

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *Chug*  
Executive Director

DATE: January 16, 2003

SUBJECT: Additional Sideboards for Winter Pacific Cod Fishery

ESTIMATED TIME  
2 HOURS  
(For all C-5 items)

**ACTION REQUIRED**

Final action on negotiated remedy

**BACKGROUND**

In December 2002, staff presented for public review the EA/RIR/IRFA for Amendment 73 (Pacific cod sideboard provisions). The purpose of the amendment is to provide greater protection to non-AFA trawl catcher vessels targeting BSAI Pacific cod during the months of January and February. The concern is over impacts to the non-AFA vessels that have traditionally fished Pacific cod and may have been subject to increased competition as a result of implementation of the AFA. The potential impacts of this increased level of competition include factors such as decreased catch per unit of effort (resulting in longer fishing times per trip), reductions in catch, and decreased safety.

At the December meeting, the Council selected as a preferred alternative a joint proposal by AFA and non-AFA trawl catcher vessel participants. The preferred alternative would limit access to the directed trawl catcher vessel fishery for Pacific cod for the period of January 20 through February 25<sup>th</sup> in area 655430 to qualified non-AFA vessels, cod exempt AFA vessels, and AFA non-exempt vessels not to exceed a daily average of 10 vessels for the period of January 20 to February 25<sup>th</sup>. Exceeding this 10-vessel limit in 2003 or any later year by the AFA non-exempt catcher vessels will trigger an area closure to Pacific cod fishing for AFA non-exempt vessels the following year from January 20 to February 25<sup>th</sup>. The EA/RIR/IRFA was changed to reflect the Council's preferred alternative and is presented now for final action. The Executive Summary is attached as Item C-5(b)(1).

Also at the December meeting, the Council requested that NMFS assess the 'do ability' of this approach, and provide draft regulatory language for implementing the preferred alternative. A discussion paper written by NMFS addressing these issues has been submitted for review by the Council. It is included here as Item C-5(b)(2).

In addition, it has come to the attention of NOAA GC that the problem statement for Amendment 73 may not be sufficient to draw a clear connection between the action selected and the authority delegated to the Council by statute. Currently, the problem statement has language that indicates that the problem being addressed is a "claim" that competition has increased considerably, and that increased competition is "thought" to have adversely impact non-AFA vessels. This language could be interpreted that Amendment 73 may not be justified under the AFA as a conservation and management measure determined by the Council to be necessary to protect other fisheries and their participants from adverse impacts caused by the AFA or fishery cooperatives in the directed pollock fishery (pursuant to Section 211 of the AFA) and under the Magnuson-Stevens Act as a limited access measure. The Council may want to revise the problem statement accordingly.

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### EXECUTIVE SUMMARY

In December 2002, the Council selected as the preferred alternative to limit access to the directed trawl catcher vessel fishery for the winter Pacific cod in area 655430 to non-AFA vessels with a history of economic dependence, AFA vessels with cod exemption, and AFA non-exempt vessels not to exceed a daily average of 10 vessels. If the number of AFA non-exempt vessels exceed this limit, with the exception of one AFA non-exempt vessel which has a history of economic dependence, these participants would be restricted from fishing in the Cape Sarichef test area the following year from January 20 through February 25th. Other options in the amendment package include restricting AFA trawl catcher vessels from harvesting Pacific cod in an area just north of Unimak Island during January and February, allocating a portion of the Bering Sea Aleutian Islands (BSAI) Pacific cod to non-AFA vessels meeting specified historical landing minimums, or requiring cooperatives to limit the number or size of AFA vessels on the cod grounds to ensure non-AFA vessels do not get preempted and insure their historical participation.

#### **Problem Statement:**

The problem being addressed by this amendment is a claim by three non-AFA vessels, who have historically harvested BSAI Pacific cod, that competition in area 655430 has increased considerably during the January and February period because of AFA. AFA-qualified trawl catcher vessels, that normally targeted pollock during this period prior to the AFA, can now transfer their share of pollock allocation to other more efficient cooperative members, thus, are free to now target winter cod. The increased competition is thought to adversely impact open access vessels through lower catch per unit of effort, reduction in catch, and increased dangers to smaller vessels from crowding on the fishing grounds. Section 211 of the AFA requires the Council to recommend measures necessary to protect vessels with a history of investment in and dependence on Pacific cod from the adverse impacts caused by the AFA or by fishery cooperatives in the directed BSAI pollock fishery.

#### **Description of Alternatives Under Consideration:**

**Alternative 1: (Status Quo)** Retain current sideboard measures for AFA trawl catcher vessels targeting Pacific cod in the Bering Sea/Aleutian Islands. Currently these vessels are limited to harvesting no more than the ratio of retained catch of AFA vessels in 1997 (for Pacific cod only) to the available TAC for Pacific cod during that same period.

**Alternative 2: Limiting access to the directed trawl fishery for Pacific cod in January and February in area 655430 to open access vessels which have a history of economic dependency upon the winter Bering Sea Pacific cod fisheries, demonstrated by average January, February deliveries of at least 250,000 lbs for 4 out of the 5 pre-AFA years of 1995-1999 and to the cod exempt AFA vessels.**

**Alternative 3: Allocating catch for non-AFA vessels which meet the criteria set forth in alternative number two under the following options:**

- Option 1: A range of 2.5 to 5 million lbs (with no cap)
- Option 2: Historical catch of TAC of Pacific cod

**Alternative 4: Require co-ops to use such measures as limiting the number or size of AFA vessels on the cod grounds at any given time to ensure that non-AFA vessels do not get preempted and insure their historical participation.**

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Alternative 5 (**Preferred**): Limit access to the directed trawl catcher vessel fishery for Pacific cod for the period of January 20 through February 25<sup>th</sup> in area 655430 to the following participants:

- (1) catcher vessels which have a history of economic dependence upon the winter Bering Sea Pacific cod fisheries, as demonstrated by average January and February deliveries of at least 250,000 lbs for 4 out of the 5 pervious years of 1995-1999
- (2) the cod exempt AFA catcher vessels
- (3) AFA non-exempt Bering Sea catcher vessels not to exceed a daily average of 10 vessels for the period of January 20 to February 25<sup>th</sup> (except for vessels qualifying under item (1) above).

Exceeding this 10-vessel limit in 2003 or any later year by the AFA non-exempt catcher vessels will trigger an area closure to Pacific cod fishing the following year. The closure area, if triggered, is defined as the same area closed for the NMFS Cod Fishery Interaction Study (Cape Sarichef Test Area). The triggered closure would be in effect from January 20 through February 25<sup>th</sup> and would apply to all AFA cod non-exempt catcher vessels participating in the BSAI directed cod fishery (except for vessels qualifying under item (1) above).

The 10-vessel limit for AFA non-exempt catcher vessels and trigger mechanism shall not apply for any period from February 1 of any given year until at least 2 non-AFA vessels that meet the threshold standard of at least 250,000 lbs in 4 out of 5 years from 1995-1999 are fishing for Pacific cod in area 655430. This regulatory action will terminate upon rationalization of the BSAI Pacific cod fishery.

### **Environmental Impacts:**

None of the alternatives under consideration would affect the prosecution of BSAI Pacific cod other than potentially reducing temporal concentration of effort during the winter period. If Alternative 2, 4, or 5 are selected, there is some potential for temporal and spatial shifting of vessels displaced from the winter cod grounds North of Unimak Island. None of the alternatives are expected to affect takes of species listed under the Endangered Species Act or substantially alter the take of Pacific cod and bycatch rates of other fish and crab. A summary of the environmental impacts are included in Table E1.

### **Economic Impacts:**

The impacts of this amendment are distributional in nature, and reflect the losses or gains from the vessels that would be removed from participation in the January and February Pacific cod fishery in statistical area 655430.

If Alternative 2 were implemented, many of the vessels that have participated in the Pacific cod fishery during January and February in the BSAI would be displaced. Both non-AFA and AFA vessels displaced from the January and February fishery would experience decreased net revenues from Pacific cod. There could also be potential negative impacts to shorebased processing plants from diminished efficiency due to extended period of deliveries for Pacific cod over the year. As a result, Alternative 2 would likely have the highest cost of all of the alternatives since it would displace all non-AFA vessels that did not qualify and AFA non-exempt vessels from the targeting Pacific cod in area 655430 during the January and February period.

In contrast, Alternative 5 would likely have a lower cost since only a limited number of AFA non-exempt vessels would be displaced from the winter cod fishery. Unlike Alternative 2 where all AFA non-exempt

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trawl catcher vessels would be displaced from area 655430 during the January and February period, Alternative 5 would allow a certain number of AFA non-exempt vessels on the winter cod grounds. If the number of vessels is exceeded, then the AFA non-exempt trawl catcher fleet would be restricted from fishing in the Cape Sarichef test area from January 20 to February 25<sup>th</sup> of the following year.

Alternatives 3 and 4 are less clear. Alternative 3 would allocate quota to the non-AFA vessels who qualified under Alternative 2, but would not restrict AFA vessels from fishing in area 655430. By itself this alternative would provide little protection for the non-AFA vessels on the winter cod grounds, and thus would not solve the initial claim by the three non-AFA vessels. Alternative 4 requires the AFA cooperatives to devise their own methods for reducing their effort on the winter cod grounds so as not to preempted the non-AFA vessels from their historical dependence. However, the alternative does not state what level of preemption is consider harmful to the non-AFA vessels and how effort would be limited on the grounds. In general though, the alternative does provide greater flexibility for AFA and non-AFA vessels to reach an agreement on limiting effort on the winter cod grounds than Alternative 2.

A qualitative summary of the benefits and costs that will result from the different alternatives is shown in Table E2. Based on results from analysis, all alternatives except the no-action alternative will likely result in costs exceeding benefits.

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Table E1. Summary of Environmental Impacts

Area of Consideration	Alternative 1 Retain Current Sideboard Measures (Status Quo)	Alternative 2 Limited Access	Alternative 3, Option 1 Allocate 2.5 - 5 million lbs	Alternative 3, Option 2 Allocated based on Catch History	Alternative 4 Co-ops Limit Effort	Alternative 5 Limited Access
Impacts on Pacific cod stocks	Alternative 1 is not expected to change Pacific cod stocks. In retaining the current sideboard restrictions, effort by AFA and non-AFA catcher vessels will continue to target Pacific cod on fishing grounds northwest of Unimak Island during the January and February period.	Alternative 2 is not expected to change Pacific cod stocks. There is the potential for some reduction in effort on the winter cod fishery. In addition, there could be some temporal and spatial shifting, but no significant impacts are expected.	Same as for Alternative 2, but with the likelihood of a larger degree of temporal and spatial shifting of AFA vessels including cod-exempt vessels.	Same as for Alternative 3	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels
Direct impacts of trawl gear on habitat	Alternative 1 is not expected to change the intensity, timing, or location of the winter cod fishery. Effort by AFA and non-AFA catcher vessels will likely continue northwest of Unimak Island during the January and February period.	Alternative 2 could potentially reduce the impacts of trawling on the habitat northwest of Unimak Island during the January and February period. There is the potential for some temporal or spatial shifting by AFA catcher vessels, but no significant impacts are expected.	Same as for Alternative 2, but with the likelihood of a larger degree of temporal and spatial shifting of AFA vessels including cod-exempt vessels.	Same as for Alternative 3	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels
Impacts on essential fish habitat	Alternative 1 is not expected to impact the essential fish habitat. Effort by AFA and non-AFA catcher vessels will likely continue northwest of Unimak Island during the January and February period.	Alternative 2 is not expected to adversely impact the essential fish habitat northwest of Unimak Island and could even decrease impacts caused by reduced effort. There is the potential for some temporal and spatial shifting in effort by AFA catcher vessels to other areas in the Aleutian Islands and Bering Sea, but no significant impacts are expected.	Same as for Alternative 2, but with the likelihood of a larger degree of temporal and spatial shifting of AFA vessels including cod-exempt vessels.	Same as for Alternative 3	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels

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Table E1. (continued) Summary of Environmental Impacts

	Alternative 1	Alternative 2	Alternative 3, Option 1	Alternative 3, Option 2	Alternative 4	Alternative 5
Bycatch and discard impacts	Alternative 1 is not expected to adversely impact the bycatch rate from status quo level.	Alternative 2 is not expected to adversely impact the bycatch rate. The action does not alter the amount of Pacific cod harvested. There is the potential for effort by AFA catcher vessels to shift to other areas in the Bering Sea and Aleutian Islands during the January and February period, but bycatch rates are similar or lower in these areas.	Same as for Alternative 2, but with the likelihood of a larger degree of temporal and spatial shifting of AFA vessels including cod-exempt vessels.	Same as for Alternative 3	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels
Endangered or threatened species	Alternative 1 is not expected to adversely impact endangered or threatened species. Effort will likely continue northwest of Unimak Island during the January and February period by AFA and non-AFA catcher vessels.	Alternative 2 is not expected to adversely impact endanger or threaten species. There is some potential for temporal and spatial shifting of effort by AFA catcher vessels, but no significant impacts are expected.	Same as for Alternative 2, but with the likelihood of a larger degree of temporal and spatial shifting of AFA vessels including cod-exempt vessels.	Same as for Alternative 3	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels
Marine Mammal Protection Act	Same as Endangered or Threatened Species	Same as Endangered or Threatened Species	Same as Endangered or Threatened Species	Same as Endangered or Threatened Species	Same as Endangered or Threatened Species	Same as Endangered or Threatened Species
Cumulative Effects	Alternative 1 will retain the existing sidebar regulations, so there is no additional cumulative impact	Alternative 2 is anticipated to have minor incremental cumulative impacts, but are similar enough to and within the scope of the cumulative impacts presented in Alternative 3 of the AFA EIS and Alternative 1 of the Groundfish DPSEIS that the conclusion would not defer in any significant way from the reference studies.	Same as for Alternative 2, but with the likelihood of a larger degree of temporal and spatial shifting of AFA vessels including cod-exempt vessels.	Same as for Alternative 3	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels
Significance of fishery management actions	Alternative 1 is not expected to result in any adverse impacts to the environment that would result in a significance determination.	Alternative 2 is not expected to result in adverse impacts to the environment that would result in a significance determination. There is the potential for establishing a precedent for future actions by restricting access to the fishery for a limited number of participants.	Same as for Alternative 2, but with the likelihood of a larger degree of temporal and spatial shifting of AFA vessels including cod-exempt vessels.	Same as for Alternative 3	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels	Same as for Alternative 2, but with the likelihood of a smaller degree of temporal and spatial shifting by AFA catcher vessels

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Table E2. Qualitative Summary of Economic Impacts

	Alternative 1	Alternative 2	Alternative 3, Option 1	Alternative 3, Option 2	Alternative 4	Alternative 5
Impact on resource management	none	A reduction in the number of vessels participating in the January/February BSAI Pacific cod fishery in area 655430. There would be a potential for shifting harvest to March-December months.	A minimum allocation of 2.5 to 5 million pounds would be reserved for the qualifying non-AFA vessels.	A historical allocation would result in reserving 1.25 to 1.88 million pounds for the qualifying non-AFA vessels for the January/February BSAI Pacific cod fishery.	The number of AFA vessels (including both AFA cod-exempt and non-cod exempt) vessels participating would be restricted to a maximum daily limit during January and February in area 655430.	The number of AFA non-exempt vessels would be restricted to a daily average of 10 vessels from January 20 to February 25 in area 655430. If the ceiling is exceeded, then AFA non-exempt vessels would be restricted from fishing for Pacific cod in the Cape Sarichef test area from January 20 to February 26 of the following year.
Benefits	no change from the status quo	Decreased on-grounds competition for Pacific cod during January and February. The level of decrease in participation would depend upon whether or not the restrictions were applied to both the AFA cod-exempt vessels and AFA non-cod exempt vessels.	Allocate quota to non-AFA vessels and allow AFA vessels to fish during the winter cod fishery.	Same as for Alternative 3, Option 1.	Would allow greater flexibility to AFA and non-AFA participants to reach an agreement on the level harm and methods for limiting effort on the cod grounds.	Provides a mechanism to limit effort and not displace AFA non-exempt vessels on the winter cod grounds. If the limit is exceeded AFA non-exempt vessels would be restricted from the Cape Sarichef test area from January 20 to February 25 the following year.
Costs	no change from the status quo	Economic dislocation from vessels restricted from future participation in the January/February Pacific cod fishery in area 655430. Potential for shifts to higher fishing costs and spreading out the processing period for shoreside plants	Would not limit the number of AFA vessels on the winter cod grounds, and thus, would not resolve the initial claim by the non-AFA vessels.	Same as for Alternative 3, Option 1.	Economic dislocation from vessels restricted from future participation in the January/February Pacific cod fishery in area 655430. Potential for shifts to higher fishing costs and spreading out the processing period for shoreside plants. Alternative has the potential for lower costs than Alternative 2.	Could cause some economic dislocation from vessels restricted from participation in the January/February Pacific cod fishery in area 655430. Alternative has the potential for lower costs than Alternative 2.

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Table E2. (continued) Qualitative Summary of Economic Impacts

	Alternative 1	Alternative 2	Alternative 3, Option 1	Alternative 3, Option 2	Alternative 4	Alternative 5
Net Benefits	no change in net benefits	Benefits to the number of qualified vessels are likely to be exceeded by costs to excluded vessels and to shoreside processing companies. The increased costs result from: a) displaced effort to the March-December Pacific cod fishery will result in decreased catch per unit of effort on dispersed stocks, b) increases in running and fishing time will increase vessel costs or displaced vessels, and c) shoreside processing companies may have extended processing periods for Pacific cod throughout a longer season, resulting in lowered efficiencies.	Likely would result in lower net benefits since there would be an allocation of quota to non-AFA vessels, but the alternative would do little to resolve the initial claim by the non-AFA vessels.	Same as for Alternative 3, Option 1.	Economic dislocation from vessels restricted from future participation in the January/February Pacific cod fishery in area 655430 would be the same as described for Alternative 2. Alternative has the potential for a lower economic impact on displaced vessels than Alternative 2.	Economic dislocation from vessels restricted from participation in the January/February Pacific cod fishery in the area 655430 would be lower than noted in Alternative 2. However, if the number of vessels exceed a daily average of 10 during January 20 to February 25 period, then economic dislocation of AFA non-exempt vessels would be greater, but lower than Alternative 2.
Objectives of Amendment		Achieves a reduction in on-ground competition for qualifying non-AFA vessels, as well as qualifying AFA vessels participating in the January and February Pacific cod fishery in area 655430.	Would not limit the number of AFA vessels on the winter cod grounds, and thus, would not resolve the initial claim by the non-AFA vessels.	Same as for Alternative 3, Option 1.	same as for Alternative 2	same as for Alternative 2
E.O. 12866 significance	Does not appear to be significant. The entire ex-vessel value of the January/February Pacific cod fishery during the 1995-2000 period for the three fleet groups ranges from \$1.6 million in 1996 to \$7.2 million in 2000.	same as for Alternative 1	same as for Alternative 1	same as for Alternative 1	same as for Alternative 1	same as for Alternative 1



January 15, 2003

**Discussion Paper of Regulatory Issues & Frameworking**  
**Amendment 73 to the Fishery Management Plan for BSAI Groundfish**  
**Additional Sideboard Measures for Bering Sea Winter Pacific Cod**

In its December 2002 meeting the North Pacific Fishery Management Council (NPFMC) requested that NMFS Alaska Region of Sustainable Fisheries and the NPFMC staff provide framework language for implementing preferred alternative 5 of Amendment 73 regarding Additional Sideboard Measures for Bering Sea Winter Pacific Cod. This paper provides preliminary framework language as well as a discussion of the implementation issues for draft framework regulations. The regulatory review for this action was to be provided to the NPFMC staff prior to the January 2003 meeting, so the Draft EA/RIR/IRFA could be updated, released to the public for review, and provide additional information for NPFMC final action.

A preferred alternative number 5 for the Amendment was adopted by the NPFMC in December of 2002 that would:

“Limit access to the directed trawl catcher vessel fishery for Pacific cod for the period of January 20 through February 25<sup>th</sup> in area 655430 to the following participants:

- (1) catcher vessels which have a history of economic dependence upon the winter Bering Sea Pacific cod fisheries, as demonstrated by average January and February deliveries of at least 250,000 lbs for 4 out of the 5 previous years of 1995-1999.
- (2) the cod exempt AFA catcher vessels
- (3) AFA non-exempt Bering Sea catcher vessels not to exceed a daily average of 10 vessels for the period of January 20 to February 25<sup>th</sup> (except for vessels qualifying under item (1) above).

“Exceeding this 10-vessel limit in 2003 or any later year by the AFA non-exempt catcher vessels will trigger an area closure to Pacific cod fishing the following year. The closure area, if triggered, is defined as the same area closed for the NMFS Cod Fishery Interaction Study (Cape Sarichef Test Area). The triggered closure would be in effect from January 20 through February 25<sup>th</sup> and would apply to all AFA cod non-exempt catcher vessels participating in the BSAI directed cod fishery (except for vessels qualifying under item (1) above).”

“The 10-vessel limit for AFA non-exempt catcher vessels and trigger mechanism shall not apply for any period from February 1 of any given year until at least 2 non-AFA vessels that meet the threshold standard of at least 250,000 lbs in 4 out of 5 years from 1995-1999 are fishing for Pacific cod in State statistical area 655430. This regulatory action will terminate upon rationalization of the BSAI Pacific cod fishery.”

## **Regulatory Approaches for an AFA LLP endorsement for 655430 and the Cape Sarichef conditional closure:**

Alternative 5 of the December 2002 motion on Amendment 73 describes an action that requires enumeration of AFA and non-exempt vessels participating in "directed cod fishing" in State statistical area 655430 during the period of January 20 to February 25. If the number of these AFA Pacific Cod trawl vessels is exceeded, an area closure is triggered for those vessels in the following year. The NPFMC has asked NMFS and NPFMC staff to report on how this action might be implemented as a "frameworked" regulation. One reason for this inquiry is that the December 2002 motion specifically calls for an additional closure to be implemented in the following year, that is conditional on the number of AFA vessels participating in directed fishing in State statistical area 655430. Industry testimony suggests this pending closure in the following year is intended to create a disincentive for AFA non-exempt catcher vessels to exceed the 10 vessel average in the preceding year. The normal rule making process for an amendment of this type may often take more than the 10 months that would be available from the date that the agency had an updated count of AFA vessels in State statistical area 655430 to the start of a new season. Thus, for the closure action to have the desired impact on AFA vessel behavior, it was reported that the specific details of the action should be known in advance and implemented within one year of the AFA vessel trigger. A second reason that NMFS was asked to develop this discussion paper is that the parties who have developed this agreement informally, expressed a need for formal rulemaking to create secure incentives that could not be achieved through private contracts or other agreements among BSAI cod fishery participants.

This discussion assesses a frameworking notice and a separate full rulemaking approach to construct regulatory text for Amendment 73. Each of the two regulatory approaches includes an LLP License endorsement to allow AFA non-exempt and non AFA directed cod trawlers as well as AFA vessels that are exempt from Pacific Cod sideboards to fish in State statistical area 655430.

The frameworking notice would provide criteria for reaching the 10 vessel trigger through regulation and monitoring of the directed fishing in State statistical area 655430, as well as providing notice for a specific closed area for these vessels occurring in the following year. The need for closing the area would be determined by monitoring and would be announced by notice to the public. We will explain that this approach is likely to result in a conventional and full rulemaking process that the NPFMC and industry would like to avoid. **This is in part due to the January 13, 2003 opinion provided by the Ninth Circuit Court of Appeals on the use of frameworking in NRDA v NMFS that appears likely to eliminate any practical consideration of a frameworked notice for alternative 5 of Amendment 73.** The full rulemaking approach would consist of only monitoring and notice to NPFMC if an AFA non-exempt directed fishing ceiling has been reached (this approach is discussed in the Appendix). This would lead to full rulemaking to implement the closure, unless some other preferred alternative was selected.

Both regulatory approaches, a frameworking notice, and full rulemaking approach would require a new LLP endorsement allowing the anticipated 3 non-AFA cod trawl vessels and 1 AFA non-exempt vessel that made "deliveries of at least 250,000 lbs for 4 out of the 5 previous years of 1995-1999" to fish for Pacific Cod in State statistical area 655430 for the period of January 20 to February 25. All AFA cod exempt vessels would also receive an LLP endorsement to operate in this area during this period. To the extent that some of the crowding in 655430 were to extend beyond AFA causes, the NPFMC staff analysis has included data and analysis in the EA/RIR/IRFA for Amendment 73 that is supportive of the general Magnuson-Stevens Act authority on limited access.

Much of the process for implementing an LLP endorsement of this type is already in regulation in the endorsement sections under 50 CFR 679.4. NMFS would implement the new endorsement under a one-time closed application process that may consist of as little as a notice of eligibility or ineligibility for BSAI trawl vessels and opportunity to appeal. As well, issuance of interim permits and appeals for the qualifying non-AFA operators, and to Pacific Cod exempt operators could utilize the existing implementation tools under the LLP program. Other options for a completely stand alone permit have been discussed, but an independent permit appears to impose more burden than utilizing an endorsement on the existing LLP program.

#### General Description of Frameworked Regulatory Approach to AM 73 requested by the NPFMC

In general, this approach would consist of (a) an additional LLP endorsement to allow directed fishing of qualifying vessels into State statistical area 655430 and (b) rules to establish frameworked participation criteria (c) inseason monitoring, and (d) and potentially, a noticed closure by the Regional Administrator .

A "closed" regulatory framework may be thought of as a specific action such as a closure for a certain period of time, area, and gear type that, when triggered, is fixed, and not modified. In the application we envisioned for Amendment 73, new rules would be required to modify AFA sections of 50 CFR 679 that require the Regional Administrator to close the Cape Serichief experimental area if the trigger is reached. Under the closed framework approach, we have investigated whether this closure could be implemented by notice to the fleet, as opposed to the normal rulemaking process. Monitoring of the participation of the AFA and non-AFA Pacific cod vessels in State statistical area 655430 would be required under any rulemaking option. This monitoring and reporting of whether a trigger was reached along with the explicit closure action would be intended to provide a disincentive to AFA non-exempt vessels in the directed Pacific Cod fishery from exceeding the 10 vessel average in this area during this period.

#### **Issues related to implementation of a "Frameworking notice" for alternative 5.**

*Issue 1. Frameworking Issues: Could statute provisions of the AFA (Section 211) provide sufficient legal coverage to pursue a closed regulatory framework, similar to what has been used for some conservation actions? There are other examples of this in 50 CFR 679.*

Answer: A central question raised by the NPFMC is whether regulatory frameworking can be applied to the portion of this action dealing with the conditional closure of Cape Sarichef under Amendment 73. The Amendment 73 action is similar to questions posed and direction provided to the NPFMC in the Letter of November 25, 2002 from James W, Balsiger Re: Amendments 48/48 to Fishery Management Plans (FMPs) for the Groundfish Fisheries of the Bering Sea and Aleutian Islands Management Area and the Gulf of Alaska that would revise the current process for setting harvest specifications and related management measures for new fishing years. In that instance, the advice from NOAA GC for Amendments 48/48 was for the NPFMC to postpone final action until the issues surrounding the actions of the 9<sup>th</sup> Circuit Court of Appeals were resolved. On January 13, 2003 Judge Rymer of the 9<sup>th</sup> Circuit Court of Appeals ruled on one component of the Appeal. At the date that the Amendment 73 discussion paper was finalized, NMFS has not had an opportunity to thoroughly review the ruling, but it does not appear to be favorable to the NMFS request for an institutional waiver of prior notice and comment in dealing with TAC specifications. Thus, we are not confident that it will provide any relief to the use of a frameworked notice under Amendment 73.

In anticipation that it may apply to this action we have reviewed 50 CFR 679.25 Inseason adjustments (c) procedures, which includes criteria for an application of rulemaking where there are some adjustments to full rulemaking. NMFS considered whether this regulatory approach may provide some relief from the full rulemaking process.

#### 50CFR 679.25

(1) No inseason adjustment issued under this section will take effect until

- (i) NMFS has filed the proposed adjustment for public inspection with the Office of the *Federal Register*; and
- (ii) NMFS has published the proposed adjustment in the *Federal Register* for public comment for a period of 30 days before it is made final, unless NMFS finds for good cause that such notification and public procedure is impracticable, unnecessary, or contrary to the public interest.

(2) If NMFS decides, for good cause, that an adjustment is to be made without affording a prior opportunity for public comment, public comments on the necessity for, and extent of, the adjustment will be received by the Regional Administrator for a period of 15 days after the effective date of notification.

The fact that this procedure is located within the section on inseason adjustments is relevant, as the Amendment 73 (alternative 5) is not likely to be considered an inseason action due to the 9 to 10 month lag period between the trigger and the closure action phase, and we suspect that it would be a challenge to meet the "good cause" criteria. The closure action would also occur in a new Federal fishing year, that could result in a new TAC, a different roe season, and a changing need to implement a closure of the Cape Serichief experimental area.

Secondly, even if this abbreviated procedure were used, it is not likely to reduce or shorten the rulemaking process in any significant way, as all the analytical requirements of the National Environmental Policy Act, the Regulatory Flexibility Act, and Executive Order 12866 would still apply, as well as the requirement of the Administrative Procedure Act (APA).

2. *Notice issues: What is our obligation to “notice” non-exempt AFA vessels and what process is desirable to limit legal challenge of the subsequent year’s area closure if the trigger is reached or exceeded? Could NMFS rely on AFA inshore cooperatives to monitor themselves (their directed fishing in State statistical area 655430) and assume they know when they are approaching the trigger vessel number in period 1(January 20 to January 31)? In period 2 (February 1 to February 25), we assume we would be obligated to notice non-exempt AFA vessels when the accounting period starts (i.e., when 2 or more non AFA qualified vessels fish in the area in the time period).*

Answer: This question is directly linked to question 1 on frameworking, where, “notice” of an action, leading to a management measure such as a seasonal closure appears to require NMFS to go through the full rulemaking process. We are unaware of any regulation that would allow NMFS to enforce a closure based on the use of industry tracking of their own behavior. We investigated the possibility of using an interim final rule in the event that NMFS could establish good cause for waiving the public notice and comment requirements of APA. This notice and comment requirement is not often waived and requesting such action cannot be considered until, NMFS fully developed a rule that demonstrated the need for the specific closure, and analyzed it’s effects.

Implementing Amendment 73 (alternative 5) through a closed regulatory notice, specifically the closing of Cape Serichief to AFA non-exempt directed fishing, will require an appeals process including:

- (1) NMFS eligibility determinations for the LLP endorsement are subject to appeal..
- (2) A NMFS action to close the Cape Sarichef experimental area in response to monitoring data would be subject to appeal. The concern is that if an appeal delayed the closure action, it could easily negate the usefulness of the proposed amendment.

#### **Issues related to both implementation of a “Frameworking notice” or full rulemaking for alternative 5**

*Issue 1. Monitoring, Tracking and inseason management issues for the 10 vessel Trigger: How would NMFS track the average number of non-exempt AFA vessels in either the Jan 20 - Jan 31 period and Feb 1 to Feb 31?*

Answer: The December 2002 motion identifies two accounting periods during which NMFS would monitor the average number of non-exempt AFA vessels in State statistical area 655430: The first period is Jan 20 until Jan 31. The second occurs from Feb 1-25. If at any time during the aggregate of these two periods the average number of non-exempt AFA vessels (directed fishing for Pacific cod in 655430) exceeded a specified average number of vessels, a follow up management action would occur in the subsequent fishing season.

We propose to use an automated data query from the electronic fish ticket data that is aggregated over a 24 hour period which would identify the presence of a unique vessel (one of the non-AFA qualifying vessels) that was directed fishing in State statistical area 655430 between Feb 1 and Feb 25. This computation would occur at some defined period on each day. If after the landing of cod exceeded some specific proportional threshold for that vessel (20 percent by weight for example), it would be counted as a vessel day of cod fishing between the trip start date and the trip landing date in State statistical area 655430. Finally, the VMS data would be compared with each of those days that were determined to be a proxy for a directed cod fishing day, and where there was both a VMS observation, and an estimated cod fishing day, a count of one fishing day would be recorded. This method could be applied to both AFA and non AFA vessels in State statistical area 655430.

*2. Enforcement Issues: Once the trigger of 10 average vessel days have been met, how would NMFS propose to enforce any given closure of the Cape Sarichef experimental area?*

**Answer:** The closing of the Cape Sarichef experimental area to directed fishing for AFA non-exempt vessels, as an incentive to limit crowding in State statistical area 655430, will be difficult to enforce. The Cape Sarichef area is a small fishing area that overlaps sections of State statistical area 655430, 655410 and 645434. Unlike the fish ticket data system that links landings to State statistical areas, there is no specific data collection within the proposed Cape Sarichef closure area that would differentiate between vessels that land within the Cape Sarichef zone, or outside. Participation in directed or non-directed fishing activity would also be difficult to detect. Further, while the act of directed fishing is generally defined as an accounting of the predominant species caught on a vessel at any time, in practice (for catcher vessels) this may only be computed after a landing is made. Further, directed fishing is determined by a percent of a certain species retained on board at any one time during the fishing trip. There is also no real-time record of this directed fishing activity. With a fundamental inability to break out landings between areas within the Cape Sarichef closure area, and other areas of 655430, enforcement agents would require more information and possibly a specific Cape Sarichef reporting area in logbooks to have some reasonable confidence of compliance with the closure. AFA vessels may not have an incentive to comply with the 10 vessel day trigger if the closure action cannot be sufficiently enforced.

**A potential fix for this constraint in the FMP text would be to allow for closing of the Cape Sarichef experimental area to AFA catcher vessels for any fishing activity once the trigger had been reached.**

*3. Computing the Trigger: Could the trigger for the 10 vessel day average be computed in more than one way?*

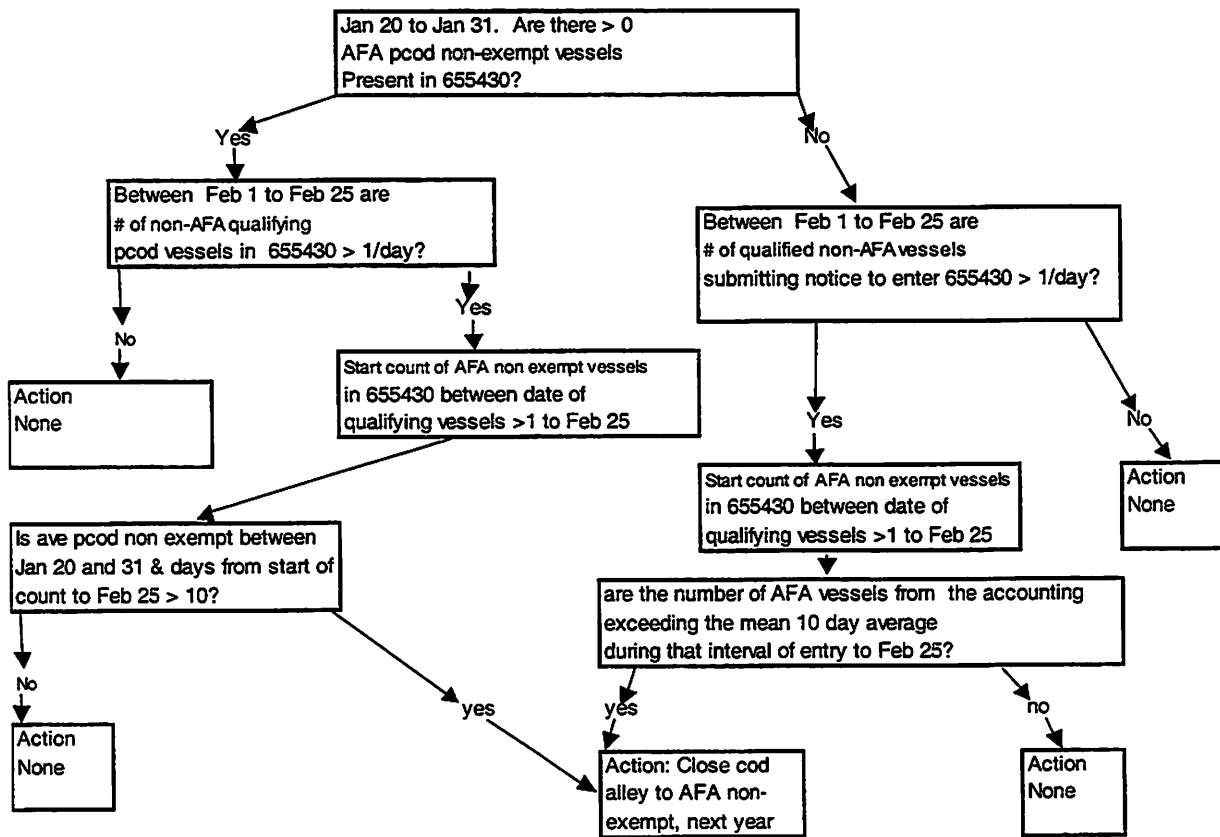
**Answer:** Assuming that a verifiable measure of a vessel directed fishing day is adopted, the triggering mechanism of both AFA non-exempt vessels and non-AFA Pacific Cod vessels described in the December 2002 NPFMC motion on Amendment 73 could be interpreted in more

than one possible manner. There are two separate conditions listed whereby AFA non-exempt vessels could trigger the 10 vessel daily average. One condition is under item (3) where the trigger could extend between the dates of January 20 and February 25, and in the last paragraph the trigger would not be reached until an additional condition is met of having more than 1 AFA non-exempt trawl catcher vessel in State statistical area 655430 on or after the date of February 1. It is possible to interpret the NPFMC motion on Amendment 73 as exceeding the trigger of more than 10 vessels per day during the interval of January 20 to January 31, but our discussions with industry suggest they did not intend to trigger the Cape Sarichef closure without considering the entire interval from January 20 to February 25. Given that the number of AFA vessels triggering the 10 day average limit must occur as an average between the days of January 20 and February 25, then there appear to be 2 ways to account for the 10 vessel limit (Figure 1). The approach suggested by industry was for AFA catcher vessel directed fishing in this area to be accounted for by aggregating two time intervals. The first interval would count the number of AFA vessels per day from January 20 to January 31. For this first period the numerator would be the total number of AFA non-exempt directed fishing catcher vessels accruing over that interval, while the denominator would consist of 12 days irrespective of the number of non-AFA qualified catcher vessels in State statistical area 655430. In the second interval, the enumeration of vessels would begin on the first day that 2 qualified non-AFA cod catcher vessels appeared in 655430. The enumeration of the number of days (on the denominator for the second interval) would begin from the first day that 2 qualified non-AFA cod catcher vessels appeared in State statistical area 655430 on or after Feb 1 and end on Feb 25. The number of vessels from the two intervals would be aggregated together. The number of days from the two intervals would also be aggregated together.

There is, however, one variant on this approach. Some parties involved in negotiating this sideboard provision, are also considering a second way of computing the denominator (the number of days available to fish for the second interval). This second method would count the denominator as the number of days from Feb 1 to Feb 25, irrespective of which day, during that interval, the 2 qualifying non-AFA Pacific cod vessels were determined to be involved in "directed fishing" in State statistical area 655430 after Feb 1.

Figure 1.

**Flowchart of Triggers and actions to Implement  
10 vessel Average and Closure of Cape Serichef in following Year  
For Amendment 73**





## Potential changes to 50 CFR 679

### 679.2 Definitions

The December 2002 motion on AM 73 refers to vessels that are participating in “directed fishing” in the Pacific cod fishery occurring in State statistical area 655430. For groundfish catcher vessel operations there is not a “real time” accounting of when directed fishing is occurring on a groundfish species by time and area. Currently, determinations of whether a vessel is participating in directed fishing for a species may occur on a post landing basis. This presents a challenge to develop a framework approach to this action, if we need to enumerate or notify AFA vessels that a given vessel is being counted in the directed fishing group within State statistical area 655430. The same problem may also apply to the non-AFA vessels that can trigger the accounting between February 1 and February 25 when one of these vessels appears in State statistical area 655430. The approach suggested in the draft regulatory text section of this discussion document is to assert that a Pacific cod vessel fishing in State statistical area 655430 for the purpose of this accounting exercise has engaged in “directed fishing” when it’s landing composition exceeds a stated proportion of Pacific cod, and it has been detected on VMS in the stat area on a particular day between the start and end of a fishing trip.

### 679.4 Permitting

The initial authorization for qualifying directed Pacific cod fishing vessels would be developed through the permitting sections of 50 CFR 679.4 regardless of whether the frameworked notice or the full rulemaking approach is used. No anticipated changes, however, in the permitting section are required for the frameworking components of Alternative 5 for Amendment 73. As previously noted, this step would be required under either the frameworking full rulemaking approach. The implementation time required to obtain SF and OMB approval of a new LLP endorsement like this is often time consuming, and may be expected, by itself, to delay the implementation of the AM 73 additional AFA sideboard program to 2004.

### 679.22 Closures:

The December 2002 NPFMC motion for Amendment 73 proposes 2 primary regulatory actions, the first is a LLP licensing action (that we propose through a LLP Cod endorsement of AFA & non-AFA vessels to access 655430). The second is a delayed closure action directed to a sub set area of State statistical area 655430 and adjacent State statistical areas that prohibits certain vessels from directed fishing in a prohibited area within 655430 when a directed fishing ceiling has been exceeded (determined by exceeding the 10 vessel daily average). To define the landings criteria based qualification of AFA and non AFA vessels to State statistical area 655430, text similar to the language identified under the draft regulatory text section of this document could be adopted.

## Participation Standard under AFA Regulations:

The Amendment 61/61/13/8 (final as of December 30, 2002) created a new regulatory section 679.64. This section describes the authority of the Regional Administrator to place harvest limits on sideboard species for AFA catcher vessels.

*From 679.64 (b) Harvesting sideboards for AFA catcher vessels.* The Regional Administrator will restrict the ability of AFA catcher vessels to engage in directed fishing for other groundfish species to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the directed pollock fishery.

These limits are presumed to extend to closure of specific areas to AFA catcher vessels. At this time, any criteria for closing the Cape Sarichef experimental area (Figure 2.) would likely be included under this section of 679.64. We have drafted some regulatory language as an example of a closed frameworked regulation, see: Selected Draft Regulatory Text for AM 73, but have serious reservation regarding whether the text would be approved in a formal regulatory review because of the previously stated constraints and Court action on the use of “frameworking” in regulations. Even if the use of a frameworked notice under some were feasible, it is anticipated that it would have almost no impact on the most time consuming portions of rulemaking under the Administrative Procedures Act. During the course of our review process we drafted some hypothetical text, but it is presented as text with strikeout, reflecting our considerable lack of confidence that this approach can be implemented.

## Monitoring, Notice, and Recordkeeping/ Reporting Considerations: *Monitoring of AFA vessels*

As previously noted, the NPFMC December 2002 motion on Amendment 73 describes a program to “Limit access to the directed trawl catcher vessel fishery for Pacific cod...”. This focus on directed fishing of Pacific cod in State statistical area 655430 would create some additional verification of the intent of vessel operations if AFA vessels are to be informed that their behavior could result in a subsequent closing of the Cape Sarichef experimental area. Industry testimony provided in the December meeting suggests that a primary purpose for implementing the regulation is to provide a verifiable and enforceable trigger and closure action to insure that certain non-AFA vessels are protected from preemption from AFA vessels. To be verifiable and enforceable, the regulations would require a concise identification and accounting of which vessels were meeting the criteria for “directed fishing” in State statistical area 655430 and when they would be included in a directed fishing observation, otherwise the measure may have no higher compliance than what could be achieved through a private contract. A description of this approach was included in Issue 1 under, Issues related to both implementation of a “Frameworking notice” or full rulemaking for alternative 5. If a frameworking notice approach were attempted for Amendment 73 (alternative 5), it is probable that prompt notice of how close AFA vessels were reaching the trigger would be required. We have not determined if this type of notice consideration would result in any specific regulations at this time.

**Selected Draft Regulatory Text for AM 73**

***Proposed text 679.2 Definitions:***

*Directed Pacific Cod fishing day in State statistical area 655430 Jan 20 to Feb 25:* An AFA or Non-AFA catcher vessel is determined to be directed fishing in directed Pacific Cod fishing day in State statistical area 655430 during the period of January 20 to February 25 if the Regional Administrator determines:

- through electronic fish ticket data that the vessel has reported cod landings from State statistical area 655430 during any day between the trip start date and landing date, representing more than 20% of total landing weight during that period.
- and VMS data identifies a single observation of the vessel present at any time between the 0000 hours and 2400 of any single day.

***Proposed text for 679.4 (k) (4) (ii):***

<u>A groundfish license will be assigned...</u>	<u>If...</u>	<u>During the period...</u>	<u>From a vessel in vessel length category</u>	<u>And if the license is designated as a...</u>
<u>(1) A Bering Sea area exemption to Pcod closures of State statistical area 655430 from Jan 20 to Feb 25</u>	<u>Under AFA the permit is endorsed as BSAI Pcod or exempt.</u>  <u>And</u> <u>average January and February deliveries of at least 250,000 lbs or</u>	<u>for 4 out of the 5 previous years of 1995-1999</u>		<u>catcher vessel, trawl gear, and designation for directed fishing of BSAI Pacific Cod</u>

***Proposed text for Framework option under 679.22 Closures:***

It may also be appropriate to include some text under 679.22 closures such as:

*LLP cod endorsement (cod landings based):* The Cape Serichief experimental area will be closed to BSAI AFA Trawl catcher vessels from January 20 to February 25 unless exempted from the closure through a Bering Sea area exemption to Pcod closures of State statistical area 655430 from Jan 20 to Feb 25 under 679.4 (k) (4) (ii). This closure does not apply until the criteria for AFA vessels in State statistical area 655430 have reached the threshold number of average vessel days for non-exempt AFA vessels under 679.64 in the previous year and the closure has been implemented through rulemaking.

***Proposed Draft text for Framework option under 679.64:***

Note: This text is presented as strikethrough. NMFS anticipates that that a Frameworking notice approach to Amendment 73 is unlikely to be approved.

~~(c) Restrictions on AFA non-exempt trawl catcher vessels in Cape Sarichef experimental area—The Regional Administrator will prohibit AFA catcher vessels from fishing the area known as Cape Sarichef experimental area (identified as Alternative 4 of the experimental area in the Regulatory amendment for the closure of the Cape Sarichef) by notification in the *Federal Register* if in the previous year:~~

~~—————(1) The Regional Administrator determines the daily average number of AFA catcher vessels (not counting the vessels meeting the qualifying cod landings criteria under 679.4 (k) (4) (ii)) that are participating in “directed fishing”, under 679.2, in State statistical area 655430 on the dates of January 20 to January 31,~~

~~—————and~~

~~—————(2) The Regional Administrator determines, after the date of Feb 1, that the daily average number of AFA catcher vessels (not counting the Non-AFA vessels meeting the qualifying cod landings criteria), from the date at which more than 1 of the non-AFA trawl vessels meeting the qualifying cod landings criteria are “directed fishing” in 655430 through February 25, has exceeded 10 vessels over the aggregate of the periods from January 20 to February 25. —————~~

~~—————or~~

~~(1) The Regional Administrator determines, there are no AFA catcher vessels (not counting the vessels meeting the qualifying cod landings criteria under 679.4 (k) (4) (ii)) that are participating in “directed fishing” under 679.2, in 655430 on the dates of January 20 to January 31,~~

~~—————and~~

~~—————(2) The Regional Administrator determines after the date of Feb 1, that the daily average number of AFA catcher vessels (not counting the Non-AFA vessels meeting the qualifying cod landings criteria), from the date at which more than 1 of the non-AFA trawl vessels meeting the qualifying cod landings criteria are “directed fishing” in 655430 through February 25, has exceeded 10 vessels.~~

## Appendix 1.

### Full Rulemaking Approach:

This approach would consist of a permit or adding new endorsement language to allow AFA non-exempt and non AFA directed cod trawlers in State statistical area 655430 and monitoring and notice to NPFMC that the AFA non-exempt participation ceiling is reached.

This approach would (as in Approach 1) also require 50 CR 679 LLP endorsement text to allow the anticipated 3 non-AFA cod trawl vessels and 1 AFA vessel making "deliveries of at least 250,000 lbs for 4 out of the 5 previous years of 1995-1999" into State statistical area 655430. All AFA cod exempt vessels would receive a permit or LLP endorsement to operate in this area during this period. Unlike Approach 1, this approach would not use frameworking or an abbreviated regulatory action outside of NPFMC consideration. It would require a full NPFMC initial and final review along with Regulatory amendments. In this approach, NMFS could implement the initial closed area exemption based upon the delivery criteria. It would also implement further regulations to monitor the fishery entry and exit from State statistical area 655430, and then report the findings to the NPFMC (see Closure section for text). Ultimately, this data would be made available to industry to self regulate directed fishing till the end of the AFA vessel accounting period. There would only be a closure of Cape Sarichef experimental area if deemed necessary by the NPFMC through normal rule making, requiring Regulatory amendments.

### advantages

This approach would still achieve the objective of having some initial rule based permit or LLP endorsement for cod vessels that could operate in State statistical area 655430. It would still provide all of the necessary monitoring and identification of any relevant triggers to industry and the NPFMC. There is little if any concern by NOAA GC that it might violate the intent of frameworking or have other PRA issues.

### disadvantages

If the triggers in State statistical area 655430 are reached, the NPFMC would have to recommend further action that NMFS would subsequently initiate through rulemaking. This may not provide the magnitude of administrative simplicity that the NPFMC had intended with it's December 2002 motion. It would not provide an explicit closure action for the industry. There is considerable uncertainty as to whether the closure of the Cape Sarichef experimental area between January 20 and February 25 could be implemented before the next season began.

## Appendix 2

### Accounting for the AFA vessel trigger.

1. This assessment assumes that the accounting of the 10 vessel daily average for the period between January 20 and January 31, is computed as the number of vessels in State statistical area 655430 divided by 12.

For example, if 11 AFA Pacific cod non-exempt catcher vessels appear on each day from January 20 to 31, in 655430 then the daily average number of vessels is 11. This vessel average would not by itself trigger a closure for AFA vessels in the Cape Sarichef research closure area because it does not consider the entire period from January 20 to February 25.

2. The accounting of the 10 vessel daily average for the period of January 20 to February 25 may be reached in the following two ways depending on the method used, for example:

(A) given that 2 or more qualifying non-AFA vessels fished in 655430 on February 25, with 20 AFA non-exempt Pacific cod vessels, the ten day average would also not be exceeded if each day from January 20 to February 25 were counted, producing a denominator of 37.  $(11 \text{ vessels} \times 12 \text{ days} + 20 \text{ vessels}) / 37 \text{ days} = 4.378$  average vessel days,

(B) or, if 2 or more qualifying non-AFA vessels fished in 655430 on February 25, with 20 AFA non-exempt Pacific cod vessels, the ten day average would be exceeded if **the 12 days from January 20 to 31 were counted plus an additional day from the date that the 2<sup>nd</sup> qualifying non-AFA vessel showed up on February 25.**  $(11 \text{ vessels} \times 12 \text{ days} + 20 \text{ vessels}) / 13 \text{ days} = 11.69$  average vessel days (Table 1).

3. The accounting of the 10 vessel daily average for the motion section (c), during this period from Feb 1 to Feb 25, is computed from the date at which more than 1 of the non-AFA or AFA vessels meeting the threshold standard that has participated in directed fishing in State statistical area 655430, to Feb 25. One interpretation of the motion, is that the trigger may be reached during this interval even if there are no AFA vessels appearing between January 20 to January 31.

For example, if 20 vessels appear on February 25, and 2 qualifying non-AFA vessels appear on February on Feb 25 then the daily average number of vessels is 20 (20 vessels/1day).

Table 1. Examples of how a 10 vessel average trigger could be estimated using each of the alternative approaches suggested by industry. Some would trigger the Cape Sarichef experimental area closure.

An example of how the 10 vessel average trigger could be estimated

Date	Left Column		Right Column	
	Number AFA non-exempt Vessels	Number of qualifying non-AFA	Number AFA non-exempt Vessels	Number of qualifying non-AFA
20-Jan	11	0	0	0
21-Jan	11	0	0	0
22-Jan	11	0	0	0
23-Jan	11	0	0	0
24-Jan	11	0	0	0
25-Jan	11	0	0	0
26-Jan	11	0	0	0
27-Jan	11	0	0	0
28-Jan	11	0	0	0
29-Jan	11	0	0	0
30-Jan	11	0	0	0
31-Jan	11	0	0	0
1-Feb	0	0	0	0
2-Feb	0	0	0	0
3-Feb	0	0	0	0
4-Feb	0	0	0	0
5-Feb	0	0	0	0
6-Feb	0	0	0	0
7-Feb	0	0	0	0
8-Feb	0	0	0	0
9-Feb	0	0	0	0
10-Feb	0	0	0	0
11-Feb	0	0	0	0
12-Feb	0	0	0	0
13-Feb	0	0	0	0
14-Feb	0	0	0	0
15-Feb	0	0	0	0
16-Feb	0	0	0	0
17-Feb	0	0	0	0
18-Feb	0	0	0	0
19-Feb	0	0	0	0
20-Feb	0	0	0	0
21-Feb	0	0	0	0
22-Feb	0	0	0	0
23-Feb	0	0	0	0
24-Feb	0	1	0	1
25-Feb	20	2	20	2

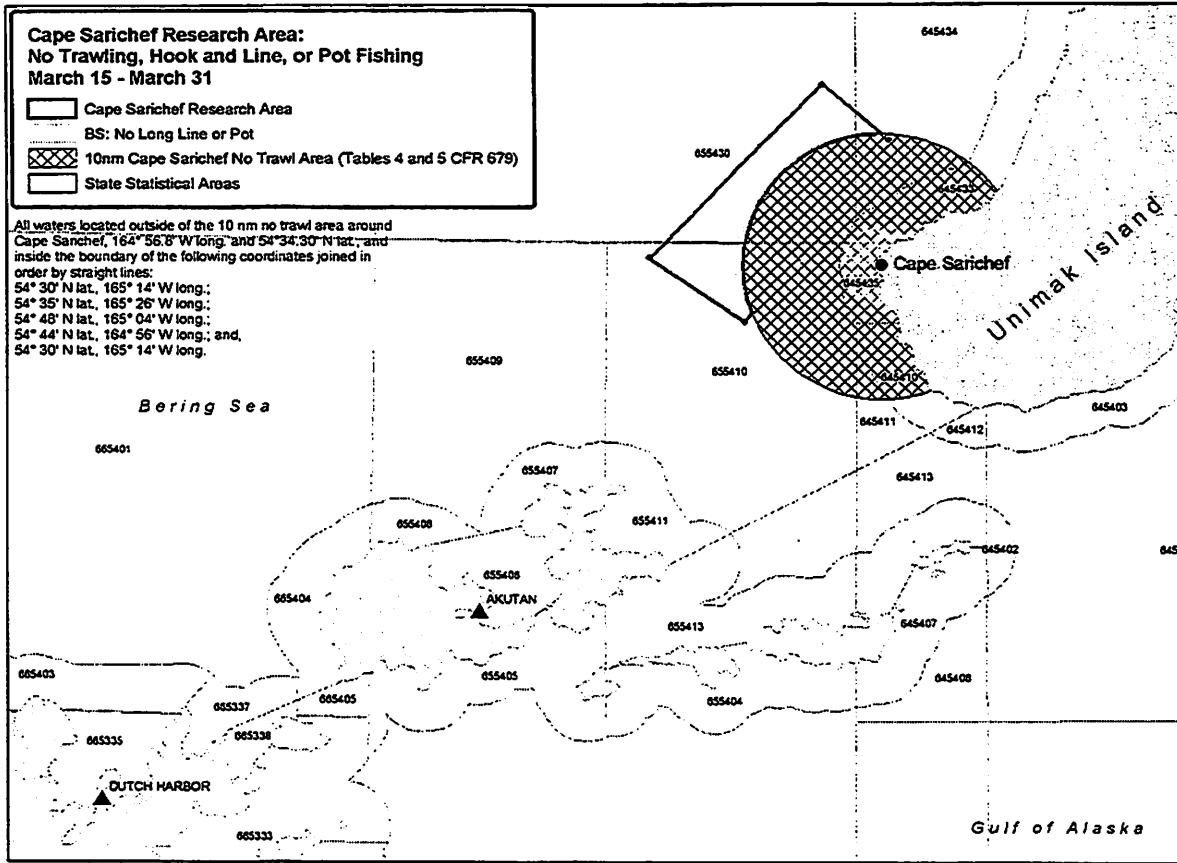
  

Mean	Mean
4.108	11.692
Not exceeded	Exceeded
4.108	11.692

Mean	Mean
1.667	20.000
Exceeded	Not exceeded
1.667	20.000

Figure 2. Boundaries of the Cape Sarichef experimental area (in blue).

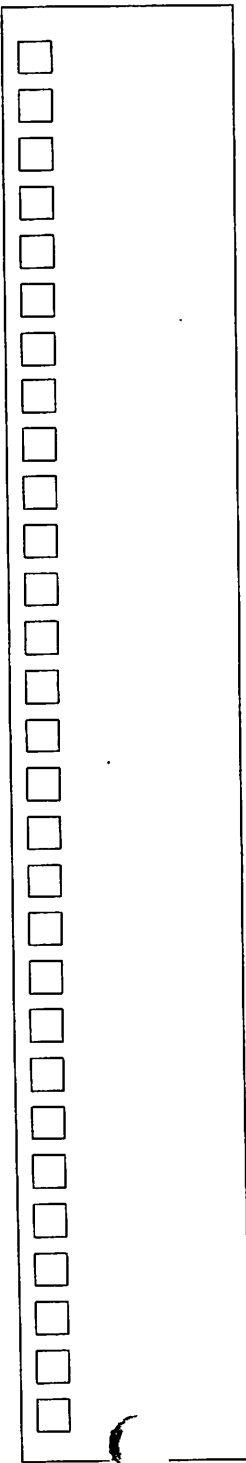




January 15, 2003

**Discussion Paper of Regulatory  
Issues & Frameworking for  
Amendment 73**

Additional Sideboard Measures for Bering  
Sea Winter Pacific Cod





## Preferred Alternative 5

- **(1) Limit entry to a set of trawl catcher vessels directed fishing for Pacific cod in State Statistical area 655430 & AFA cod exempt vessels when trigger is reached.**
- **2) Trigger is reached when the average number of AFA non-exempt vessels directed fishing in 655430 exceeds 10.**
- **3) Implement experimental area closure if the trigger is reached to AFA non-exempt and possibly other non-AFA vessels.**



# Sections of 50 CFR 679

Draft changes under Amendment 73

- **Definitions**
- **Permits**
- **Closures**
- **American Fisheries Act**
- **Recordkeeping and Reporting**

## Issues for the Council

### How to determine when “Directed trawl fishing” occurred in 655430?

- automated data query from the electronic fish ticket data
  - ◆ Landing of cod exceeds threshold % of total for that period, the whole interval is counted if:
- Tracking of VMS data for AFA and non-AFA vessels.



## Issues for the Council

### **Tracking Accounting Periods for AM 73 for Directed Fishing**

Two accounting periods for AFA non-exempt vessels in 655430:

Period I is Jan 20 until Jan 31.

- ◆ Track just AFA vessels

- Period II is Feb 1-25.

- ◆ Track AFA and qualifying vessels





## Issues for the Council

Need Clarification: Which Vessel categories are excluded upon reaching the trigger?

- The text of the motion states
  - “The triggered closure would ..... apply to all **AFA cod non-exempt catcher vessels** participating in the BSAI directed cod fishery (except for vessels qualifying under item (1) above).
- The intent of the motion (we believe) is to exclude Gulf vessels that are BSAI groundfish endorsed from 655430, if the trigger is reached.
- Clarification of excluded vessel groups is desired.

# Issues for the Council

## Enforcement of the Closed Experimental area

- The Dec 2002 motion could close the Cape Serichef experimental area to Directed Fishing
- Directed fishing is difficult to verify for such a small closure.
  - ◆ Fish ticket data does not break out landings between Cape Serichef and other areas of 655430
  - ◆ Compliance may not be enhanced by by treating the fishery as an MRB fishery.
- Inability to Enforce could lead to trigger mechanism being ineffective.
- Simple fix: prohibit transit or trawling activity of AFA non-exempt vessels.





## Issues for Council

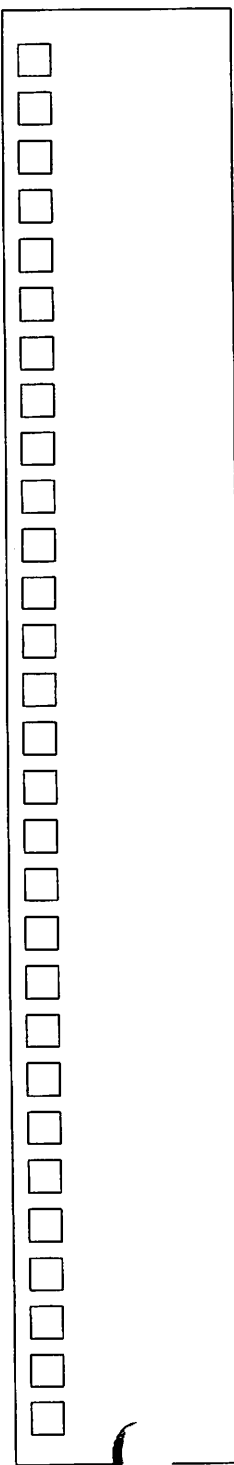
### Frameworking Issues

- What is a “frameworked notice” for closed and discretionary action?
- NMFS is not confident that a “Frameworked notice” for AM 73 is likely to be approved in a formal regulatory review.
- November 25, 2002 letter to the NPFMC on amendment 48/48

## Issues for Council

### Ninth Circuit Court of Appeals

- NW region TAC specs skip the proposed rulemaking step...Directly to publishing a final rule.
- The concept we reviewed for Frameworking AM 73 was to be very similar.
- NW approach produced convincing timing, stock, and fishing impacts argument.
- AM 73 based on claim of preemption without stock effect.



## **Other alternatives: Full Rulemaking?**

- Reviewed Feasibility of two, full rulemaking steps.
  - ◆ Initial step: limit entry under LLP endorsement.
  - ◆ The LLP endorsement would only go into effect upon reaching the trigger.
  - ◆ This is implicitly a Frameworking action



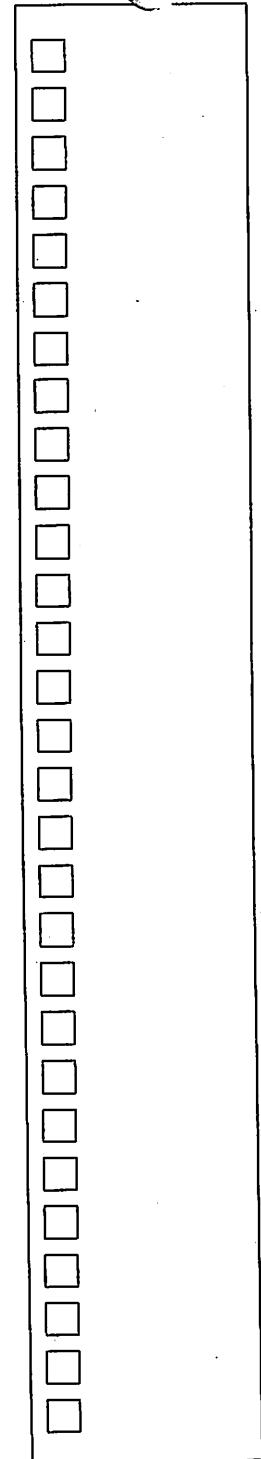
## A potential approach to implement NMFS Tracking and Reporting

- **Feasible to implement tracking of Directed Fishing Activity now.**
- **If trigger is reached, NMFS would report findings to Council.**
- **Council would have discretion to recommend both the LLP endorsement for 655430 and Closure of Cape Serichef test area under full rulemaking.**
- **NMFS would implement closure upon approval of final rule.**



## **Qualifying Vessels: Does the LLP endorsement Achieve the Intended Goal?**

- Qualifying entities will be LLP endorsed for 655430.
- LLP endorsement derived from vessel history, but they can be transferred.
- If LLP permit is transferred, vessel history may be disconnected from vessel.
- One vessel has sold original LLP that contained the qualifying history.



The End

January 15, 2003

**Discussion Paper of Regulatory Issues & Frameworking**  
**Amendment 73 to the Fishery Management Plan for BSAI Groundfish**  
**Additional Sideboard Measures for Bering Sea Winter Pacific Cod**

In its December 2002 meeting the North Pacific Fishery Management Council (NPFMC) requested that NMFS Alaska Region of Sustainable Fisheries and the NPFMC staff provide framework language for implementing preferred alternative 5 of Amendment 73 regarding Additional Sideboard Measures for Bering Sea Winter Pacific Cod. This paper provides preliminary framework language as well as a discussion of the implementation issues for draft framework regulations. The regulatory review for this action was to be provided to the NPFMC staff prior to the January 2003 meeting, so the Draft EA/RIR/IRFA could be updated, released to the public for review, and provide additional information for NPFMC final action.

A preferred alternative number 5 for the Amendment was adopted by the NPFMC in December of 2002 that would:

“Limit access to the directed trawl catcher vessel fishery for Pacific cod for the period of January 20 through February 25<sup>th</sup> in area 655430 to the following participants:

- (1) catcher vessels which have a history of economic dependence upon the winter Bering Sea Pacific cod fisheries, as demonstrated by average January and February deliveries of at least 250,000 lbs for 4 out of the 5 previous years of 1995-1999.
- (2) the cod exempt AFA catcher vessels
- (3) AFA non-exempt Bering Sea catcher vessels not to exceed a daily average of 10 vessels for the period of January 20 to February 25<sup>th</sup> (except for vessels qualifying under item (1) above).

“Exceeding this 10-vessel limit in 2003 or any later year by the AFA non-exempt catcher vessels will trigger an area closure to Pacific cod fishing the following year. The closure area, if triggered, is defined as the same area closed for the NMFS Cod Fishery Interaction Study (Cape Sarichef Test Area). The triggered closure would be in effect from January 20 through February 25<sup>th</sup> and would apply to all AFA cod non-exempt catcher vessels participating in the BSAI directed cod fishery (except for vessels qualifying under item (1) above).”

“The 10-vessel limit for AFA non-exempt catcher vessels and trigger mechanism shall not apply for any period from February 1 of any given year until at least 2 non-AFA vessels that meet the threshold standard of at least 250,000 lbs in 4 out of 5 years from 1995-1999 are fishing for Pacific cod in State statistical area 655430. This regulatory action will terminate upon rationalization of the BSAI Pacific cod fishery.”

## **Regulatory Approaches for an AFA LLP endorsement for 655430 and the Cape Serichef conditional closure:**

Alternative 5 of the December 2002 motion on Amendment 73 describes an action that requires enumeration of AFA and non-exempt vessels participating in "directed cod fishing" in State statistical area 655430 during the period of January 20 to February 25. If the number of these AFA Pacific Cod trawl vessels is exceeded, an area closure is triggered for those vessels in the following year. The NPFMC has asked NMFS and NPFMC staff to report on how this action might be implemented as a "frameworked" regulation. One reason for this inquiry is that the December 2002 motion specifically calls for an additional closure to be implemented in the following year, that is conditional on the number of AFA vessels participating in directed fishing in State statistical area 655430. Industry testimony suggests this pending closure in the following year is intended to create a disincentive for AFA non-exempt catcher vessels to exceed the 10 vessel average in the preceding year. The normal rule making process for an amendment of this type may often take more than the 10 months that would be available from the date that the agency had an updated count of AFA vessels in State statistical area 655430 to the start of a new season. Thus, for the closure action to have the desired impact on AFA vessel behavior, it was reported that the specific details of the action should be known in advance and implemented within one year of the AFA vessel trigger. A second reason that NMFS was asked to develop this discussion paper is that the parties who have developed this agreement informally, expressed a need for formal rulemaking to create secure incentives that could not be achieved through private contracts or other agreements among BSAI cod fishery participants.

This discussion assesses a frameworking notice and a separate full rulemaking approach to construct regulatory text for Amendment 73. Each of the two regulatory approaches includes an LLP License endorsement to allow AFA non-exempt and non AFA directed cod trawlers as well as AFA vessels that are exempt from Pacific Cod sideboards to fish in State statistical area 655430.

The frameworking notice would provide criteria for reaching the 10 vessel trigger through regulation and monitoring of the directed fishing in State statistical area 655430, as well as providing notice for a specific closed area for these vessels occurring in the following year. The need for closing the area would be determined by monitoring and would be announced by notice to the public. We will explain that this approach is likely to result in a conventional and full rulemaking process that the NPFMC and industry would like to avoid. **This is in part due to the January 13, 2003 opinion provided by the Ninth Circuit Court of Appeals on the use of frameworking in NRDA v NMFS that appears likely to eliminate any practical consideration of a frameworked notice for alternative 5 of Amendment 73.** The full rulemaking approach would consist of only monitoring and notice to NPFMC if an AFA non-exempt directed fishing ceiling has been reached (this approach is discussed in the Appendix). This would lead to full rulemaking to implement the closure, unless some other preferred alternative was selected.



Both regulatory approaches, a frameworking notice, and full rulemaking approach would require a new LLP endorsement allowing the anticipated 3 non-AFA cod trawl vessels and 1 AFA non-exempt vessel that made "deliveries of at least 250,000 lbs for 4 out of the 5 previous years of 1995-1999" to fish for Pacific Cod in State statistical area 655430 for the period of January 20 to February 25. All AFA cod exempt vessels would also receive an LLP endorsement to operate in this area during this period. To the extent that some of the crowding in 655430 were to extend beyond AFA causes, the NPFMC staff analysis has included data and analysis in the EA/RIR/IRFA for Amendment 73 that is supportive of the general Magnuson-Stevens Act authority on limited access.

Much of the process for implementing an LLP endorsement of this type is already in regulation in the endorsement sections under 50 CFR 679.4. NMFS would implement the new endorsement under a one-time closed application process that may consist of as little as a notice of eligibility or ineligibility for BSAI trawl vessels and opportunity to appeal. As well, issuance of interim permits and appeals for the qualifying non-AFA operators, and to Pacific Cod exempt operators could utilize the existing implementation tools under the LLP program. Other options for a completely stand alone permit have been discussed, but an independent permit appears to impose more burden than utilizing an endorsement on the existing LLP program.

#### General Description of Frameworked Regulatory Approach to AM 73 requested by the NPFMC

In general, this approach would consist of (a) an additional LLP endorsement to allow directed fishing of qualifying vessels into State statistical area 655430 and (b) rules to establish frameworked participation criteria (c) inseason monitoring, and (d) and potentially, a noticed closure by the Regional Administrator .

A "closed" regulatory framework may be thought of as a specific action such as a closure for a certain period of time, area, and gear type that, when triggered, is fixed, and not modified. In the application we envisioned for Amendment 73, new rules would be required to modify AFA sections of 50 CFR 679 that require the Regional Administrator to close the Cape Serichief experimental area if the trigger is reached. Under the closed framework approach, we have investigated whether this closure could be implemented by notice to the fleet, as opposed to the normal rulemaking process. Monitoring of the participation of the AFA and non-AFA Pacific cod vessels in State statistical area 655430 would be required under any rulemaking option. This monitoring and reporting of whether a trigger was reached along with the explicit closure action would be intended to provide a disincentive to AFA non-exempt vessels in the directed Pacific Cod fishery from exceeding the 10 vessel average in this area during this period.

#### **Issues related to implementation of a "Frameworking notice" for alternative 5.**

*Issue 1. Frameworking Issues: Could statute provisions of the AFA (Section 211) provide sufficient legal coverage to pursue a closed regulatory framework, similar to what has been used for some conservation actions? There are other examples of this in 50 CFR 679.*

Answer: A central question raised by the NPFMC is whether regulatory frameworking can be applied to the portion of this action dealing with the conditional closure of Cape Serichef under Amendment 73. The Amendment 73 action is similar to questions posed and direction provided to the NPFMC in the Letter of November 25, 2002 from James W, Balsiger Re: Amendments 48/48 to Fishery Management Plans (FMPs) for the Groundfish Fisheries of the Bering Sea and Aleutian Islands Management Area and the Gulf of Alaska that would revise the current process for setting harvest specifications and related management measures for new fishing years. In that instance, the advice from NOAA GC for Amendments 48/48 was for the NPFMC to postpone final action until the issues surrounding the actions of the 9<sup>th</sup> Circuit Court of Appeals were resolved. On January 13, 2003 Judge Rymer of the 9<sup>th</sup> Circuit Court of Appeals ruled on one component of the Appeal. At the date that the Amendment 73 discussion paper was finalized, NMFS has not had an opportunity to thoroughly review the ruling, but it does not appear to be favorable to the NMFS request for an institutional waiver of prior notice and comment in dealing with TAC specifications. Thus, we are not confident that it will provide any relief to the use of a frameworked notice under Amendment 73.

In anticipation that it may apply to this action we have reviewed 50 CFR 679.25 Inseason adjustments (c) procedures, which includes criteria for an application of rulemaking where there are some adjustments to full rulemaking. NMFS considered whether this regulatory approach may provide some relief from the full rulemaking process.

#### 50CFR 679.25

- (1) No inseason adjustment issued under this section will take effect until
  - (i) NMFS has filed the proposed adjustment for public inspection with the Office of the *Federal Register*; and
  - (ii) NMFS has published the proposed adjustment in the *Federal Register* for public comment for a period of 30 days before it is made final, unless NMFS finds for good cause that such notification and public procedure is impracticable, unnecessary, or contrary to the public interest.
- (2) If NMFS decides, for good cause, that an adjustment is to be made without affording a prior opportunity for public comment, public comments on the necessity for, and extent of, the adjustment will be received by the Regional Administrator for a period of 15 days after the effective date of notification.

The fact that this procedure is located within the section on inseason adjustments is relevant, as the Amendment 73 (alternative 5) is not likely to be considered an inseason action due to the 9 to 10 month lag period between the trigger and the closure action phase, and we suspect that it would be a challenge to meet the "good cause" criteria. The closure action would also occur in a new Federal fishing year, that could result in a new TAC, a different roe season, and a changing need to implement a closure of the Cape Serichef experimental area.

Secondly, even if this abbreviated procedure were used, it is not likely to reduce or shorten the rulemaking process in any significant way, as all the analytical requirements of the National Environmental Policy Act, the Regulatory Flexibility Act, and Executive Order 12866 would still apply, as well as the requirement of the Administrative Procedure Act (APA).

2. *Notice issues: What is our obligation to “notice” non-exempt AFA vessels and what process is desirable to limit legal challenge of the subsequent year’s area closure if the trigger is reached or exceeded? Could NMFS rely on AFA inshore cooperatives to monitor themselves (their directed fishing in State statistical area 655430) and assume they know when they are approaching the trigger vessel number in period 1 (January 20 to January 31)? In period 2 (February 1 to February 25), we assume we would be obligated to notice non-exempt AFA vessels when the accounting period starts (i.e., when 2 or more non AFA qualified vessels fish in the area in the time period).*

Answer: This question is directly linked to question 1 on frameworking, where, “notice” of an action, leading to a management measure such as a seasonal closure appears to require NMFS to go through the full rulemaking process. We are unaware of any regulation that would allow NMFS to enforce a closure based on the use of industry tracking of their own behavior. We investigated the possibility of using an interim final rule in the event that NMFS could establish good cause for waiving the public notice and comment requirements of APA. This notice and comment requirement is not often waived and requesting such action cannot be considered until, NMFS fully developed a rule that demonstrated the need for the specific closure, and analyzed it’s effects.

Implementing Amendment 73 (alternative 5) through a closed regulatory notice, specifically the closing of Cape Serichief to AFA non-exempt directed fishing, will require an appeals process including:

- (1) NMFS eligibility determinations for the LLP endorsement are subject to appeal..
- (2) A NMFS action to close the Cape Serichief experimental area in response to monitoring data would be subject to appeal. The concern is that if an appeal delayed the closure action, it could easily negate the usefulness of the proposed amendment.

#### **Issues related to both implementation of a “Frameworking notice” or full rulemaking for alternative 5**

*Issue 1. Monitoring, Tracking and inseason management issues for the 10 vessel Trigger: How would NMFS track the average number of non-exempt AFA vessels in either the Jan 20 - Jan 31 period and Feb 1 to Feb 31?*

Answer: The December 2002 motion identifies two accounting periods during which NMFS would monitor the average number of non-exempt AFA vessels in State statistical area 655430: The first period is Jan 20 until Jan 31. The second occurs from Feb 1-25. If at any time during the aggregate of these two periods the average number of non-exempt AFA vessels (directed fishing for Pacific cod in 655430) exceeded a specified average number of vessels, a follow up management action would occur in the subsequent fishing season.

We propose to use an automated data query from the electronic fish ticket data that is aggregated over a 24 hour period which would identify the presence of a unique vessel (one of the non-AFA qualifying vessels) that was directed fishing in State statistical area 655430 between Feb 1 and Feb 25. This computation would occur at some defined period on each day. If after the landing of cod exceeded some specific proportional threshold for that vessel (20 percent by weight for example), it would be counted as a vessel day of cod fishing between the trip start date and the trip landing date in State statistical area 655430. Finally, the VMS data would be compared with each of those days that were determined to be a proxy for a directed cod fishing day, and where there was both a VMS observation, and an estimated cod fishing day, a count of one fishing day would be recorded. This method could be applied to both AFA and non AFA vessels in State statistical area 655430.

*2. Enforcement Issues: Once the trigger of 10 average vessel days have been met, how would NMFS propose to enforce any given closure of the Cape Serichef experimental area?*

Answer: The closing of the Cape Serichef experimental area to directed fishing for AFA non-exempt vessels, as an incentive to limit crowding in State statistical area 655430, will be difficult to enforce. The Cape Serichef area is a small fishing area that overlaps sections of State statistical area 655430, 655410 and 645434. Unlike the fish ticket data system that links landings to State statistical areas, there is no specific data collection within the proposed Cape Serichef closure area that would differentiate between vessels that land within the Cape Serichef zone, or outside. Participation in directed or non-directed fishing activity would also be difficult to detect. Further, while the act of directed fishing is generally defined as an accounting of the predominant species caught on a vessel at any time, in practice (for catcher vessels) this may only be computed after a landing is made. Further, directed fishing is determined by a percent of a certain species retained on board at any one time during the fishing trip. There is also no real-time record of this directed fishing activity. With a fundamental inability to break out landings between areas within the Cape Serichef closure area, and other areas of 655430, enforcement agents would require more information and possibly a specific Cape Serichef reporting area in logbooks to have some reasonable confidence of compliance with the closure. AFA vessels may not have an incentive to comply with the 10 vessel day trigger if the closure action cannot be sufficiently enforced.

**A potential fix for this constraint in the FMP text would be to allow for closing of the Cape Serichef experimental area to AFA catcher vessels for any fishing activity once the trigger had been reached.**

*3. Computing the Trigger: Could the trigger for the 10 vessel day average be computed in more than one way?*

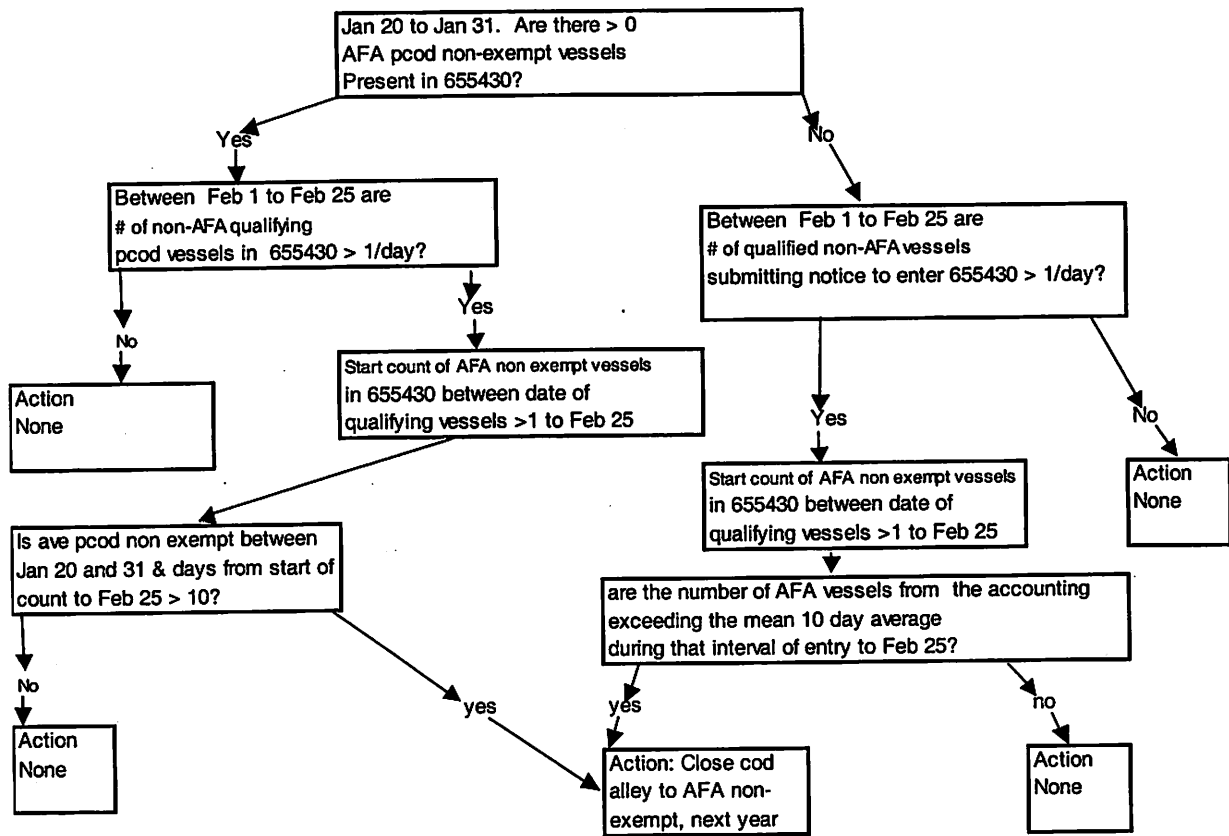
Answer: Assuming that a verifiable measure of a vessel directed fishing day is adopted, the triggering mechanism of both AFA non-exempt vessels and non-AFA Pacific Cod vessels described in the December 2002 NPFMC motion on Amendment 73 could be interpreted in more

than one possible manner. There are two separate conditions listed whereby AFA non-exempt vessels could trigger the 10 vessel daily average. One condition is under item (3) where the trigger could extend between the dates of January 20 and February 25, and in the last paragraph the trigger would not be reached until an additional condition is met of having more than 1 AFA non-exempt trawl catcher vessel in State statistical area 655430 on or after the date of February 1. It is possible to interpret the NPFMC motion on Amendment 73 as exceeding the trigger of more than 10 vessels per day during the interval of January 20 to January 31, but our discussions with industry suggest they did not intend to trigger the Cape Serichef closure without considering the entire interval from January 20 to February 25. Given that the number of AFA vessels triggering the 10 day average limit must occur as an average between the days of January 20 and February 25, then there appear to be 2 ways to account for the 10 vessel limit (Figure 1). The approach suggested by industry was for AFA catcher vessel directed fishing in this area to be accounted for by aggregating two time intervals. The first interval would count the number of AFA vessels per day from January 20 to January 31. For this first period the numerator would be the total number of AFA non-exempt directed fishing catcher vessels accruing over that interval, while the denominator would consist of 12 days irrespective of the number of non-AFA qualified catcher vessels in State statistical area 655430. In the second interval, the enumeration of vessels would begin on the first day that 2 qualified non-AFA cod catcher vessels appeared in 655430. The enumeration of the number of days (on the denominator for the second interval) would begin from the first day that 2 qualified non-AFA cod catcher vessels appeared in State statistical area 655430 on or after Feb 1 and end on Feb 25. The number of vessels from the two intervals would be aggregated together. The number of days from the two intervals would also be aggregated together.

There is, however, one variant on this approach. Some parties involved in negotiating this sideboard provision, are also considering a second way of computing the denominator (the number of days available to fish for the second interval). This second method would count the denominator as the number of days from Feb 1 to Feb 25, irrespective of which day, during that interval, the 2 qualifying non-AFA Pacific cod vessels were determined to be involved in "directed fishing" in State statistical area 655430 after Feb 1.

Figure 1.

**Flowchart of Triggers and actions to Implement  
10 vessel Average and Closure of Cape Serichef in following Year  
For Amendment 73**



## Potential changes to 50 CFR 679

### 679.2 Definitions

The December 2002 motion on AM 73 refers to vessels that are participating in “directed fishing” in the Pacific cod fishery occurring in State statistical area 655430. For groundfish catcher vessel operations there is not a “real time” accounting of when directed fishing is occurring on a groundfish species by time and area. Currently, determinations of whether a vessel is participating in directed fishing for a species may occur on a post landing basis. This presents a challenge to develop a framework approach to this action, if we need to enumerate or notify AFA vessels that a given vessel is being counted in the directed fishing group within State statistical area 655430. The same problem may also apply to the non-AFA vessels that can trigger the accounting between February 1 and February 25 when one of these vessels appears in State statistical area 655430. The approach suggested in the draft regulatory text section of this discussion document is to assert that a Pacific cod vessel fishing in State statistical area 655430 for the purpose of this accounting exercise has engaged in “directed fishing” when it’s landing composition exceeds a stated proportion of Pacific cod, and it has been detected on VMS in the stat area on a particular day between the start and end of a fishing trip.

### 679.4 Permitting

The initial authorization for qualifying directed Pacific cod fishing vessels would be developed through the permitting sections of 50 CFR 679.4 regardless of whether the frameworked notice or the full rulemaking approach is used. No anticipated changes, however, in the permitting section are required for the frameworking components of Alternative 5 for Amendment 73. As previously noted, this step would be required under either the frameworking full rulemaking approach. The implementation time required to obtain SF and OMB approval of a new LLP endorsement like this is often time consuming, and may be expected, by itself, to delay the implementation of the AM 73 additional AFA sideboard program to 2004.

### 679.22 Closures:

The December 2002 NPFMC motion for Amendment 73 proposes 2 primary regulatory actions, the first is a LLP licensing action (that we propose through a LLP Cod endorsement of AFA & non-AFA vessels to access 655430). The second is a delayed closure action directed to a sub set area of State statistical area 655430 and adjacent State statistical areas that prohibits certain vessels from directed fishing in a prohibited area within 655430 when a directed fishing ceiling has been exceeded (determined by exceeding the 10 vessel daily average). To define the landings criteria based qualification of AFA and non AFA vessels to State statistical area 655430, text similar to the language identified under the draft regulatory text section of this document could be adopted.

## Participation Standard under AFA Regulations:

The Amendment 61/61/13/8 (final as of December 30, 2002) created a new regulatory section 679.64. This section describes the authority of the Regional Administrator to place harvest limits on sideboard species for AFA catcher vessels.

*From 679.64 (b) Harvesting sideboards for AFA catcher vessels.* The Regional Administrator will restrict the ability of AFA catcher vessels to engage in directed fishing for other groundfish species to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the directed pollock fishery.

These limits are presumed to extend to closure of specific areas to AFA catcher vessels. At this time, any criteria for closing the Cape Serichef experimental area (Figure 2.) would likely be included under this section of 679.64. We have drafted some regulatory language as an example of a closed frameworked regulation, see: Selected Draft Regulatory Text for AM 73, but **have serious reservation regarding whether the text would be approved in a formal regulatory review because of the previously stated constraints and Court action on the use of “frameworking” in regulations.** Even if the use of a frameworked notice under some were feasible, it is anticipated that it would have almost no impact on the most time consuming portions of rulemaking under the Administrative Procedures Act. During the course of our review process we drafted some hypothetical text, but it is presented as text with ~~strikeout~~, reflecting our considerable lack of confidence that this approach can be implemented.

## Monitoring, Notice, and Recordkeeping/ Reporting Considerations: *Monitoring of AFA vessels*

As previously noted, the NPFMC December 2002 motion on Amendment 73 describes a program to “Limit access to the directed trawl catcher vessel fishery for Pacific cod....”. This focus on directed fishing of Pacific cod in State statistical area 655430 would create some additional verification of the intent of vessel operations if AFA vessels are to be informed that their behavior could result in a subsequent closing of the Cape Serichef experimental area. Industry testimony provided in the December meeting suggests that a primary purpose for implementing the regulation is to provide a verifiable and enforceable trigger and closure action to insure that certain non-AFA vessels are protected from preemption from AFA vessels. To be verifiable and enforceable, the regulations would require a concise identification and accounting of which vessels were meeting the criteria for “directed fishing” in State statistical area 655430 and when they would be included in a directed fishing observation, otherwise the measure may have no higher compliance than what could be achieved through a private contract. A description of this approach was included in Issue 1 under, Issues related to both implementation of a “Frameworking notice” or full rulemaking for alternative 5. If a frameworking notice approach were attempted for Amendment 73 (alternative 5), it is probable that prompt notice of how close AFA vessels were reaching the trigger would be required. We have not determined if this type of notice consideration would result in any specific regulations at this time.



**Selected Draft Regulatory Text for AM 73**

***Proposed text 679.2 Definitions:***

*Directed Pacific Cod fishing day in State statistical area 655430 Jan 20 to Feb 25:* An AFA or Non-AFA catcher vessel is determined to be directed fishing in directed Pacific Cod fishing day in State statistical area 655430 during the period of January 20 to February 25 if the Regional Administrator determines:

- through electronic fish ticket data that the vessel has reported cod landings from State statistical area 655430 during any day between the trip start date and landing date, representing more than 20% of total landing weight during that period.
- and VMS data identifies a single observation of the vessel present at any time between the 0000 hours and 2400 of any single day.

***Proposed text for 679.4 (k) (4) (ii):***

<u>A groundfish license will be assigned...</u>	<u>If...</u>	<u>During the period...</u>	<u>From a vessel in vessel length category</u>	<u>And if the license is designated as a...</u>
<u>(I) A Bering Sea area exemption to Pcod closures of State statistical area 655430 from Jan 20 to Feb 25</u>	<u>Under AFA the permit is endorsed as BSAI Pcod or exempt.</u>  <u>And</u> <u>average January and February deliveries of at least 250,000 lbs or</u>	<u>for 4 out of the 5 previous years of 1995-1999</u>		<u>catcher vessel, trawl gear, and designation for directed fishing of BSAI Pacific Cod</u>

***Proposed text for Framework option under 679.22 Closures:***

It may also be appropriate to include some text under 679.22 closures such as:

*LLP cod endorsement (cod landings based):* The Cape Serichief experimental area will be closed to BSAI AFA Trawl catcher vessels from January 20 to February 25 unless exempted from the closure through a Bering Sea area exemption to Pcod closures of State statistical area 655430 from Jan 20 to Feb 25 under 679.4 (k) (4) (ii). This closure does not apply until the criteria for AFA vessels in State statistical area 655430 have reached the threshold number of average vessel days for non-exempt AFA vessels under 679.64 in the previous year and the closure has been implemented through rulemaking.

**Proposed Draft text for Framework option under 679.64:**

Note: This text is presented as strikethrough. NMFS anticipates that that a Frameworking notice approach to Amendment 73 is unlikely to be approved.

~~(c) Restrictions on AFA non-exempt trawl catcher vessels in Cape Serichef experimental area~~ The Regional Administrator will prohibit AFA catcher vessels from fishing the area known as Cape Serichef experimental area (identified as Alternative 4 of the experimental area in the Regulatory amendment for the closure of the Cape Serichef) by notification in the *Federal Register* if in the previous year:

~~(1) The Regional Administrator determines the daily average number of AFA catcher vessels (not counting the vessels meeting the qualifying cod landings criteria under 679.4 (k) (4) (ii)) that are participating in "directed fishing", under 679.2, in State statistical area 655430 on the dates of January 20 to January 31,~~

~~and~~

~~(2) The Regional Administrator determines, after the date of Feb 1, that the daily average number of AFA catcher vessels (not counting the Non-AFA vessels meeting the qualifying cod landings criteria), from the date at which more than 1 of the non-AFA trawl vessels meeting the qualifying cod landings criteria are "directed fishing" in 655430 through February 25, has exceeded 10 vessels over the aggregate of the periods from January 20 to February 25.~~

~~or~~

~~(1) The Regional Administrator determines, there are no AFA catcher vessels (not counting the vessels meeting the qualifying cod landings criteria under 679.4 (k) (4) (ii)) that are participating in "directed fishing" under 679.2, in 655430 on the dates of January 20 to January 31,~~

~~and~~

~~(2) The Regional Administrator determines after the date of Feb 1, that the daily average number of AFA catcher vessels (not counting the Non-AFA vessels meeting the qualifying cod landings criteria), from the date at which more than 1 of the non-AFA trawl vessels meeting the qualifying cod landings criteria are "directed fishing" in 655430 through February 25, has exceeded 10 vessels.~~

## Appendix 1.

### Full Rulemaking Approach:

This approach would consist of a permit or adding new endorsement language to allow AFA non-exempt and non AFA directed cod trawlers in State statistical area 655430 and monitoring and notice to NPFMC that the AFA non-exempt participation ceiling is reached.

This approach would (as in Approach 1) also require 50 CR 679 LLP endorsement text to allow the anticipated 3 non-AFA cod trawl vessels and 1 AFA vessel making "deliveries of at least 250,000 lbs for 4 out of the 5 previous years of 1995-1999" into State statistical area 655430. All AFA cod exempt vessels would receive a permit or LLP endorsement to operate in this area during this period. Unlike Approach 1, this approach would not use frameworking or an abbreviated regulatory action outside of NPFMC consideration. It would require a full NPFMC initial and final review along with Regulatory amendments. In this approach, NMFS could implement the initial closed area exemption based upon the delivery criteria. It would also implement further regulations to monitor the fishery entry and exit from State statistical area 655430, and then report the findings to the NPFMC (see Closure section for text). Ultimately, this data would be made available to industry to self regulate directed fishing till the end of the AFA vessel accounting period. There would only be a closure of Cape Serichef experimental area if deemed necessary by the NPFMC through normal rule making, requiring Regulatory amendments.

### advantages

This approach would still achieve the objective of having some initial rule based permit or LLP endorsement for cod vessels that could operate in State statistical area 655430. It would still provide all of the necessary monitoring and identification of any relevant triggers to industry and the NPFMC. There is little if any concern by NOAA GC that it might violate the intent of frameworking or have other PRA issues.

### disadvantages

If the triggers in State statistical area 655430 are reached, the NPFMC would have to recommend further action that NMFS would subsequently initiate through rulemaking. This may not provide the magnitude of administrative simplicity that the NPFMC had intended with it's December 2002 motion. It would not provide an explicit closure action for the industry. There is considerable uncertainty as to whether the closure of the Cape Serichef experimental area between January 20 and February 25 could be implemented before the next season began.

## Appendix 2

### Accounting for the AFA vessel trigger.

1. This assessment assumes that the accounting of the 10 vessel daily average for the period between January 20 and January 31, is computed as the number of vessels in State statistical area 655430 divided by 12.

For example, if 11 AFA Pacific cod non-exempt catcher vessels appear on each day from January 20 to 31, in 655430 then the daily average number of vessels is 11. This vessel average would not by itself trigger a closure for AFA vessels in the Cape Serichef research closure area because it does not consider the entire period from January 20 to February 25.

2. The accounting of the 10 vessel daily average for the period of January 20 to February 25 may be reached in the following two ways depending on the method used, for example:

(A) given that 2 or more qualifying non-AFA vessels fished in 655430 on February 25, with 20 AFA non-exempt Pacific cod vessels, the ten day average would also not be exceeded if each day from January 20 to February 25 were counted, producing a denominator of 37.  $(11 \text{ vessels} \times 12 \text{ days} + 20 \text{ vessels}) / 37 \text{ days}$  or 4.378 average vessel days,

(B) or, if 2 or more qualifying non-AFA vessels fished in 655430 on February 25, with 20 AFA non-exempt Pacific cod vessels, the ten day average would be exceeded if **the 12 days from January 20 to 31 were counted plus an additional day from the date that the 2<sup>nd</sup> qualifying non-AFA vessel showed up on February 25.**  $(11 \text{ vessels} \times 12 \text{ days} + 20 \text{ vessels}) / 13 \text{ days}$  or 11.69 average vessel days (Table 1).

3. The accounting of the 10 vessel daily average for the motion section (c), during this period from Feb 1 to Feb 25, is computed from the date at which more than 1 of the non-AFA or AFA vessels meeting the threshold standard that has participated in directed fishing in State statistical area 655430, to Feb 25. One interpretation of the motion, is that the trigger may be reached during this interval even if there are no AFA vessels appearing between January 20 to January 31.

For example, if 20 vessels appear on February 25, and 2 qualifying non-AFA vessels appear on February on Feb 25 then the daily average number of vessels is 20 (20 vessels/1day).

Table 1. Examples of how a 10 vessel average trigger could be estimated using each of the alternative approaches suggested by industry. Some would trigger the Cape Serichef experimental area closure.

**An example of how the 10 vessel average trigger could be estimated**

	Number AFA non-exempt Vessels	Number of qualifying non-AFA			AFA non-exempt Vessels	qualifying non-AFA		
20-Jan	11	0			20-Jan	0	0	
21-Jan	11	0	Mean	Mean	21-Jan	0	0	Mean
22-Jan	11	0	4.108	11.692	22-Jan	0	0	1.667
23-Jan	11	0	Not exceeded	Exceeded	23-Jan	0	0	Exceeded
24-Jan	11	0	4.108	11.692	24-Jan	0	0	1.667
25-Jan	11	0			25-Jan	0	0	
26-Jan	11	0			26-Jan	0	0	
27-Jan	11	0			27-Jan	0	0	
28-Jan	11	0			28-Jan	0	0	
29-Jan	11	0			29-Jan	0	0	
30-Jan	11	0			30-Jan	0	0	
31-Jan	11	0			31-Jan	0	0	
1-Feb	0	0			1-Feb	0	0	
2-Feb	0	0			2-Feb	0	0	
3-Feb	0	0			3-Feb	0	0	
4-Feb	0	0			4-Feb	0	0	
5-Feb	0	0			5-Feb	0	0	
6-Feb	0	0			6-Feb	0	0	
7-Feb	0	0			7-Feb	0	0	
8-Feb	0	0			8-Feb	0	0	
9-Feb	0	0			9-Feb	0	0	
10-Feb	0	0			10-Feb	0	0	
11-Feb	0	0			11-Feb	0	0	
12-Feb	0	0			12-Feb	0	0	
13-Feb	0	0			13-Feb	0	0	
14-Feb	0	0			14-Feb	0	0	
15-Feb	0	0			15-Feb	0	0	
16-Feb	0	0			16-Feb	0	0	
17-Feb	0	0			17-Feb	0	0	
18-Feb	0	0			18-Feb	0	0	
19-Feb	0	0			19-Feb	0	0	
20-Feb	0	0			20-Feb	0	0	
21-Feb	0	0			21-Feb	0	0	
22-Feb	0	0			22-Feb	0	0	
23-Feb	0	0			23-Feb	0	0	
24-Feb	0	1			24-Feb	0	1	
25-Feb	20	2			25-Feb	20	2	

# PUBLIC TESTIMONY SIGN-UP SHEET FOR AGENDA ITEM C-5(b) Amendment 73

PLEASE SIGN ON THE NEXT BLANK LINE.  
LINES LEFT BLANK WILL BE DELETED.

	NAME	AFFILIATION
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2.	Dale B. ... Kestell ...	AGDB
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C-56  
Julie Boney

PUBLIC REVIEW DRAFT

Table 4.2 Summary of Pacific Cod Harvests in Area 517 during January/February by Fleet Category from 1995-2002.

fleet category	1995	1996	1997	1998	1999	2000	2001	2002
<b>Non-AFA trawlers</b>								
number of vessels	4	6	4	3	3 <sup>(1)</sup>	3 <sup>(1)</sup>	3 <sup>(1)</sup>	6
total harvest of P. cod (lbs)	3,741,904	2,340,070	3,124,747	nd	1,513,995	1,839,519	1,274,503	1,776,815
average harvest of P.cod (lbs)	935,476	390,011	781,186	nd	504,665	613,173	424,834	296,136
<b>AFA P. cod exempt trawlers</b>								
number of vessels	7	5	5	7	6	7	7	9
total harvest of P. cod (lbs)	9,464,963	7,278,817	10,817,524	11,680,027	8,824,233	7,636,980	3,010,191	7,846,385
average harvest of P.cod (lbs)	1,352,137	1,455,763	2,163,504	1,668,575	1,470,705	1,090,997	430,027	871,821
number of qualified vessels								
<b>AFA trawlers w/o P. cod exemption</b>								
number of vessels	4	3	27	7	23	35	20	13
total harvest of P. cod (lbs)	630,268	nd	10,091,872	7,362,208	9,344,903	16,094,582	2,696,282	4,537,773
average harvest of P.cod (lbs)	157,567	nd	373,773	1,051,744	406,300	459,845	134,814	349,059

data source: from NPFMC BSAI Amendment 73 data base, November 2002.

nd means the catch is non-disclosable due to confidentiality concerns.

<sup>(1)</sup>Release of confidential data approved by specific authorization to the NPFMC by these vessel owners and permit holders.

Table 4.3 Summary of Pacific Cod Harvests in Statistical Area 655430 during January/February by Fleet Category from 1995 to 2002.

fleet category	1995	1996	1997	1998	1999	2000	2001	2002
<b>Non-AFA trawlers</b>								
number of vessels	4	6	4	3	3 <sup>(1)</sup>	3 <sup>(1)</sup>	3 <sup>(1)</sup>	4
total harvest of P. cod (lbs)	3,422,081	2,284,005	3,117,301	nd	1,487,853	1,839,519	1,274,503	nd
average harvest of P.cod (lbs)	855,520	380,667	779,325	nd	495,951	613,173	424,834	nd
<b>AFA P. cod exempt trawlers</b>								
number of vessels	7	5	5	7	6	7	7	8
total harvest of P. cod (lbs)	9,360,601	6,933,177	10,817,524	11,421,781	8,824,233	7,535,979	3,010,191	7,746,323
average harvest of P.cod (lbs)	1,337,228	1,386,635	2,163,504	1,631,683	1,470,705	1,076,568	430,027	968,540
number of qualified vessels								
<b>AFA trawlers w/o P. cod exemption</b>								
number of vessels	4	3	26	7	23	35	20	15
total harvest of P. cod (lbs)	630,268	nd	9,773,871	7,312,154	9,338,602	15,905,042	2,671,397	nd
average harvest of P.cod (lbs)	157,567	nd	375,918	1,044,593	406,026	454,430	133,570	nd
number of qualified vessels								

data source: from NPFMC BSAI Amendment 73 data base, November 2002.

nd means the catch is non-disclosable due to confidentiality concerns.

<sup>(1)</sup>Release of confidential data approved by specific authorization to the NPFMC by these vessel owners and permit holders.

Table 4.3 shows the participation for the non-AFA fleet is relatively constant throughout the 1995 to 2002 period, ranging from three to six vessels in area 655430. The total annual landings of Pacific cod for this group was highest in 1995. The 2001 average harvest for non-AFA catcher vessels of 424,834 pounds.