture
 - Lack of incentive for fishers
 - Commerce abuses through misreporting of catch, species or catch value.
 - Difficult to enforce provisions, particularly with personal use fish.

Carry-over Provisions

- Fishing trip catch variability causes underage and overages of vessel catch limit
- Overage/underage covered through quota transfers (halibut fishery) or future fishing permits (rockfish).
- Underage (under the limit)
 - Within 10% of limit carried forward.
 - >10% of limit forfeited.
- Overage (over the limit)
 - Within 10% of limit carried forward.
 - >10% of limit carried forward at twice poundage.

Offload Monitoring Program

- 100% of offload events
- Observers:
 - Verify species sorting
 - Verify poundage
 - Complete preliminary remaining catch balances.
- 100% industry funded

At-Sea Monitoring Program

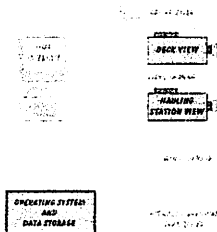
- Relatively new programs
 - Halibut - 1999
 - Rockfish - 2001
- Low coverage levels
 - Halibut - 15% (~1,200 fishing days)
 - Rockfish - 8% (~350 fishing days)
- Observer Programs are industry/government co-funded (~70%:30%)
- Trial video-based electronic monitoring program in 2002

At-Sea Monitoring Challenges*

- Small vessels (30% <40' length)
- Random sampling logistically complex
- Coverage levels too low for accurate estimation of uncommon species
- Observational bias likely

* - personal opinions

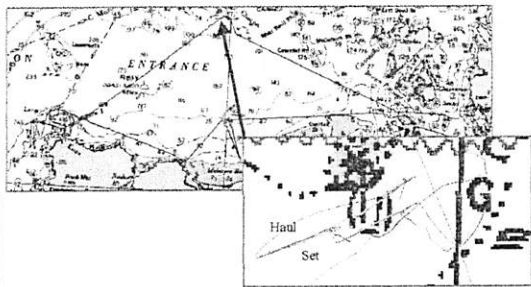
2002 Pilot Electronic Monitoring Program



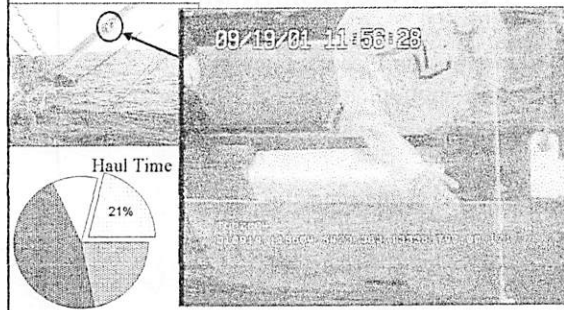
Electronic Monitoring

- 'Black Box' automated data recorder
 - Video
 - Sensor array
- Data analysis following fishing trip

Position Tracking



EM - Catch Monitoring



EM Pilot Project Objectives

- Evaluate fleet suitability and overall system reliability.
- Compare Observer and EM data.
- Compare costs, benefits and operational issues associated with EM and observer methods.

Sample Design

Sample Target:

- 10% of Halibut Fishery (~1,600 sets or ~850 vessel days at sea)

Fleet Focus:

- 100% voluntary
- Cross-section of fleet

Treatments:

- EM only
- EM/Observer w/ catch summarized by set
- EM/Observer w/ catch summarized by hook

Summary of Findings

- EM performance:
 - EM suitable for many fishing vessels
 - EM catch within 2% of observer estimate
 - EM species recognition ability:
 - Excellent for distinctive species (>90% of catch)
 - Poor for uncommon less distinctive species (<2% of catch)
 - EM good for depth, time, area, utilization, hook counts.
- EM set up more involved
- EM less than half the cost of observer-based monitoring.

Next Steps*

- Increase quota transferability
 - Integrated groundfish fishing plan
- Increase at-sea monitoring program
 - Increased coverage levels
 - Integrated EM – observer program

* - personal opinions

For Further Information:

➤ Fisheries and Oceans Canada
management plans:
www.pac.dfo-mpo.gc.ca/ops/fm/groundfish

➤ Electronic Monitoring
www.archipelago.ca
howardm@archipelago.ca