AGENDA C-5(a)
Supplemental
OCTOBER 2013

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SEP 24 2013

September 12, 2013

Mr. Eric A. Olson, Chair
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Dear Chairman Olson: Agenda Item C-5(a) GOA Trawl Bycatch Management

The communities of Kodiak Island have reviewed the eight public proposals for comprehensive management of bycatch in the Gulf of Alaska (GOA) groundfish trawl fisheries that are published on the NPFMC website. Five of those deal most specifically with the inshore trawl fisheries in the Central GOA surrounding Kodiak and these received the bulk of our attention. We believe that these five proposals provide a good, broad mix of goals, objectives, elements, options, and concepts with which to begin the design of an effective bycatch management program.

The proposal submitted by the Alaska Groundfish Databank, the Alaska Whitefish Trawlers Association and the Pacific Seafood Processors Association follows patterns of previous catch share programs in the Gulf of Alaska and the Bering Sea, with a focus on ending the race for target fishery catch in order to provide an opportunity for individuals and cooperatives to take greater care in avoiding bycatch. The AGDB/AWTA/PSPA proposal, which would issue catch shares to owners of eligible vessels holding valid LLPs and who belong to an established cooperative, sets a framework for possible alternatives. For example, catch shares could be issued to harvesters and processors instead of solely to harvesters through the intermediary of cooperatives, as outlined in the proposal by Pacific Seafoods. Or some quota share could also be issued to communities, to compensate for surplus infrastructure, as outlined by Plesha/Riley.

A separate proposal submitted by Americans for Equal Access focuses directly and solely on bycatch, rather than on target species. It contemplates annually assigning portions of prohibited species catch (PSC) limits and maximum retainable amounts (MRAs) to individual fisheries and their harvesting participants, rather than issuing more permanent catch shares to private individuals.

Yet another approach is put forward by the Alaska Marine Conservation Council, the Gulf of Alaska Coastal Communities Coalition, the Aleutians East Borough and others. Their proposal calls for the

issuance of any target fishery and bycatch shares to a community fishing association (CFA) comprising representatives of local governments, industry, and conservation interests. The CFA would then apportion annual harvesting opportunities based upon a formula including catch history, number of harvesting participants, and specified performance standards.

We see value in more fully developing and analyzing the benefits and impacts of each and all of these approaches. The communities of Kodiak appreciate the need to devise a comprehensive program to manage the bycatch of the groundfish trawl fishery, but we need also to protect our social and economic wellbeing. As noted in our previous letters to the Council, and in formal resolutions passed by the Kodiak City Council and the Kodiak Island Borough, we request that the NPFMC make sure that any management programs not only provide effective controls on bycatch, but also maintain or increase target fishery landings, maintain or increase employment opportunities, provide opportunities for value-added processing, maintain opportunities for fishermen and processors to enter the fishery, minimize any adverse effects of consolidation in the harvesting or processing sectors, maximize active participation by owners of vessels and fishing privileges, and maintain the economic strength and vitality of the Kodiak waterfront.

However you choose to proceed, the local governments of Kodiak will continue to work towards and will need assurances that our community interests, economy and wellbeing will be protected and enhanced.

We appreciate your consideration of our recommendation that each of the various proposals be further developed and analyzed, and we look forward to continued cooperation in the management of groundfish fisheries in the central Gulf of Alaska.

Sincerely,

Jerome M. Selby, Mayor
Kodiak Island Borough

Pat Branson, Mayor
City of Kodiak

Alaska Marine Conservation Council

September 23, 2013

Mr. Eric Olson, Chair
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, AK 99501

Re: Agenda Item C-5(a) GOA Trawl Bycatch Management

Dear Chairman Olson and Council members:

We appreciate the opportunity to comment on the issue of GOA Trawl Bycatch Management. We submit these comments on behalf of the Alaska Marine Conservation Council (AMCC) and the Gulf of Alaska Coastal Communities Coalition (GOAC3). Both of our organizations are non-profits committed to the long-term ecological health and social and economic well-being of Gulf of Alaska communities. AMCC is dedicated to protecting the long-term health of Alaska's oceans and sustaining the working waterfronts of our coastal communities. Our members include fishermen, subsistence harvesters, marine scientists, small business owners and families. GOAC3 is dedicated to protecting the long term socio-economic health of the smaller fishery dependent communities of the Gulf of Alaska.

Together, our organizations as well as other Gulf of Alaska community leaders, developed and submitted a proposal for a Gulf of Alaska trawl bycatch management program. Our proposal, section 3.2 in the discussion paper, presents a concept in which the fishing communities are at the center of the catch share program and 100% of the catcher vessel quota is allocated to a Community Fishing Association (CFA). Our proposal, developed by a number of Gulf of Alaska community residents, presents a new paradigm for a catch share program which puts fishing communities at the center of the program. Allocating 100% of the quota to a Community Fishing Association (CFA) composed of fishermen, processors, city governments, and community members is the critical starting point for this proposal. By allocating directly to the CFA, community concerns, including areas such as bycatch reduction, crew shares and seafood deliveries and values among others, can be addressed directly by the CFA. The decision for the CFA to hold the quota ensures that quota will be anchored in the community and the problems associated with a transferable individual ownership system of capital flight, rapid vessel consolidation, absentee ownership of quota and high leasing fees can be avoided.

We appreciate the thorough examination of the proposals the Council has received contained in this discussion paper. This is an important and deliberate step in outlining the Council's progress

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forward on this matter. The paper outlines a set of questions and issues which will need to be addressed in regards to our proposal. We have carefully reviewed these issues and do not see any of them as insurmountable. All of these issues can be addressed as we work with the Council to further develop the CFA concept and have a viable alternative on the table which works for fishers, processors, crew, other stakeholders and the community.

The attached memo addresses a set of questions outlined in the memo related to the Council's ability to allocate 100% of the quota to a CFA. The memo, from George Mannina, an attorney with Nossaman LLP and fisheries law expert, addresses the specific questions of whether a 100% allocation to a CFA is a permissible delegation of NMFS's authority, whether it complies with the proscription in National Standard 4 against an allocation of excessive shares to an entity and whether it complies with National Standard 4's requirement that allocations be fair and equitable. The memo concludes that:

1. a 100% allocation of harvesting rights to a fishing community will be judged against the proscription in National Standard 4 against an allocation of excessive shares to an entity but, **if the administrative record justifies the 100% initial allocation to a geographic area and that initial allocation will be reallocated pursuant to standards approved by the Council and the Secretary, it is likely that a 100% allocation would not be deemed excessive;**

2. a 100% initial allocation of harvesting rights to a fishing community will also be judged against the requirement in National Standard 4 that the allocation be fair and equitable but, **if the administrative record adequately justifies the allocation as rationally connected to the goals of the MSA and the FMP, it is likely the allocation would be found to be fair and equitable**; and

3. **Allowing the fishing community to receive and reallocate 100% of the harvesting rights would not be an impermissible delegation of authority from the Council and the Secretary** given that Congress implicitly approved the delegation of authority and that the Council and the Secretary have approved the standards used for the reallocation.

Allocating 100% of the quota to a CFA, so long as it is justified adequately and is reallocated pursuant to standards approved by the Council and Secretary, complies with the Magnuson Stevens Act, and the Council is therefore not precluded from considering this proposal.

While the memo addresses this specific issue, we recognize that there are many other issues identified and that the list of issues that must be addressed is more extensive for this proposal than for others. This is merely a symptom of the fact that the CFA proposal, unlike many of the other proposals, does not replicate past catch share programs. We see this as a benefit, insomuch as we know the impacts on communities from past catch share programs and do not want to replicate a program whose consequences for fishing communities can longer be called unintended. The CFA concept is a new one, and thus there are—not surprisingly—more questions to consider. The

North Pacific Fishery Management Council has never been a body which shies away from new or innovate concepts which take work. Rather, this Council has earned its reputation as a national leader in fisheries policy precisely because you have been willing to work hard and develop new models for doing things which can then be replicated nationwide.

As the Council moves forward with developing a bycatch management program for the Gulf of Alaska trawl fleet, we ask you to move our CFA proposal forward as an alternative. We look forward to further developing the proposal to address the issues raised and further refine the proposal.

Thank you for your consideration of our comments and for your continued attention to this important issue.

Sincerely,

Dave Kubiak, Board Chair
Alaska Marine Conservation Council

Chuck McCallum, Executive Director
Gulf of Alaska Coastal Communities Coalition

Theresa Peterson, Kodiak Outreach Coordinator
Alaska Marine Conservation Council

NOSSAMAN LLP | Memorandum

TO: Gulf of Alaska Coastal Communities Coalition
Alaska Marine Conservation Council

FROM: George J. Mannina, Jr.

DATE: September 24, 2013

RE: Allocation of Harvest Rights

At the request of the Gulf of Alaska Coastal Communities Coalition and Alaska Marine Conservation Council, I have reviewed legal issues associated with a proposal to allocate 100% of the total allowable catch of target species, non-target species, secondary species, and associated prohibited species catch to a community fishery association ("CFA"). The proposed CFA would be established pursuant to section 303a(c)(3) of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). 16 U.S.C. §1853a(c)(3). Since the defined term in section 303a(c)(3) is "fishing community," the proposed CFA will be deemed the equivalent of a "fishing community." The proposed CFA would be a non-profit entity with a community sustainability plan approved by the Secretary of Commerce ("Secretary") pursuant to 16 U.S.C. §1853a(c)(3(A)(i)(IV). The proposed CFA would allocate annual harvest privileges according to criteria, goals, and objectives established by the North Pacific Fishery Management Council ("North Pacific Council") and codified in federal regulation promulgated by the Secretary.

In particular, you have asked that I review whether the Council can allocate fishing rights to a fishing community, whether an allocation of 100% of such fishing rights to a fishing community would violate National Standard 4 of the MSA, and whether an allocation of 100% of fishing rights to a fishing community would be an impermissible delegation of authority under the MSA.

I. Eligibility of a Fishing Community to Receive a Harvest Allocation

Public Law 109-479 added section 303A, 16 U.S.C. §1853a, to the MSA. That section authorizes the Secretary to approve a limited access privilege program ("LAPP") for a fishery managed under a limited access program. 16 U.S.C. §1853a(a). Section 303A provides that a fishing community is eligible "to participate" in a LAPP to harvest fish if (a) it is located within the management area of the relevant Regional Fishery Management Council ("Council"); (b) meets criteria developed by that Council, approved by the Secretary, and published in the Federal Register; (c) consists of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the relevant Council's management area; and (d) develops a community sustainability plan that is approved by the Council and the Secretary. 16 U.S.C. §1853a(c)(3)(A)(i). Thus, the MSA clearly provides that a fishing community is eligible to participate in a LAPP to harvest fish.

II. What Constitutes a Fishing Community

Section 303A provides that a fishing community shall, among other things, "consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the Council's management area...." 16 U.S.C. §1853a(c)(3)(A)(i)(III). The question is whether this provision is describing (a) a geographic area containing certain groups such that it is the locale, *i.e.*, its governing body, that must be the applicant fishing community, or (b) the specific persons who must be the applicant, *i.e.*, residents of a geographic area who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses. Addressing this question also requires consideration of the other definition of a "fishing community" set forth in section 3 of the MSA. There, a "fishing community" is defined as

> a community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew and United States fish processors that are based in such community.

16 U.S.C. §1802(17).[1]

Courts have consistently held that a statute shall be construed so as to give effect to all of its provisions. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-539 (1998) ("[i]t is [the Court's] duty to give effect, if possible, to every clause and word of a statute") (citations omitted); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("[the Court is] hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law").

Under the section 3 definition of "fishing community," such a community must include at least the following four groups: "fishing vessel owners, operators, and crew and United States fish processors that are based in such community." 16 U.S.C. §1802(17). This definition links these four groups with the word "and" which signifies that all four must be present for a "fishing community" to exist. Further, at least three of these words are stated in the plural which suggests that the "fishing community" eligible for the LAPP allocation must include at least two persons/entities from each such category.

In contrast to the section 3 definition regarding the membership of a "fishing community," the persons who comprise a "fishing community" under section 303A are residents who conduct "commercial or recreational fishing, processing, or fishery-dependent support businesses." 16 U.S.C. §1853a(c)(3)(A)(III). These categories are linked by the word "or" which suggests that only one of the three need be present to constitute a "fishing community."

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[1] The MSA defines "United States fish processors" as "facilities located within the United States for, and vessels of the United States used or equipped for, the processing of fish for commercial use or consumption." 16 U.S.C. §1802(46).

Given the lack of consistency between the two definitions of a "fishing community," the most reasonable way to reconcile these definitions is that the applicant fishing community must, at a minimum, include fishing vessel owners, operators, and crew and U.S. fish processors.

Addressing the membership of a "fishing community" does not, however, completely resolve the question of whether the entity applying for a LAPP as a "fishing community" (a) can only be the representatives of a geographic area that includes at least fishing vessel owners, operators, and crew and U.S. fish processors, or (b) can only be a collection of individuals or entities that include, at a minimum, the four categories set forth in the section 3 definition of "fishing community" and who reside in a related geographic locale.

A review of the statutory language and the sparse legislative history suggests that a "fishing community" is a geographic area. The section 3 definition of "fishing community" identifies the members of a "fishing community" as persons/entities "that are based in such community." 16 U.S.C. §1802(17). This definition suggests that only a geographic entity, *i.e.*, a county, parish, borough, city, town, etc. can be a "fishing community" eligible to apply for a LAPP. How that geographic entity exercises its authority, *i.e.*, through an appointed board, commission, etc., would be left to the discretion that geographic entity. The section 3 definition of "fishing community" was added to the MSA by P.L. 104-297 and the legislative history of that Public Law provides no clear insight into this issue.[2] However, the legislative history of section 303A does provide some guidance. The Report of the Senate Committee on Commerce, Science, and Transportation on the legislation that added section 303A to the MSA refers to "LAPPs to a region or community." S. Rep. 229, 108th Cong., 2d Sess. (2006) at 25. The Senate Report also refers to a fishing community as including "smaller, isolated communities." *Id.* at 27. These references suggest Congress intended that a "fishing community" be a geographic area that has residents who meet the membership standards set forth in the applicable sections of the MSA discussed above.

Although no definitive conclusion can be made regarding what constitutes a "fishing community" until the courts have considered the issue, the structure of the MSA and the available legislative history suggest that the better interpretation of the term "fishing community" is a geographic locale that includes (a) fishing vessel owners, (b) fishing vessel operators, (c) fishing vessel crew, and (d) U.S. fish processors, and may include fishery-dependent support businesses. The difficulty with this view is that section 303A provides that a "fishing community" may consist of fishermen, processors "or" support businesses. The implication being only one of the three need be present. This language is, therefore, inconsistent with the

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[2] Previous versions of the legislation that ultimately was enacted referenced "local community-based fleets," H.R. 39, 104th Cong. (1996). Congress ultimately adopted provisions that included the broader term "fishing community." This suggests Congress may have intended "fishing communities" to include smaller, local fleets, which again suggests that a "fishing community" refers to a geographic area.

definition of "fishing community" in section 3. Nevertheless, given the overall context, the interpretation set forth in this paragraph seems the most reasonable.[3]

Assuming the applicant "fishing community" meets the requisite eligibility standard discussed above and otherwise meets the remaining eligibility standards set forth in section 303a(c)(3)(A), 16 U.S.C. §1853a(c)(3)(A),[4] the next question is whether a fishing community can receive 100% of the total allowable catch.

III. National Standard 4

Any fishery management plan ("FMP"), including a LAPP, must be consistent with the ten National Standards set forth in the MSA. 16 U.S.C. §1851(a). Among these, National Standard 4 sets forth three requirements that must be met whenever an FMP allocates fishing privileges: (a) the allocation must be fair and equitable; (b) it must be reasonably calculated to promote conservation; and (c) it must not allocate an excessive share of privileges to any particular group. 16 U.S.C. §1851(a)(4). If a 100% of the fishing rights are allocated to a fishing community, the question becomes if the allocation would be considered "excessive" and "fair and equitable" under National Standard 4. 16 U.S.C. §1851(a)(4).

A. The Excessive Share Standard

National Standard 4 provides that if there is an assignment of "fishing privileges among various United States fishermen" then the allocation must be "carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." 16 U.S.C. §1851(a)(4); *see also* 50 C.F.R. §600.325(c)(3)(iii) ("[a]n allocation scheme must be designed to deter any person or entity from acquiring an excessive share of fishing privileges, and to avoid creating conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist.").

This part of National Standard 4 is mirrored in section 303A which provides that in considering a LAPP the Council or Secretary "shall ... ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program...." 16 U.S.C. §1853a(c)(5)(D). To "ensure" this result, the Council or Secretary shall establish (a) "a maximum share, expressed as a percentage of the total limited access privileges, that a

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[3] However, it is also possible to argue that the only way the two statutory provisions can be given full effect is that Congress intended that a "fishing community" eligible to apply for a LAPP could be a geographic locale under section 3 or a group of residents as set forth in section 303A. Under that interpretation, there could be more than one "fishing community" in the same geographic area.

[4] The MSA also provides that to be eligible to participate in a LAPP, a fishing community must be located within the management area of the relevant Council, meet criteria developed by that Council which criteria are approved by the Secretary, and develop a community sustainability plan approved by the Council and the Secretary. 16 U.S.C. §1853(a)(c)(3)(A)(i). The MSA also sets forth requirements regarding what a LAPP shall include. 16 U.S.C. §1853a(c)(1). In addition, a LAPP is a subset of a section 303(b)(6) limited entry program and would need to meet the standards set forth in that section. 16 U.S.C. §1853(b)(6).

limited access privilege holder" may have and (b) any other limitations or measures that are deemed necessary. *Id.*

The question is whether it is consistent with these provisions to allocate 100% of the fishing privileges to a fishing community, notwithstanding the fact that the community will reallocate those privileges to others. Case law suggests that courts will review the conservation and management goals of the MSA and the applicable FMP to determine if an allocation is consistent with National Standard 4. For example, in *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456 (9th Cir. 1987), an amendment to the Gulf of Alaska Groundfish FMP allocated the optimum yield ("OY") of sablefish among fishermen based on geographic area and the type of fishing gear used. 831 F.2d at 1461. Trawl fishermen in the Eastern Gulf were allocated five percent of the OY and trawl fishermen in the Western and Central Gulf were allocated 20 percent. *Id.* at 1463. Longline fishermen were allocated the remainder of the sablefish OY – 95 percent in the Eastern areas and 80 percent in the Central and Western areas. *Id.* The amendment required that pot fishing be phased out over three years. *Id.* Pot and trawl fishermen challenged the amendment, arguing that it violated National Standard 4, including the excessive share requirement. *Id.* at 1464. After reviewing the record, the court found: "The administrative record constantly refers to the ground preemption and gear conflict problems which result from pot fishing and trawl fishing in the same area as longline fishing." *Id.* The court concluded "the regulations satisfy the requirements of National Standard 4 in that they are tailored to solve the gear conflict problem and to promote the conservation of sablefish." *Id.* In short, the court held the allocations were not excessive because they were rationally related to solving gear conflict problems and conserving the sablefish fishery. *Id.; see also Hall v. Evans,* 165 F.Supp.2d 114, 141-42 (D. R.I. 2001) (holding an amendment to the Monkfish FMP that authorized trawl gear vessels to land up to 1,500 pounds per day, while limiting non-trawl gear vessels to 300 pounds per day, did "not allocate to any person or other entity an excessive share of fishing privileges" because such amendment was tailored to ameliorating the depleted state of monkfish).

In *General Category Scallop Fishermen v. Secretary of U.S. Dept. of Commerce*, 720 F.Supp.2d 564 (D. N.J. 2010), an amendment to the Atlantic Sea Scallop FMP established criteria for determining the percentage of scallop catch to be allocated to various fishermen. 720 F.Supp.2d at 569-71. Historically, the FMP authorized either "limited access" or "open access general category" permits for scallop fishing vessels. *Id.* at 568. The amendment abolished the "open access general category" and replaced it with a "limited access general category," under which only vessels that satisfied certain criteria could receive permits. *Id.* at 570. The amendment allocated approximately 95 percent of the scallop catch to the "limited access" permit holders, with roughly five percent allocated to the newly formed "limited access general category" permit holders. *Id.* at 571. Former "open access general category" permit holders challenged the amendment, arguing, among other things, that the allocation of scallop catch between the "limited access" fleet and the "limited access general category" violated National Standard 4. *Id.* at 572. The court rejected plaintiffs' argument, holding "the allocation of 5 percent of the scallop catch to the ["limited access general category"] permit holders does not contravene National Standard 4." *Id.* at 585. The court reasoned "[b]ecause the allocation is based on historical landings data and provides for a slightly higher than average participation in the fishery by the general access fleet, it is fair and equitable, without conferring an excessive share of privileges to the limited access fleet." *Id.* at 586.

Taken together, these cases suggest that a 100% allocation to a fishing community would not be excessive, provided the administrative record supports a determination that the allocation is rationally connected to promoting fishery conservation and management. [5] Further, in considering the allocation, it must be remembered that if the Council and the Secretary approve a 100% allocation to a fishing community with the clear requirement that it be reallocated in smaller portions to other eligible persons, then the real allocation is in portions less than 100%. Thus, the fishing community is only the administrative agent that does not actually hold or exercise the allocation.

B. The Fair and Equitable Standard

National Standard 4 also provides that any allocation of fishing privileges shall be "fair and equitable." 16 U.S.C. §1851(a)(4). The guidelines interpreting this standard provide that to be fair and equitable, a plan "should be rationally connected to the achievement of [optimum yield] or with the furtherance of a legitimate FMP objective" and "may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups." 50 C.F.R. §600.325(c)(3)(i). The guidelines further recognize that "inherent in [every] allocation is the advantaging of one group to the detriment of another." 50 C.F.R. §600.325(c)(3)(i)(A). The regulations also authorize the Secretary to carry out allocations that "impose a hardship on one group if it is outweighed by the total benefits received by another group or groups." *Id.* §600.325(c)(3)(i)(B). In light of these principles, courts are reluctant to "to second-guess the Secretary's judgment simply because the provisions of a FMP or a plan allocation 'have a greater impact upon' one group or type of fishermen." *North Carolina Fisheries Ass'n v. Gutierrez*, 518 F.Supp.2d at 89 (quoting *Nat'l Fisheries Inst., Inc. v. Mosbacher,* 732 F. Supp. 210, 225 (D.D.C. 1990)); *accord Alliance Against IFQs v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996) ("The Secretary is allowed ... to sacrifice the interests of some groups of fishermen, for the benefit as the Secretary sees it, of the fishery as a whole."). As with the excessive share standard, the fair and equitable standard is mirrored in section 303A. 16 U.S.C. §1853a(c)(3)(A).

The analysis of whether a 100% allocation of fishing privileges to a fishing community is fair and equitable would likely proceed along lines similar to those discussed above regarding the excessive share standard with respect to a review of the administrative record justifying the allocation, with one potential difference. While it may be possible to draw a distinction between

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[5] However, it should also be noted that since the Council and the Secretary will be making the allocation to the fishing community, it is this allocation that might be judged by the excessive share standard. If that is the case, it is possible that a 100% allocation to one entity might be found by a court to be excessive, particularly if there are other persons who could be eligible to receive an initial allocation. Support for this view is found in the definition of a "limited access privilege" set forth in section 3 of the MSA. There, a "limited access privilege" is defined as a permit issued under section 303A to harvest a quantity of fish expressed "by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person...." 16 U.S.C. §1802(26). The use of the word "portion" suggests something less than 100%. Thus, in *North Carolina Fisheries Ass'n v. Gutierrez*, 518 F.Supp.2d 62, 93 (D.D.C. 2007), the court held it was reasonable for the Secretary to reject an allocation proposal that could have resulted "in a direct allocation of the state's entire [quota] share to one or two fishing operations" because such an allocation might be "excessive."

the initial allocation and subsequent reallocations by the fishing community with respect to the excessive share standard, the fair and equitable requirement in the LAPP provisions of the MSA expressly applies to "initial allocations." 16 U.S.C. §1853a(c)(5)(A).

As noted above, the guidelines interpreting National Standard 4 provide that an allocation is likely "fair and equitable" where it is "justified in terms of the objectives of the FMP" and serves to "maximize overall benefits." 50 C.F.R. § 600.325(c)(3)(i)(A)-(B). These guidelines were applied in *Pacific Coast Federation of Fishermen's Associations v. Blank*, 693 F.3d 1084 (9th Cir. 2012), where amendments to an FMP impacted the catch limit allocations in the Pacific Coast groundfish fishery. 693 F.3d at 1088-89. Prior to the amendments, catch limits were allocated between the trawl and the non-trawl sectors of the fishery. *Id.* The amendments implemented a "trawl rationalization" program under which catch limits were allocated based on new criteria. *Id.* As a result, many non-trawlers were either denied an initial allocation or forced to consolidate with trawlers. *Id.* at 1090. Non-trawl fishermen challenged the amendments, arguing the amendments were not "fair and equitable" because they favored the trawl sector over the non-trawl sector. *Id.* In denying plaintiffs' argument, the court relied on conclusions in the record: "While the trawl rationalization program would move the fishery toward some of its most important goals and objectives, in order for the program to realize those benefits, a large amount of consolidation would have to occur, resulting in fewer people employed in the fishery." *Id.* at 1094 (quoting 75 Fed. Reg. 60,868, 60,872 (Oct. 1, 2010)). In upholding the amendments, the court determined that, despite weakening certain sectors, the amendments were rationally connected to the goal of better managing the Pacific Coast groundfish fishery.

Other courts have upheld allocation measures as "fair and equitable" when, on balance, such allocations are rationally based on the requirements of the MSA and the goals of conservation. *See, e.g., Alliance Against IFQs v. Brown,* 84 F.3d at 348-350 (allocation of quota shares to boat owners and lessees, and not to crew members, was "fair and equitable" because such allocations were rationally based on MSA requirements that an FMP prevent overfishing and promote efficiency); *Lovgren v. Locke,* 701 F.3d 5, 35 (1st Cir. 2012) (the fact that plaintiffs disagree with the Council's rationale "does not make it an unreasoned judgment"); *W. Sea Fishing Co., Inc. v. Locke*, 722 F.Supp.2d 126, 139 (D. Mass. 2010) (the "stated reasons regarding protection of the fishery as a whole provide sufficient justification to satisfy nation[al] standard 4, despite any inequitable application"); *North Carolina Fisheries Ass'n v. Gutierrez*, 518 F.Supp.2d at 91 ("[t]he lines drawn by the Secretary do not cease to be 'fair and equitable' simply because plaintiffs view them as unfair and inequitable.").

These cases suggest that a 100% allocation would be fair and equitable provided the allocation is rationally related to compliance with other provisions of the MSA or to otherwise achieving conservation objectives. As with the excessive share standard, the key is whether the allocation is justified in the administrative record.

IV. Delegation of Authority

Relevant to the preceding sections on the excessive share standard and the fair and equitable standard is the reality that a fishing community, if defined as a geographic area, does not harvest and process fish. Members of the community do so. Thus, it is implicit in any allocation of fish to a fishing community that is a geographic area that there will be some

reallocation. However, providing for a 100% allocation to such a fishing community could raise an additional issue of whether the initial allocation to that fishing community is an impermissible delegation of authority under the MSA.

There are no provisions in the MSA relating to delegation of authority except that FMPs are to be developed by Councils and approved by the Secretary. 16 U.S.C. §§1853, 1854. That said, an October 3, 2003 Opinion from the NOAA General Counsel, Alaska Region concluded that the Council could allocate quota shares to organizations representing communities and could authorize such organizations to reallocate quota shares but that "the authority thus delegated cannot be unlimited." Regarding the limitation, the Opinion asserts any sub-allocations must be subject to final approval by the Secretary and any aggrieved party must have a right to appeal any allocation decision to the Secretary.

The 2003 Opinion letter preceded, by four years, enactment of P.L. 109-479 which specifically authorized the allocation of fishing rights to fishing communities. Implicit in an allocation to a fishing community defined as a geographic area is some reallocation pursuant to a community sustainability plan. *See* 16 U.S.C. §1853a(c)(3)(A)(IV). Thus, Congress both assumed and approved a delegation of allocation authority. This is particularly the case when Congress established the requirement for a community sustainability plan that would provide the standards and basis for any reallocation, including an appropriate appeal procedure. Further, these standards would be approved by both the Council and the Secretary as consistent with the MSA. Thus, the Council and the Secretary have not impermissibly delegated authority but instead have approved the allocation process.

V. Conclusion

An analysis of the applicable statutory language and of related judicial precedents suggests:

1. a fishing community is a geographic area comprised of certain persons and entities;

2. a 100% allocation of harvesting rights to a fishing community will be judged against the proscription in National Standard 4 against an allocation of excessive shares to an entity but, if the administrative record justifies the 100% initial allocation to a geographic area and that initial allocation will be reallocated pursuant to standards approved by the Council and the Secretary, it is likely that a 100% allocation would not be deemed excessive;

3. a 100% initial allocation of harvesting rights to a fishing community will also be judged against the requirement in National Standard 4 that the allocation be fair and equitable but, if the administrative record adequately justifies the allocation as rationally connected to the goals of the MSA and the FMP, it is likely the allocation would be found to be fair and equitable; and

4. allowing the fishing community to receive and reallocate 100% of the harvesting rights would not be an impermissible delegation of authority from the Council and the Secretary given that Congress implicitly approved the delegation of authority and that the Council and the Secretary have approved the standards used for the reallocation.

Subject: halibut bycatch comments
From: clayton dale <notyalc.elad@gmail.com>
Date: 9/20/2013 8:32 PM
To: npfmc.comments@noaa.gov

Hello.
i think that the equating of hook and line by catch and trawl by catch is erroneous, the mortality rate is totally different on the two types of vessels.
-Clayton Hamilton