

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *CO*  
Executive Director

DATE: November 30, 2005

SUBJECT: BSAI Salmon Bycatch

ESTIMATED TIME 12 HOURS (all D items)
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**ACTION REQUIRED**

Review BSAI salmon bycatch alternatives/options for closure areas. Receive update on 2005 Bering Sea salmon bycatch and ESA consultation.

Receive progress report on the salmon excluder exempted fishing permit (SSC only).

**BACKGROUND**

Review BSAI salmon bycatch alternatives/options for closure areas

In October 2005, the Council took final action on Amendment 84, which will exempt vessels participating in a voluntary rolling hot spot (VRHS) system from regulatory salmon savings area closures. Regulations to promulgate this exemption are anticipated to be in place by August 1, 2006. In conjunction with this action, the Council revised the problem statement and draft suite of alternatives for the next phase of the salmon bycatch analysis. The Council motion from October 2005 is attached as Item D-1(f)(1). The Council also requested clarification regarding any regulatory constraints with these draft alternatives. Clarifications on the notice and comment requirements under the Administrative Procedures Act (APA) have been provided by NMFS and NOAA General Counsel and are attached as Item D-1(f)(2). A discussion paper which reviews the existing problem statement, suite of alternatives and discusses the analytical requirements, necessary clarifications and timeline for analysis of these alternatives, is attached as Item D-1(f)(3). Given this information the Council may wish to revise the alternatives as well as establish a time line and prioritization for this analysis.

Update on 2005 Bering Sea salmon bycatch and ESA consultation

Bycatch of salmon in 2005 continues to be elevated. As of November 26, 2005 a total of 69,865 Chinook salmon had been taken in the Bering Sea pollock trawl fishery (including CDQ). This is in excess of the approved Incidental Take Statement (ITS) from the 1999 Biological Opinion (upheld in the 2000 Biological Opinion). Non-Chinook bycatch (primarily chum salmon) also continues to be elevated. As of November 26, 2005, total non-Chinook bycatch was 712,454 salmon (including CDQ). This represents the highest historical amount of non-Chinook bycatch. Of this amount, 53,793 salmon were taken within the CVOA during the accounting period.

The AK Region SF Division will be continuing the ESA-listed salmon consultation with the NW Region PR Division. This consultation is a continuation of the reinitiating of consultation in 2004, which was triggered by exceeding the BSAI Chinook salmon ITS. The ITS was again exceeded in 2005, and the

Council has taken further action to reduce salmon bycatch through proposed Amendment 84 to the groundfish fishery management plan for the BSAI. The AK Region will consult with the NW Region on the latest salmon bycatch information, coded-wire and high seas tag studies, ESUs of listed salmon, Amendment 84, and any necessary revisions to the ITS. ESA determinations by the NW Region for Amendment 84 are scheduled to be completed in late spring/early summer to allow for final rule implementation before the Chum Salmon Savings Area closure date of August 1.

Receive updated report on progress with the salmon excluder exempted fishing permit (SSC only)

The exempted fishing permit holders (John Gauvin and John Gruver) along with Dr. Craig Rose wish to make a brief presentation to the SSC following the recent completion of the latest stage of their research on salmon excluders. The purpose is to get the SSC's input on the quantitative and statistical methods the EFP holders and Dr. Rose plan to use to evaluate the results of the test made on the C/P Arctic Fjord. The Arctic Fjord test relied on a comparison of salmon and pollock catch rates between pairs of tows (with and without the excluder) to determine the performance of the excluder. These testing methods are a departure from their previous salmon excluder tests which relied on a recapture device. The researchers are also seeking the SSC's guidance concerning possible adjustments to the experimental design for future testing. The exempted permit holders will then present their results to the NPFMC in February of 2006 upon completion of their data analysis.

**BSAI SALMON BYCATCH  
Council Motion  
October 2005**

**Amendment Package B**

The Council and NMFS have initiated action to exempt AFA qualified and CDQ vessels participating in the intercooperative voluntary rolling hotspot system (VRHS) from regulatory Bering Sea salmon bycatch savings areas. Analysis and refinement of the current salmon savings areas may be necessary in the event pollock vessels either surrender or lose their exemption and return to fishing under the regulatory salmon bycatch program.

Further, alternatives to the VRHS system and/or the regulatory salmon bycatch program should be developed to assess whether they would be more effective in reducing salmon bycatch. The following amendment packages are not intended to preclude the intercooperative annual review as required under Amendment 84.

**Amendment Package B-1**

Establish new regulatory salmon savings systems taking into account the most recent available salmon bycatch data. In developing alternatives include an analysis of the need and implementation strategy for appropriate caps as bycatch control measures. This package should be completed first and implemented when ready so that salmon savings regulations are based on the best available information.

Option A: Adjust the Chinook and non-Chinook regulatory closure areas annually based on the most current bycatch data available, such as the 2-3 year rolling average of bycatch rates by species and area.

Option B: Adjust the Chinook and non-Chinook regulatory closure areas at least once in-season based on the best bycatch information available.

**Amendment Package B-2**

Develop a regulatory individual vessel salmon bycatch accountability program.

Option A: managed at the individual level

Option B: managed at the co-op level

Suboption 1: Implement the individual vessel salmon bycatch accountability program if, after 3 years, it is determined the VRHS has failed to achieve the desired level of bycatch reduction.

Suboption 2: Analyze the need and implementation strategy for appropriate caps as bycatch control measures.



AGENDA D-1(f)(2)  
DECEMBER 2005

**UNITED STATES DEPARTMENT**  
**National Oceanic and Atmospheric Administration**

*National Marine Fisheries Service*  
*P.O. Box 21668*  
*Juneau, Alaska 99802-1668*

November 30, 2005

Ms. Stephanie Madsen, Chair  
North Pacific Fishery Management Council  
605 W. 4<sup>th</sup> Avenue  
Anchorage, Alaska 99501-2252

Dear Stephanie,

During its October 2005 meeting, the North Pacific Fishery Management Council (Council) asked NOAA's National Marine Fisheries Service (NMFS) to explore management measures the Pacific Fishery Management Council and the NMFS Northwest Region may have implemented that do not require notice and comment rulemaking under the Administrative Procedure Act (APA). This issue is relevant to Council consideration of alternative salmon bycatch management measures under proposed Amendment 84B for the Fishery Management Plan for Groundfish of the Bering Sea and Aleutians Islands Area (BSAI). One of the measures under consideration for analysis would use the most recent data on salmon bycatch rates to designate closed areas either inseason or annually to reduce the number of salmon taken incidentally in the BSAI pollock fishery.

On November 10, 2005, staff from Sustainable Fisheries Division and General Counsel, Alaska, discussed this issue with staff from General Counsel, Northwest. The following discussion summarizes our understanding the Northwest Region's management programs relative to the APA.

**Fraser River Salmon Management**

Fraser River salmon are managed jointly between the U.S. and Canada by the Pacific Salmon Commission under authority of the Pacific Salmon Treaty of 1985. Regulations implementing salmon management programs under the Pacific Salmon Treaty are exempt from notice and comment rulemaking under the APA. Section 553 of the APA exempts actions which involve a "military or foreign affairs function of the United States" from APA provisions of informal rulemaking (5 U.S.C. § 553(a)(1)). Because salmon management under the Pacific Salmon Treaty involves a foreign affairs function, inseason actions and adjustments are not required to go through notice and comment rulemaking. We also apply this exemption to the annual Pacific halibut fishery management measures developed by the International Pacific Halibut Commission under authority of the Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea.



### **Routine Management Measures**

Every other year, the Pacific Fishery Management Council sets annual harvest limits (ABCs and OYs) for the groundfish fishery in the EEZ off Washington, Oregon, and California, and adopts management measures to keep the harvest within those ABCs and OYs. These management decisions are guided by and authorized under the fishery management plan. They are implemented through notice and comment rulemaking and informed by the appropriate analysis. The development and implementation process takes approximately 14 months. Inseason adjustments are made to the management measures in order to keep the fishery within the ABCs and OYs established for the year. Most of the adjustments have been designated as "routine" under the FMP, which means they have been identified as measures that may be changed frequently, and the changes are within the scope of the prior analysis. The industry is on notice in general that these adjustments may be recommended at a Council meeting, and implemented swiftly after the meeting. Most are implemented after waiver of prior notice and comment in the Federal Register because they must be made swiftly in order to keep the fishery on its pre-determined track. While adjustments are made to annual management measures during the fishing season, this process is NEPA compliant because the effects to the human environment of these actions have been addressed in a prior analysis. Furthermore, this process is APA compliant because when notice and comment is waived, it is waived based on the specific facts of that adjustment that demonstrate good cause for the waiver.

### **Amendment 84B and the APA**


Under Amendment 84B, the Council is considering alternatives to adjust Chinook and non-Chinook regulatory closure areas on an inseason or annual basis. These adjustments would apply to certain groundfish vessels and be based on the most current salmon bycatch information available. None of the management measures governing the groundfish fisheries off Alaska involve a foreign affairs function and, as such, are not exempt from the APA under the provision at 5 U.S.C. § 553(a)(1) described above.

The effects of any management action recommended by the North Pacific Fishery Management Council under Amendment 84B would need to be described in an appropriate NEPA document. Additionally, the FMP amendment and subsequent implementing regulations would need to go through notice and comment rulemaking. Any inseason or annual adjustments to salmon savings areas would need to be within the context of the original analysis and implementing regulations. Inseason actions that are not described in the analysis or implementing regulations would require additional analysis and rulemaking.

Conclusions about adjustments to salmon savings areas described above are consistent with previous APA advice provided to the Council. Enclosed for your information are two legal opinions addressing APA process for rulemaking. The first enclosure reviews "closed framework" actions as described in the NOAA Fisheries Operational Guidelines/Fishery Management Plan Process, examines how they should be viewed under the APA, and describes relevant APA requirements and standards for waiver of those requirements. The second enclosure responds to a 2003 request by the Council for a summary of rulemaking requirements applicable to the procedure for development and implementation of Alaska groundfish fishery specifications, with an emphasis on past and recent court decisions in the Ninth Circuit. The

information in these attachments should continue to be useful to the Council in evaluating whether proposed management measures would be consistent with the APA. As always, we will be pleased to respond to Council requests for further guidance as needed.

Sincerely,

*for*   
Robert D. Mecum  
Acting Administrator, Alaska Region

Enclosures



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

**PRIVILEGED ATTORNEY-CLIENT COMMUNICATION**

**MEMORANDUM**

February 6, 2004

RECEIVED FEB 13 2004

TO: Rebecca Lent  
Deputy Assistant Administrator for Regulatory Affairs

FROM: *Mariam McCall*  
Mariam McCall  
Deputy Assistant General Counsel for Sustainable Fisheries

SUBJECT: In-season Actions and the Administrative Procedure Act

In response to questions from NOAA Fisheries staff, we have reviewed "closed framework" actions used for in-season management measures in the context of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq., and concluded that in almost all circumstances closed framework actions are substantive rules subject to notice and comment requirements under section 553 of the APA.<sup>1</sup> This means that, with one very narrow exception, NOAA Fisheries must provide prior notice and comment for in-season actions, unless the particular facts and circumstances support waiving those requirements. This memorandum reviews closed frameworks as described in the NOAA Fisheries Operational Guidelines/Fishery Management Plan Process, revised May 1, 1997 (Operational Guidelines or Guidelines), examines how they should be viewed under the APA, and describes relevant APA requirements and standards for waiver of those requirements.

**Closed Frameworks**

The Operational Guidelines at section F recognize that the procedures required under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.) to amend fishery management plans (FMPs) make it impractical to use amendments to FMPs as the mechanism for making adjustments to management regimes under conditions requiring real time management. The Operational Guidelines provide that FMPs and their implementing regulations may include frameworks within which certain measures can be implemented as

<sup>1</sup> 5 U.S.C. § 553.



necessary, without the need to amend the FMP. The Guidelines make clear that all such management measures must be analyzed and subject to notice and comment, either in connection with their inclusion in the framework provisions of the FMP, or at the time of implementation, and that all other legal requirements must likewise be met for the framework measures.

For actions that cannot be forecast with specificity in the FMP (such as the annual specification of harvest levels), the Guidelines provide for an "open framework" that permits development of such measures through Council recommendations to NOAA Fisheries, and implementation through the normal rule-making process, with attendant analyses and opportunities for notice and public comment. However, for actions that are "ministerial, and virtually without discretion," and for which all impacts have already been described in the FMP or implementing regulations, the Guidelines create a category of "closed framework" actions that can be implemented by "rule-related notices" that do not require notice and comment or further analysis. For the reasons set out below, based on our research on current APA caselaw we conclude that except in very limited circumstances, even closed framework actions require notice and comment and attendant analyses, unless there is good cause in the record to waive such requirements.

#### The Administrative Procedure Act

The APA defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...." 5 U.S.C. § 551(4). Thus the definition of a "rule" is broad and includes "nearly every statement an agency may make...."<sup>2</sup> Courts treat almost all agency actions as rules under the APA. With one very narrow exception discussed at page 7 below, we conclude that actions taken under both open and closed frameworks are "rules" under the APA and must meet the procedural requirements of the APA as described below.

Within the general category of "rules," the APA distinguishes between substantive rules (sometimes referred to as legislative rules), interpretative rules, general statements of policy, and rules of agency organization. Substantive rules are rules "other than organizational or procedural... issued by an agency pursuant to statutory authority and which implement the statute.... Such rules have the force and effect of law."<sup>3</sup>

Because in-season actions implement the Magnuson-Stevens Fishery Conservation and Management Act and have the force and effect of law, they are substantive rules, even if the

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<sup>2</sup> Battenton v. Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980).

<sup>3</sup> JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 58 (3d ed. 1998) (quoting ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n. 3 (1947) (AG MANUAL)).



agency refers to them as a "notice" or uses some other label.<sup>4</sup> They are not interpretative rules because they do not merely clarify or explain terms in existing statutes or regulations, but instead change substantive obligations and have the force of law. Similarly, because in-season actions are not general guidelines from which the agency can deviate, they are not general statements of policy.<sup>5</sup> Nor are they rules of agency organization, procedure, or practice, which include "agency rules of practice governing the conduct of its proceedings and rules delegating authority or duties within an agency." LUBBERS, supra note 3, at 53.

### APA Notice and Comment Requirements

For substantive rules, unless an exception applies, the APA requires that the agency publish a notice of proposed rulemaking in the Federal Register and provide interested persons an opportunity to submit comments. 5 U.S.C. § 553(b)-(c). After considering comments, the agency must publish the final rule in the Federal Register. Unless the rule relieves a restriction, the APA also requires a 30-day delay in the effectiveness of a substantive rule following publication of the final rule in the Federal Register (the "cooling-off period"), 5 U.S.C. § 553(d), in order to "give the affected parties time to adjust their behavior before the final rule takes effect."<sup>6</sup> Thus unless these requirements can be waived as discussed below, all fishery management actions (with the possible narrow exception described at page 7 below), including those taken pursuant to closed frameworks, must provide for notice and comment and delay the effectiveness of the rule for 30 days following publication of the final rule.

The APA allows the agency, for "good cause," to waive both the requirements for prior notice and opportunity for public comment and the cooling off period. The authority to waive notice and comment is "narrowly construed and only reluctantly countenanced" and "should be limited

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<sup>4</sup> See Batterton v. Marshall, supra note 2, at 705 n.57-58 (noting that neither the label that an agency applies to an action, nor an agency's longstanding practice of acting without rulemaking, is dispositive of whether an action is a "rule" subject to APA rulemaking procedures).

<sup>5</sup> "Interpretative rules" are statements "advis[ing] the public of the agency's construction of the statutes and rules which it administers." LUBBERS, supra note 3, at 58 (quoting AG MANUAL at 30 n. 3). This category of rules applies to statements that clarify or explain terms in an existing statute or regulation, or remind parties of existing legal obligations, and do not create new law, rights, or duties. American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987). Interpretative rules have no force and effect of law and are not binding on the public. Alabama Tissue Center of the University of Alabama Health Service Foundation, et al., v. Sullivan, 975 F.2d 373, 379 (7<sup>th</sup> Cir. 1992). "General statements of policy" advise "the public prospectively of the manner in which the agency proposes to exercise a discretionary power." LUBBERS, supra note 3, at 58 (quoting AG MANUAL at 30 n. 3). A general policy statement leaves decision makers free to exercise discretion, does not establish a "binding norm," and is "not finally determinative of the issues or rights to which it is addressed." Pacific Gas & Electric Co. v Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

<sup>6</sup> Riverbend Farms, Inc., v. Madigan, 958 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1992).

to emergency situations.”<sup>7</sup> Neither actual notice nor acceptance of post hoc comments remedies the failure to provide for prior notice and comment in the absence of a waiver for good cause. The good cause waiver requires a showing in the record that prior notice and an opportunity for public comment are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B). These terms have been the subject of much judicial interpretation, as discussed below.

“Impracticable” means that notice and comment are impossible, infeasible or incompatible with the agency’s mission, i.e., the agency would be unavoidably prevented from the due and required execution of its functions if it undertook public rulemaking.<sup>8</sup> Statutory deadlines alone are not sufficient to satisfy the “impracticable” prong;<sup>9</sup> nor is agency delay that results in a tight rulemaking time frame.<sup>10</sup> The agency must show some exigency apart from generic data collection and the complexity of fishery management that prevents compliance with the normal rulemaking process.<sup>11</sup> Even under very tight time frames, courts have not found notice and

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<sup>7</sup> Utility Solid Waste Activities Group, et al., v. EPA, 236 F.3d 749 (D.C. Cir. 2001) (quoting New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980) and American Fed’n of Gov’t Employees v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981)).

<sup>8</sup> LUBBERS, supra note 3, at 77 (quoting ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248 200 (1946)). See also Utility Solid Waste, supra note 7, at 754 (citing AG MANUAL, supra note 3, at 30-31, and noting that a “situation is ‘impracticable’ when an agency finds that due and timely execution of its functions would be impeded by the notice required,” as “when a safety investigation shows that a new safety rule must be put in place immediately.”)

<sup>9</sup> Asiana Airlines, et al., v. FAA, 134 F.3d 393, 398 (D.C. Cir. 1998).

<sup>10</sup> In Napoleon, et al., v. Hodges, the court held that there was no support for the good cause waiver for the 1980 interim final eastern Bering Sea herring regulations. Civ. No. A80-005 (D. Alaska 1980) (unpublished opinion). The agency based its waiver on the fact that information on Bering Sea groundfish had been the subject of public comment in the groundfish FMP, that the foreign groundfish fishery would be adversely affected if there was a delay in implementing the regulations, and that the regulations did not govern fishing by United States fishermen. Id. at 6 ¶ 24. The court noted that the groundfish FMP did not include herring and stated that “delay in promulgation of such regulations was not unavoidable in that defendants had sufficient information to initiate rulemaking as early as August 1979 and no later than November 9, 1979, but inexcusably failed to do so” and that “potential disruption of foreign fishing activities is not a permissible justification” for the good cause waiver for rulemaking to regulate foreign fishing under the Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq. Id. at 6 ¶ 24 and 7 ¶ 4.

<sup>11</sup> See Natural Resources Defense Council, Inc. v. Evans (NRDC), 316 F.3d 904, 912 (9<sup>th</sup> Cir. 2003) (rejecting good cause waiver for the 2001 Pacific Coast groundfish specifications). The good cause waiver that the court rejected in NRDC read as follows: “This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late implementation. Much of the data necessary for these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management

comment "impracticable" unless the agency convincingly demonstrates that notice and comment were not possible.<sup>12</sup> The agency must identify reasons – external to the agency or outside the agency's control – that would justify foregoing normal rulemaking processes.

"Unnecessary" refers to situations in which, from the public's perspective, notice and comment are unnecessary, as would be the case with rules that are routine, insignificant in nature and impact, and inconsequential to the public, or so minor or technical that the public would not be particularly interested.<sup>13</sup>

There is currently a split in authority regarding whether prior public participation at fishery management council (FMC) meetings is a sufficient basis for waiving APA notice and comment as "unnecessary." In the NRDC decision cited above, the Ninth Circuit rejected the good cause waiver for the 2001 Pacific Coast groundfish specifications that was based in part on the fact that there was extensive public participation at the Pacific FMC meetings. NRDC, 316 F.3d at 911. Although the council held public meetings and accepted public comment on the measures in question, the court noted that there was "no notice or formal opportunity to comment to [NOAA Fisheries], which is the final decisionmaker." Id. In contrast, a Massachusetts district court held that similar public participation at New England FMC meetings provided the necessary basis for "good cause" to waive prior notice and comment. Conservation Law Foundation v. U.S. Department of Commerce (CLF), 229 F.Supp.2d 29, 34 n. 10 (D.Mass. 2002) (currently on appeal). The Ninth Circuit decision is binding law within that court's jurisdiction (California, Oregon, Washington, Idaho, Montana, Nevada, Arizona, Alaska, Hawaii and Alaska), and NOAA Fisheries must comply with that decision in those states. However, unless the Massachusetts decision is overturned on appeal, or until other courts follow the Ninth Circuit's lead, NOAA Fisheries is free as a legal matter to follow the Massachusetts court's interpretation outside the Ninth Circuit.

The legislative history of the APA clarifies that the phrase "contrary to the public interest" is not

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measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, SSC, and Council meetings in September and November 2000 where these recommendations were formulated. Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register." 66 Fed.Reg. 2338, 2372 (January 11, 2001).

<sup>12</sup> See Riverbend Farms, supra note 6, at 1486 (rejecting good cause waiver where agency failed to show that notice a few days before weekly rulemaking was "impracticable"); NRDC, supra note 11 (finding that NMFS failed to show that notice and comment were impracticable during two-month rulemaking period).

<sup>13</sup> See Utility Solid Waste, supra note 7, at 755 (quoting AG MANUAL, supra note 3, at 31).

an independent basis for waiver, but instead supplements the terms "impracticable" or "unnecessary."<sup>14</sup> The "public interest" justification has been upheld, in conjunction with the impracticable or unnecessary justification, where notice and comment would result in evasion of the rule being promulgated,<sup>15</sup> or where very serious public health and welfare, environmental, or financial interests are at risk if there is a delay in implementing the rule.<sup>16</sup> The agency must provide specific facts in its waiver language regarding how real environmental, economic, or other harm would result from delay in implementing the rule.<sup>17</sup>

As noted earlier, in addition to the good cause waiver for prior notice and comment, the APA also provides for waiver for good cause of the required 30-day delay in effectiveness.<sup>18</sup> While the test for waiver of the cooling-off period is not as stringent as the test for waiver of notice and comment, it is still necessary to show inescapable or unavoidable limitations of time and demonstrable urgency.<sup>19</sup>

When invoking the good cause waiver for prior notice and comment or for the cooling off

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<sup>14</sup> LUBBERS, *supra* note 3, at 77 (quoting ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. No. 248 200 (1946)).

<sup>15</sup> Prior notice and comment would be "contrary to the public interest" in "a situation in which the interest of the public would be defeated by any requirement of advance notice," as when announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." *Utility Solid Waste*, 236 F.3d at 755 (quoting AG MANUAL, *supra* note 3, at 31 and citing *Riverbend Farms*, *supra* note 6, at 1484 n. 2).

<sup>16</sup> See, e.g., *Service Employees Intl. Union, Local 102, et al., v. County of San Diego*, 60 F.3d 1346, 1353 n. 3 (9<sup>th</sup> Cir. 1995) (stating that there was good cause to waive notice and comment in this "emergency situation," because failing to clarify existing regulations could result in "real harm" by exposing state and local governments to unforeseen liabilities under Fair Labor Standards Act); *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212 (9<sup>th</sup> Cir. 1995) (upholding emergency rule addressing escalating numbers of fatal helicopter accidents: seven accidents with four fatalities in the 9 months preceding the rule with the most recent non-fatal accident occurring three weeks before FAA issued the rule); *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741 (10<sup>th</sup> Cir. 1987) (upholding good cause finding for interim hunting regulations, because the hunting season had begun, there was an immediate need to protect wildlife resources and evidence of the threat of possible extinction); *Parravano v. Babbitt*, 837 F.Supp. 1034 (N.D.Cal. 1993) (upholding emergency rule on chinook salmon), *aff'd on appeal*, 70 F.3d 539 (9<sup>th</sup> Cir. 1995) (stating that, assuming section 553 applied, there would be good cause to waive notice, as there was a "reasonable basis for finding that emergency, expedited action was warranted to avoid closure of the fall fishing season" and "to avoid the severe economic harm that would result should the season fail to occur.").

<sup>17</sup> See, e.g., *Parravano v. Babbitt*, *supra*.

<sup>18</sup> The 30-day delay in effectiveness is not required for a substantive rule that grants or recognizes an exemption or relieves a restriction or for interpretative rules and statements of policy. 5 U.S.C. § 553(d)(1)-(2).

<sup>19</sup> See, e.g., *Riverbend Farms*, *supra* note 6, at 1486 (rejecting good cause waiver for prior notice and comment but upholding waiver of cooling off period because delay would "cause great harm," "throw an entire regulatory program out of kilter," and public knew that rules were effective each Friday and had advance notice of what they were likely to contain).

period, it is critical that the agency articulate the basis for the waiver in the preamble to the rule and make sure that the factual basis on which the waiver is predicated is supported in the administrative record. See, for example, the NRDC case cited above, in which the court rejected the good cause waiver for the 2001 Pacific Coast groundfish specifications, because the agency did not "engage in any context-specific analysis of the circumstances giving rise to good cause." 316 F.3d at 912.

### Narrow Exception

As noted above, the requirements for notice and comment and the 30-day delay in effectiveness are applicable only to actions that constitute substantive rules under the APA. While virtually all management actions, including in-season management measures, fall within the scope of the APA's definition of a rule, there is a narrow category of actions that do not constitute rules, and therefore are not subject to these requirements – actions that are entirely non-discretionary, and as to which the impacts have been analyzed in connection with a prior rulemaking establishing the basis for the action.<sup>20</sup> Thus, if an action taken pursuant to an FMP framework were entirely non-discretionary, and all impacts of the action had been analyzed during rulemaking on the underlying closed framework regulation, then the action would not be a substantive rule and notice and comment and a delay in effectiveness would not be required.<sup>21</sup> However, because almost all in-season actions require some exercise of discretion by the agency, very few actions would fall under this exception. The underlying closed framework regulation and supporting documents would need to be carefully scrutinized before deciding an action was outside the definition of a "legislative rule" and therefore not subject to notice and comment requirements.

### Conclusion

The agency must ensure that in-season actions comply with APA notice and comment procedures as discussed above. Even for closed framework actions for which the FMP and its implementing regulations do not contemplate notice and comment and delayed effectiveness, the agency must comply with those requirements unless a waiver can be justified. The agency cannot justify the waiver based on the generic difficulty of collecting or analyzing the data or the complexity of fishery management, but must point to external circumstances or factors outside the agency's control that resulted in the shortened rulemaking time frame. In addition, when

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<sup>20</sup> See U.S. v. Thompson, 687 F.2d 279 (10<sup>th</sup> Cir. 1982) (finding that a trespass notice did not need to go through prior notice and comment as it was "nothing more than the execution of the regulation by those in the field charged with such administrative duties" or an "administrative act" or "pronouncement" at the "end of an administrative chain" for a substantive, "complete," underlying regulation).

<sup>21</sup> This approach is consistent with the Operational Guidelines, which describe closed framework actions as "ministerial, and virtually without discretion by the RD. The action's ecological, economic, and social impacts have already been described in the analyses prepared when the framework measure was adopted." Operational Guidelines at F-2. However, not all closed framework actions fall outside the APA definition of a substantive rule, only those limited actions for which there is no discretion exercised by the decisionmaker.

developing new closed framework regulations, the agency must ensure that the frameworks comply with APA procedural requirements consistent with this memorandum.


cc: Jane Chalmers  
Sam Rauch  
Regional Attorneys



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Office of General Counsel  
P.O. Box 21109  
Juneau, Alaska 99802-1109

March 21, 2003

MEMORANDUM FOR: David Benton  
Chair, North Pacific Fishery Management Council

FROM: Jonathan Pollard   
Attorney-Advisor

SUBJECT: Summary of rulemaking requirements applicable to the development and implementation of Alaska groundfish fishery specifications

This memorandum responds to the Council's request for a summary of the rulemaking requirements applicable to the procedure for development and implementation of Alaska groundfish fishery specifications. The memorandum reviews past and recent court decisions, with particular emphasis on decisions in the Ninth Circuit.

**Conclusions and Recommendations:**

In developing revisions to the Alaska groundfish fishery specification procedure, NOAA Fisheries and the North Pacific Fishery Management Council should consider the following issues:

- (1) the possibility that the Magnuson-Stevens Act independently requires NOAA Fisheries to publish proposed fishery specifications in the Federal Register and receive public comment on them for a period of 15 to 60 days. This is an open question in the Ninth Circuit Court of Appeals, which includes Alaska (although the only district court in the Ninth Circuit to consider this issue held that the Magnuson-Stevens Act does require notice and comment on fishery specifications).
- (2) proposed fishery specifications published for public comment pursuant to the Administrative Procedure Act (APA) should be based on the data and studies upon which NOAA Fisheries intends to rely in developing the final specifications. Final specifications that rely in significant part on data and studies that were not available when the proposed specifications were proffered for public comment may in some cases not be deemed "a logical outgrowth" of the proposed rule and may be invalid for that reason.
- (3) the APA normally requires a notice of proposed rulemaking published in the Federal Register with an opportunity for public comment before the final rule is published in the Federal Register. The APA's "good cause" waiver of notice and opportunity for comment is an exception to be "narrowly construed and only reluctantly countenanced."



Fishery specifications implemented pursuant to a procedure that categorically requires waiver of this rulemaking requirement would be legally insufficient. Although a recent Ninth Circuit opinion states that "habitual invocation of the good cause exception" is not necessarily improper, generic concern over timing and complexity of fishery management is not a legally sufficient basis to waive notice and comment.

(4) publication of annual interim specifications without notice and comment as required by current regulations raises serious legal concerns under the APA. Interim specifications would serve no purpose in a revised specification procedure that results in 15-month or 18-month fishery specifications.

(5) NOAA Fisheries needs a sufficient amount of time between Council action and approval of fishery specifications to document their compliance with applicable laws, such as the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

#### **The Alaska Groundfish Fishery Specification Procedure:**

The current Alaska groundfish annual fishery specification regulations require NOAA Fisheries to publish a notice of the next year's proposed fishery specifications in the Federal Register as soon as practicable after consultation with the North Pacific Fishery Management Council, and accept public comment on the proposed specifications for 30 days. 50 C.F.R. § 679.20(c)(1)(A) and (B). NOAA Fisheries typically publishes its notice of proposed specifications in the Federal Register in December after consultation with the Council at its October meeting.<sup>1</sup> The regulations also provide that "interim specifications" will become effective on January 1 without any opportunity for public comment and will remain effective until superseded by the notice of final specifications. 50 C.F.R. § 679.20(c)(2). NOAA Fisheries typically publishes its annual notice of interim specifications in December or January.<sup>2</sup> NOAA Fisheries is required to consider public comments on the proposed specifications received during the comment period and, after another consultation with the Council which typically occurs in December, publish final specifications in the Federal Register. 50 C.F.R. § 679.20(c)(3)(i). The final specifications supersede the interim specifications and are effective for the remainder of that fishing year only. NOAA Fisheries typically publishes its annual notice of final specifications in

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<sup>1</sup> See *Notice of Proposed Specifications for 2003*, 67 Fed. Reg. 76362 (December 12, 2002); *Notice of Proposed Specifications for 2000*, 64 Fed. Reg. 69464 (December 13, 1999); *Notice of Proposed Specifications for 1998*, 63 Fed. Reg. 71867 (December 30, 1998).

<sup>2</sup> See *Notice of Interim Specifications for 2003*, 67 Fed. Reg. 78739 (December 26, 2002); *Notice of Interim Specifications for 2000*, 65 Fed. Reg. 60 (January 3, 2000); *Notice of Interim Specifications for 1999*, 64 Fed. Reg. 50 (January 4, 1999).



February or March, ensuring that the first months of the fishing year are managed pursuant to the interim specifications.<sup>3</sup>

**The Rulemaking Requirements of the Magnuson-Stevens Act:**

Two recent cases have addressed whether the notice and comment requirement of Magnuson-Stevens Act section 304(b)(1)(A) applies to fishery specifications and other framework actions implemented pursuant to fishery management plans.<sup>4</sup> In 2001, the District Court for the Northern District of California held that the 2001 Pacific coast groundfish fishery specifications and annual management measures were regulations for which section 304(b)(1)(A) required a prior notice and comment period of 15 to 60 days. *Natural Resources Defense Council v. Evans*, 168 F. Supp. 2d 1149 (N.D.Cal. 2001). Alternatively, the court held that NOAA Fisheries had not justified its waiver of prior notice and opportunity for public comment under the Administrative Procedure Act. NOAA Fisheries appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's holding that NOAA Fisheries had violated the Administrative Procedure Act. However, the Ninth Circuit Court of Appeals did not address the question whether NOAA Fisheries also violated the Magnuson-Stevens Act's notice and comment requirement and vacated (rescinded) this portion of the district court's order. *Natural Resources Defense Council v. Evans*, 316 F.3d 904 (9<sup>th</sup> Cir. 2003).

In an opinion at odds with the *Natural Resources Defense Council* district court opinion, the District Court for the District of Massachusetts distinguished between "regulations" and "actions" and held that the notice and comment requirement of section 304(b)(1)(A) applies only to regulations, not to actions taken by NOAA Fisheries pursuant to regulations. *Conservation Law Foundation v. U.S. Department of Commerce*, 229 F. Supp. 2d 29 (D. Mass. 2002) (on appeal).

Because the Court of Appeals declined to reach the question in *Natural Resources Defense Council*, the applicability of the notice and comment requirement of section 304(b)(1)(A) remains an open question in the Ninth Circuit.

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<sup>3</sup> See *Notice of Final Specifications for 2000*, 65 Fed. Reg. 8282 (February 18, 2000); *Notice of Final Specifications for 2000*, 64 Fed. Reg. 12103 (March 11, 1999); *Notice of Final Specifications for 1998*, 63 Fed. Reg. 12689 (March 16, 1998).

<sup>4</sup> Section 304(b)(1)(A) provides in part that "[u]pon transmittal by the Council to the Secretary of proposed regulations prepared under section 303(c), the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this Act and other applicable law. Within 15 days of initiating such evaluation the Secretary shall make a determination and . . . if that determination is affirmative, the Secretary shall publish such regulations in the Federal Register . . . for a public comment period of 15 to 60 days . . . ."

### The Administrative Procedure Act:

In addition to any procedural requirements imposed by the Magnuson-Stevens Act, NOAA Fisheries must also comply with the rulemaking requirements of the APA when implementing fishery specifications. *Natural Resources Defense Council*, 316 F.3d at 907. Section 553 of the APA specifies general requirements for informal rulemaking by federal agencies. Unless one of the APA's exemptions applies, agency rulemaking must comply with the following minimum procedural requirements:

- (1) a notice of proposed rulemaking must be published in the Federal Register, such notice to include a statement of the time, place and nature of the public rulemaking proceeding; a reference to the legal authority under which the rule is proposed; and either the terms or a description of the subjects and issues to be addressed by the proposed rule;
- (2) interested persons must be given an opportunity to submit written data, views or arguments on the proposed rule; and
- (3) publication of the final rule must occur not less than 30 days before its effective date.

In order to evaluate the current Alaska groundfish annual fishery specification procedure and its alternatives, NOAA Fisheries and the Council must address two main issues presented by APA section 553: (1) the adequacy of notices of proposed rulemaking prepared for the annual fishery specifications; and (2) the availability of "good cause" waiver in particular circumstances.

### Adequacy of Notices of Proposed Rulemaking:

The notice and comment provisions of the APA are intended to encourage public participation in the rulemaking, to help educate the agency and to produce more informed agency decisions. *Rybachek v. EPA*, 904 F.2d 1276, 1286 (9<sup>th</sup> Cir. 1990); *Washington Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9<sup>th</sup> Cir. 1981). To further these goals, courts have consistently held that a notice of proposed rulemaking must fairly notify interested persons of the issues involved in the rulemaking. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1103 (D.C. Cir. 1980). Unless an exemption applies, failure to publish a proposed rule in the Federal Register may result in a court setting aside the final rule. The rule may also be set aside when the notice of proposed rulemaking published in the Federal Register was inadequate to afford the public a meaningful opportunity to comment on the issues involved in the rulemaking; in this type of case the test is whether the final rule is a "logical outgrowth" of the proposed rule such that the public could reasonably have anticipated the final rulemaking from the proposed rule. *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1402-04 (9<sup>th</sup> Cir. 1995).

A number of courts have applied the "logical outgrowth" test to rulemakings in which agencies base final rules on studies or data that were not made available when the notice of proposed rulemaking was published. In a leading early case of this type, the Environmental Protection

Agency based cement production air emission standards on test results that existed when the agency published the proposed rule but that had not been made available for public comment. The court found "a critical defect in the decision-making process in the initial inability of the petitioners to obtain - in timely fashion - the test results and procedures used on existing [cement] plants which formed a partial basis for the emission control level adopted . . . ." *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 392 (D.C. Cir. 1973). The court further stated that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on inadequate data or data that, critical degree, [sic] is known only to the agency." *Portland Cement Association*, 486 F.2d at 393.

The Court of Appeals for the District of Columbia restated the legal requirement as follows:

The APA requires that a notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved," and that the agency "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." Integral to the notice requirement is the agency's duty "to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules . . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

*Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (citations omitted).

Agencies may, however, consider supplementary data unavailable at the time of publication of the proposed rule that "expands upon and confirms" information contained in the notice of proposed rulemaking and addresses alleged deficiencies in the preexisting data, "so long as no prejudice is shown." *Idaho Farm Bureau Federation*, 58 F.3d at 1402 (quoting *Solite Corp.*, 952 F.2d at 484). In such a case, the final rule will likely be deemed a "logical outgrowth" of the proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 706 F.2d 506, 547 (D.C. Cir. 1983); *Solite Corp.*, 952 F.2d at 485. In practice, this means that an agency may rely on supplementary data and studies to corroborate or explain apparent discrepancies in material that was available for comment when the notice of proposed rulemaking was published, particularly when the new data or studies are not in dispute. *Ober v. EPA*, 84 F.3d 304, 314 (9<sup>th</sup> Cir. 1996). Courts frequently find procedural error when an agency relies on new data or studies to publish a final rule that significantly departs from its proposed rule. *Air Transport Association of America v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (FAA should have published supplementary data for additional public comment when data provided sole justification for FAA's action); *Ober v. EPA*, 84 F.3d at 314 (EPA should have published supplementary information for additional public comment when information was critical to EPA's decision and accuracy of the information was open to serious question); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d at 1402-04 (FWS should have published supplementary USGS report for additional public comment when report "was central" to the FWS' decision to list the Springs Snail as an endangered species, when report provided the

only information relating to the decline in spring flow, and when report's accuracy was in question).

These "logical outgrowth" cases pose an obvious legal problem for the current Alaska groundfish annual fishery specification procedure and for any other alternative that requires publication of the proposed specifications prior to the development of the annual groundfish stock assessments. The current annual fishery specification regulations require NOAA Fisheries to publish a notice of the next year's proposed fishery specifications in the Federal Register as soon as practicable after consultation with the Council, and accept public comment on the proposed specifications for 30 days. 50 C.F.R. § 679.20(c)(1)(A) and (B). In practice, NOAA Fisheries publishes a notice of proposed specifications for public comment shortly after consultation with the Council at its annual October meeting. However, the stock assessments that fully inform the next year's fishery specifications are not available until the second week of November. The Council considers these new stock assessments and public comment at the December Council meeting and then recommends its final fishery specifications to NOAA Fisheries. This schedule allows the Council to base its final recommendations on the November stock assessments each year, but it ensures that NOAA Fisheries' published notice of proposed specifications cannot take those November stock assessments into consideration.

As explained above, Ninth Circuit caselaw would not flatly prohibit NOAA Fisheries from publishing final fishery specifications that rely in significant part on data and studies that were not available when the proposed rule was published for public comment. Although the notice of proposed specifications published under the current fishery specification procedure may be written in anticipation of the new data and studies that will be available later in November, the legal problem is presented when the new data and studies contradict, rather than expand upon and confirm, information contained in the notice of proposed specifications. In this case a notice of final specifications that departs from the proposed specifications in reliance on these new data and studies would not be "a logical outgrowth" of the proposed specifications and would be legally insufficient for that reason.<sup>5</sup> *Idaho Farm Bureau Federation*, 58 F.3d at 1402. The risk of legal insufficiency is greatest when the accuracy of the new data and studies is in dispute, as is often the case in fishery conservation and management. Basing the initial notice of proposed specifications on consideration of the November stock assessments or conducting a second cycle of notice and comment rulemaking would obviate this risk.<sup>6</sup>

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<sup>5</sup> In this situation the Administrative Conference of the United States has recommended a second cycle of notice and comment rulemaking in consideration of new data or studies developed after publication of the proposed rule. *Administrative Conference of the United States Recommendation 76-3*, ¶¶ 1(a) and (b) (1976).

<sup>6</sup> It has been argued that publication of proposed specifications after the November stock assessments are developed would prevent NOAA Fisheries from using the most recent survey information in management of the fisheries in the early part of the year. It is worth noting, however, that fisheries are now managed as late as mid-March under the interim fishery specifications, which themselves do not take into account the November stock assessments.

### Waiver of APA Notice and Comment Rulemaking Requirements:

The current Alaska groundfish annual fishery specification procedure requires that "interim specifications" become effective on January 1 without any opportunity for public comment and remain effective until superseded by the notice of final specifications. 50 C.F.R. § 679.20(c)(2). Each year NOAA Fisheries invariably waives for "good cause" the opportunity for notice and comment and delayed effectiveness for the notice of interim specifications, determining that compliance with these rulemaking requirements is "impracticable" and "contrary to the public interest" under section 553(b)(B) of the APA.<sup>7</sup> The question is whether the APA authorizes this habitual waiver under the current Alaska groundfish annual fishery specification procedure or any other alternative that routinizes waiver of notice and comment rulemaking requirements

The good cause waiver for prior notice and comment is to be "narrowly construed and only reluctantly countenanced." *Utility Solid Waste Activities Group, et al., v. EPA*, 236 F.3d 749 (D.C. Cir. 2001); *Independent Guard Ass'n of Nevada Local No. 1 v. O'Leary*, 57 F.3d 786 (9th Cir. 1995); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Courts apply this exception narrowly to prevent it from swallowing the notice and comment requirement. *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795 (D.C. Cir. 1983). "Emergencies, though not the only situations constituting good cause, are the most common." *Riverbend Farms, Inc., v. Madigan*, 958 F.2d 1479, 1484 n. 2 (9th Cir. 1992); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). The Ninth Circuit's inquiry into whether an agency properly invoked the good cause waiver "proceeds case-by-case, sensitive to the totality of the factors at play . . . ." *Natural Resources Defense Council*, 316 F.3d at 911. The Ninth Circuit Court of Appeals has stated that the good cause exception "authorizes departure from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission." *Cal-Almond*, 14 F.3d 429, 441 (9th Cir. 1993) (quoting *Riverbend Farms*, 958 F.2d at 1485), or when "delay would do real harm." *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995).

In *Riverbend Farms*, the Secretary of Agriculture set orange volume restrictions by convening public meetings each Tuesday to make initial calculations, then publishing a final rule each Friday in the Federal Register for the next week. The weekly rules stated the Secretary's finding that it was impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register. However, the *Riverbend Farms* court concluded that the Secretary lacked good cause for failing to give notice in the Federal Register of the weekly meetings and failing to solicit written public comments and that actual notice of the weekly meetings to the affected industry did not satisfy APA's requirement of notice to the general public. *Riverbend Farms*, 958 F.2d at 1486-87. In addition, the court found that the Secretary failed to demonstrate that "it would be impracticable to publish a notice in the Federal Register a few days before the . . . meeting, advising the public

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<sup>7</sup> See *Interim 2003 Harvest Specifications for Groundfish in the Bering Sea and Aleutian Islands Area*, 67 Fed. Reg. 78739, 78749-50 (December 26, 2002).

of the time and place of the meeting, the legal authority for the proposed volume restrictions and the proposed volume restrictions.” *Riverbend Farms*, 958 F.2d at 1486.

The Ninth Circuit has confirmed the *Riverbend Farms* analysis in subsequent cases. In *Cal-Almond*, the U.S. Department of Agriculture established budget estimates and annual assessment rates for almonds from 1980 to 1986, each year asserting that the rate could not be formulated with prior notice and comment and a delayed effective date. To formulate the rate, a government-appointed California Almond Board held meetings each July to gather crop projection information for that year and receive comments from interested parties. After deciding on its recommendations, the Board gave each almond handler notice of the proposed rate, then submitted the rate to the Secretary of Agriculture, who issued final rules without first publishing a proposed rule and requesting public comment. The Secretary of Agriculture apparently contended that “since the Board’s annual harvest forecast and proposed budget depended on the crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA.” *Cal-Almond*, 14 F.3d at 441. The court disagreed based on its opinion in *Riverbend Farms*. The court stated that it could find no good cause to waive notice and comment for “annual meetings and rules” in the instant case where it had “found no reason in *Riverbend Farms* to depart from the notice-and-comment procedure for weekly meetings and rules.” *Cal-Almond*, 14 F.3d at 441-442.

In *Natural Resources Defense Council*, the Ninth Circuit found that NOAA Fisheries failed to “engage in any context-specific analysis of the circumstances giving rise to good cause” when it promulgated its 2001 Pacific Coast groundfish fishery specifications. *Natural Resources Defense Council*, 316 F.3d at 912. In its Federal Register notice at 66 Fed. Reg. 2372 (January 11, 2001), NOAA Fisheries asserted the following “good cause” justification for waiving the APA requirement for prior notice and opportunity for comment on the specifications:

This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late implementation. Much of the data necessary for these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by

which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, SSC, and Council meetings in September and November 2000 where these recommendations were formulated. Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register.

The court ultimately found the waiver language merely repeated generic concerns about timing and the complexity of fishery management. The court concluded that

[i]f there were no good cause in *Riverbend Farms* for failure to publish notice of weekly meetings advising the public of proposed volume restrictions on the marketing of oranges, despite the fact that the committee responsible for recommending to the Secretary of Agriculture weekly volume restrictions was constantly revising projections right up until, and occasionally even during, the week in question, then, as we said in *Cal-Almond*, the timeliness of rulemaking on an annual basis cannot constitute good cause.

*Natural Resources Defense Council*, 316 F.3d at 912 (citations omitted) (emphasis in original). The court reasoned directly from its holding in *Cal-Almond*, noting in each case the decisionmaker issued a final rule without first publishing a proposed rule for public comment, asserting that the timing of key studies did not allow for publication of a proposed rule before the scheduled effective date of the final rule. Although the court held that NOAA Fisheries failed to make a sufficient showing that "good cause" existed for the 2001 Pacific Coast groundfish fishery specifications and management measures, the court observed that "habitual invocation of the good cause exception" is not necessarily improper. However, in this case, NOAA Fisheries needed to show that some "exigency apart from generic data collection and timing constraints interfered with its ability to promulgate [the] specifications and management measures." *Natural Resources Defense Council*, 316 F.3d at 912.

The current Alaska groundfish fishery specification procedure does not meet the legal standards articulated in *Natural Resources Defense Council*. The interim specifications are the subject of consultation with the Council in October each year; however, NOAA Fisheries typically publishes the final interim specifications at the end of December or beginning of January - more than two months later - without any additional opportunity for public comment. NOAA Fisheries invariably waives the APA requirements for prior notice and comment and delay in effectiveness date for reasons that are very similar to those invalidated in *Natural Resources Defense Council*.<sup>8</sup> The Ninth Circuit Court of Appeals likely would reject this generic assertion of good cause for the

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<sup>8</sup> For example, see NOAA Fisheries' notice of Bering Sea and Aleutian Islands 2003 interim fishery specifications at 67 Fed. Reg. 78749-50 (December 26, 2002).

same reasons it rejected the good cause findings in *Riverbend Farms, Cal-Almond* and *Natural Resources Defense Council*. Although the *Natural Resources Defense Council* court stated that habitual invocation of the good cause exception is not necessarily improper, any Alaska groundfish fishery specification procedure that by design prospectively *compels* annual waiver of notice and comment would not meet the legal standards articulated in that case; that is, such a fishery specification procedure would generally *require* findings of good cause rather than *permit* individual findings based on the requisite "context-specific analysis of the circumstances."<sup>9</sup> *Natural Resources Defense Council*, 316 F.3d at 912.

NOAA Fisheries is the final decisionmaker for approval and implementation of fishery specifications. Although the public is afforded opportunities to comment on the Council's recommended specifications, it is clear that at least in the Ninth Circuit opportunities to comment to the Council on its recommendations do not satisfy NOAA Fisheries' APA notice and comment responsibility in subsequent rulemaking to approve and implement the recommendations. NOAA Fisheries has based waivers of APA notice and comment requirements in part on prior opportunities for extensive public participation at regional fishery council meetings.<sup>10</sup> However, this argument has not met with success in the Ninth Circuit; indeed, the waiver rejected by the *Natural Resources Defense Council* court was based in part on the opportunities for public participation at the Pacific Fishery Management Council's meetings during development of the Council's recommendations on the 2001 Pacific Coast groundfish fishery specifications. 66 Fed. Reg. 2372 (January 11, 2001). Although the court recognized the opportunity for public participation at Pacific Council meetings, the court finally observed that "under the [fishery specification] process that has been in place there is no notice or formal opportunity to comment to NMFS, which is the final decisionmaker." *Natural Resources Defense Council*, 316 F.3d at 911.

Moreover, Ninth Circuit caselaw makes it clear that the APA's notice and comment requirement is not satisfied by the mere publication of a proposed rule and acceptance of public comment; for the process to be meaningful, the agency must consider comments submitted on the proposed rule and respond to significant ones in the published final rule. *Safari Aviation, Inc. v. Garvey*,

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<sup>9</sup> The utility of notices of interim specifications is questionable anyway; separate interim specification notices might easily be eliminated in a revised specification procedure that results in 15-month or 18-month fishery specifications. Under such a procedure the groundfish fisheries in the first months of a year could be managed pursuant to specifications that had been published the preceding year. This procedure would not differ greatly from the current practice of managing the first months of the fishing year pursuant to the interim specifications.

<sup>10</sup> Although the *Conservation Law Foundation* court held that NOAA Fisheries' compliance with an abbreviated framework rulemaking procedure that included public participation at New England Fishery Management Council meetings constituted "good cause" under the APA for waiving notice and comment rulemaking, courts in the Ninth Circuit are not constrained to follow this holding. *Conservation Law Foundation*, 229 F. Supp.2d at 34, n. 10.



300 F.3d 1144, 1150-51 (9<sup>th</sup> Cir. 2002); *Idaho Farm Bureau Federation*, 58 F.3d at 1404-05; *American Mining Congress v. EPA*, 965 F.2d 759, 771 (9<sup>th</sup> Cir. 1992). NOAA Fisheries, not the Council, is the federal agency responsible for compliance with these APA rulemaking requirements.

Courts may vacate a final rule unlawfully promulgated without prior notice and opportunity for comment. Section 706 of the APA states that courts shall “set aside agency action . . . found to be . . . without observance of procedure required by law;” however, this provision is qualified by the rule of harmless error codified in section 706. A court that rejects an agency waiver of notice and comment rulemaking must take “due account” of the harmless error rule in fashioning a remedy. *Riverbend Farms*, 958 F.2d at 1487. Courts finding harmless error may allow a rule unlawfully promulgated without observance of APA procedural requirements to remain in effect pending completion of new proceedings complying with the APA. *Western Oil & Gas v. EPA*, 633 F.2d 803, 813 (9<sup>th</sup> Cir. 1980). Ninth Circuit courts have held that “the failure to provide notice and comment is harmless only where the agency’s mistake ‘clearly had no bearing on the procedure used or the substance of the decision reached.’” *Cal-Almond*, 14 F.3d at 442 (quoting *Riverbend Farms*, 958 F.2d at 1487 (quoting *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9<sup>th</sup> Cir. 1986))). In *Riverbend Farms* and *Cal-Almond*, failure to comply with the APA’s notice and comment requirements was harmless error in large part because the public was afforded alternate opportunities for public comment. *Cal-Almond*, 14 F.3d at 442; *Riverbend Farms*, 958 F.2d at 1488. Opportunities for public participation at Council meetings during development of Council recommendations may be relevant in determining whether NOAA Fisheries commits harmless error by approving and implementing them without observance of APA notice and comment requirements; however, NOAA Fisheries must not commit procedural error anticipating that a court will find the error harmless and the imposed remedy painless.

#### Waiver of APA Delayed Effectiveness for Good Cause:

Section 553(d)(3) provides a waiver of the APA requirement of a 30-day delay in effectiveness which courts have held is an easier burden to meet. The delay in effectiveness is “intended to give affected parties time to adjust their behavior before the final rule takes effect,” whereas prior notice and comment ensures public participation in rulemaking. *Riverbend Farms*, 958 F.2d at 1485. See also *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-290 (7<sup>th</sup> Cir. 1979); *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (noting that sections 553(b) and (d) provide notice so affected parties can adjust to new rules but 553(b) serves the “even more significant purpose” of public participation in rulemaking). Courts have found good cause to waive the cooling off period where agencies showed “inescapable or unavoidable limitations of time,” “demonstrable urgency,” and prior participation of affected parties, whereas prior notice and comment can only be waived if it is unnecessary, impracticable or contrary to the public interest. In *Riverbend Farms*, the Ninth Circuit upheld the determination of good cause to waive the delay in effective date because requiring the waiting period would “cause great harm” and “throw the entire regulatory program out of kilter” and because the public knows that the rules are effective each Friday and has advance notice of what they are likely to contain. *Riverbend*

*Farms*, 958 F.2d at 1485. Although waiver of the APA requirement of a 30-day delay in effectiveness may be easier to justify than waiver of prior notice and opportunity to comment, the waiver still must be based on context-specific analysis of the circumstances giving rise to good cause.<sup>11</sup>

**Compliance With Other Applicable Laws:**

Finally, the current procedure established for publishing the interim specifications allows NOAA Fisheries very little time to document their compliance with other applicable laws, such as NEPA and the ESA. Publication of the 2003 interim specifications was delayed until late December 2002 until the necessary NEPA and ESA analyses of fishing pursuant to the interim specifications were completed.<sup>12</sup> Any revisions to the procedure should take into account the time necessary to complete this documentation.

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<sup>11</sup> Section 706 of the APA also requires courts to take due account of the harmless error rule for unlawful waiver of the 30-day delay in effectiveness.

<sup>12</sup> See *Interim 2003 Harvest Specifications for Groundfish in the Bering Sea and Aleutian Islands Area*, 67 Fed. Reg. 78739, 78749-50 (December 26, 2002).



UNITED STATES DEPARTMENT OF COMMERCE  
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March 28, 2003

MEMORANDUM FOR: David Benton  
Chair, North Pacific Fishery Management Council

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Attorney-Advisor

SUBJECT: Review of the Marine Conservation Alliance's options for revisions to the Alaska groundfish annual fishery specification procedure

This memorandum presents NOAA General Counsel's review of the Marine Conservation Alliance's ("MCA") options for revisions to the Alaska groundfish annual fishery specification procedure. The MCA, through legal counsel, initially presented the Council with two options in a letter dated September 25, 2002. In light of the Ninth Circuit's recent decision in *Natural Resources Defense Council v. Evans*, 316 F.3d 904 (9<sup>th</sup> Cir. 2003), the MCA presented a modification of its Option 2 ("Modified Option 2") to Lisa Lindeman, Alaska Regional Counsel, in a letter dated February 24, 2003.

For the reasons described in NOAA General Counsel's March 21, 2003, memorandum<sup>1</sup> to Council Chair David Benton, we conclude that the options presented by MCA on September 25, 2002, are legally insufficient under the Administrative Procedure Act ("APA") as interpreted and applied by the Ninth Circuit Court of Appeals. However, we conclude that MCA's Modified Option 2 presents a fishery specification procedure that could result in Alaska groundfish fishery specifications that comply with the APA.

#### Summary of MCA's Modified Option 2:

Under MCA's Modified Option 2, Alaska groundfish fishery specifications would authorize fishing in the year in which they are specified and for the first three or six months of the next year. NOAA Fisheries would prepare the annual notice of proposed rulemaking to implement fishery specifications ("proposed specifications") after the October Council meeting based upon the best scientific information then available and in consideration of the Council's October recommendations. NOAA Fisheries would publish this notice of proposed specifications in the Federal Register as soon as practicable after the October Council meeting and solicit public comment for some period of time. Upon the close of the public comment period and in consideration of the recommendations made by the Council at its December meeting and any new information that has become available after the publication of the notice of proposed specifications, NOAA Fisheries either may (1) publish a final rule implementing the fishery specifications ("final specifications") in the Federal Register; or (2) if the desired notice of final

<sup>1</sup> Jonathan Pollard, *Summary of rulemaking requirements applicable to the development and implementation of Alaska groundfish fishery specifications* (March 21, 2003).



specifications would not be "a logical outgrowth" of the notice of proposed specifications, begin a second cycle of rulemaking to implement fishery specifications because in retrospect the notice of proposed specifications was inadequate to afford the public a meaningful opportunity to comment on the issues involved (for example, the desired final specifications diverge significantly from the notice of proposed specifications). In the event a second cycle of rulemaking is necessary, NOAA Fisheries could either (1) publish a second notice of proposed specifications in the Federal Register and solicit public comment, or (2) waive the requirement for notice and comment for "good cause" pursuant to the APA and directly publish final specifications with a post-effectiveness public comment period of 15 to 30 days.

Discussion:

MCA's Modified Option 2 contemplates fishery specifications that are effective for the first three or six months of the next year, thereby dispensing with the need for annual publication without APA notice and comment of interim specifications. This extension of the annual fishery specifications allows the groundfish fisheries to resume on January 1 of the next year without implementation of new annual interim specifications. Therefore, the APA problems associated with the current procedure's mandatory waivers of notice and comment for the interim specifications are eliminated.<sup>2</sup>

As with the current fishery specification procedure, MCA's Modified Option 2 still contemplates that NOAA Fisheries would prepare the notice of proposed specifications after the October Council meeting based upon the best scientific information then available and in consideration of the Council's October recommendations. However, the stock assessments that fully inform the next year's fishery specifications are not available until the second week of November. This schedule ensures that NOAA Fisheries' published notice of proposed specifications cannot take those November stock assessments into consideration, thereby perpetuating the risk that final specifications based on those November stock assessments might not be deemed "a logical outgrowth" of the proposed specifications.<sup>3</sup> NOAA General Counsel has advised that basing the initial notice of proposed specifications on consideration of the November stock assessments would obviate this risk.<sup>4</sup> However, MCA's Modified Option 2 addresses this potential legal insufficiency by requiring that the notices of proposed specifications identify ranges of harvest quotas and other specifications in order to notify interested persons of the issues involved in the rulemaking and afford the public a meaningful opportunity to comment on those issues. In addition, MCA's Modified Option 2 explicitly provides that NOAA Fisheries may either (1) implement final specifications after the December Council meeting without a second cycle of rulemaking, or (2) if the desired notice of final specifications would not be "a logical outgrowth"

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<sup>2</sup> *Id.*, at pages 9-10.

<sup>3</sup> *Id.*, at pages 4-6.

<sup>4</sup> *Id.*, at page 6.

of the notice of proposed specifications, begin a second cycle of rulemaking to implement the specifications. This opportunity for NOAA Fisheries to consider the context-specific circumstances and, when necessary, begin a second cycle of rulemaking instead of directly implementing the final specifications is another way to address the "logical outgrowth" problem.

In the event a second cycle of rulemaking to implement the fishery specifications is required, MCA's Modified Option 2 also provides that NOAA Fisheries may either (1) commence notice-and-comment rulemaking with the publication of a revised notice of proposed specifications in the Federal Register for public comment, or (2) publish a notice of final specifications, waiving the requirements for notice and comment and delayed effectiveness for "good cause" pursuant to the APA. MCA's Modified Option 2 would not by design prospectively *compel* waiver of notice and comment and delayed effectiveness; instead, it would *permit* NOAA Fisheries to invoke the exception on a case-by-case basis only when analysis of the context-specific circumstances supports it. A fishery specification procedure that allows invocation of the "good cause" exception only when circumstances warrant obviously would not violate the APA; however, as discussed more fully in the memorandum dated March 21, 2003, the APA would not permit NOAA Fisheries to base a waiver on generic concerns about timing and the complexity of fishery management.<sup>5</sup>

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<sup>5</sup> *Id.*, at pages 7-10.

# Bering Sea Aleutian Islands Salmon Bycatch:

## December 2005 Staff Discussion Paper

In October 2005, the Council took final action on amendment 84, electing to exempt vessels participating in a voluntary rolling hot spot (VRHS) system from regulatory salmon savings area closures. Regulations to promulgate this exemption are anticipated to be in place by August 1, 2006. In conjunction with this action, the Council revised the problem statement and draft suite of alternatives for the next phase of the salmon bycatch analysis (currently referred to as amendment 84B). The Council also requested clarification regarding any regulatory constraints with these draft alternatives. Clarification on the notice and comment requirements under the Administrative Procedures Act (APA) have been provided by NMFS and NOAA General Counsel. Given these clarifications, the Council may wish to revise their alternatives for this analysis.

### Considerations and Decisions for this Council meeting

The Council may wish to clarify the following:

1. Review and Clarify alternatives as necessary
2. Determine a timeline and prioritization for the analysis

### Problem Statement

The Council adopted the following revised problem statement for the analysis:

*The Council and NMFS have initiated action to exempt AFA qualified and CDQ vessels participating in the intercooperative voluntary rolling hotspot system (VRHS) from regulatory Bering Sea salmon bycatch savings areas. Analysis and refinement of the current salmon savings areas may be necessary in the event pollock vessels either surrender or lose their exemption and return to fishing under the regulatory salmon bycatch program.*

*Further, alternatives to the VRHS system and/or the regulatory salmon bycatch program should be developed to assess whether they would be more effective in reducing salmon bycatch. The following amendment packages are not intended to preclude the intercooperative annual review as required under Amendment 84.*

### Alternatives

The following alternatives were refined by the Council in conjunction with the problem statement in October 2005. These alternatives were bifurcated given that it may be more feasible (timing-wise) to analyze them as different amendment packages.

#### Amendment Package B-1

Establish new regulatory salmon savings systems taking into account the most recent available salmon bycatch data. In developing alternatives include an analysis of the need and implementation strategy for appropriate caps as bycatch control measures. This package should

be completed first and implemented when ready so that salmon savings regulations are based on the best available information.

Option A: Adjust the Chinook and non-Chinook regulatory closure areas annually based on the most current bycatch data available, such as the 2-3 year rolling average of bycatch rates by species and area.

Option B: Adjust the Chinook and non-Chinook regulatory closure areas at least once in-season based on the best bycatch information available.

### **Amendment Package B-2**

Develop a regulatory individual vessel salmon bycatch accountability program.

Option A: managed at the individual level

Option B: managed at the co-op level

Suboption 1: Implement the individual vessel salmon bycatch accountability program if, after 3 years, it is determined the VRHS has failed to achieve the desired level of bycatch reduction.

Suboption 2: Analyze the need and implementation strategy for appropriate caps as bycatch control measures.

### **Analytical needs for each of the alternatives**

**Amendment package B-1** would establish new regulatory salmon savings area closures based on current salmon bycatch data. Analysis of this alternative would require similar analyses to that which comprised the original amendments (21b, 35 and 58) establishing the regulatory closure areas. The Council will likely review closures under development to ascertain which would be the most appropriate for inclusion in the analysis. The analysis involved in proposing specific closure areas as well as analyzing the environmental and economic effects of moving the fleet away from these new specified closures is extensive.

Options A and B under amendment package B-1 are designed to allow for greater flexibility in the designation of regulatory closure areas. The actual rulemaking requirements for these options makes them difficult to implement. Any plan to change the boundaries of the regulatory salmon savings area closures (developed under this amendment package) will require a regulatory amendment and the accompanying analyses for this. This would be necessary whether it is an in-season adjustment or an annual adjustment. While the accompanying analysis would be very focused, there is still a timing issue with analyzing the requisite data in order to establish different boundaries for the closure areas. Council review of the proposed and final closure boundaries would also presumably be included. Once the requisite analyses are completed and the Council has reviewed and taken action on it, there are notice and comment requirements to be met under APA as detailed in the accompanying letter. While under some situations, prior notice and comment can be waived to implement an emergency rule, the standards to meet this waiver are very high and the use of emergency rule authority is not intended to be institutionalized to

implement a regulatory change. Thus, these changes would need to meet the detailed notice and comment requirement under the APA. The timing for the combined regulatory amendment analysis and notice and comment requirements would be, at best, approximately 12 months. Thus neither an in-season nor annual adjustment would be possible under this time frame.

The Council may wish to consider modifying the options under amendment package B-1 such that the regulatory salmon savings areas may be adjusted periodically based upon Council review. The Council would therefore choose when to trigger a regulatory amendment for a new closure analysis based upon information presented to the Council on both the effectiveness of the existing closures as well as the relative rates of bycatch of salmon species over time. Under the exemption agreement for amendment 84, the Council will receive an annual report from the Inter-Cooperative Agreement participants on the effectiveness of bycatch reduction under the VRHS system. In conjunction with this, the Council may request staff to produce an annual report on salmon bycatch trends. If the Council decides upon review of these reports that it would be prudent to adjust the closure configuration, the Council could then decide to pursue the regulatory amendment to do so.

This amendment package would also evaluate the need and implementation strategy of an appropriate bycatch cap on chum and Chinook salmon species in BSAI trawl fisheries. In April, 2005, the SSC noted that a great deal of analysis would be required to support implementation of a voluntary rolling hot spot closure system (VRHS) such as is under consideration in amendment 84. The SSC suggested that in the following amendment, analysis of additional protection measures such as a bycatch cap would be appropriate. In their minutes from the June 2005 meeting, the SSC recommended "*an expanded examination of an appropriate limit on salmon bycatch that considers such factors as region of origin and, at least for salmon of Alaskan origin, total run sizes and the allocated quantities of salmon to subsistence, commercial and sport users as well as escapement goals*" (SSC minutes, June 2005).

The Council is planning to hold a workshop on salmon bycatch and stock origin which is tentatively scheduled in conjunction with the April 2006 Council meeting. Additional information from this workshop will assist in clarifying methodologies for examining appropriate salmon bycatch limits for this analysis.

**Amendment package B-2** would develop a regulatory individual vessel salmon bycatch accountability program. Options under this alternative specify that this program could be implemented at the individual vessel level (under Option A) or at the cooperative level (under Option B).

Under this alternative (and options), vessels (option A) would receive a specific allocation of salmon bycatch (possibly an Individual Bycatch Quota, IBQ) which their vessel cannot exceed. If vessels exceed their individual bycatch quota they must cease fishing. Under the cooperative structure (option B), the cooperative can receive an allocation for the entire cooperative and subdivide this amongst their vessels (or manage however the co-op decides is appropriate) in order to better monitor the fleet. If the co-op exceeds their bycatch quota, the entire co-op would be required to cease fishing.

This alternative is extremely problematic both from a monitoring standpoint as well as for potential economic losses to fishermen. For monitoring and enforcement, generating bycatch numbers on an individual vessel basis would require whole-haul sampling. Basket sampling for salmon on an individual vessel basis would not generate meaningful numbers for managing



bycatch by individual vessels. However, whole haul sampling the entire AFA pollock fleet is a massive undertaking. On catcher vessels alone this would likely require video monitoring to enforce a no-presorting requirement and additional observers at the plant to whole-haul sample 24 hours per day (K. Lind, NMFS, personal communication). For catcher processors, this would be also be very difficult. Currently these CPs carry 2 observers and are still not yet able to whole-haul sample on a boat operating 24 hours per day, so at the minimum an additional observer would be necessary on board CPs. Obviously the observer program would need to be involved in developing the protocol for how they would achieve sampling 100% of the pollock catch on 100% of the fleet. In order to be effective for management and enforcement, the observer estimates of salmon on each vessel would need to be extremely precise.

Another consideration is the potential for economic losses to fishermen. If a vessel has a tow with very high salmon bycatch early in the season, depending upon their IBQ amount, it is possible for that vessel to exceed its annual IBQ for salmon. That vessel would likely then have to cease fishing for the remainder of the year. While vessels can coordinate on known 'hot spot' areas, changing conditions and migrating salmon leave open the possibility for extreme economic hardship to vessels based on the possibility of even a single bad tow. This also presents problems for the responsibility placed upon individual observers doing this whole-haul sampling. Some form of appeals process would likely need to be incorporated into an individual vessel accountability program in order for vessels to be able to challenge the reliability of a single whole-haul estimate particularly in cases where this could preempt fishing for the remainder of the year.

These are just some of the issues which would need to be considered in developing an individual bycatch accountability program. While these problems may not be insurmountable, the development of any individual vessel accountability program would need to give careful consideration to these and likely many other additional issues. The Council would need to consider what type of individual vessel bycatch system would be developed and how this would be monitored and enforced. How would the allocative process be decided upon? Many clarifications would need to be addressed in conceptualizing and analyzing the development of a program. The development and analysis of this alternative would therefore be fairly lengthy and would require a substantial timeline for development

### **Additional considerations for the analysis**

In their June 2005 motion, the Council identified several items of importance to be considered in conjunction with salmon bycatch initiatives, specifically the importance of a research plan and recommendations (expanded from the SSC suggestions) for additional information to better inform the Council and the public on the status of salmon stocks and the related impact of trawl fisheries in the Bering Sea.

The Council motion noted the following (excerpted from June 2005 Council motion):

Further, the Council has identified the importance of a research plan in cooperation with the pollock fleet, western Alaska entities, NMFS and ADF&G to facilitate salmon bycatch reduction, including:

- Developing methods for reducing salmon bycatch in the pollock fishery through excluder devices, fishing behavior modification, net design and the like;
- Developing methods to gauge salmon abundance preseason or inseason so that trigger rates can be set appropriately based on the best scientific information; and

- Identifying the rivers of origin of salmon bycatch, and the timing and location of bycatch of the various stocks, paying particular attention to stocks of concern and developing methods to avoid these.

As a basis for understanding some of these issues, the Council further adopts SSC recommendations for presentations on, but not limited to:

1. The "BASIS" salmon program, emphasizing new information on the distribution of chum and Chinook salmon in the eastern Bering Sea;
2. Recent genetic stock ID of chum and Chinook salmon in the eastern Bering Sea; and
3. AYK commercial and subsistence salmon overview by ADF&G staff.

These considerations and suggestions will be addressed in conjunction with the Council's proposed April 2005 salmon workshop as well as their continued actions under this forthcoming analysis.

The Council has also discussed that the overall analysis of the effectiveness of the VRHS program will occur when the analysis of these amendment package alternatives are available for comparative purposes. The Council may wish to consider at this time the means by which this effectiveness will be evaluated. The milestones for and standards against which effective bycatch reduction will be measured should be clearly outlined.