


MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver 
Executive Director

ESTIMATED TIME 4 HOURS

DATE: January 23, 2004

SUBJECT: Congressional Legislation

ACTION REQUIRED

(a) Receive supplemental information relevant to management of a directed pollock fishery in the Aleutian Islands and respond to the recent Congressional action.

(b) Receive report from NOAA Fisheries on implementation of a pilot rockfish fishery rationalization program in the GOA per recent Congressional action.

BACKGROUND

During its December 2003 meeting, the Council was informed that a rider to the 2004 omnibus appropriations bill (Sections 801-804, Title VIII - Alaskan Fisheries, in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004) may require the Council to provide for a directed Aleutian Islands pollock fishery and to apportion the TAC to the Aleut Corporation for economic development in Adak (Section 803). That rider also would require the Council to implement a pilot rockfish fishery rationalization program in the GOA. In December, the Council discussed options for how they might respond to the Congressional intent in these two measures, but recognized that the legislation had not yet passed and this issue should be addressed if/when it passes.

Therefore, the Council decided to wait until Congress takes action on the appropriations bill and address these issues in their February 2004 meeting. However, to prepare for the possibility that the legislation does pass, and the measures outlined in the rider become law, the Council requested staff to prepare several documents for Council review and action at its February 2004 meeting. The Council also formally initiated a comprehensive analysis of the Aleutian Islands pollock fishery for review in June 2004. This analysis would form the basis for a NEPA documentation to accompany consideration of a fishery beyond 2004.

Aleutian Islands Directed Pollock Fishery

The Council asked for two documents in February:

- (1) A discussion document from NOAA Fisheries that summarizes the options available to the Council to respond to the Congressional rider, and
- (2) A document from NOAA Fisheries and Council staff that provides information necessary for examining, to the extent possible, the potential cumulative effects of opening the Aleutian Islands to a directed pollock

fishery. The Council also asked that this document include the information requested in the Council motion made during its October 2002 meeting.

In response to the Council's request, NOAA and Council staffs have developed both of these documents. The "options analysis" document is attached as Item C-6(a). It was prepared by NOAA Fisheries and NOAA GC and provides guidance to the Council as it considers options for addressing the issue of apportioning TAC to the Aleut Corporation for a directed Aleutian Islands pollock fishery.

NOAA Fisheries and NOAA GC staff will present this options paper and will be available for questions.

The "cumulative effects document" is provided as C-6(Supplemental). This document is a discussion document that includes the following information:

- An historic review of previous Council discussions and actions on the Aleutian Islands pollock fishery issue
- A summary of the Congressional rider (Section 803) and a discussion of options the Council has to respond
- An overview of the Aleutian Islands pollock fishery including historic fishing patterns and revenues; historic pollock fishery bycatch data; historic pollock harvest relative to Steller sea lion critical habitat, seabirds, habitat types, and other target fisheries; and State managed and parallel fisheries
- A summary of other target fisheries in the Aleutian Islands
- Information on Steller sea lions in the Aleutian Islands area including stock structure, prey fields and densities, prey depletion, telemetry data, and fishery effects on sea lions
- Information on the structure of the pollock stock in the Aleutian Islands
- A supplement to the NMFS letter of March 13, 2003 that summarizes various NOAA and Council documents and initiatives under way at the time that responded to the Council's October 2002 information request
- Excerpted language from the Congressional Record that includes Senator Stevens' remarks on Section 803 of Title VIII of the Consolidated Appropriations Act, 2004

NOAA Fisheries and Council staff will be available to review this information and to answer questions. Regardless of the action taken by the Council in this meeting, these materials will be further developed for the longer-term NEPA analysis scheduled for completion in June. The Council may wish to re-visit the schedule for completion of this document in light of the specifications process - i.e., the Council likely would need to take final action on this issue in June in order to treat the AI pollock fishery quota in the normal specifications process; if final action is taken in October 2004, the specifications for a 2005 AI pollock fishery would have to be set using an emergency rule.

GOA Pilot Rockfish Fishery Rationalization

NOAA Fisheries has prepared a discussion document relevant to establishing a pilot rockfish fishery rationalization program in the GOA (Item C-6(b)). The Act directs the Secretary to develop such a program (in consultation with the Council), but is silent relative to many aspects of the program that will need to be considered, and does not specify a target date for implementation of such a program. NOAA is looking to the Council to help develop the specifics of the program, which is expected to require typical analyses of different approaches and options, and standard rulemaking under MSA and NEPA.

The actual language in the Consolidated Appropriations Act, 2004 (Title VIII - Alaskan Fisheries), as well as the floor statement and legislative history for these riders, are under Item C-6(c).

Section 803
Aleutian Islands Pollock Allocation to the Aleut Corporation
Considerations for Implementation

Prepared by:
NMFS, Alaska Region Staff
January 2004

Section 803 of Title VIII of the Consolidated Appropriations Act, 2004, requires that any directed pollock fishery in the Aleutian Islands Subarea of the BSAI be allocated to the Aleut Corporation to be fished by it, or by its authorized agents. Allocations under this section are to be used for the purposes of the economic development of Adak, Alaska. The section identifies the classes of vessels that may be used to fish these allocations. The section allows these allocations in excess of the BSAI optimum yield of 2 million metric tons. The Council has requested NMFS to provide an overview as to how this allocation might be implemented in 2004, if the legislation passes.

Text of the Section 803

SEC 803. ALEUTIAN ISLANDS FISHERIES DEVELOPMENT.

(a) **ALEUTIAN ISLANDS POLLOCK ALLOCATION.** - Effective January 1, 2004 and thereafter, the directed pollock fishery in the Aleutian Islands Subarea (AI) of the BSAI (as defined in 50 CFR 679.2) shall be allocated to the Aleut Corporation (incorporated pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)). Except with the permission of the Aleut Corporation or its authorized agent, the fishing or processing of any part of such allocation shall be prohibited by section 307 of the Magnuson-Stevens Fishery conservation and Management Act (16 U.S.C. 1857), subject to the penalties and sanctions under section 308 of such Act (16 U.S.C. 1858), and subject to the forfeiture of any fish harvested or processed.

(b) **ELIGIBLE VESSELS.** - Only vessels that are 60 feet or less in length overall and have a valid fishery endorsement, or vessels that are eligible to harvest pollock under section 208 of Title II of Division C of Public Law 105-277, shall be eligible to form partnerships with the Aleut Corporation (or its authorized agents) to harvest the allocation under subsection (a). During the years 2004 through 2008, up to 25 percent of such allocation may be harvested by vessels 60 feet or less in length overall. During the years 2009 through 2013, up to 50 percent of such allocation may be harvested by vessels 60 feet or less in length overall. After the year 2012, 50 percent of such allocation shall be harvested by vessels 60 feet or less in length overall, and 50 percent shall be harvested by vessels eligible under such section of Public Law 105-277.

(c) **GROUND FISH OPTIMUM YIELD LIMITATION.** - The optimum yield for groundfish in the Bering Sea and Aleutian Islands Management Area shall not exceed 2 million metric tons. For the purposes of implementing subsections (a) and (b) without adversely affecting current fishery participants, the allocation under subsection (a) may be in addition to such optimum yield during the years 2004 through 2008 upon recommendation by the North Pacific Council and approved by the Secretary of Commerce (if consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)).

(d) **MANAGEMENT AND ALLOCATION.** - For the purposes of this section, the North Pacific Fishery Management Council shall recommend and the Secretary shall approve an allocation under subsection (a) to the Aleut Corporation for the purposes of economic development in Adak, Alaska pursuant to the requirements for the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

Analysis of Section 803

Following is a discussion of the subsections of Section 803. Table 1 provides an overview of some general implementation questions, assuming that this legislation would be implemented either by initiating an FMP amendment for 2005 and beyond or through an emergency rulemaking process in 2004 followed by a subsequent FMP amendment.

Subsection (a) Aleutian Islands pollock allocation

This subsection provides that effective January 1, 2004, and thereafter, the directed pollock fishery in the Aleutian Island (AI) subarea of the BSAI Management Area shall be allocated to the Aleut Corporation, or its authorized agent. The effective date obviously has passed without authorizing legislation. The Council has concluded its recommendations for the 2004 harvest specifications, specifying the full 2 million mt Optimum Yield (OY) in a manner that does not authorize any directed fishery for AI pollock.

Based on historic harvest patterns of AI pollock, the high value roe pollock fishery can be prosecuted through early spring (March - May). Beyond that time period, roe bearing pollock are not available, or are not economically viable. Little interest appears to exist to fish for AI pollock during the B season (June 10 - Nov 1); however, that could change depending on the perspective of the eligible participants.

General Implementation Approaches.

Two general approaches are available to implement this section and are discussed more fully below. First, the Council could develop and recommend an emergency rule (ER) in an attempt to provide some fishing opportunities in 2004 and develop a subsequent FMP amendment and rulemaking to implement the measures for 2005 and future years. Second, the Council could proceed directly to developing an FMP amendment and rulemaking for 2005 and beyond. No time line is specified in the legislation under paragraph (d) and some discretion exists as to when, and how, this legislation would be implemented. At this point, NMFS is not endorsing one

approach over the other from a legal perspective. However, logistic and timing issues associated with an ER should be carefully assessed by the Council before staff resources are committed to this approach. We note that the Council already has tasked staff to develop an analysis that assesses the impacts of an AI pollock fishery for initial consideration in June. The Council may need to reassess the suite of alternatives being developed in this analysis, as well as timing for initial review, in response to new legislation.

Approach 1: An ER and subsequent FMP amendment and rulemaking

The roe fishery would occur within two to four months of the passage of this legislation. An ER would still require Council direction and analysis before it could be implemented. Based on previous experience, NMFS seriously questions whether the development and review of an ER and attendant EA/RIR and other documentation could be completed within a time frame that would authorize a directed AI pollock fishery during the 2004 roe season.

If this bill were enacted early in 2004, the Council would need to make recommendations to provide for an allocation to the Aleut Corporation consistent with other provisions of this section, specifically subsections (c) and (d). Subsection (c) stipulates that the optimum yield shall not exceed 2 million mt; however, an AI pollock allocation to the Aleut Corporation may be in addition to the OY through 2008 "upon recommendation by the North Pacific Council and approval by the Secretary of Commerce (if consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act ...)." This would require the Council to analyze the effects of the action, address a suite of unanswered policy questions which are described in Table 1, and adhere to the MSA (and NEPA) requirements to review the potential economic and biological effects of the action, which is typically done through the EA/RIR analytical process.

We believe the Council could build a record for an ER based on the unanticipated statutory requirement to establish an AI directed pollock fishery for the economic development of Adak that could justify waiver of notice and comment for "good cause" under the Administrative Procedure Act (APA). This would make it possible to implement a 2004 directed AI pollock fishery through an ER. In addition to an adequate basis for "good cause" waiver, NMFS still must analyze the suite of environmental, social, and economic effects of this action (see Table 1). The process of addressing the unanswered policy questions, analyzing their effects, and developing adequate monitoring and enforcement measures could require several months to complete.

If enacted, the effective date of this legislation is January 1, 2004, and thereafter. The directed AI pollock fishery does not exist now, and subsection (d) provides that an allocation for a directed AI pollock fishery must be recommended and approved. The statutory language does not specify a time line or require a 2004 allocation. An ER likely would not be implemented until after the roe season. Under the circumstances, the Council may want to consider whether staff resources are better spent developing an ER that may have little value, or focusing on the timely development in 2004 and implementation of an FMP amendment by 2005.

If the Council decides to recommend an emergency rule in February, it would need to make a number of decisions and justify them based on criteria in the legislation, as well as under the MSA. These decisions are presented in Table 1 and include:

- The amount of pollock to be allocated to the AI directed fishery;
- Whether this allocation would be specified under or over the BSAI OY;
- Whether the AI pollock allocation would only be for the "B" season, assuming the Council agrees with NMFS that the likelihood of an A season allocation is remote;
- If the allocation is within the BSAI OY, how would the existing harvest specifications be respecified; and
- What vessels and processors would be eligible to participate in the fishery, i.e., whether or not to simplify the 2004 catch accounting measures by prohibiting the participation of non AFA eligible vessels.

Approach 2: Develop an FMP Amendment

Regardless of whether an ER is implemented in 2004, the Council and NMFS would need to develop an FMP amendment in 2004 to implement the statute in 2005 and beyond. An ER is limited in duration, and regulations for future fisheries would need to be developed through an FMP amendment process. This process would need to be initiated in addition to any ER that the Council may recommend, with the same analytic requirements and policy questions to be addressed, but with the additional time required for notice and comment rulemaking. Table 1 provides additional detail on this approach.

If a 2005 AI pollock allocation to the Aleut Corporation is to be authorized through the normal harvest specification process, final Council action on the FMP amendment would have to be scheduled for June 2004 to have the rulemaking package completed in time for the 2005 interim harvest specifications that start out the fishing year. If final Council action were delayed until October 2004, the interim harvest specifications for the 2005 directed AI pollock fishery would have to be implemented by ER. Almost all the policy questions that would need to be addressed for an ER would also need to be addressed in the FMP amendment.

The advantages of initiating an FMP amendment are that the allocation of a directed AI pollock fishery could be incorporated into the usual TAC specification process, the time line for completing an FMP Amendment rulemaking process could provide for a fishery in 2005, and the suite of policy questions that must be addressed could be responded to over a longer period of time than under an ER time frame.

Additional Issues Concerning Subsection (a)

Subsection (a) specifies that directed pollock allocations in the Aleutian Islands be allocated to the Aleut Corporation. This would supercede Section 206(a) of the American Fisheries Act which requires that "...10 percent of the [TAC] of pollock in the [BSAI] shall be allocated as a directed fishing allowance to the western Alaska community development program..." If this bill language becomes law, NMFS would revise the regulations to remove the 10% allocation of

AI pollock TAC to a CDQ reserve because all of this pollock would be specifically required to be allocated to the Aleut Corporation and no pollock in the AI subarea would be allocated to the CDQ Program. NMFS also would have to amend the BSAI FMP to provide for the allocation to the Aleut Corporation.

Subsection (b) – Eligible vessels

This subsection lists the classes of vessels that would be eligible to participate in a partnership with the Aleut Corporation to harvest any allocation established under Subsection (a). Note that any allocation of pollock to the Aleut Corp would require a catch accounting program similar to that required of the AFA pollock offshore and inshore cooperatives. Further, new provisions likely would need to be developed to account for small vessel harvests under the Aleut Corp. allocation. Similarly, any shoreside processing of pollock would have to comply with a shoreside catch monitoring plan developed by the Aleut Corporation and approved by NMFS before fish could be delivered. These provisions likely would need to be included in any emergency rulemaking that allowed for small vessel harvests or shoreside delivery of pollock, as well as in any final rule implementing an FMP amendment.

Subsection (b) specifies that AFA vessels would be eligible to harvest AI pollock allocated to the Aleut Corporation. This section also implies that vessels 60 feet or less length overall (LOA) with a “valid fishery endorsement” could also participate in this fishery. The language is unclear about what is intended by the term “fishery endorsement.” Presumably, this endorsement would be an LLP endorsement currently issued to qualified vessels under the LLP regulations. No vessels less than or equal to 60' LOA, however, possess an LLP with a trawl endorsement in the AI subarea. Vessels less than or equal to 60' LOA that fish exclusively within State waters are not required to possess an LLP. If a “fishery endorsement” were interpreted as an LLP endorsement, vessels 60' LOA and under, which are not required to have an LLP endorsement, possibly could still form partnerships with the Aleut Corporation. This condition would exist only in State waters that were open to pollock trawl vessels and pollock could be effectively harvested exclusively within State waters.

Additionally, this subsection establishes limits on the amount of pollock that may be harvested by vessels 60' LOA or under through 2013. The first provision says that no more than 50% of the allocation may be harvested by these vessels through 2013; the second provision says that at least 50% of the allocation must be harvested by these vessels in 2013 and beyond. The result, is that exactly 50% of the allocation must be harvested by these vessels in 2013. This may not be an issue as, in subsequent years the subsection requires 50% of the allocation be harvested by small (vessels 60' LOA and under) and 50% by AFA vessels.

Given the apparent lack of vessels less than or equal to 60' LOA that would qualify to participate in this program in 2004, implementing regulations that would allow only AFA qualified vessels to form partnerships with the Aleut Corporation may be appropriate, particularly under a 2004 ER, and assume that subsequent regulations would be required to establish eligibility criteria and catch accounting standards for smaller vessels. This could simplify the analysis and reduce the time required to prepare an emergency rule, if such a rule were prepared, for a 2004 fishery

during the B season. Vessels under 60' LOA could be incorporated under a final rule implementing a longer term FMP amendment once the Council develops recommendations for a more complete catch accounting program.

Subsection (c) – Groundfish OY

This subsection establishes the current OY for BSAI groundfish as a 2.0 million mt level that cannot be increased by future FMP amendment. Harvests could exceed this level during the next 4-year period only if necessary to provide for the Aleut Corp AI pollock allocation in a manner that would not adversely affect current fishery participants. The Council could choose to pursue an alternative for an FMP amendment that would not allow for harvests to exceed the OY during the next 4-year period.

Subsection (d) – Management and allocation

This subsection requires the Council to recommend and the Secretary to approve an allocation of AI pollock to the Aleut Corporation for the purposes of economic development in Adak. The subsection does not specify the level or amount of the pollock allocation, but it requires approval pursuant to the MSA. Therefore, the Council and NMFS would need to provide a clear rationale, including the appropriate analysis, for the level of harvest recommended and approved.

Table 1: Implementation Approaches and Policy Considerations for Section 803.

Issue	<u>Approach 1</u> Emergency Rule for 2004 & Subsequent FMP Amendment for 2005	<u>Approach 2</u> FMP Amendment process for 2004/2005
NEPA Requirements	<p>An emergency rule requires a NEPA analysis and this analysis would need to be completed before the ER could be implemented. A separate analysis would need to be prepared for the subsequent FMP Amendment. Two separate rulemaking packages would have to be prepared.</p> <p><u>Potential Policy Question:</u> NMFS believes at this point that the appropriate NEPA document would be an EA. If the EA were unable to conclude a FONSI on the preferred alternative, an EIS would have to be considered.</p>	<p>A NEPA analysis would be required for an FMP amendment.</p> <p><u>Potential Policy Question:</u> Same</p>
Other Analytical Requirements	<p>An IRFA is not required for an ER, but would be for a future FMP Amendment. All other analytical requirements would need to be addressed in both the ER and the FMP Amendment rule.</p>	<p>All the usual analytical requirements would need to be addressed.</p>

Issue	<u>Approach 1</u> Emergency Rule for 2004 & Subsequent FMP Amendment for 2005	<u>Approach 2</u> FMP Amendment process for 2004/2005
Allocation of AI pollock	<p>An ER would require the Council to specify the amount of allocation and possibly revise the designation of the “unspecified species” category, or revise the 2004 harvest TAC specifications – this requires additional rulemaking and revision to the analyses.</p> <p>Alternatively, the Council would have the ability to recommend harvests in excess of the 2 million MT OY cap, but would need to analyze the effects on other fishery participants. In both cases the Council would need to recommend the allocation and provide a rationale for that allocation.</p> <p><u>Unanswered Policy Questions:</u> How much pollock would be allocated? When would the fishery operate? How would other species in the 2004 harvest specification be affected by any changes to the allocations?</p>	<p>The allocation to AI pollock could be considered in the context of other species and in the 2005 TAC setting process. The 2 million mt OY cap would not need to be exceeded to accommodate a directed AI fishery. The Council would need to recommend the allocation and provide a rationale for that allocation.</p> <p><u>Unanswered Policy Questions:</u> Same</p>

Issue	Approach 1 Emergency Rule for 2004 & Subsequent FMP Amendment for 2005	Approach 2 FMP Amendment process for 2004/2005
Monitoring & Enforcement	<p>NMFS would need to establish regulations for catch reporting and monitoring.</p> <p><u>Unanswered Policy Questions:</u> Would all aspects of this program be implemented in the ER, or would only certain elements be implemented, if so, which elements would not be implemented? What shoreside requirements would be required at ports that receive AI pollock? Would deliveries be restricted to Adak or specific ports? Would observers be required on vessels fishing both AI and BS pollock to ensure proper catch accounting? Would vessels need to be specified prior to the fishing season? Would the partnership agreement need to be submitted for review and approval prior to fishing?</p>	<p><u>Unanswered Policy Questions:</u> Same, with the exception of the first question.</p>
Steller Sea Lion Restrictions	<p><u>Unanswered Policy Questions:</u> How would the allocation be distributed to ensure that it adheres to existing restrictions?</p>	<p><u>Unanswered Policy Question:</u> Same</p>
Other Fishery Participants	<p><u>Unanswered Policy Questions:</u> How would "adverse effect" be measured? Would these criteria be developed by the Council and submitted as a recommendation to NMFS?</p>	<p><u>Unanswered Policy Questions:</u> Same</p>
Vessels under 60' LOA	<p><u>Unanswered Policy Question:</u> There is no clear definition of a "fishery endorsement"</p>	<p><u>Unanswered Policy Question:</u> Same</p>
"For the purposes of economic development" pursuant to the MSA	<p><u>Unanswered Policy Question:</u> What obligations, if any, are placed on NMFS to monitor the relationship between allocation and development?</p>	<p><u>Unanswered Policy Question:</u> Same</p>

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Section 802
Gulf of Alaska Rockfish Demonstration Program
Considerations for Implementation

Prepared by:
NMFS, Alaska Region Staff
January 2004

Section 802 of Title VIII of the Consolidated Appropriations Act, 2004 would establish a new pilot program recognizing the historic participation of fishing vessels and the historic participation of fish processors for a group of rockfish species harvested in the Central Gulf of Alaska (CGOA). Specifically, this program would recognize the catch histories of Pacific ocean perch, northern rockfish, and pelagic shelf rockfish. The years recognized are: the best 5 out of 7 years from 1996 to 2002 for fishing vessels, and the best 4 of 5 years from 1996 to 2000 for processors. This program also would establish catch limits based on fishing history for other non-rockfish species that are currently harvested with the rockfish species.

Text of Section 802

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

Analysis of Section 802 and Policy Questions

The Council has requested NMFS to provide an overview of how this pilot program could be implemented. Although the legislative language provides a clear time line for implementing the program, it does not provide much guidance on what criteria or mechanisms to use in recognizing fishing or processing history. Furthermore, the legislation directs the Secretary to consult with the North Pacific Fishery Management Council in establishing a pilot program.

Based on the lack of clear direction within the legislative language and the requirement to consult with the Council, a reasonable approach to implementing this section is to seek Council recommendations on specific elements of this program.

Key Policy Questions

Several key questions would need to be resolved through consultation with the Council, including:

1. Would "recognition" mean the establishment of transferable quota shares?
2. Would "catch history" include retained harvests only or would it also account for discards?
3. In order to qualify as a "historic participant," would a harvester need to meet a minimum landing amount? Similarly, would processors need to meet a minimum threshold to qualify?
4. Would "recognition" require the establishment of cooperatives, and if so, how would the cooperatives be set up in terms of specifics such as number of participants, leasing arrangements, etc.?
5. How would processing history be "recognized," given that section 804 of Title VIII prohibits the consideration or establishment of any program to allocate individual processor quotas or processor shares in any fishery other than the Bering Sea Aleutian Islands crab fishery?

Guidance from NOAA General Counsel would also be important in dealing with questions that remain unanswered by the legislative language. For example, the legislation expressly recognizes processing history from 1996 to 2000, but does not indicate whether other years can be considered. Also, the legislation does not expressly authorize explicitly linking a processor and a specific class or group of harvesters. A linkage would be required between harvesters and processors participating in the 5 percentage set aside fishery because harvesters would be required to deliver their harvests to processors not eligible to participate in the pilot program. Any program that is developed that would require an explicit processor-harvester cooperative linkage other than the 5 percent set aside fishery, would require additional legislative authority before it could be implemented.

Section 802 requires setting aside up to 5 percent of the total allowable catch (TAC) in the Pacific ocean perch, northern rockfish, and pelagic shelf rockfish fisheries to catcher vessels that are not eligible to participate in the pilot program. That 5 percent set aside would have to be delivered to shore-based fish processors also ineligible to participate in the pilot program. If catcher vessels that are eligible to participate chose not to participate in the pilot program they would not be authorized to fish in the 5 percent set aside rockfish fisheries. The legislation is unclear, however as to whether the 5 percent set aside for rockfish is intended to accommodate both target and incidental catch needs by non-qualified vessels. We probably can infer from the language that if catcher vessels eligible to participate in the pilot program choose not to do so, they would not be authorized to fish in the 5 percent set aside rockfish fisheries, but this is another point requiring clarification.

The legislation also is ambiguous as to whether rockfish taken by a qualified vessel as incidental catch in another fishery (e.g., cod or flatfish) could be delivered to a non-qualified CGOA rockfish processor along with the vessel's target catch. Similarly, could a non-qualified vessel

deliver incidental catch of rockfish to a qualified processor? The legislation also does not indicate whether rockfish catch taken incidentally while targeting on other species would count towards a vessel's qualifying catch.

This section also establishes catch limits for non-rockfish species, and non-target rockfish species that are harvested with the specified rockfish fisheries, which "shall be based on the historic harvesting of such bycatch species." The legislation is not clear if the catch limit would be based on the years 1996 to 2002 for fishing vessels and the years 1996 to 2000 for processors. It is also not clear if these catch limits would be based on retained harvests only, or if discards would be considered in the computation. Equally unclear is whether this catch limit would be established for all participants, whether it would be "allocated" as a form of individual catch allowance, or if there would be some potential for cooperative management of this catch limit among the eligible participants. It is also unclear whether halibut PSC would be accounted for in this program. The pilot rockfish fishery would require its own allocation of halibut to fully realize benefits of rationalizing this fishery.

The pilot program will sunset when a GOA comprehensive rationalization plan is implemented by the Secretary or 2 years from the date of implementation of the pilot program, whichever is earlier.

One step NMFS could undertake immediately would be to establish a registry of catch history and processing history in the CGOA rockfish fisheries. This registry would identify the amount of species harvested by vessel and area for the years in question. This registry could include both retained harvests and retained harvested and discarded based on ADF&G fish ticket and observer blend data estimates. A similar registry could be established for processing history in the CGOA rockfish fisheries. This registry would be the basis for any subsequent allocations or for use in the formation of cooperatives once the Council recommends specific implementation details.

H.R.2673

1. Consolidated Appropriations Act, 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

DEPARTMENT OF COMMERCE AND RELATED AGENCIES

DEPARTMENT OF COMMERCE

International Trade Administration

OPERATIONS AND ADMINISTRATION

(RESCISSION)

Of the appropriations made available for travel and tourism by section 210 of Public Law 108-7, \$40,000,000 are rescinded.

National Oceanic and Atmospheric Administration

COASTAL AND OCEAN ACTIVITIES

(RESCISSION)

Of the appropriations made available for coastal and ocean activities by Public Law 106-553, \$2,500,000 are rescinded.

TITLE VIII—ALASKAN FISHERIES

SEC. 801. BERING SEA AND ALEUTIAN ISLANDS CRAB RATIONALIZATION. Section 313 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), as amended, is further amended by adding at the end thereof the following:

(j) BERING SEA AND ALEUTIAN ISLANDS CRAB RATIONALIZATION-

(1) By not later than January 1, 2005, the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003. This section shall not preclude the Secretary from approving by January 1, 2005, and implementing any subsequent program amendments approved by the Council.

(2) Notwithstanding any other provision of this Act, in carrying out paragraph (1) the Secretary shall approve all parts of the Program referred to in such paragraph. Further, no part of such Program may be implemented if, as approved by the North Pacific Fishery Management Council, individual fishing quotas, processing quotas, community development quota allocation, voluntary cooperatives, binding arbitration, regional landing and processing requirements, community protections, economic data collection, or the loan program for crab fishing vessel captains and crew members, is invalidated subject to a judicial determination not subject to judicial appeal. If the Secretary determines that a processor has leveraged its

Individual Processor Quota shares to acquire a harvesters open-delivery 'B shares', the processor's Individual Processor Quota shares shall be forfeited.

`(3) Subsequent to implementation pursuant to paragraph (1), the Council may submit and the Secretary may implement changes to or repeal of conservation and management measures, including measures authorized in this section, for crab fisheries of the Bering Sea and Aleutian Islands in accordance with applicable law, including this Act as amended by this subsection, to achieve on a continuing basis the purposes identified by the Council.

`(4) The loan program referred to in paragraph (2) shall be carried out pursuant to the authority of sections 1111 and 1112 of title XI of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f, 1279g).

`(5) For purposes of implementing this section \$1,000,000 shall be made available each year until fully implemented from funds otherwise made available to the National Marine Fisheries Service for Alaska fisheries activities.

`(6) Nothing in this Act shall constitute a waiver, either express or implied, of the antitrust laws of the United States. The Secretary, in consultation with the Department of Justice and the Federal Trade Commission, shall develop and implement a mandatory information collection and review process to provide any and all information necessary for the Department of Justice and the Federal Trade Commission to determine whether any illegal acts of anti-competition, anti-trust, or price collusion have occurred among persons receiving individual processing quotas under the Program. The Secretary may revoke any individual processing quota held by any person found to have violated a provision of the antitrust laws of the United States.

`(7) An individual processing quota issued under the Program shall be considered a permit for the purposes of sections 307, 308, and 309, and may be revoked or limited at any time in accordance with this Act. Issuance of an individual processing quota under the program shall not confer any right of compensation to the holder of such individual processing quota if it is revoked or limited and shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is purchased from an individual fishing quota holder.

`(8) The restriction on the collection of economic data in section 303 shall not apply with respect to any fish processor who is eligible for, or who has received, individual processing quota under the Program. The restriction on the disclosure of information in section 402(b)(1) shall not apply when the information is used to determine eligibility for or compliance with an individual processing quota program.

`(9) The provisions of sections 308, 310, and 311 shall apply to the processing facilities and fish products of any person holding individual processing quota, and the provisions of subparagraphs (D), (E), and (L) of section 307(l) shall apply to any facility owned or controlled by a person holding individual processing quota.'

SEC. 802. GULF OF ALASKA ROCKFISH DEMONSTRATION PROGRAM. The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) and historic participation of fish processors (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in Central Gulf of Alaska. Such a pilot program shall: (1) provide for a set-aside of up to 5 percent for the total allowable catch of such

fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; and (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historical harvesting of such bycatch species. The pilot program will sunset when a Gulf of Alaska Groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from date of implementation, whichever is earlier.

SEC. 803. ALEUTIAN ISLANDS FISHERIES DEVELOPMENT. (a) **ALEUTIAN ISLANDS POLLOCK ALLOCATION-** Effective January 1, 2004 and thereafter, the directed pollock fishery in the Aleutian Islands Subarea [AI] of the BSAI (as defined in 50 CFR 679.2) shall be allocated to the Aleut Corporation (incorporated pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)). Except with the permission of the Aleut Corporation or its authorized agent, the fishing or processing of any part of such allocation shall be prohibited by section 307 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857), subject to the penalties and sanctions under section 308 of such Act (16 U.S.C. 1858), and subject to the forfeiture of any fish harvested or processed.

(b) **ELIGIBLE VESSELS-** Only vessels that are 60 feet or less in length overall and have a valid fishery endorsement, or vessels that are eligible to harvest pollock under section 208 of title II of division C of Public Law 105-277, shall be eligible to form partnerships with the Aleut Corporation (or its authorized agents) to harvest the allocation under subsection (a). During the years 2004 through 2008, up to 25 percent of such allocation may be harvested by vessels 60 feet or less in length overall. During the years 2009 through 2013, up to 50 percent of such allocation may be harvested by vessels 60 feet or less in length overall. After the year 2012, 50 percent of such allocation shall be harvested by vessels 60 feet or less in length overall, and 50 percent shall be harvested by vessels eligible under such section of Public Law 105-277.

(c) **GROUND FISH OPTIMUM YIELD LIMITATION-** The optimum yield for groundfish in the Bering Sea and Aleutian Islands Management Area shall not exceed 2 million metric tons. For the purposes of implementing subsections (a) and (b) without adversely affecting current fishery participants, the allocation under subsection (a) may be in addition to such optimum yield during the years 2004 through 2008 upon recommendation by the North Pacific Council and approval by the Secretary of Commerce (if consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.)).

(d) **MANAGEMENT AND ALLOCATION-** For the purposes of this section, the North Pacific Fishery Management Council shall recommend and the Secretary shall approve an allocation under subsection (a) to the Aleut Corporation for the purposes of economic development in Adak, Alaska pursuant to the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

SEC. 804. A Council or the Secretary may not consider or establish any program to allocate or issue an individual processing quota or processor share in any fishery of the United States other than the crab fisheries of the Bering Sea and Aleutian Islands.

This division may be cited as the 'Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004'.

PASSAGE OF THE FY2004 CONSOLIDATED APPROPRIATIONS CONFERENCE REPORT
REGARDING PROVISIONS RELATED TO ALASKAN FISHERIES

Mr. STEVENS. Mr. President, three years ago Congress directed the North Pacific Fishery Management Council to analyze the management of the Bering Sea Crab fisheries and determine whether rationalization was necessary. The North Pacific Council completed its study and recommended a rationalization program that recognized the historical participation in the fishery of remote Alaska fishing communities, harvesters, and processors. The "Three-pie Voluntary Cooperative Program" developed by the North Pacific Council protects the resource and ends the dangerous race for fish. Section 801 of Title VIII-Alaskan Fisheries of the FY2004 Consolidated Appropriations conference report directs the Secretary to implement the North Pacific Council's crab rationalization program in its entirety.

Section 801 amends section 313 of the Magnuson-Stevens Fishery Conservation and Management Act by adding a new subsection 313(j). Paragraph 313(j)(1) directs the Secretary to approve and implement the North Pacific Council's rationalization program for the Bering Sea/Aleutian Islands crab fisheries, including all trailing amendments. It also clarifies that the Secretary may approve and implement additional trailing amendments approved by the North Pacific Council. The Secretary must implement all parts of the crab rationalization program that were reported to Congress between June 2002 and April 2003, and all trailing amendments including those reported on May 6, 2003, no later than January 1, 2005. Any further amendments approved by the Council should be corrective in nature or address unforeseen problems with the overall functionality of the crab rationalization program. Primary elements of the Voluntary Three-pie Cooperative crab program that made three separate allocations, one to the harvest sector, one to the processing sector, and one to defined regions, should not change as this was the basis of understanding of how the crab fisheries would be rationalized in the Bering Sea and Aleutian Islands. It is imperative that the deadly and inefficient race for crab in the harsh winters months in the Bering Sea ends. Congress expects the Secretary to meet the statutory deadline of implementation of the rationalization program in time for the 2005 crab fisheries. Congress does not expect the Council to revisit particulars of the crab rationalization program that were part of the initial report to Congress in June of 2002, such as individual harvest shares, processing shares, the 90/10 split of "Class A" and "Class B" shares, regional share designations, voluntary harvester cooperatives, and community development quota allocations, to name a few.

Paragraph 313(j)(2) directs the Secretary to approve all parts of the North Pacific Council's crab program, including harvester quota, processor quota, and community protections. It also includes a non-severability clause that prevents a court from overruling only certain parts of the program. If any part of the program is found to violate the law, the entire program fails and the Bering Sea/Aleutian Islands crab

fisheries will operate under their current open-access management scheme. It also prevents processors from improperly seeking crab deliveries harvested under a harvester's open-delivery quota.

Paragraph 313(j)(3) authorizes the North Pacific Council to recommend to the Secretary any necessary changes after implementation of the crab program to continue to meet conservation and management goals set out in the program for the Bering Sea/Aleutian Islands crab fisheries.

Paragraph 313(j)(4) specifies that the loan program defined under the crab rationalization program for captains and crew be authorized pursuant to relevant sections of Title XI of the Merchant Marine Act as amended for fisheries financing and capacity reduction and for direct loan obligations for fisheries financing and capacity reduction. The loan program for crab fishing vessel captains and crew members is to be a low interest loan program similar to the loan program under the halibut and sablefish IFQ program.

Paragraph 313(j)(5) authorizes \$1,000,000 each year from funds available in the National Marine Fisheries Service account for Alaska fisheries activities to implement the program.

Paragraph 313(j)(6) specifies that the antitrust laws of the United States apply to the crab program. It requires the Secretary of Commerce to work with Department of Justice and the Federal Trade Commission to develop and implement a mandatory information collection and review process to monitor the crab program and ensure no anticompetitive acts occur among persons receiving individual processing quota. If any person receiving individual processor quota is found to have violated a provision of the antitrust laws the Secretary may revoke their processor quota share.

Paragraph 313(j)(7) requires individual processor quota share under the crab program to be considered a permit and subject to sections 307 (Prohibited Acts) and 308 and 309 (penalties and criminal offenses) of the Magnuson-Stevens Fishery Conservation and Management Act. It specifies that, like individual fishing quota, issuance of individual processor quota share does not confer any compensation right if it is revoked or limited, and does not create title or other interest in or to any fish before purchase from a harvester.

Paragraph 313(j)(8) specifies that the restriction on the collection of economic data in section 303(d)(7) of the Magnuson-Stevens Act will not apply for any processor that receives individual processing quota under the crab program. In addition, the restriction on the confidentiality of information in section 402(b)(1) will not apply when the information is used to determine eligibility or verify history for individual processing quota. This is consistent with the exception to the confidentiality of information requirement under the Magnuson-Stevens Act for verifying catch under an individual fishing quota program.

Paragraph 313(j)(9) specifies that sections 308 (civil penalties and permit sanctions), 310 (civil forfeitures), and 311 (enforcement) of the Magnuson-Stevens Act will apply to the processing facilities and

fish products of any person holding individual processing quota. In addition, to ensure compliance with the crab program it may be necessary for the Secretary to inspect a processor's facilities, therefore facilities owned or controlled by a person holding individual processing quota will be subject to the prohibited acts of section 307(1) subparagraphs (D), (E) and (L) of the Magnuson-Stevens Act.

The North Pacific Council is recognized for developing novel and innovative approaches to conservation and management of the abundant fisheries in the North Pacific. The "Three-pie Voluntary Cooperative Program" for rationalizing the Bering Sea and Aleutian Islands crab fisheries is another example of that creativity. It is the product of three years of public meetings and discussion by industry sectors, citizens and affected communities, two years of discussion and development by the North Pacific Council and its Advisory Panel, and nearly two years of extensive and thorough analysis by Council staff, with technical assistance from the National Marine Fisheries Service, Alaska Department of Fish and Game, and independent economists and fisheries consultants.

The Council meticulously constructed the crab rationalization program to achieve bold conservation and management goals for the resource; but also considered the very unique reality of a high value, capital intensive, high risk fishery that is prosecuted entirely in the distant waters of the Bering Sea and Aleutian Islands. The Council has done a great job crafting the Three-pie Voluntary Cooperative crab rationalization program and it is expected to implement the program in its entirety, including all trailing amendments, as reported to Congress in June of 2002. The Council should not revisit the particulars of the crab program, but should continue to work with the Commerce Department to ensure that the crab program is implemented in its entirety in time for the 2005 winter crab fisheries.

The Magnuson-Stevens Act requires fishery management plans and amendments to provide for the sustained participation of communities in the fisheries it has historically depended on for employment and economic opportunity. Small, isolated communities like St. Paul and St. George located on the Pribilof Islands, and Adak on the Aleutian chain have become dependent on the crab resource crossing their docks. This plan slows down the pace of the fishery, achieves efficiencies in harvesting the resource, manages and conserves the resource better, and helps decapitalize the fishery.

While there will inevitably be a degree of economic dislocation in the communities dependent on the revenues. The crab rationalization program addresses these concerns by tying the crab resource to the communities that historically processed the crab. Processor quota share is a form of community protection which maintains historical processing capacity in the communities. Processor quota share should remain in those unique, isolated communities like St. Paul, St. George, King Cove and Adak; communities completely dependent on the crab fishery, that do not benefit from multi-species processing and other economic

opportunities. The North Pacific Council determined that for the crab fisheries, processor quota share was a necessary safeguard to protect the investments made by the processing sector and more importantly, to maintain the economic benefits in the communities that have historically depended on the resource.

Section 802 of Title VIII-Alaskan Fisheries directs the Secretary in consultation with the North Pacific Fishery Management Council to establish a pilot fisheries management program that recognizes the historic participation of fishing vessels and fish processors in the central Gulf of Alaska rockfish fishery. The provision delineates the years and types of rockfish that should be considered for a pilot rationalization program to allow for increased use and value in the fishery. The pilot rockfish program will expire when the North Pacific Council authorizes a comprehensive rationalization program for Gulf of Alaska Groundfish and implemented by the Secretary, or two years from the date of implementation, whichever is earlier. The pilot program contemplates new entrants into this fishery and provides a set-aside of up to five percent of the total allowable catch of such fishery for catcher vessels not eligible to participate in the program. In addition, the five percent that is available for new entrants must come into Kodiak, Alaska for processing and can be processed by processors that have not historically participated in the fishery. The North Pacific Council will establish catch limits for nonrockfish species and non-target rockfish species currently harvested along with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which should be based on historical harvesting of such bycatch species. The Gulf of Alaska rockfish pilot program should also recognize the historic fishing and processing participation of catcher-processors that have historically participated in this fishery, and should utilize the same years and species of fish considered under the provision.

The intent of the pilot program is to consider the historic participation of all of those that have been involved in the fishery. The Gulf of Alaska rockfish pilot program does not authorize individual processing quota share for processors in this fishery. The "historic participation of fish processors" under this pilot program should be considered pursuant to the cooperative model under the American Fisheries Act, or any other manner the North Pacific Council determines is appropriate. This provision in no way authorizes individual processor quota share for the comprehensive Gulf of Alaska groundfish rationalization program that the North Pacific Council is currently developing. This pilot program is intended to allow for better conservation and management of the central Gulf of Alaska rockfish and extend the work year for processing jobs in Kodiak.

Section 803 of Title VIII-Alaskan Fisheries directs the Aleutian Islands pollock allocation to the Aleut Corporation for economic development in Adak, Alaska. If the North Pacific Council opens the Aleutian pollock fishery, the allocation of pollock for economic development in Adak will be restricted by

the prohibited acts contemplated under section 307 of the Magnuson-Stevens Fishery Conservation and Management Act and subject to the penalties and sanctions under section 308 of the Act, including the forfeiture of any fish harvested or processed. Two classes of vessels may harvest this pollock allocation: vessels that are 60 feet or less in length overall and have a valid fishery endorsement can harvest the Aleutian pollock allocation and deliver it to Adak for processing; and vessels eligible to harvest pollock under section 208 of Title II of Division C of Public Law 105-277 are permitted to form partnerships with the Aleut Corporation to harvest the Aleutian Islands pollock allocation for economic development in Adak. Section 803 does not waive the requirements of the Magnuson-Stevens Act, Endangered Species Act, National Environmental Policy Act or any other federal laws. The North Pacific Council and NMFS should be cautious in implementing section 803(a) to ensure that any reopening of a directed Aleutian Islands pollock fishery is accomplished in full compliance with all applicable law, and without disrupting 2004 groundfish fisheries which have already commenced.

In an effort to gradually establish a small boat fleet in Adak, subsection (b) of section 803 provides that during the years 2004 through 2008, up to 25 percent of the Aleutian allocation may be harvested by vessels 60 feet or less in length overall. During the years 2009 through 2013, up to 50 percent of such allocation may be harvested by vessels 60 feet or less in length overall. After the year 2012, 50 percent of such allocation shall be harvested by vessels 60 feet or less in length overall, and 50 percent shall be harvested by vessels eligible under section 208 of Title II of Division C of Public Law 105-277. Establishing a small boat fleet will be critical for the economic diversification of Adak and the revenues generated from the use of the Aleutian Islands pollock allocation will allow for greater investment opportunities in this community. For purposes of implementing this section, section 206 of the American Fisheries Act (AFA) is redefined so that the allocations in section 206(b) of the AFA should only apply to the Bering Sea portion of the directed pollock fishery.

Subsection (c) of section 803 codifies one of the longest standing conservation and management measures of the North Pacific Fishery Management Council, the 2 million metric ton cap for groundfish in the Bering Sea. The optimum yield for groundfish in the Bering Sea and Aleutians Islands Management Area shall not exceed 2 million metric tons. Upon the recommendation of the North Pacific Council and approval of the Secretary of Commerce, and only if consistent with the conservation and management goals and requirements of the Magnuson-Stevens Fishery Conservation and Management Act, the allocation of Aleutian pollock for economic development in Adak, may be in addition to the 2 million metric ton optimum yield. This treatment of the Aleutian Islands pollock allocation would only be during the 2004 through the 2008 fishing years, but only if harvests in excess of the cap do not result in overfishing and then only to the

extent necessary to accommodate a directed pollock fishery in the Aleutian Islands and should not adversely affect the current participants in the Bering Sea pollock fishery in the near term. Eventually this pollock allocation will come under the combined optimum yield for all groundfish in the Bering Sea and Aleutian Islands 2 million metric ton cap by taking proportional reductions in the total allowable catches for each of the existing groundfish fisheries as necessary to accommodate the establishment of the Aleutian Island pollock fishery.

Subsection (d) of section 803 allows the North Pacific Fishery Management Council to recommend and the Secretary to approve an allocation of Aleutian Islands pollock to the Aleut Corporation for the purposes of economic development in Adak pursuant to the requirements of the Magnuson-Stevens Fishery Conservation and Management Act. The North Pacific Council should consider pollock allocations given to the various groups that participate in the Community Development Quota program to recommend a reasonable amount of the Aleutian Islands pollock to the Aleut Corporation for purposes of economic development in Adak and in no case should this amount exceed 40,000 metric tons.

Nothing in this section requires the North Pacific Council to open the Aleutian Islands pollock fishery. The Council should not take any action in regards to this fishery which would require a new consultation under the current biological opinion or Endangered Species Act covering Steller sea lions.

Section 804 of Title VIII--Alaskan Fisheries prohibits any Regional Fishery Management Council or the Secretary from approving any fishery management plan or plan amendments to allocate or issue individual processing quota or processor share in any fishery of the United States other than the crab fisheries of the Bering Sea and Aleutian Islands.

**Management of the Aleutian
Islands Pollock Fishery**

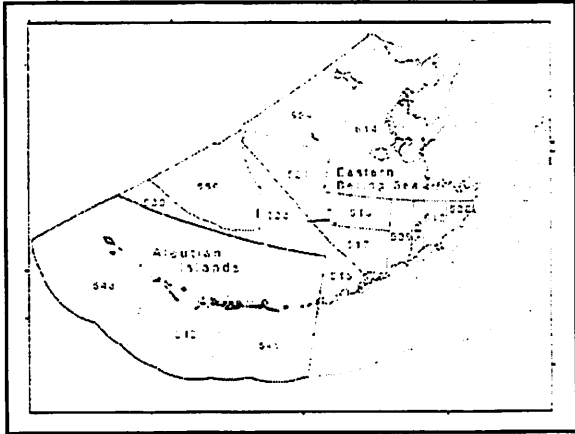
North Pacific Fishery
Management Council
February, 2004
Agenda C-6

Council's Charge:

- Dec. '03 meeting, Council informed of impending legislation
- Appropriations Bill and rider
- Require changes in management of AI pollock fishery
- Council request: assemble information for Feb. '04 discussion and possible action

Overview:

- Description of the document and its appendices
- Summary of the Cumulative effects analysis
- Choices before the Council (handout)



Document

- Introduction
- 2003 EA/RIR/IRFA core of the document
- Appendices

Description of the appendices

What's in the Appendices?

- History of Council discussions about AI pollock (App A)
- Options for implementing an AI pollock fishery (App B)
- Perspectives on an Aleutian Islands Pollock Fishery (App C)

What's in the Appendices?

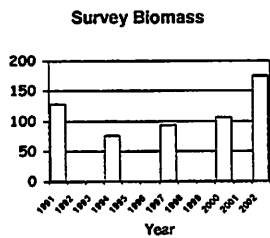
- Perspectives on other target fisheries (App D)
- Cumulative information on Steller sea lions (App E)
- Cumulative information on other protected resources (App F)

What's in the Appendices?

- Cumulative information on pollock stock structure (App G)
- Cumulative information from other analyses (App H)
- Sen. Stevens floor remarks concerning the pollock rider (App I)

Summary of the cumulative effects analysis

Aleutian Islands Region Pollock Assessment

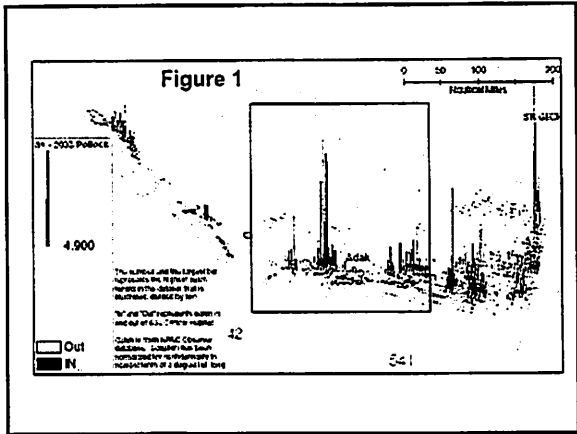


1. New age structured assessment; but needs further development
2. Depend on Survey Biomass
 - 1991 167,140
 - 1994 77,503
 - 1997 93,512
 - 2000 105,554
 - 2002 175,000
3. ABC from Tier 5 = 39,400

From presentation by Low Leo Dec 2003

Steller sea lion issues

- AI pollock fishery closed since 1999
- 2001 BiOp/2003 Supplement - AI open in 2003
- Pollock fishery could only occur outside of critical habitat, and subject to the 40/60 "A" season, "B" season split



Steller sea lion issues

- Proposed action should not affect SSL stock structure
- Future genetic studies may prompt different management if they show additional stock differentiation in the AI
- Not likely to alter prey fields

Steller sea lion issues

- More telemetry information will improve knowledge of foraging outside 20 n mi closures
- Proposed fishery likely to take small amounts of prey, from outside of critical habitat - may not adversely affect SSLs

Steller sea lion issues

- Restriction on pollock fishery to waters outside of critical habitat will keep it in areas where telemetry data indicates less foraging occurs

Additional cumulative effects analysis:

- Other target fisheries
- Bycatch
- PSC
- Other marine mammals and seabirds
- Forage fish
- Habitat

Social and economic impacts

- Contributes to development of community at Adak
- Adak intends to develop a small vessel fleet to harvest pollock
- Impacts on other Alaskan communities
- CDQ fishery in AI precluded

Social and economic impacts

- Efficient harvest with most net benefits accruing to the Aleut Corporation
- Overall economic impacts will depend on whether allocation is made under or outside of the OY, and if under, what allocations are reduced to create the AI allocation

Choices before the Council

Possible actions:

- 2004 "A" season
- 2004 "B" season
- 2005 fishery

2004 "A" season fishery

- Interest in "A" season - roe fishery in April
- Requires emergency rule and analysis
- Extremely difficult to accomplish in given time frame
- Legislation does not require 2004 fishery

2004 "B" season fishery

- Little interest in "B" season
- Requires emergency rule and analysis
- Could divert resources from FMP amendment process
- Legislation does not require 2004 fishery

2005 fishery

- FMP amendment
- Staff already working on this
- Need Council direction on schedule and alternatives

Schedule: June/October alternative

- June draft EA/RIR/IRFA, final decision in October
- Requires emergency rule and analysis
- May conflict with other actions in same time frame

Schedule: April/June alternative

- April draft EA/RIR/IRFA, final decision in June
- Meshes with normal specs process
- Capitalizes on staff momentum
- Avoids additional emergency rule
- More certainty to industry for 2005
- Need Council guidance at this meeting

Direction on issues:

- TAC within or outside 2 M mt OY cap
- Use of "B" season allocation
- Small vessels
- Economic development mandate

Direction on issues:

- **Monitoring small vessel activity**
- **Define fishery endorsement**
- **Permission of Aleut Corp to process catch**
- **Safety and efficiency of small vessel operations**

For more information:

- **Bill Wilson**
 - North Pacific Fishery Management Council
 - 907-271-2809
- **Ben Muse**
 - NMFS, Alaska Region
 - 907-586-7234

Change Management of the AI Pollock Fishery

1. Alternative Schedules

<p>2004 "A" season fishery</p> <ul style="list-style-type: none"> • Interest in "A" season - roe fishery in April • Requires emergency rule and analysis • Extremely difficult to accomplish in given time frame • Legislation does not require 2004 fishery
<p>2004 "B" season fishery</p> <ul style="list-style-type: none"> • Little interest in "B" season • Requires emergency rule and analysis • Could divert resources from FMP amendment process • Legislation does not require 2004 fishery
<p>2005 season fishery</p> <ul style="list-style-type: none"> • FMP amendment • Staff already working on this • Need Council direction on schedule and alternatives • Schedule options: April/June or June/October

2. Potential FMP Amendment Alternatives

Optimum yield (OY) cap

The Appropriations Bill rider allows the Council to apportion an Aleutian Islands pollock fishery TAC outside of the BSAI optimum yield cap of 2 million metric tons in the years 2004 to 2008. The options available to the Council are:

- Require, in the FMP, that pollock allocations to an Aleutian Islands fishery come from within the optimum yield cap

- Leave open the possibility of an allocation from outside the OY cap
- Require all of the AI pollock fishery apportionment to be taken outside of the OY cap

Parenthetically, it does not appear necessary to evaluate alternative levels of Aleutian Islands pollock allocations in this FMP Amendment analysis. Harvest levels would not normally be specified in the FMP. This analysis would take place during the annual specifications process in the same way as any other allocation of a part of the BSAI OY.

Use of "B" season allocation

The Steller sea lion (SSL) protection measures in the Aleutian Islands impose 40/60 seasonal harvest limitations on a pollock fishery. Only 40% of a TAC in the Aleutians can be harvested in the "A" season roe fishery. The remainder of the TAC, 60%, must be harvested in the "B" season. There may be little interest in a "B" season allocation. This may mean that 60% of the TAC would be unavailable to other users. Changing SSL protection measures would require a consultation process, possible compensatory changes in SSL protection measures elsewhere, and possibly an EIS.

- No action. Maintain current 40/60 seasonal apportionment requirement for pollock fisheries.
- Put "B" season allocation in a reserve, permitting reallocation of harvest amount to another gear group in the B season, to the EBS subarea, or to another species or species group.
- Change the SSL protection measures so that only 40% of any annual Aleutian Islands pollock ABC may be harvested, and only in the "A" season.
- Eliminate seasons for pollock in the AI.

Small vessels

The Appropriations Bill rider only allows the Aleut Corp to contract with vessels under 60 feet, or with AFA vessels, to harvest an Aleutians allocation. NMFS has arrangements governing the monitoring of harvest by AFA vessels. There are concerns about arrangements to monitor small vessel activity. Additional time may be required to make arrangements for small vessel monitoring programs. The Appropriations Bill requires that 50 percent of the allocation of AI pollock go to small vessels after 2012. Before this time there are upper limits placed on the amount of allocation that can be given to small vessels, with no lower limit specified.

- Provision for small vessels to fish starting in 2005.
- Defer small vessel participation until a later date 2 or 5 years from now to allow for development of a management program.
- Don't provide for small vessels in the initial FMP amendment; make provisions for small vessels in a subsequent trailing amendment.

Economic development mandate

The Appropriations Bill rider specifies that the allocation of Aleutian Islands pollock to the Aleut Corp is for the purpose of economic development in Adak. This implies that it may be necessary to monitor use of the pollock fishery proceeds by the Aleut Corp.

- Do not address in the FMP amendment
- Define Adak economic development in FMP amendment
- Require an annual report to the Council
- Create a "Maintenance of Expenditure" requirement and have NMFS monitor compliance
- Other?

Monitoring vessel activity

AFA vessel activity is monitored fairly carefully. Introduction of small, unobserved vessels raises enforcement issues. Vessels are already required to carry VMS.

- Require small vessels targeting pollock for the Aleut Corp in the Aleutians to carry one or more observer(s)
- Require some lesser level of observer coverage
- Impose an Adak delivery requirement
- Require the Aleut Corp to notify NMFS of vessels given permission to fish prior to the fishing year
- Electronic log books?
- Review and approval of partnership agreements

What is a fishery endorsement?

The Appropriations Bill rider requires vessels under 60 feet to have a valid fishery endorsement. What does this mean?

- An LLP
- An LLP with an AI endorsement
- An LLP with an AI or BS endorsement
- Other?

Permission of Aleut Corp to process

The Appropriations Bill rider indicates that a processing firm must have Aleut Corp permission to process pollock from its allocation.

- Depend on Aleut Corp contracts with fishers, and private enforcement
- Require Aleut Corp nominations of authorized processors and require vessels to deliver Aleutians pollock to nominated processors
- Other?

Safety and efficiency of small vessel operations

Vessels under 60 feet may not be able to trawl for roe pollock safely and/or efficiently outside of SSL critical habitat in the winter. Should the SSL protection measures be changed to make it possible for them to fish more closely inshore? Changing SSL protection measures would require a consultation process, possible compensatory changes in SSL protection measures elsewhere, and possibly an EIS.

- No change to SSL protection measures.
- Change SSL measures to allow small pollock trawlers to operate under the same restrictions as Pacific cod trawlers in the AI
- Change SSL protection measures to allow small pollock trawlers to operate under the same restrictions as Pacific cod trawlers within the vicinity of Adak

**PUBLIC TESTIMONY SIGN-UP SHEET FOR
AGENDA ITEM**

C-6 Congressional Legislation

	NAME (PLEASE PRINT)	AFFILIATION
1	CLEM TILLION	Alut Enterprise Corp.
2	TERRY LEITZELL and SANDRA Moller	ICE
3	EARL COMSTOCK	CRAB Group
4	Pat Carlson	Kodiak Island Borough
5	John Garner	N.PAC. CRAB ASSN
6	KEVIN KENNEDY	TDX
7	Steve Minor	of FRA Tribes St Paul
8	MATEO PAZ-SOLDAN	City of St. Paul
9	GERRY MERRIGAN THOMPSON SMITH	Prowler Fisheries, MPLA
10	Joe Moore	TOC
11	Gary Loncon	Royal Alaskan Sds
12	Donna Parker	HSCC
13	dave fraser	Marin Milach
14	Aveni THOMPSON	ACC
15	Julie Bonnell + MIKE SFCR	AGDB
16	Kevin Suydon	Lady Alaska
17	BRENT PAINE	UCB
18	Frank Kelly	
19	Paul Mac Gray	CITY of UNAlaska of Sea Processors Assn.
20	ED LUTTRELL / LORI SWANSON	GROUND FISH FORUM
21	DENNIS PHELAN	PSPA
22	Margaret Hall	Rondys, Inc
23	LINDA KOZAK	
24		
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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

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Dave C-6
Fraser

It is my understanding that Sec. 801 Crab Rationalization legislation allows modifications and refinements of the elements of the program consistent with the MS-FCMA:

- 1- if such trailing amendments are approved by Jan. 1, 2005 - or -
- 2- a trailing amendment is approved subsequent to full implementation.

There are a couple key items in the AP recommendations relative to the EIS that may lead the Council to wish to refine the A/B split.

The EIS should provide additional clarity on:

- 1- Whether the Mandatory Data Collection program can be fully implemented. Sec. 801 dealt with prior MS-FCMA constraints in (j)(1), but as noted in the Council's Aug. 5, 2002 letter to Congress, there are "other statutes" that may constrain the recommended program.
- 2- Whether the issues raised in the DOJ letter of Aug. 27, 2003 will impact the intended function of Binding Arbitration as a surrogate for competition in price formation.

Additionally, it is critical to the functioning of Binding Arbitration that the arbitrator has access to good verifiable data. However, it is not clear that there is an interface between the Binding Arbitration program and the Mandatory Data Collection program under (j)(1) or with the Federal Trade Commission data collection and review program under (j)(6).

As the SSC minutes note, it is the threat of Binding Arbitration that is really important. However, a threat is only meaningful if it is credible.

The Council should endorse the AP recommendation to initiate a trailing amendment to modify the A/B share split, including the recommendation that all A shares redesignated as B shares retain their regional designations.

The analysis of this trailing amendment should tie off the EIS and the RIR/IRFA/SIA appendices. The original RIR pointed out that quantitative analysis of the impact of different A/B share splits was impossible. As a result there were only a handful of pages of qualitative discussion in RIR that allowed the 2002 Council to evaluate the impact of different splits.

Ultimately the original RIR, EIS, and any new analysis of A/B share ratios all boil down to this:

- A ratio of 0%:100% A/B split is best for fishers.
- A ratio of 100%:0% A/B split is best for processors.
- At each incremental increase of A shares between 0% and 100% in the A/B split, the benefits are being increased for processors and decreased for harvesters.

Please initiate the trailing amendment recommended by the AP, so that the Council will be poised to respond in a timely way to the issues raised concerning Binding Arbitration.

dave fraser

C-6
Earl Constock

C . R . A . B . GROUP

Crab Rationalization and Buyback Group

907-747-7967 · P. O. Box 1064 · Sitka, Alaska 99835

Agenda Item C-6

February 7, 2004

Ms. Stephanie Madsen
Chair
North Pacific Fishery Management Council
605 West 4th Avenue
Anchorage, Alaska 99501-2252

Dear Ms. Madsen:

The CRAB Group supports the full implementation of new section 313(j) of the Magnuson-Stevens Fishery Conservation and Management Act as quickly as possible. To that end the CRAB Group has submitted testimony under Agenda Item C-5 supporting the release of the draft Environmental Impact Statement with only minor revisions. Our testimony under this Agenda Item, C-6, focus's on the implementation of the specific authority provided by Congress under new section 313(j)(3) of the Magnuson-Stevens Act for the Council to submit, and the Secretary to approve, amendments to the preferred alternative once that alternative has been implemented.

The CRAB Group supports the recommendation of the Advisory Panel (AP) that the Council should begin the process of developing a subsequent amendment to the preferred alternative to analyze a range of alternative options for the ratio of A shares to B shares. This subsequent amendment should be ready and available for final action by the Council by no later than the December 2005 meeting. The CRAB Group agrees with the concern that the AP was seeking to address with this recommendation, namely that the Council may find that the binding arbitration safeguard adopted in the preferred alternative is unworkable, and therefore would need an alternative means of addressing the anti-competitive concerns that binding arbitration was intended to address.

There are a number of reasons why the AP's recommendation is a prudent course of action for the Council:

First and foremost, the AP recommendation is clearly within the authority granted by new section 313(j)(3), which permits the Council to submit amendments "subsequent to implementation" of the preferred alternative "to achieve on a continuing basis the purposes identified by the Council." See Section 313(j)(3) on page 2 of C-6(c).

Second, the AP recommendation responds to information provided to the Council after it had made its selection of the preferred alternative and considered the trailing amendments. The August 27, 2003 letter from the Department of Justice to NOAA raises a number of serious concerns with the Council's proposed binding arbitration program, to the point where many interested parties have questioned whether the program can be made to work at all. If it comes to pass that binding arbitration can not be made to work as the Council intends, then the Council will need an alternative way of addressing the anti-competitive concerns that binding arbitration was intended to address. Adjusting the ratio of A shares to B shares is such an alternative. Having a subsequent amendment to adjust those alternatives analyzed and ready to go gives the Council the ability to continue implementation of the crab rationalization program without the lengthy delay that would otherwise occur if the Council waited until the binding arbitration program was in fact found to be unworkable. It is the CRAB Group's understanding from discussions with legal counsel that the Council would not be able to respond to the failure of binding arbitration with an emergency rule, which means that a minimum of 12 or more months would elapse before the Council could implement alternative measures if the Council were to wait for that failure to occur.

Third, the AP recommendation gives effect to the commitments that the Council made to Congress in both the August 2002 Report to Congress and the subsequent May 2003 letter, as well as the testimony of Commissioner Duffy to Congress on May 20, 2003. The Council stated on page 23 of their August 2002 Report to Congress that "the Council's continuing development of the program through a series of ongoing amendments and clarifications" would ensure a "fair and equitable rationalization program." Further, the Council told Congress on page 2 of their May 2003 letter that "the Council intends to assume responsibility for addressing any difficulties that arise" and asked Congress to provide "explicit direction to the Council concerning its obligation to review and amend the program should any unanticipated negative impacts arise." Finally, Commissioner Duffy stated on page 5 of his May 20, 2003 testimony to the Senate Committee on Commerce, Science, and Transportation that "we will make necessary adjustments to achieve our stated goals" and that the Council could "adjust the percentage of B shares" among other options. Section 313(j)(3) clearly responds to the Council's request for authority to make changes, and the AP's recommendation is consistent with the exercise of that authority.

Fourth, the Council has previously analyzed and prepared an alternative, but then withheld final action, on at least two occasions as a means to address concerns and promote cooperative behavior between fishermen and processors. One occasion was when the Council analyzed the "Dooley-Hall" alternative for coops under the American Fisheries Act, and the second was when the Council analyzed the "Steele" amendment on binding arbitration. In both cases the Council elected not to take final action, and chose instead to announce to industry that in the event that the behavior the amendments were intended to address did in fact materialize, then the Council would have a solution ready and available for quick implementation. In the case of the "Dooley-Hall" amendment, the behavior that the amendment was intended to address has not yet materialized, so it appears that the Council's action had the intended effect. With respect to the "Steele" amendment no such judgment

can yet be made, since binding arbitration is not yet in effect. Further, should the concept of binding arbitration prove unworkable due to anti-trust issues, the "Steele" amendment would not fix that problem and therefore is unavailable as a solution. The CRAB Group notes that on page 5 of the draft Scientific and Statistical Committee (SSC) report, under point 3, the SSC notes that it is the "threat" of binding arbitration that is likely to have the most beneficial effect on negotiations; the same has been shown to be the case with the "Dooley-Hall" amendment. Adoption of the AP recommendation would provide the Council with a credible threat that an alternative exists if binding arbitration proves to be ineffective or unworkable to achieve the goals identified by the Council.

~~Fourth~~
Fourth, the AP recommendation is consistent with Senator Stevens' statement regarding the implementation of section 313(j), namely that "any further amendments should be corrective in nature or address unforeseen problems with the overall functionality of the crab rationalization program." See page 1 of Senator Stevens statement under Agenda Item C-5(a)(4). The AP recommendation is both corrective in nature and addresses an unforeseen problem. It is corrective in that it provides an option to address the potential failure of a critical element of the Council's preferred alternative, namely the binding arbitration program. That there is a serious possibility that binding arbitration may not work as the Council intends was, at the time of the adoption of the preferred alternative and the trailing amendments (including binding arbitration), an unforeseen problem that did not come to light until months later, when the Department of Justice finally issued a letter outlining their numerous concerns with the program.

~~Fifth~~
Sixth and finally, the AP recommendation will not delay implementation of the preferred alternative. The AP has recommended that the amendment be prepared for final action 23 months from now, well past the January 1, 2005 date for adoption of the preferred alternative and past the expected implementation date of sometime around the middle of 2005. Much of the analysis for the range of alternative ratios recommended by the AP has already been done and is contained in the appendices to various Council documents, so the AP recommendation does not involve a tremendous commitment of staff time to produce the needed analysis.

For the reasons set forth above the CRAB Group believes the AP recommendation to develop a subsequent amendment with an alternative range of ratios for the A share - B share split should be adopted by the Council. Because the AP recommendation does not contemplate final action by the Council until after implementation of the preferred alternative, the AP recommendation is in accordance with new section 313(j)(3) and should be adopted.

Respectfully,



Earl W. Comstock
Counsel for the CRAB Group

To: North Pacific Fisheries Management Council
From: TDX Corporation, Ron Philemonoff CEO

C-6
Kevin Kennedy
TDX Corp.

Madam Chair

On repeated occasions we have documented to the NPFMC regarding the rights of Tanadgusix Corporation (TDX) and the Aleut Community of St. Paul Island, a federally recognized tribal entity "eligible for the special programs and services provided by the United States to Indians because of their status as Indians," we requested you protect the legal right of TDX and the Native community's reserved fishing rights to participate in the fisheries of the Bering Sea around the Pribilof Islands. The Pribilof Aleuts' requests went unanswered. As a result, the economy and cultural livelihood of Aleut Community continue to be threatened by the decimation of the fishery resource and the community's inability to meaningfully participate in the commercial fishery managed pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("MSCMA"), 16 U.S.C. § and The Fur Seal Act Amendments of 1983, Pub. L. 98-129, 16 U.S.C. § 1151 *et seq*

Congress directed TDX and the Aleut Community of St. Paul Island to invest substantial sums of money to engage in the crab and other Bering Sea fisheries after Congress eliminated the Pribilof Aleuts' only source of economic wellbeing when it banned the commercial harvesting of fur seals two decades ago. The Fur Seal Act Amendments of 1983, Pub. L. 98-129, 16 U.S.C. § 1151 *et seq.*, directed a shift in the Pribilof Aleut's traditional economy to "a stable, diversified and enduring economy not dependent on commercial fur sealing." 16 U.S.C. § 1161(d)(7). Despite Congress' intent for the Pribilof Aleuts to develop an economy based on "crab, halibut, and groundfish fisheries and other industries," the Pribilof Aleuts have been foreclosed from developing and participating in a meaningful commercial fishing economy. *See* 129 Cong. Rec. H3170 (1983) (remarks of Rep. Breaux). To protect TDX's and the Aleut Community's legal right to a share of the Bering Sea fisheries, the NPFMC and United States must take action to reaffirm TDX and the Tribe's reserved fishing rights and regulate the fisheries of the Bering Sea in order to provide a share of the harvest and processing shares to TDX and the Pribilof Aleut people. Therefore we make the legal claim and request for action:

1. That the NPFMC and the United States Government provide the village corporation, TDX with 8% processor share of the Total Bering sea Opilio Crab quota and the prorated processing share of the other Bering Sea crab Species under the proposed crab rationalization plan allocation and hardship section.
2. That the NPFMC and the United States Government provide the Pribilof Aleuts a share of Bering Sea fisheries so as that the Pribilof Aleuts maintain their rights to a fair and equitable right to an economy and means to make a living like the rest of America.

The importance of TDX and the Pribilof Aleuts' reserved rights to fisheries in the Bering Sea in order to achieve economic self-sufficiency cannot be overemphasized. As noted in the enclosed historical report of Dr. Lisa Mighetto entitled *The Pribilof Aleuts' Dependence on Marine Resources of the Bering Sea* (1997), the Aleuts use and dependence on Pribilof Islands' fisheries resources long predates European contact. During the era of Russian sovereignty, Aleut groups were relocated permanently to St. Paul and St. George islands to harvest valuable

seal fur. The treeless, volcanic Pribilof Islands occupy a desolate portion of the Bering Sea, 375 miles west of the mainland of Alaska and 250 miles north of the Aleutian Islands chain. The remoteness of St. Paul and St. George islands and the isolation of the Pribilof Aleuts led to the creation of a separate society and new political institutions. In acquiring Alaska, the United States commenced a guardianship over the Pribilof Aleuts, responsible for the protection of their interests and the provision of their welfare. The Federal Court of Claims acknowledged "the United States recognized the dependence of the [Aleut Community of St. Paul Island] on fishing and seal hunting for their continued existence. And that the United States undertook to protect the [Aleut Community of St. Paul Island] in securing their 'comfort, maintenance, . . . and protection.'" *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831, 839 (Ct. Cl. 1973) (citing Act of July 1, 1870 and Act of April 21, 1910). This was recently reaffirmed by the Ninth Circuit which noted that section 206 of the Fur Seal Act directed that "land be set aside "for homesite, commercial or other purposes . . ." for the Pribilofs." *City of St Paul v. Evans*, No. 02-35958 (9th Cir. Sept. 25, 2003) (also citing Dorothy Miriam Jones, *A Century of Servitude: Pribilof Aleuts Under U.S. Rule* (1981)).

The Aleut people have always been absolutely dependent on the Bering Sea's fisheries resources. The remote location of the Pribilof Islands is not an insurmountable obstacle to the pursuit of such a livelihood, so long as the Pribilof Aleuts have a reserved right to participate and share in the fisheries of the Bering Sea. The Pribilof Islands offer little hope to the Aleuts of obtaining economic self-sufficiency absent a right to participate and share in the harvest and processing of the fisheries. The insurmountable obstacle here is the NPFMC's and National Oceanic and Atmospheric Administration ("NOAA") Fisheries' reckless allocation of the Bering Sea fisheries to non-native interests, factory trawlers, CDQ Program and processors, leaving nothing for the Aleuts. The so called community protection provisions and State managed CDQ program do not address our claims. We note that the recent Crab rationalization plan developed by the NPFMC provides a section, "Hardship" claims for crab processor shares:

"Hardship Provisions for processors that did not process crab in 1998 or 1999 but meet the following provisions:

- A processor(not a Catcher/Processor) that processed Opilio crab in each season between 1988 and 1997 and
- Invested significant capital in the processing platform after 1995, will be determined to be a qualified processor.
- Significant capital is defined as a direct investment in processing equipment and processing vessel improvements in excess of \$ 1 million."

This provision could partially address our one of claims raised here and in the past, but does not go far enough or better put, it has been watered down to a meaningless provision that results in TDX being cut out unjustly of any processor shares for its investment made in the former fur seal processing plant to a crab processing plant as was mandated by Congress in the Fur Sea Act. The TDX Anderson crab processing plant has well over million dollars investment in it, the plant has a historical record of processing up 8% of the total Bering Sea Opilio quota, the plant also processed Bristol Bay and Pribilof Red and Blue King Crab, Bairdi and Hair Crab during the majority of the so called qualifying years. But the proposed rationalization plan has been crafted to further to exclude TDX from participating. Therefore we request once again that TDX be certified a qualified processor and be allocated 8% of the total Opilio crab and the prorated share of the related other crab species for processing shares in the Northern region.

Further background for this justification can be found in the Fur Seal Act Amendments which directed establishment of a \$20 million trust administered under terms and conditions prescribed by the Secretary, to address such matters as:

(1) establishing standards and procedures for the disbursement by the trustee or trustees of Trust assets for the purposes of fostering in the Pribilof Islands a stable, diversified and enduring economy not dependent upon sealing after Federal management of the islands is terminated, which procedures may include formal participation of Pribilof Islands Native councils, corporations, or other such entities. Section 206(c)(1).

Legislative History of the FSAA Points Directly to Bering Sea Fisheries.

While the Fur Seal Act Amendments does not specifically legislate a fisheries allocation for the fishing industry of the Pribilofs, it is clear from the legislative history that Congress intended sealing to be replaced by the taking of other species as the major economic activity on the Pribilofs. The Senate Report on the legislation notes that the Act sets up "a trust fund to be used by the residents of the Pribilof Island to enable them to develop new livelihoods not based on sealing. The primary economic activity which is anticipated is fishing." S. Rep. No. 98-212, 98th Cong., 2d Sess. 1 (1983) (emphasis added).

During the Senate floor debates on the bill, Senator Stevens, its primary sponsor, took note of the law's intent to foster a fishing industry on the Islands:

This legislation maintains and enhances environmental values on the Pribilofs – and it also gives the Aleut people who live there a good opportunity to develop a self-sufficient economy independent of Federal subsidy. There are vast resources in the Bering Sea fisheries. This legislation will permit the Aleut villages of St. Paul and St. George to enter commercial fishing in the waters contiguous to their islands. 129 Cong. Rec. S11676 (Aug. 4, 1983) (remarks of Senator Stevens). Senator Levin echoed this purpose:

Of special importance to assist the Aleuts with their economic development efforts, this legislation established a \$20 million trust fund to be used by the Pribilof Island native corporations to foster the development of a self-sufficient economy less dependent on fur sealing.

Important efforts have already been taken in this regard. The Pribilof Islands are located in the eastern Bering Sea, one of the world's richest fishing grounds. During the past 2 years, the Aleut people have begun a small commercial fishing operation that they hope to expand. With the availability of moneys from the fund, and the State of Alaska's commitment to construct a harbor facility, the Aleuts should be able to take advantage of their location to develop this valuable fishery resource.

Id. at S11677 (remarks of Sen. Levin) (emphasis added).

Like the Senate, the House consideration of the bill demonstrates that Congress

specifically intended expansion of a fishery on non-seal species in the waters surrounding the Pribilof Islands.

The House Report states:

The concept for H.R. 2840 has grown out of negotiations between the federal and state governments and Pribilof native corporations. One desired result, the development of a commercial fishing industry, is expected to be achieved due to the strategic location of the two islands in the middle of one of the world's richest fisheries. Over 70 percent of the potential yield of the major commercial fish species found in the Bering Sea are concentrated within 200 miles of the Pribilofs.

H. Rep. No. 98-213, 98th Cong., 1st Sess. 8 (1983) (emphasis added).

The floor debates in the House demonstrate a similar intent that the Pribilof Natives maintain a fishing-based economy. Representative Breaux, the chief House sponsor of legislation, stated:

The purpose of H.R. 2840 is to assist the Natives of the Pribilof Islands in achieving economic diversification and independence through livelihoods not dependent on seal harvesting. . . .

Since the Pribilofs are located in the rich Bering Sea fishing grounds, the potential for economic diversification is significant. The \$20 million appropriation, as authorized in H.R. 2840 at the request of the administration, would supplement the islands' economy during the development of halibut, king crab, and groundfish fisheries and other industries

129 Cong. Rec. H3170 (remarks of Rep. Breaux) (emphasis added).

Referring to the Pribilof Islands' location in the Bering Sea fishery, Rep. Forsythe said:

The committee also amended the bill to clarify that one purpose of the \$20 million fund is to move the Pribilof economy away from dependence on sealing. I supported this amendment because it emphasizes that the long term objective is a diversified economy for the Pribilofs which will take advantage of, among other things, the wealth of other natural resources available to the islanders.

Id. (remarks of Rep. Forsythe).

Rep. Jones also referred to the Congressional intent that a fishing industry develop on the Pribilofs:

Still, the time is long past due for these people to be given an opportunity and a small capital base upon which, we are hopeful, they will build a strong and enduring diverse economy which is not based on sealing. The islands sit in the midst of one of the world's richest fisheries and development of a commercial fishing industry and related sources of employment are contemplated.

Id. at H3171 (remarks of Rep. Jones) (emphasis added).

¹⁴/E.g., Oren R. Young, "The Pribilof Islands: A View From the Periphery" *Anthropologica* XXIX (1987) at 155 (Since the bottomfish and haircrab fishery were subject to the Magnuson Act, the United States "probably would take steps to promote and protect a fledgling fishing industry based on the Pribilofs even if it took some time for this industry to approach the level of efficiency attained by the high seas fishing fleets of Japan, the Soviet Union and Korea.").

In our opinion this legislative history, taken as a whole, compels the conclusion that

Congress specifically intended the result that a viable fishing industry for the Pribilof Islands would replace the sealing activity that previously provided the virtually sole means of livelihood to its residents. While Congress did not preclude the development of other economic activity, Congress assumed that Bering Sea fisheries would be expanded and relied upon because there was no other feasible alternative.¹⁴ Fairly read, a principal purpose of the Fur Seal Act Amendments was to establish, as federal policy, the goal of creating a fishing industry in the Pribilofs. Congress had mandated through the FSAA trust fund that the village corporation, TDX invest in the Bering Sea fisheries, including the crab fishery. And recently in Senator Steven's management report on the need for the Crab Rationalization provisions in the Omnibus bill, Senator Stevens reported the urgency of this bill to protect the needs of the Aleut people of Pribilof Islands. At the least, the FSAA belies any congressional purpose to eliminate or minimize the long-standing federal protection of the Pribilof Aleuts' right to a livelihood based upon the fisheries of the Islands and adjacent waters; that continued right and trust mandate furnishes a legal basis for

1. allocating the historical 8% opilio crab processing shares and related other crab species shares to the village corporation, TDX for its investment in converting the former Fur Seal Anderson processing plant to a Crab processing plant.
2. allocating a share of the fisheries to the Pribilof Aleuts that would provide for a fair and equitable right to an economy and means to make a living like the rest of America.

C-6
Gerry Merrigan
Proble
Fisheries

C-6: Adak Pollock

The Council recommends that an amendment to the BSAI FMP be initiated for an AI pollock fishery. In the development of this amendment, the Council will be cautious that any opening of a directed Aleutian Islands pollock fishery is accomplished in full compliance with all applicable law and not disruptive to existing fisheries to the extent practicable. The Council will avoid taking any action in regards to this fishery which would require a new consultation under the current biological opinion or Endangered Species Act covering Steller sea lions. *[from floor language]*

It is the Council's intent that this amendment should be developed on a schedule to that will address all these considerations. These considerations must be met in order for the fishery to occur. As long as these considerations are met and if possible, the schedule should mesh with the normal specifications process for a fishery to occur in 2005. The schedule will be _____.

Further, the Council provides the following comments on the potential FMP amendment alternatives:

Initial Allocation Amount

For guidance in determining the allocation amount to the AI pollock fishery, the Council shall consider pollock allocations given to the various groups that participate in the CDQ program in order to recommend a reasonable amount of AI pollock to the Aleut Corporation and in no case should this amount exceed 40,000 mt. *[from floor language]*

Optimum Yield Cap & Allocation of Unutilized AI Pollock Allocation

The following options will be analyzed:

Option 1: The pollock allocation to the AI fishery would be in addition to the 2 million metric ton cap consistent with the provisions in Section 803 (c).

Option 2: The pollock allocation to an AI fishery will come from within the OY cap.

Suboption 1: The pollock allocation to the AI fishery will be funded by a reduction in the EBS pollock TAC. *[this is consistent with the methodology used in existing CDQ allocations]*. Any unused pollock TAC from the AI fishery will be rolled back to the EBS pollock TAC. This will occur at the earliest time possible in the calendar year and no later than _____ each year.

Suboption 2: The pollock allocation to the AI fishery will be funded by taking proportional reductions in the TACs for each of the existing groundfish fisheries in the BSAI. *[from the floor language]*. Any unused pollock TAC from the AI fishery will be rolled back on a pro-rated basis to the fisheries from where it originated in the same proportions. This should occur at the earliest possible time in the calendar year and no later than _____ each year.

- i.) exempt the BSAI sablefish IFQ fishery from the proportional reduction.

Use of B Season Allocation

Option 1: Maintain current 40/60 seasonal apportionment requirement for pollock fisheries. *[unutilized B season TAC is addressed in previous section]*

Small Vessels *[as in AP motion]*

Option 1: Provisions for small vessels to fish starting in 2005.

Option 2: Defer small vessel participation until a later date 2 or 5 years from now to allow for development of a management program.

Economic Development Mandate *[as in AP motion]*

Option 1: Require an annual report to Council.

Option 2: Other

Mandatory Vessel Activity *[as in AP motion]*

Option 1: Have NMFS staff consult with enforcement and provide the Council with options.

Option 2: Mandatory shoreside monitoring.

Safety and Efficiency of Small Vessel Operations

Option 1: No change in SSL protection measures

Option 2: Charge the SSL Mitigation Committee to consider changes to the SSL protection measures to allow small pollock trawlers to operate more safely and efficiently. The Council will not take any action which would require a new consultation under the current biological opinion.

C-6
Joe Moore



February 6, 2004

Ms. Stephanie Madsen, Chair
North Pacific Fishery Management Council
605 W. Fourth Avenue, Suite 306
Anchorage, AK 99501-2252

Dr. James Balsiger, Regional Administrator
NOAA Fisheries, Alaska Region
709 West Ninth Street
Juneau, AK 99802-1668

Re: Agenda Item C-6

Dear Ms. Madsen and Dr. Balsiger:

Thank you for the opportunity to comment on Agenda Item C-6, specifically on issues concerning the Aleutian Islands pollock fishery.

The Aleutian Island ecosystem is one of the most vibrant, dynamic, productive and rare ocean environments in the world. Its ecological value warrants special management and protection. As we have stated several times in the past, the risks of reopening this fishery without thorough analysis of the consequences far outweigh the benefits. Therefore, we support continued closure of the Aleutian Islands to pollock fishing.

Prior to any reasoned decision about whether or not to open a directed fishery for pollock in the Aleutian Islands, a full and thorough analysis of the ecological and socioeconomic effects of opening a fishery that has been closed since 1998 must be completed and considered. The Council and Fisheries Service must consider fully the implications of opening such a fishery on listed and declining species and their habitats in the Aleutian Islands, on the pollock stock, and on other fisheries and the communities in the region. The National Environmental Policy Act regulations make clear that a full blown Environmental Impact Statement is the only permissible vehicle for such considerations and analyses. See, e.g., 50 C.F.R. § 1508.27 (definition of "significantly").

Even without the benefit of the analysis an Environmental Impact Statement would provide, the 2003 Aleutian Islands Walleye Pollock SAFE raises several questions about the wisdom of opening a directed fishery on this stock.

For example, the 2003 SAFE contains some changes in analysis, particularly in the delineation of stocks, which may obscure important biomass trends. This new partitioning of stocks is based on "apparent breaks"¹ in spatial distribution of past fisheries, and not on genetic analysis or identification of spawning grounds. The 2003

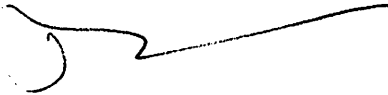
¹ Barbeux, S., J. Ianelli, and E. Brown. 2003. Aleutian Islands Walleye Pollock SAFE. Alaska Fishery Science Center. pg. 841.

SAFE's departure from the analytical approach employed in previous years must be fully evaluated and explained before making rational management decisions.

We are also concerned about the very large confidence intervals associated with these estimates. The large confidence intervals of the survey biomass are indicative of a few large survey hauls that increased mean biomass estimates.² NOAA scientists caution that "overestimation of Aleutian Islands stock productivity because of influx from Eastern Bering Sea stock is a considerable risk."³

It would be irresponsible to open a directed Aleutian Island pollock fishery in light of the significant uncertainty and risks surrounding the status of these pollock stocks, as well as the ecological and socioeconomic effects. We urge you to maintain the closure.

Sincerely,



Jim Ayers
Director, Pacific Region
Oceana Inc.



Kris Balliet
Alaska Region Director
The Ocean Conservancy

² Id. at 877, 886, Figs. 1A.20, 1A.9.

³ Id. at 851.

C-6
Arnie THOMPSON

Alaska Crab Coalition

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February 7, 2004

**ACC COMMENTS ON THE BSAI CRAB EIS AND
CONGRESSIONAL LEGISLATION NPFMC AGENDA ITEMS
C-5 AND C-6**

- The ACC finds the Crab EIS to be quite adequate and recommends sending the Crab EIS out for public review in its present state. The ACC also provides a few brief technical comments below.
- The ACC participated in both the SSC and Advisory Panel discussions and the ACC concurs with the recommendations of the SSC and in general with the AP recommendations, with the exception of the request to develop the trailing amendment on the A and B shares split. The ACC supports the AP minority report on this issue.
 - The ACC finds the request to be inconsistent with HR 2673, under paragraph 313(j)(3) which “authorizes the NPFMC to recommend to the Secretary any necessary changes after implementation of the crab program to continue to meet conservation and management goals set out in the program for the BSAI crab fisheries.” This does not mean the allocation goals of those who want as Senator Stevens noted “a better deal.”
 - Senator Stevens in his statement on the floor of the Senate makes it very clear that the intent of Congress in regards to this legislation does not mean changes in the particulars of allocations to the various sectors when he said: “Congress does not expect the Council to revisit particulars of the crab rationalization program that were part of the initial report to Congress in June of 2002, such as individual harvest shares, processing shares, the 90/10 split of “Class A” and “Class B” shares, regional share designations, voluntary harvester cooperatives, and community development quota allocations, to name a few.”
 - Requesting the analysis of a trailing amendment on A and B shares prior to the implementation program is as the AP minority report states “simply requesting another vote on the issue with no new information and no experience with implementation.” The minority report further notes that the analysis of the trailing amendment “in the middle of implementation will sow uncertainty in the entire program.” It will also facilitate the

opposition's efforts to obfuscate constructive discussions between future cooperative partners.

- The ACC notes that numerous harvester protections have been built into the Council approved plan, including the Council intent to take up the "Steele Amendment" to the binding arbitration program, in the event that the current arbitration program is found unworkable. The congress has also strengthened protections for harvesters by putting two provisions in the legislation that call for forfeiture of processors quota shares and makes it clear that there is no waiver of anti-trust laws of the United States.
- The ACC vividly recalls the tremendous amount of Council staff and public time that was taken up with the Council analysis of the "Dooley-Hall cooperative amendment following the passage of the AFA. The Council and staff have many other priorities including HAPCs and rationalization of other fisheries that will be adversely affected by taking on this additional project.
- The A and B shares split was initially decided in June 2002 in the main Council motion. The Council then had before it the full range of alternatives in this motion. The ACC, all through the rationalization process, was the only harvester voice testifying and recommending an 80/20 split on A and B shares. There was not another harvester voice that testified in June of 2002, to recommend a preferred alternative on any percentage of the A and B shares split. This reminds the ACC of the situation at the NPFMC in April of 1995 on a Council vote for ITQ versus License Limitation Program alternatives—when almost the identical personalities now supporting an ITQ only preferred alternative—totally opposed the ITQ program. In 1996, the same persons also opposed ACC's efforts to have BSAI crab statutorily exempted from the congressional moratorium on new ITQ programs.

EIS Technical Comments:

- Additional ACC comments on economic considerations that need to be included in the EIS as part of the three year comparative program review:
 - (1). The costs of royalty fees paid for quota shares (both initial acquisition and leased or purchased quota shares) and the overall effects of royalty fees on the income of vessel owners, skippers and crew; and
 - (2). A comparative review of the city and borough fish taxes that would produce a transparent analysis of City and Borough taxes.

- The ACC also recommends the inclusion in the EIS of the text of Senator Stevens prepared remarks on the floor of the U.S. Senate and also his written statement that he submitted for the record on January 22, 2004. Senator Stevens prepared remarks summarize and provide insights on congressional perspectives on the crab three pie cooperative program.
- The ACC wishes to conclude its comments with specific reference to one of Senator Stevens remarks which addresses a core reason for why the NPFMC did not select the IFQ alternative, but instead opted for the three pie cooperative alternative to address the unique characteristics of the Bering Sea and Aleutian Islands king and tanner crab fisheries.

The essence of his remarks are pertinent to the EIS discussion of the “Distribution of benefits between the harvesting sector and the processing sector under the individual fishing quota alternative,” and the “three pie alternative,” pages 4-156 through 4-159. Although there is a discussion on page 159 of the adverse market effects of processors’ vertical integration on market competition for landings of crab in the three pie quota share program, there is no discussion of the adverse effects of vertical integration of harvesters under a harvester only IFQ program on communities and shore-side processors. Senator Stevens clarifies those effects in his remarks on the floor of the Senate as noted below.

Now the crab fishery is a unique one in that there is a very high dollar value for a small amount of resource that can be processed quickly. If the crab plan only provided for a harvester-only quota share, it would ultimately result in a de facto processing quota for the exclusive group of boat owners that control the harvesting rights to the resource

Currently, in the Bering Sea crab fishery there is a surplus of catcher-processor vessels and floating crab processors that can be leased or bought cheaply. This mobile processing capacity in combination with a harvester-only share would enable fishermen to form cooperatives and vertically integrate such that none of the crab resource would ever have to come to shore-side processors.

Substantial investments made by shore-based processors would be lost and communities such as Unalaska , Adak, St. Paul, St. George, Akutan and King Cove would lose out on processing jobs, taxes and associated revenues. The North Pacific Fishery Council understood this and developed a plan that recognized the commitments made by all sectors of this fishery and tied the resource to the communities that have historically processed the crab.

Safety will also be achieved by this crab plan; this point is irrefutable.
The reality is, if we do not pass the crab plan in its entirety now, it will be many years, possibly even ten years, before the Council could develop another rationalization plan and fully implement it.

Arni Thomson
Executive Director



Tape 53, approximately 10:44 a.m.

Stephanie Madsen (Council Chair): O.K., that finally concludes our public testimony and we're back to the action for Aleutian Islands pollock and rockfish; bring staff back up to the table. Are there any questions for staff, are we ready to move into any motions? Mr. Fuglvog.

Arne Fuglvog (Council member): Madam Chairman, is your preference, then, to start with Adak and do the Gulf after that?

Madsen: Whichever you would prefer.

Fuglvog: Madam Chairman, I have a motion. Under item C-6, Legislation on Adak pollock. For the Council members, if they could. . .we're going to be working off of that handout that Gerry Merrigan passed around. It's a 3-page handout, in bold at the top, says 'C-6, Adak pollock'.

Madsen: Does everybody have their copy of Mr. Merrigan's testimony?

Fuglvog: And, Madam Chairman, I will read it into the record to start:

The Council recommends that an amendment to the BSAI FMP be initiated for an Aleutian Island pollock fishery. In the development of this amendment, the Council will be cautious that any opening of a directed Aleutian Islands pollock fishery is accomplished in full compliance with all applicable law and not disruptive to existing fisheries to the extent practicable. The Council will avoid taking any action in regards to this fishery which would require a new consultation under the current biological opinion or Endangered Species Act covering Steller sea lions. It is the Council's intent that this amendment should be developed on a schedule that will address all these considerations. These considerations must be met in order for the fishery to occur. As long as these considerations are met, and if possible the schedule should mesh with the normal specifications process for a fishery to occur in 2005.

And, Madam Chairman, just for clarification, I believe that staff would provide information on dates, so that last sentence of that one I'm not reading into the record.

Further, the Council provides the following comments on the potential FMP amendment alternatives:

Under Initial Allocation Amount: For guidance in determining the allocation amount to the Aleutian Island pollock fishery, the Council shall consider pollock allocations given to the various groups that participate in the CDQ program in order to recommend a reasonable amount of Aleutian Island pollock to the Aleut Corporation and in no case should this amount exceed 40,000 metric tons.

Under Optimum Yield Cap, an allocation of unutilized Aleutian Island pollock allocation, the following options will be analyzed:

And, we would re-number. . . Option 2 is now Option 1:

The pollock allocation to an Aleutian Island fishery will come from within the OY cap. There will be two suboptions: [moving to page 2]

Suboption 1: The pollock allocation to the Aleutian Island fishery will be funded by a reduction in the Eastern Bering Sea pollock TAC. Any unused pollock TAC from the Aleutian Island fishery will be rolled back to the Eastern Bering Sea pollock TAC. This will occur at the earliest time possible in the calendar year.

Suboption 2: The pollock allocation in the Aleutian Island fishery will be funded by taking proportional reductions in the TACs for each of the existing groundfish fisheries in the BSAI. Any unused pollock TAC from the Aleutian Island fishery will be rolled back on a pro-rated basis to the fisheries from where it originated in the same proportions. This should occur at the earliest possible time in the calendar year.

And, under Suboption 2, I guess rather than. . . since it's a suboption, I believe it would still be a decision point, so it could be another suboption, and that would be:

Exempt the Bering Sea Aleutian Islands sablefish IFQ fishery from the proportional reduction.

If I could speak to just that point for clarification. The reason being, it's an IFQ fishery. IFQs are set at the beginning of the year in the TAC-setting process. Fishermen go out and. . . they're issued their cards, they go out and fish—it's very problematic to roll back fish to an IFQ fishery. We've seen what that problem can be. A lot of fishermen. . . it's very difficult to set the schedule.

Use of 'B' season allocation: Option 1: maintain the current 40/60 seasonal apportionment requirement for pollock fisheries.

Again, following the 'B' season TAC issue from Suboption 2. Now, we're going to follow the AP motion. These are the same as the AP motion.

On small vessels, Option 1: Provisions for small vessels to fish starting in 2005;
Option 2: defer small vessel participation until a later date, 2 or 5 years from now to allow for development of a management program.

On the Economic Development Mandate: Option 1: Require an annual report to the Council.

On the Mandatory Vessel Activity: Option 1: Have NMFS staff consult with Enforcement and provide the Council with options. And, Option 2 would be mandatory shoreside monitoring.

And, I'm on page 3, now.

Under Safety and Efficiency of Small Vessel Operations: Option 1 would be no change in the Steller sea lion protection measures. Option 2 would be to charge the Steller Sea Lion Mitigation Committee to consider changes to the Steller sea lion protection measures to allow small pollock trawlers to operate more safely and efficiently. The Council will not take any action which would require a new consultation under the current biological opinion.

Unidentified: Second, and request a clarification.

Madsen: Moved and seconded. I think Mr. Oliver had a question about how this relates to our previous action on the EA/EIS for Adak. . .or, Aleutian Island pollock. Mr. Oliver.

Chris Oliver (Council staff): Maybe this is just a clarification, Madam Chair. The Council had previously initiated an analysis of the Aleutian Island pollock issue and you had alternatives that included no action, i.e., no explicit closure; the second alternative was to prohibit a directed Aleutian pollock fishery and then in December you added a third alternative as a place holder in anticipation of legislation, which was to provide for a fishery as defined in the draft legislation, with the provision that the Council would not exceed the 2 million metric ton cap. Now, what we assume is that now that we have this legislation that this ongoing analysis which Ben and Bill have pulled together a lot of pieces for is simply going to be morphed, if you will, into this new document. So, in essence you're really not initiating a new amendment, rather we're sort of modifying the one that's already tasked. And so if you adopted this motion, for example, it would move forward as part of the package we already have underway you would simply be modifying obviously the alternatives and some of the alternatives from you had in December.

Fuglvog: That's my understanding.

Madsen: O.K. Mr. Wilson.

Bill Wilson (Council staff): Madam Chairman, just a quick clarification on that issue. My understanding is that this would supercede the intent and the components of that previously assigned analysis. This is the way Council wishes to go. I just didn't want to imply here that we were going to do what we had already started plus this. Is that correct?

Madsen: I appreciate that clarification. I think. . .the way I understand what Mr. Oliver said was we have taken action; we are not talking about a new document. What we're talking about is we are making changes to that document, and you're going to need to know when there's inconsistencies, today's action will supercede anything that was in that previous document.

Wilson: Thank you, Madam Chair.

Madsen: I think I have Mr. Anderson, Dr. Balsiger, and. . .I think a hand over here. . .Mr. Duffy? Mr. Anderson.

Stosh Anderson (Council member): Madam Chairman, through the chair, on the bottom of page 1, you have optimum yield caps, etc., and then you have the following options will be analyzed, and you struck Option 1 and then you made Option 2 Option 1? In doing that, shouldn't that sentence be above following the option, 'cause it's not an option any more. It's a statement and policy call?

Madsen: And, actually Mr. Anderson, that is in the existing document, so this would be something that is almost a repeat of what we had in the document, because we explicitly said in December that we would not exceed so this is almost a re-statement of that.

Anderson: Madam Chairman, where the difference is, is there's suboptions. And if we didn't choose that, we'd have a problem, so I just wanted the motion maker to clarify that.

Madsen: O.K., Mr. Fuglvog.

Fuglvog: Madam Chair, I would delete the actual option 2 or 1 language and it would just state the pollock allocation to an Aleutian Island fishery will come from within the OY cap, and then there are two suboptions to that statement.

Madsen: O.K., so what we've done is we've made that option to actually a statement that would precede the two options on how that will be decided. Thank you. Dr. Balsiger?

Jim Balsiger (Council member): Thank you, Madam Chairman. On that particular point, then, the language that was originally option 1 is entirely gone, is that correct?

Madsen: That's correct.

Balsiger: Thank you. And, then if I could, Madam Chair, on the very last sentence of this document where the language says the Council will not take any action which would require a new consultation. I don't understand very well, perhaps, the art of the various terms of the ESA, but we may have a consultation. We don't want to have a formal consultation, and so I don't know if we need to get the exact language. It may be something more appropriate to say the Council will not take any action which would likely result in a adverse effect or something like that, but if that's the intent of the words and consultation, perhaps we can leave it this way and straighten that out later.

Fuglvog: Madam Chairman, I think this was associated with the language from the Act, but I'm certainly amenable to wordsmithing that better to suit the Agency.

Madsen: Do you have that now, Dr. Balsiger, or are you going to come back to us?

Balsiger: Well, Madam Chair, I'm not sure that I can provide the exact right words, but of course the language of the Act says that we can't skip ESA, so we want to have the right words that say the right kind of consultation so it doesn't imply that we're intending to avoid the requirements of the ESA and that's all I was looking for.

Fuglvog: Madam Chairman, if I can, this language was taken directly out of the language of the Act and I think staff has a comment.

Madsen: Mr. Wilson.

Wilson: Madam Chairman, if the Council chooses to go forward with an analysis of changes in the Steller sea lion protection measures in the Aleutian Islands, that would necessarily imply a consultation with the Protected Resources Division of NMFS; it doesn't necessarily mean it has to be formal. Informal consultations are almost an ongoing process. I don't think you should fear an informal consultation process at all.

Fuglvog: So, Madam Chairman, what I'm hearing is, we could get further input from the Agency, but the word could have been 'formal' instead of 'new' if that would suffice, but that's a question maybe for Dr. Balsiger, or GC.

Madsen: Dr. Balsiger.

Balsiger: Madam Chairman, a proposed amendment, if this is the time, although I know we haven't discussed the main motion, . . .

Madsen: Well, I think we're on this topic. Let's see, I'll just ask. Mr. Duffy, is it all right? O.K., go ahead.

Balsiger: I would offer an amendment on that very last sentence, it would say, 'The Council will not take any action which would require a formal consultation under the ESA.'

Madsen: Is there a second? [Unidentified: Second] It's been moved and seconded. Dr. Balsiger, do you have any other comments about your amendment?

Balsiger: No, I believe I've bumbled through my explanation already.

Madsen: O.K., is there any other discussion on the amendment? Mr. Benson.

Dave Benson (Council member): Madam Chair, I guess I'm having difficulty knowing how we can make that definitive statement. The Council takes an action and it goes to the analysts. They look at what we did and determine if it's an informal or if a formal is necessary for consultation. It takes them some time to do the whole analysis of cumulative effects, etc., etc., so it's hard to predict for this Council, I think, ahead of time, to say we're not going to do anything that's going to trigger formal consultation. It's always after the fact, and so. . . I mean, we can say the Council will attempt to not take any action which would require a formal consultation, but I think that's about the best we can.

Madsen: Let's see, I think I had Mr. Bundy, Mr. Anderson. [Change to Tape 54]

John Bundy (Council member): Madam Chair, I think that Dr. Balsiger's language the first time around might have addressed Mr. Benson's points, so if it's appropriate I'd like to move to amend .

Madsen: You're going to amend the amendment.

Bundy: Amend the amendment. So, looking at the language on the page, just substitute for the very last line, the line that starts. . . 'require', substitute the following there: 'likely result in an adverse effect requiring. . .'

Madsen: Could you read the whole thing, Mr. Bundy, please?

Bundy: O.K. Starting with the sentence, 'The Council will not take any action which would likely result, likely result, in an adverse effect requiring formal consultation under the ESA.'

Benson?: Second.

Madsen: Moved and seconded. Mr. Bundy.

Bundy: So, there is an element of judgment in there that would be exercised before the Council would take such an action.

Madsen: Further discussion on the amendment to the amendment. Mr. Benson.

Benson: Madam Chair, I think after we dispense with this we need to go and do the same thing in the first paragraph. I guess there's two amendments on the floor already, so. . .but I just want to notice folks that we've got the same problem in the first paragraph.

Madsen: O.K. And, it would be the Chair's call that if this amendment passes it carries the amendment. . ., if this amendment to the amendment passes, it carries the amendment and we would be back to the main motion. Is there any further discussion on the amendment to the amendment? Seeing no further discussion, is there objection to the amendment. Seeing no objection, the amendment to the amendment carries the amendment; we're back to the main motion. Mr. Duffy.

Kevin Duffy (Council member): Question of clarification, Madam Chair. Mr. Fuglvog, the second paragraph, page 1, down at the end, I didn't catch it. The hard copy in front of me reads, 'the schedule will be,' and then it's blank. Did you include that in your motion anywhere or not?

Fuglvog: Madam Chairman, Mr. Duffy. No. I stopped at the year 2005.

Duffy: O.K., thank you.

Madsen: Mr. Benson.

Benson: I'll give it a try on this first paragraph to clean up that language to be consistent with the amendment we just adopted. So, the last sentence in the first paragraph, 'The Council will avoid taking any action in regards to this fishery which would likely result in an adverse effect requiring a formal consultation under the current biological opinion or Endangered Species Act covering Steller sea lions.'

Madsen: One more time, Mr. Benson. Just real slow, Chris is trying to write it down.

Benson: O.K. 'The Council will avoid taking any action in regards to this fishery which would likely result in an adverse effect requiring a formal consultation under the current biological opinion or Endangered Species Act covering Steller sea lions.'

Madsen: O.K., it's been moved; is there a second?

Unidentified: Second.

Madsen: O.K., it's been moved and seconded. Any other comments, Mr. Benson?

Benson: I think it's been spoken to well enough.

Madsen: Mr. Anderson.

Anderson: Madam Chairman, I guess I'd ask the motion maker why he's just limiting it to Steller sea lions. Why couldn't he just... Endangered Species Act? Because I think we're probably dealing with more endangered species than Stellers at this point.

Benson: I think that's a good point. I'm just reading the language as it's written here. If you would like to offer an amendment I could support it.

Madsen: Mr. Anderson.

Anderson: Madam Chairman, I move to amend the amendment by putting a period after Endangered Species Act, after the word 'Act', so that would delete 'covering Steller sea lions', Madam Chairman.

Madsen: The amendment to the amendment would put a period after 'Act' and delete 'covering Steller sea lions'. Is there any further... is there a second.

Unidentified: Second.

Madsen: It's been moved and seconded. Is there any further discussion about the amendment to the amendment? Is there any objection to the amendment to the amendment? Seeing no objection, the amendment to the amendment passes; we're back to the amendment. Any further discussion? Counselor?

Lauren Smoker (NOAA GC): Thank you, Madam Chair. I have to admit I am not familiar right now with the problem statement for the analysis the Council requested be initiated at its October meeting, or whichever meeting last year. However, at that time we did have regulations in place, which we still have in place, that provide an OY range for the Bering Sea/Aleutian Islands of up to 2 million metric tons. At this point in time we now have statutory legislation that provides the Council the ability to exceed that cap for this kind of action and if you are... I guess I'm asking the maker of the motion and any other Council members to think about whether the deletion of the option, the alternative to have pollock allocation that is in excess of the 2 million metric ton cap is unreasonable and how that is not consistent with the problem statement or the purpose and need for this action because under NEPA, as you know, we do need to look at reasonable alternatives.

Madsen (Council Chair): Thank you, Counselor. I guess the first question is to the staff. Have we developed a purpose and need statement for this action?

Madsen: Point of Order? Because it wasn't on the amendment? O.K. Counselor, I think your question is on the main motion, so Mr. Benson's correct. Let's go ahead and dispense with this amendment. So, the amendment is. . .Mr. Benson's language modified by Mr. Anderson's. In the first paragraph; everyone understand what the amendment is? Is there any objection to the amendment? Amendment passes. We're back to the main motion and we need to address the Counselor's comments. Mr. Wilson.

Wilson: Madam Chairman. Could you rephrase your question, Ms. Smoker. In light of looking back at the. . .you're looking back to what, two meetings ago, in the discussions that led up to even consideration of putting an FMP amendment process on track here? Is that correct? It's going to be difficult for me to recall a lot of the discussion and debate that the Council had in that process. I probably have them here in my notebook here, though. Is that what you're requesting?

Smoker: Madam Chair, I want to note that when the Council initiated this analysis, at the time we did not have the current legislation in front of us; it had not passed, and. . .

Madsen: Counselor, actually when we initiated this analysis we did not even address the legislation. It was only whether we open the pollock the fishery or we do not. In December we modified it to include an alternative, but when we initiated this analysis we may not have even known there was potential legislation actually, so we initiated it prior to any Congressional legislation that we knew of at the time.

Smoker: Thank you, Madam Chair, that's right, and that's what I had thought. And, what I'm trying to get at is, now there is authorizing legislation that allows the Council and the Secretary to consider exceeding the 2 million metric ton cap when considering an Aleutian Islands pollock fishery and the current main motion eliminates an alternative from the analysis that would examine the impacts of such a measure, of taking the Aleutian Island pollock fishery from something above and beyond the 2 million metric ton cap. If we want to continue to not examine this particular alternative, I think it would be very helpful to have a discussion as to why that alternative is no longer reasonable and that might be in light of the problem statement or the purpose and need that was developed with your initial request for an analysis, if this analysis of the main motion is suggesting it's folded into that, which I think I understood is going to happen.

Madsen: I guess my only comment, Counselor, is that we're not deleting anything. We've never adopted an option that would look at exceeding the 2 million metric ton cap, so. . .the AP recommended that, but we never adopted it, so we really aren't dropping it, but I do think your comments are probably appropriate in relationship to building a record why we are not taking up looking at that given that we were given Congressional authority to do so, it may not be. . .I think it's a little symantical but just for the record we've never adopted anything that would exceed the 2 million metric ton cap, so it's not that we're deleting it, it's just that we've never taken it up and probably need to have a record built why we haven't, maybe. I think I had Mr. Anderson. . .do you have something, Mr. Wilson?

Wilson: Well, Madam Chairman, I've looked back to my notes from the December meeting and you did explicitly discuss this issue and in fact Mr. Krygier made a motion to add a third alternative to the analysis that you asked us to do and that was to provide for a fishery as defined in the rider with the assumption that the Council will not go over the OY cap. The motion further discussed issues about how to do the pollock fishery within the OY cap; there was a lot of discussion about having before you the accumulative assessment information that actually we provided for you at this meeting. Dr. Balsiger asked about where we're going to find the TAC if we're under the OY cap; there was quite a bit of discussion on that while issue, Madam Chairman. And, Ms. Smoker, this isn't necessarily getting at your question; I don't know if it is or not, but this is the record from the last meeting that I have some information on and I think Mr. Oliver probably has some more recollections.

Chris Oliver: I was going to speak to the other issue Counselor raised. You did have some discussion and record for why you had made that. . .passed that motion in December. I don't have that transcript in front of me, but you may or may not want to add to that at this meeting. But your other point, Ms. Smoker, had to do with a problem statement. We've talked about this issue many times, but when the Council originally initiated this issue back in October 2002, it was a motion by Mr. Duffy, there was quite a lengthy, in essence, problem statement associated with that motion which we assumed would be folded into this document, so I think we do have a basic problem statement for the issue. . .the 2 million cap. . .[words drowned out by someone coughing]. . .may be a separate issue.

Madsen: Maybe it's important for staff to bring that record back and label it whatever it needs to be labeled so that we understand that we have on the record described why we wanted to move forward with this analysis and I think actually identify some pretty specific things that we wanted in the analysis between Mr. Duffy's motion and Mr. Bundy's motion that actually turned it into an EIS at that time. I also think that it would probably be appropriate to continue to build the record on why the Council is not going to look at exceeding the 2 million metric ton cap, but we can go to that. . .I have a few reasons why I'm not in favor of it. Mr. Bundy. . .well, actually Mr. Anderson had his hand up first.

Anderson: Thank you, Madam Chairman. I think when we started this agenda item after the motion was put on the floor we did clarify that it was a policy call, that the Council was making a statement not to exceed OY of 2 million metric tons. I believe post Congressional action it's important for us to build a record that even though we have that option that we choose not to take that option. The Council's record over the years of the 2 million metric ton cap has had a lot of verbiage about its success and why the Bering Sea has been successful and that has been a significant element. When we were in DC in November it was touted as one of the reasons we've had a safety net in the rebuilding and in the sustainability of the Bering Sea, so it's been a major element of the responsibility and the objectives of this Council. With regard to Congressional actions, from the public testimony that we've had on this item, there's only been one individual that even hinted that he would want to be on death row for four years. So I think it's the consensus of the industry and I think it's the consensus of all comments I've heard the Council not to exceed the 2 million metric ton so I think it's a very explicit policy call by the Council not to include an option to exceed, Madam Chairman.

Madsen: Thank you. Mr. Bundy.

Bundy: Madam Chair, I was actually going to talk about something else, but now I want to respond to Mr. Anderson. I fully expect to be a minority here, but I don't agree entirely with everything Mr. Anderson said. The tool that was provided in this rider with regard to exceeding the 2 million OY cap is simply a very temporary and frankly deminimus exceeding of that cap, deminimus, I think, in a biological sense. In a financial sense, it's not deminimus. If you're talking about 40,000 tons of pollock, that's approximately \$30 million of revenue annually, so that gives you an idea about the money involved. And, at the same time that this particular rider is allowing a temporary and deminimus exceeding of the cap it is putting in stone, as I think the word was used by Counselor, the 2 million cap in Federal legislation. I'd remind you also of the F_{40} report that we got last year which said that our 2 million cap is certainly positive and we deserve credit for that. It is not necessarily ecosystem-based because . . . and I think that the implication was that a cap that should be indexed to what the biomass is might be better so that there's always a constant cushion but not just an arbitrary number. So, anyway, I don't entirely agree with the statements made, but I just wanted to say that for the record.

Madsen: O.K. Mr. Hyder.

Roy Hyder (Council member): Thank you, Madam Chair. I for one really appreciate Ms. Smoker's question relative to this 2 million ton cap. The legislation that we're talking about certainly addresses it and addresses it in a very clear manner and there's a temporary ability to do something there if we need to. The legislation also, however, in four years brings back down and takes the science out of that cap. I for one would appreciate an opportunity to see an analysis of the cap and how we could apply science to a cap as opposed to a legislative limit that didn't preclude our scientists and our management from considering looking at the biomass in relation to the fishery. So, I appreciate the Counselor's question and at the risk of being aligned with the State of Washington, I guess I'm comfortable with Mr. Bundy's comments.

Madsen: Any other further comments on the main motion? Mr. Anderson.

Anderson: Madam Chairman, to respond to Mr. Hyder's comments, I think examining the 2 million metric ton cap is an appropriate task to do at some point, as a separate issue. But I think the issue we're dealing with here now has a limited time frame--you're wanting to accomplish this by June; to accomplish this by June that will allow us to fold the process into our normal TAC-setting process. If we're going to do a thorough examination on what is the appropriate F_{40} rate or the 2 million metric ton cap, I don't think we can give it adequate discussion in the timeframe that we have to accomplish this task. But if it is the wisdom of this body to examine that cap and try to persuade the Congress to change their mind about the permanent cap, that's an exercise I could support.

Madsen: O.K., any further discussion? Mr. Benson.

Benson: Thank you, Madam Chair. Do I understand based on this discussion that because of Mr. Krygier's motion at the December meeting regarding staying within the cap that we are now bound by that and to do anything different in this motion would require us to go back and reconsider that?

Madsen: No, I explained that the main motion that was laid on the table did not include exceeding the 2 million metric ton cap, which would not conflict with the motion that we passed in December that added an alternative that was explicitly NOT exceed the 2 million metric ton cap. I didn't indicate that it was unreachable, that it wouldn't need reconsideration. What we do here supercedes what we did in December and staff will overlay. . . I just pointed out that this motion did not change anything relative to what we did in December for the OY cap. Mr. Fuglvog.

Fuglvog: Would this be the appropriate time to speak more to my motion, or are we still. . .

Madsen: No, no, no, the main motion is on the table. Mr. Fuglvog.

Fuglvog: Thank you, Madam Chair. I'd just like to speak to a couple parts that have not been addressed. Again, quite a bit is from. . . [unintelligible]. . . language. I spoke to the suboption to exempt the Bering Sea sablefish IFQ fishery and with the pollock allocation now being a . . . [unintelligible]. . . it would be option 1, option 2, and that would be a suboption. And, again, due to the IFQ fisheries it would be very difficult to roll fish back to the sablefish fishery. Just to highlight a couple other things, there is a difference in this motion between the AP and on one point it also makes another policy call I believe the Council should be aware of. And that is, if you compare it to the AP motion on use of 'B' season allocation, the concept of putting a 'B' season allocation in a reserve and permitting reallocation to harvest an amount to another gear group is not contained in this. I do not believe that that is an appropriate policy with comments from staff, they can speak to this a little bit if necessary, but that would be. . . it's a very open-ended and quite vague concept that would need a lot of fleshing out and I think it's much cleaner and much more appropriate that if we choose to make a proportional reduction of TAC that the fish go back to those fisheries which the. . . on a pro-rated basis from which the fisheries they originally came from. So, I just wanted to talk about that a little bit. Also, Madam Chairman, on small vessels, by having two options in there, if provisions are developed in time and we feel are adequate then the provision to allow small vessels to participate in 2005, that option is there and if we're unable to develop a management program, specifically the monitoring/enforcement I think are going to be the difficult parts of that, then we could delay the small boat participation, but we have both options in place there. I think it's appropriate under mandatory vessel activity to have enforcement provide input, staff concurs that they really need to hear from enforcement on that, and . . . [unintelligible]. . . with shoreside monitoring. With the clarifications from the Steller sea lion mitigation committee, the Council members and the Agency, I think the language is pretty well cleared up. I think that this leaves a lot to staff, under staff tasking we're going to again have to have comment about the timeline, but we'll do that, I believe, under staff tasking. But I do not believe that we have added a tremendous analytical load; I think we've just slightly modified the AP motion and I think that this is doable with the timelines. We'll have to make that choice later with staff to enable a 2005 fishery as the legislation does not mandate that we allocate, but certainly suggests.

Madsen: Mr. Duffy, then Mr. Bundy.

Duffy: Thank you, Madam Chair. Back to the 2 million metric ton cap, I want to go on record as concurring with Mr. Anderson on this issue. I think that exceeding this cap or considering it associated with initiating a new fishery given the Steller sea lion issues we're facing, and trying to accommodate Congressional direction, the short timeframe easily leads me to the conclusion to not

cross that bar. If in the future we want to do a greater analysis of that, not associated with an expedited timeframe to bring in a new program I would probably be on board with that, but not given what we're facing as a Council. The other issue I have is just a question of clarification of staff on the motion and that is, under the economic development mandate on page 2 of the motion, where it says require an annual report to the Council. That's pretty vague; I don't know if we're going to get anything back in April unless we provide some instruction. My suggestion on that for staff is to take a look at the components of the annual report that the State requires of the CDQ program and I think that would give us a framework where we could work on this issue and determine what an annual report is in April. That would be my suggestion, if that's within the motion, it's just instruction to staff, fine, otherwise I'll amend the motion.

Madsen: Mr. Fuglvog.

Fuglvog: Madam Chairman, I think that's a good suggestion. If that can be done informally with staff, then I'm certainly fine with that, if that is enough for staff.

Madsen: Mr. Bundy.

Bundy: Madam Chair, I'll make a motion to reinsert what is noted as option 1 with regard to the 2 million cap, . . .

Madsen: Well, Mr. Bundy, you're amending the motion. . . because we never deleted it. It was never read into the record as Mr. Fuglvog's motion, so you are amending the motion to include . . .

Bundy: That's correct. And, it's under the heading 'Optimum Yield Cap: an allocation of unutilized Aleutian Island pollock allocation.' So, the option would read, "The pollock allocation of the Aleutian Island fishery would be in addition to the 2 million metric ton cap consistent with the provisions of Section 803(c)."

?: Second.

Madsen: It's been moved and seconded. Mr. Bundy.

Bundy: Madam Chair, I don't need to belabor this, I've already made the statement that I wish to make.

Madsen: Mr. Fuglvog.

Fuglvog: Thank you, Madam Chairman. Well, I do believe there has been an adequate record for our justification for not going over the 2 million OY cap. I have a question of staff, I think it needs to be cleared up. We've heard some assumptions that what this would involve analytically and I think rather than having Council members try to guess, what exactly would an analysis of this include, in your opinion?

Wilson: Madam Chairman, I'll just take a first cut at that. Sue Salvesson addressed that issue, I believe, yesterday, where staff at this point, the Agency, is uncertain what the result of an analysis

would be until we do the analysis, but on the surface of it would consider this to be part of a EA process, but we would have to go through the EA process and then see if we arrive at a finding of 'no significant impact'. If we do, if the Agency and staff did arrive at that, then that's where it would stay. But we don't know whether that would occur and if we could not reach a finding of 'no significant impact', then it would trigger the need for a full environmental impact statement. There has been a fair amount of biological assessment of all of the stocks in the Bering Sea/Aleutian Islands area and there's quite a bit of acceptable biological catch in most of these fisheries. Let's just say 40,000 metric tons as a point of argument, which is about two percent of that OY, would be very small and slight in terms of biology. I'm not capable in answering the policy aspects of that, nor do I really fully understand how major changes in Council policy fit in with the National Environmental Policy Act. I don't know. General Counsel could weigh in on this, or not. Ben, you have anything else?

Ben Muse (NMFS staff): I have nothing to add. I think that with respect to the volume of fish we might be looking at, again that's been analyzed; it's analyzed routinely in the specifications documents. With respect to the principle of exceeding the optimal yield, the precedence, I think there might be issues there of some concern.

Madsen: Mr. Austin.

Dennis Austin (Council member): Thank you, Madame Chair. I find these discussions very interesting and I also sense that Congress anticipated them in the language they stuck in this law. We've used the 2 million metric ton as our ecological safeguard when people are considering the implications of our fisheries to other species, competition for these same species. We've used it as a safeguard of the lack of perfect knowledge when we're trying to maintain or sustain yield for the fisheries out of this resource. I think Congress anticipated our possible failure to resolve, which literally is just the tip of an iceberg of what we're now enjoying in this resource, and said, O.K., if you can't do this, you now have the authority to do it yourself, you can manipulate the 2 million metric ton, but if you really fail to solve this issue under it, we're going to allow you to do it for four years and then we're taking it away from you forever. And I think that's a very strong signal and I totally support that signal. I'm very uncomfortable with the discussion we're having, to exceed that 2 million metric ton cap.

Madsen: Dr. Balsiger:

Balsiger: Madam Chair, I think this is pertinent right now. I raised my hand before the motion, but relative to the NEPA process I believe the National Environmental Policy Act requires us to look at all reasonable alternatives and it's probably not enough to say the Council's adopted a policy not to go over 2 million metric tons; that probably isn't sufficient to allow us not to examine that as an alternative. There are three or four reasons why you could rule out something such as not going over the cap, which would be they're impractical or technologically infeasible, or two or three other things which I've forgotten, so should we vote on this and not agree to analyze exceeding the cap, the record for not analyzing that in a NEPA statement. . .[Change to tape 55]. . .Lost remainder of Dr. Balsiger's comments, and beginning of next speaker – unable to identify voice

Unidentified: Yes, Madam Chair, I think that Mr. Austin's comments are right on and I think if we

want to have a discussion of this we ought to put it on an agenda item in the future, and I intend to vote absolutely no on this.

Madsen: Any further discussion about the amendment? Mr. Anderson.

Anderson: Madame Chairman, I'd like to address the motion maker. The potential inconsistency with the modified first paragraph with the . . . looking at this option, and if we were to choose this amendment in our final preferred alternative, the probability of having to go through consultation.

Madsen: Mr. Bundy.

Bundy: I think that that's a very good question, and I assume it would come out in the analysis and at whatever point a decision. . . if we approved the motion, at whatever point we were considering going over cap, that exact question would come up and if we felt it was likely to result in a formal reconsultation we wouldn't do it under the rest of our motion.

Madsen: Further discussion on the motion. Mr. Austin.

Austin: Thank you, Madam Chair. In my comments I tried to offer two reasons that we should not exceed the 2 million metric tons, and based on the comments we have in the past that it serves an ecological balance, it serves an ecological value, and the consideration of the entire ecosystem for the North Bering Sea. It also serves a safeguard for the lack of perfect knowledge when in fact we are attempting to maintain sustained yield for this resource. So it's just not arbitrary and capricious, it does in fact serve a very definite purpose and we've repeatedly identified that purpose as we've considered other factors in the management of this resource. It's not done in a vacuum.

Madsen: Further discussion on the amendment. Mr. Fuglvog.

Fuglvog: Thank you, Madam Chair. We're having an excellent discussion about why we would not exceed the OY cap, but given Dr. Balsiger's comment and the motion is actually whether we analyze it, and I think that is a different issue and a consideration here. If we make the choice not to do it we are providing the rationale for that, but we're going to have to provide different rationale for why we don't want to look at it, and I think that those need to be very carefully thought out. I have very mixed feelings about this. I take a lot of deference to the Council members who have been here way before me and I know that even in the language of the Act it states that "the 2 million metric ton cap is one of the longest-standing conservation management measures of the North Pacific Fishery Management Council," and I don't take that lightly, but we are looking at an option to analyze this where Congress has authorized that we may be able to do that, and I'm also very aware of NEPA considerations, so . . . I'm very conflicted at this moment.

Madsen: O.K., any further discussion? Mr. Anderson.

Anderson: Madam Chairman. I fully respect the opinion of our Counsel that brought it to the table, and the Agency. This is a policy call and we need to have reasonable analysis and reasonable input before we can make the call. It's my perception that we have that information before us today. I

think if we choose to vote this down and not send it back for analysis, that's not assuming that we haven't analyzed. The only thing that has changed is we have the authorization by Congress to exceed the 2 million metric tons. We had that authorization prior to legislation, when it wasn't mandated by Congress to have a cap, we could choose the cap any time we want. We went through an extensive analysis on a F₄₀ report. We understood the implications at that time of what the 2 million metric ton cap was based on, what it wasn't based on. It was the choice of the Council at that time to remain with the 2 million metric ton as exemplified by our TAC-setting that we did in December, and those are some very hard decisions we made in December. So, it is my opinion that we have analyzed this, we do have the information required to make this decision at this time and I'm going to be opposed to the amendment.

Madsen: Thank you, Mr. Anderson. The question's been called for. If we have comments that have not already been made, I will certainly entertain those, but if we're going to start repeating things, I think then maybe we need to kind of think about that and move on. Any further comments? I haven't said anything, so, I guess I'm not going to support the motion. I fully agree with Mr. Anderson. This has been available to us from the time that we instituted it. I am concerned about the relationship. . .as you've probably noticed in my inquiries of the public. . .about the relationship between the programmatic. Yes, that probably could come out in the analysis, but we have some actions before us that are going to be acted upon in different sequence and our PPA (?) holds firm the 2 million metric ton cap. Yes, there are options in programmatic that may allow us to exceed it, but our preliminary preferred alternative includes a bookend for a 2 million metric ton cap. So, I'm not going to repeat, but I would concur with Mr. Anderson's comments as well as Mr. Austin's and Mr. Rasmuson's and Duffy's. Any further discussion? The question is on the amendment to include an option that would exceed the 2 million metric ton cap, consistent with the provisions in Section 803(c) of the legislation. We have a roll call vote, please.

Oliver:

- Mr. Anderson: No
- Mr. Austin: No
- Dr. Balsiger: No
- Mr. Benson: Yes
- Mr. Bundy: Yes
- Mr. Duffy: No
- Mr. Fuglvog: No
- Mr. Hyder: Yes
- Ms. Nelson: No
- Mr. Rasmuson: No
- Ms. Madsen: No

Oliver: Fails, 8 to 3.

Madsen: Mr. Bundy:

Bundy: Moving on to a different subject. For the record, I wanted to clear it up. I think, Madam Chair, that you referred to a motion made by me at some time in the past that we do an EIS on

reopening the Aleutians, and that was not the motion. I mean, actually I think I did use the word EIS and I was corrected by Dr. Balsiger, and the motion that had been approved is that we proceed with a NEPA analysis, whatever the appropriate analysis was. This reminds me of the testimony of Mr. Moore on behalf of the Ocean Conservancy and some questions by Mr. Hyder. Mr. Moore is correct; either the Conservancy or Oceana have been before the Council on occasions before, specifically Janet Searles has come before the Council in Kodiak and told us that they felt very strongly that an EIS is required and we could not open the Aleutians without an EIS and the reasoning is expressed again, I guess, in this letter. I think the answer to that is that we are going to proceed with a NEPA analysis; we have proceeded with a NEPA analysis. If the EA. . .if the analysis at any point indicates that we have to do an EIS, we'll switch over. As I understand it that's the way the process works.

Madsen: Thank you, Mr. Bundy, I stand corrected. It was not an EIS. Any further discussion? The motion before us is the amended main motion. Does everyone understand what the motion is before us? Is there objection? No objection, the motion passes. Mr. Bundy.

Bundy: I would like to ask staff, with regard to the CDQ language in this motion, if you could provide in the analysis some very basic data. One would be pollock allocation per capita under the CDQ program. One would be per community under the CDQ program, and I realize that some CDQ groups have a whole bunch of communities, but I'm aware of at least one CDQ group that has just one community, but CDQ pollock allocations per community, and perhaps a range of populations in the CDQ communities as compared to the population of Adak.

Madsen: Mr. Bundy, I'm struggling with what you're requesting. We've passed this motion, so you're just providing. . .you're asking staff to look at this. . .I guess I'm struggling with where we are in this and what you're asking.

Bundy: All I'm asking is for staff to include this information in the analysis which I think is very simple. I mean. . .and the purpose, of course, is that the floor (?) statement indicates that the Adak pollock allocation is for economic development. CDQ is for economic development, and so we ought to, for purposes of some guidance, whether or not we wish to use it, we should look at the CDQ program.

Madsen: O.K., and that's understood by staff, and you'll include that perspective? O.K. Is there any further action under the Aleutian Islands pollock portion of this agenda item? Mr. Fuglvog.

Fuglvog: Madam Chair, I have a comment I need to make. Although I won't be making a motion about this, I do believe that the Council needs to consider that very likely there will be future demands for fish and I think we must consider a policy that is not just based on pollock, but on all species in the future.

Madsen: Mr. Hyder.

Hyder: Madam Chair, if we're through with this agenda item. . .

Madsen: . . .We're not through, we need to deal with rockfish.

Hyder: I mean, with the pollock portion. . .

Madsen: Yes. I think we are complete with that, yes.

Hyder: I have a motion on the rockfish. Just very simply, I would just like to move the AP recommendation on the Gulf of Alaska rockfish. I'm referring to page 4 of the Draft AP Minutes that are noted in the lower right-hand corner, 'last printed February 7, 2004, 10:37am'.

Madsen: O.K. It's been moved. Is there a second to move the AP recommendations under rockfish. Mr. Rasmuson seconds. Mr. Hyder.

Hyder: Thank you, Madam Chair. I don't feel that I need to speak to this motion. I'll just refer to the AP report and the staff report on this agenda item.

Madsen: Mr. Fuglvog.

Fuglvog: Thank you, Madam Chair. I'd like to amend the motion to remove the second paragraph from the AP motion.

Benson: Second.

Madsen: It's been moved and seconded to amend the motion by deleting the second paragraph. Mr. Fuglvog..

Fuglvog: Thank you, Madam Chair. In response to public testimony and conversations I think many of us have had with industry, I think we agree that we don't want the rockfish pilot program to slow the Gulf rationalization program. There are some problems with the language of aligning the program with the options. . .the options for rockfish under the GOA rationalization. I think that's an exercise right now that industry has asked that they devote their time and energy to putting the rockfish program together and if we would like to see how those align, that might be more appropriate of staff to do at a later date, so I would like to not include that in our motion. . .simply to send it back to the stakeholders, put it on the April agenda.

Madsen: There's a little confusion. Who seconded Mr. Fuglvog's amendment? O.K., Benson, thank you. Sorry. Is there any further discussion on the amendment to the motion? Is there any objection to the amendment to the motion? No objection, motion passes. We're back to the main motion. Any further discussion about Mr. Hyder's motion that we would not take any action and we would schedule this for April. Seeing no further discussion, is there any objection to the motion. No objection, the motion passes.

End of this discussion.