


MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke   
Executive Director

DATE: April 8, 1997

SUBJECT: Vessel Bycatch Allowances (VBAs)

ESTIMATED TIME  
3 HOURS

**ACTION REQUIRED**

Review Committee report and provide further direction to Committee and staff.

**BACKGROUND**

At its last meeting the Council reviewed several documents relative to a proposed VBA program including: an initial analytical outline with potential alternatives, elements, and options by Dr. Joe Terry; a proposal submitted by United Catcher Boats (UCB); a proposal submitted by Dave Fraser incorporating the VBA 'pool' concept; the recent Magnuson Act language regarding VBAs; a report on Canada's IBQ program; and, previous AP and SSC minutes on the VBA issue.

Citing the potential merit in a VBA program, the Council appointed an industry Committee to further develop a 'strawman' VBA program for consideration. A related task of the Committee was to identify, and resolve where possible, a variety of monitoring, enforcement, and legal issues surrounding VBA program development. Item C-6(a) contains the Committee's report, starting with the Committee's initial list of alternatives, elements, and options. The remainder of the report provides a summary of the major points of Committee discussion as well as a discussion of the monitoring, enforcement, and legal considerations. While many of these issues remain unresolved, it is possible that analysis could begin on several components of the proposed program, though the initial allocation alternatives would likely need to be identified prior to any formal analyses. Continued work by the Committee and Council, coupled with further resolution of outstanding legal issues, could occur concurrently, with an analysis possibly being available for review in September.

Item C-6(b) is a copy of the initial response from NOAA-GC on several of the legal issues surrounding the VBA proposal.

**Vessel Bycatch Account (VBA) Committee Meeting – Report to the Council**

The VBA Committee met on April 2-3, 1997 in Seattle with the following persons present:

Members: Vince Curry (Chair), Bob Alverson, Chris Blackburn, Craig Cross, Dave Fraser, John Gauvin, Shari Gross, Brent Paine (for Steve Hughes), Carl Merculieff, Fred Munson, Gary Painter, Beth Stewart

Agency Staff: Chris Oliver, Joe Terry, Martin Loefflad, Earl Krygier, Seth Macinko, Bob Trumble, (Lisa Lindeman, Susan Auer, Sue Salvesson, Steve Myer, and Vince O'Shea by speaker phone for part of the meeting)

Others present: Tom Casey, Jim Gilmore, Arni Thompson, Paul MacGregor, William Monhiemer, Mike Szymanski, John Hart, Kim Dietrich, Denise Fredette, Dennis Austin, Jerry Brennan, Laura Jansen, Ed Richardson

The Committee identified its primary task as twofold: (1) developing a 'strawman' program (alternatives, elements, and options) for Council consideration, and (2) identification of major administrative, monitoring, enforcement, legal, and other issues which will impact development of this program. The 'strawman' list of alternatives for analysis is presented below, followed by supporting discussion from the Committee meeting.

**VBA Alternatives, Elements, and Options for Analysis**

(As proposed by the Council's VBA Committee - April 3, 1997)

The specific elements of the proposed VBAP are described in the following outline. Undoubtedly some of the elements will be changed or deleted and new elements will be added as the development of a VBA program progresses.

1. VBA Species: The VBA program would include crab and halibut initially (Gulf of Alaska program would be limited to halibut initially). Should be frameworked to facilitate future additions or adjustments.
2. Total VBAs:  
Option 1: Based on overall PSC cap - once issued a vessel (or pool) could use the VBAs in any target fishery.  
Option 2: VBAs based on target fishery PSC apportionments and locked into those target fisheries  
Scheduled reductions in PSC caps could be explicitly included the VBA amendment.
3. VBA Fisheries: All BSAI trawl fisheries, with the option to exempt the mid-water pollock fishery.
4. Allocation of VBAs: RESERVED FOR FURTHER DISCUSSION (with the general recognition that VBAs would be allocated annually, subject to a variety of possible allocation formulas).
5. Transferability: VBAs may not be transferred for monetary consideration. Transfers, or redistributions, within pools or across pools/vessels would be allowed, subject to prohibitions on monetary compensation.

6. Use of VBAs: VBAs could be used by individual vessels or by vessels within voluntary pools. Those not in pools, or not utilizing individual VBA would revert to default 'open access' fishery. Option should be included to prohibit vessel pools and only allow individual vessel VBAs.
7. PSC Closures: A closure would be imposed collectively on the vessels in a group when the prescribed monitoring plan for the group generates an estimate that indicates that the group's VBAs have been taken for a VBA species. Therefore, the fishing right associated with a vessel group's aggregate VBAs for a specific VBA species is to be able to fish without the PSC closure for that species being imposed until the estimate indicates that the group's aggregate VBAs have been used, not until it can be proved that the aggregate VBAs have actually been used. As is currently the case, the closures would be area-specific for crab PSC allowances but BSAI-wide for halibut PSC allowances (with potential to exempt mid-water pollock).
8. Vessel Group Rules
  - a. The vessels that are not part of a voluntary group would either fish on their individual VBA allocation or be part of the default (open access) group.
  - b. The rules for membership of each voluntary group would be established by the vessel license owners who form the group.
  - c. A vessel group bycatch account monitoring plan, submitted by a voluntary vessel group and approved by NMFS, would be used to estimate the halibut and crab bycatch mortality of the vessel group. The vessel group bycatch account monitoring plans would be modeled after for the current pollock Community Development Quota Monitoring Plans and the plans that will be used for the expanded CDQ program. The plan would be based on observer coverage requirements, sampling station, and equipment standards established by NMFS. A vessel group could agree to more rigorous standards.
  - d. In the default (open access) group of vessels, NMFS, in consultation with the Council and the industry, would determine the method to be used to estimate crab and halibut bycatch mortality. This group would be operating on a common PSC cap, as the whole fishery does now, and would not establish its own 'pool rules'.
  - e. NMFS would enforce the closure for the vessels in a voluntary group but not the specific rules of that group; those rules would be enforced by the members of the group in part through the use of contracts among group members.
  - f. A group's monitoring plan would identify the following:
    - i. The method to be used to estimate VBA species bycatch including a fall back method to be used if the first method cannot be used (i.e., a backup method if NMFS determines that the some observer data are seriously flawed);
    - ii. The vessels that would be allowed to fish under the plan;
    - iii. The aggregate VBAs for each VBA species and for each groundfish fishery or group of fisheries; and

- iv. Who represents the group for the purposes of submitting the monitoring plan and plan amendments to NMFS.
  - g. A group can amend its monitoring plan; however, an amendment to the method for estimating bycatch will not be effective until approved by NMFS.
  - h. NMFS would not establish minimum or maximum group size limits (the potential for separate pools to pool with other pools should be examined).
  - i. Each group would determine its own rules concerning membership, the use of its aggregate VBAs, the ability of a vessel license owner to voluntarily leave a group during a fishing year, the process for expelling a vessel from a group, the VBAs that would accompany a vessel that left a group, the process for developing and amending a plan, and other issues concerning the management of the group's VBAs.
  - j. A vessel that left a voluntary group during a fishing year could not be part of the default group for a specific fishery for the remainder of the year unless it brought with it its entire PSC allowance for that fishery (the intent of this provision is to prohibit 'double-dipping').
  - k. Once a fishery has started, a vessel in the default group could join a voluntary group but it would have no VBAs to contribute to the voluntary vessel group, that is, its VBAs would remain with the default group.
  - l. A vessel that is not fishing an individual VBA, or that is not part of a voluntary group with a monitoring plan approved by NMFS, will automatically be a member of the default (open access) group for a specific groundfish fishery.
9. Retention of VBA Species: The options include the following:
- Option 1: Retention not allowed (status quo)
  - Option 2: Careful return to sea within a set time period; after that time period, then retained until counted.
10. Underages and Overages RESERVED - pending further clarification of options.

## MAJOR ISSUES AFFECTING ALTERNATIVES, ELEMENTS, AND OPTIONS

Using Joe Terry's January 27, 1997 paper (Bycatch Reduction Partnerships) as our starting point, while referring as necessary to other background materials, the Committee walked through each major program component to develop an overall program design. Alternatives, elements, and options are identified where relevant and where the Committee found consensus. The list as presented is specifically for a BSAI program, with GOA considerations identified separately (see page 9-10 for GOA issues). This section of the report summarizes the discussion points which led to development of the 'strawman' list of alternatives, elements, and options.

### Program Objectives

While the Committee did not specifically address this component, considerable discussion was devoted to the issue of bycatch reduction, as opposed to rationalization of existing bycatch caps (optimization of groundfish catch). A VBA program that rationalizes the use of bycatch caps will decrease the costs of controlling bycatch, which in turn may justify reductions in the bycatch caps. However, that rationalization will not necessarily, by itself, reduce discards, and the Magnuson Act language requires that the program result in reductions of regulatory discards. To meet the requirements of the Act, a reduction in bycatch caps probably needs to be an integral part of the VBA program. The Act does not specify the magnitude of reduction required; therefore, the Council and NMFS have some policy discretion in determining how to meet this requirement.

### VBA Species

Halibut and crab would be the subject species. For the overall salmon cap, it is not feasible to allocate meaningful amounts to individual vessels, particularly given the random nature of salmon bycatch events. The Committee makes this recommendation with the understanding that the program could always be expanded later, and further recommends frameworking so that adjustments can be made expeditiously. The analysis for this program should discuss the practical impediments to inclusion of salmon and other regulatory discards at this time.

### Total VBAs by species and reduction schedule

Option 1 - would be to divide the total cap and let vessels use it where they like. This would allow us to mitigate bycatch related closures, and provides an incentive to minimize bycatch in one fishery to allow moving into another fishery. It further would allow operators to determine best use of their PSC allocation, and would not require making a 'perfect' allocation up front among fisheries, and would be more compatible with the IR/IU program.

Option 2 - would be to divide the total cap by fishery cells, as we do now, and then have the various VBA amounts locked into various target fisheries. This would prevent too much of the PSC cap being used in 'dirty' fisheries, and more likely could result in unused PSC amounts ( ergo, reductions).

Scheduled reductions are a follow-up issue to either option above, and can be done as a separate action or as an explicit provision of the VBA. The primary purpose of VBAs is to optimize groundfish catch within whatever PSC caps exist. If cap reductions are pursued as a separate action, there may still be upward pressure on the PSC caps to achieve OY.

### VBA fisheries

The program would be applied to all BSAI trawl fisheries, with an option to exempt midwater pollock (which is currently exempt from PSC induced closures). The issue of including fixed gear fisheries was discussed,

though the consensus of the Committee is to focus development on trawl fisheries at this time. Other gear groups can forward their individual recommendations to the Council.

### Allocations of VBAs

Other than a very generalized discussion of allocation issues, the Committee elected to 'table' this item for future consideration. Some members felt that this issue should perhaps be resolved by trawl sector representatives who will be directly involved in the allocation. There are a variety of considerations relative to this issue, including reciprocal allocation (reward clean fishers- penalize dirty fishers), equal allocations, allocation based on vessel capacity, and a system based on vessel size (capacity) coupled with participation history. An additional perspective is to keep it as simple as possible. It was also pointed out that, because the VBAs will be allocated annually, incentives can be built in to reward cleaner fishers in subsequent years.

### Transferability

The Committee concurs that VBAs are not to be transferred for monetary consideration. Legal issues have been discussed, but not totally resolved. Primarily these issues have to do with defining 'transfer for monetary compensation', and the trading or assigning of VBAs among vessels within a pool. We do not anticipate a perfect, inviolate program, but need to impose penalties which would discourage this activity, such as loss of VBAs. However, we need allowances for emergency provisions (widows and orphans, for example), and we expect this to be discussed in the analysis. The Committee recommends a registration system to aid in tracking the dispensation of these VBAs. It may also be helpful to develop a list of rebuttable presumptions which must be overcome in a prosecution. Probably we will need to provide some example 'barterers' for NOAA GC to look at, and determine whether they constitute 'monetary transfers'. Transfers within a pool are not considered a transfer, but a redistribution. The transfer occurs when the vessel gives his VBA to the pool. Individual vessels, not in a pool, can trade or barter among themselves, as long as they are not transferred for monetary consideration.

### Use of VBAs

VBAs can be used by individual vessels or pooled vessels. Others go to default (open access) pool which will operate as current PSC closures operate. The Committee feels that it would be unfair to eliminate the option for an individual vessel to go on his own. Furthermore, while the Committee generally feels that pooling will be a necessary component of the VBA program, the option for a prohibition on pooling should be maintained for discussion in the analysis at this time. The analysis should highlight the rationale, advantages, and disadvantages of the pooling concept.

### PSC Closures

This is quite straightforward on the surface – a vessel or pool stops fishing when they reach their PSC cap. It is, however, directly relevant to overall monitoring and enforcement concerns regarding due process, data accuracy, and justification for taking a vessel(s) off the water. The structure of the relationship between the agency and the pool will affect the criteria for this due process consideration. It will be more difficult for individual vessels which are not part of a pool. One solution proposed was to implement an audit of the vessel or pool's PSC account when it is estimated to be 75% complete.

The Committee wishes to explore the ability to assign differential discard mortality rates to pools, if the data allow, to reward those pools that are minimizing their mortality. This will likely be dependant upon the size of the pool. Additional input from NOAA GC and enforcement representatives will be necessary to resolve these issues. See section titled 'Monitoring and Enforcement Considerations' for further discussion of this issue.

### Vessel Group Rules

The Committee discussed and made adjustments to the language in this section. Overall the Committee recommends that this section not be rigid, that it needs to be further considered by the Committee, and that we need to allow for flexibility to these rules as we focus in on the structure of the vessel pools and their 'contractual' relationship to NMFS. Some explanatory notes are provided in the attached 'strawman' proposal.

### Retention of VBA species

The Committee recommends deleting options b and c, and retaining only options a and d. We do not want to decrease the bycatch and then turn around and increase the mortality factor, and be right where we started or worse off. We will need to strike some balance between accurate bycatch estimation and quick return to the sea.

### Underages and Overages

This issue was unresolved, though the Committee feels that we need to consider this, and get further clarification from NOAA GC on how we might accommodate for underages and overages. One potential method to prevent overages is to hold some of the overall PSC cap in reserve (not allocate as VBAs). The Canadian program should be further examined to shed light on this and other unresolved issues.

## MAJOR LEGAL ISSUES

The VBA Committee was furnished with an initial examination of legal issues by NOAA GC memorandum (dated April 1, 1997). This memo was reviewed by the members and generated the following 'follow-up' questions for NOAA GC:

### Catch Measurement/Enumeration

Recognizing that it is not an issue specific to VBAs, we will need clarification as to what constitutes 'accurate weight measurement'; i.e., to what level of accuracy and/or precision will we be held? Further, is the definition of sufficiency different for enforcement of VBAs than for general Magnuson Act intent?

Further discussion with legal counsel confirmed that, generally, a higher standard is required for enforcement actions than for other actions, because of due process considerations. Pools may be easier to close than an individual vessel, based on best available evidence (more like we do an overall fishery closure now).

### Due Process

While due process is obviously required, the Committee discussed the context within which this requirement should be considered - i.e., should we be looking at whether this program creates a different due process situation, relative to other management programs? If so, should the point of comparison be the existing VIP program, or programs of individual accountability such as IFQ/CDQ programs? Following on this issue is a more generic question - that is, can we really shut down an individual vessel, or a vessel pool, in-season? And, what action will the agency take when a vessel or pool reaches its VBA cap?

Due process can be based on best available information for general closures, but becomes more stringent as we focus in on individual operators. It may be easy to determine if someone is fishing in the face of a closure, but what is liability and recourse involved if we find out, after the fact, that they were wrongly taken off the water? The consensus is that the pool has to buy off on (accept) the rules of the game up front, and if they are closed

based on best information at the time the agency should not be held liable (just like when they implement general fishery closures now).

Relative to this issue the Committee discussed a previous NOAA GC opinion regarding the Harvest Priority proposal, and the finding at that time that due process considerations (data accuracy and statistical reliability) were a major stumbling block for implementation of Harvest Priority. Because a VBA program may impose similar sanctions (denying a vessel access to a fishery which is impossible to recapture), we will need to pay particular attention to the program design and whether it is distinguishable from the Harvest Priority issues. This will likely depend in large part on the individual monitoring plans submitted by the pool groups, and on the monitoring plans used for individual vessels.

#### Fees/Fines

The Committee discussed the relationship between a potential VBA program, the existing VIP program, and the potential fine program (up to \$25,000 fine) allowed by the Magnuson Act. Noting that we have a system in place now which allows fines (no specified limits), the point of the specific \$25,000 fine provision is unclear. In any case, it is clear that it would require due process similar to that required for a VIP prosecution. Relative to fees, and the ability to charge up to 3%, the Committee was informed that a VBA program is a form of IFQs and could be included within the 3% fee assessment described in the Magnuson Act. It is less clear whether a VBA program would be considered a form of IFQ program when viewed under the pool scenario, because specific amounts of catch are not guaranteed. This discussion generated the following additional questions: Can we use existing (standardized) exvessel values from directed fishery deliveries as a proxy for exvessel value upon which to base the fee for regulatory discards (halibut for example). Or, can the fee be assessed against the target groundfish which was caught while using the VBAs?

#### Transfer Issues

A major issue under transfers is how the term 'for monetary consideration' gets interpreted. For example, if vessels within a pool catch more fish by trading bycatch among pool member vessels, and thereby realize increased economic returns, would that violate the transfer provisions? Apparently not, but we need definition on what would be allowed and what would be prohibited. Further, the Committee is concerned with how any transfer prohibitions would be enforced. Noting that this depends to a large extent on the program's overall structure, what tools are available to allow the agency to monitor these transfer prohibitions?

It is likely that, under the pool scenario, the pool manager can reallocate the VBAs amongst the vessels, even if it creates economic benefit, as long as the VBA is not sold for monetary compensation. The agency feels that contracts within the pool should be left to the pool and its members, and not have the agency reviewing and approving contracts. The Committee was advised that there would be virtually no way to track whether someone made end of the year payments for bycatch trades (which were ostensibly made without monetary compensation). The Committee recommends serious penalties be imposed to discourage this activity, up to and including loss of VBAs or vessel seizures. An examination of the State's program for prohibiting leasing of salmon permits may provide examples.

#### Pooling Issues

In addition to transfer issues associated with vessel pools, a few other issues were raised. It appears to the Committee that allocations must be made to individual vessels (based on the language of the Act), but that subsequent pooling would be allowable. It appears that the Magnuson Act prohibits allocations directly to a pool in the first place. Vessels could join a pool, or fish under their own individual bycatch allocation (a pool of one),



though this may complicate the program by having two different burden of proof standards (burden of proof may decrease when the number of vessels which will be affected increases).

### Other

Any analysis, or future legal research, should examine jurisdictional issues such as State water fisheries or crab fisheries managed by the State, to ensure compatibility with such fisheries.

Also need to examine the legal implications of providing for overages or underages.

## GENERAL MONITORING AND ENFORCEMENT CONSIDERATIONS

The following basic questions were formulated by the Committee relative to general monitoring and enforcement concerns – these issues and discussions overlap with many of the preceding sections of this report. The questions are followed by a summary of the initial agency response and the Committee's recommendations where relevant.

1. What additional enforcement activities/duties/personnel are being envisioned for the multi-species CDQ program, and what might be expected, generally, for a VBA program?

The Committee was informed that no significant at-sea enforcement presence would be expected for the multi-species CDQ program. Specialists will be assigned to any new, major program, such as VBAs or CDQs, and extra persons may be assigned, but at-sea enforcement will be largely accomplished with existing enforcement and Coast Guard personnel. It will be relatively easy for enforcement to determine a violation by a vessel, if that vessel is fishing when its PSC account is closed. The primary additional burden can best be expressed as a bookkeeping or accounting exercise, and that portion of the management program will likely fall to the observer program and in-season management. As such, extra costs associated with a VBA program should be viewed primarily in the context of the observer program and data requirements for due process, as opposed to enforcement personnel directly. A major, general point made is that whatever program is developed should strive for simplicity in its design and enforcement requirements.

The general consensus feeling of the Committee is that the enforcement structure for CDQ and IFQ programs are good enough for VBAs. As with these programs, a VBA program may not necessarily have the threat of real-time, pulling a vessel off the water, but we will have post-season measures and the threat of vigorous sanctions, such as vessel seizures, etc. The question still outstanding is what the standards should be (data accuracy, observer coverage, etc) for making cases and sufficiently accommodating due process. We still need to define what we think is sufficient, which may or may not be the same as for the CDQ and IFQ programs.

2. What methods are available to track transfers and enforce the prohibition on sale?

Tracking of transfers will likely be a function of NMFS management, perhaps the RAM division. While the committee understands this, they are still concerned with the ability to determine, and impose penalties, on those that violate the prohibitions on transfer for monetary considerations. Enforcement representatives agreed to look further into this question, and to consult with the CFEC for information on how the State enforces their prohibitions relative to salmon permit leasing and transfer. Related to this is the necessity to define what will be considered a legal transaction or barter.

3. Will differential monitoring plans (across different vessel pools) pose impediments for monitoring and enforcement?

This question is predicated on the assumption that NMFS would establish standards which must be met by each monitoring plan. Once approved, the existence of differential monitoring plans is not expected to impose a substantial burden on enforcement; as previously noted, most of the burden related to monitoring will be an accounting function, outside the direct purview of enforcement. A more likely consideration for differential plans relates to the due process issue and the legal justification for taking a vessel off the water (would some pools be held to a higher standard than others?).

4. What lessons from the Canadian VBA program can be applied to our potential VBA program?

Considerable discussions by the Committee centered on the Canadian 'VBA' program, and whether our VBA program would be expected to result in similar impacts, given the different starting basis for our program. Attendant to those discussions were questions regarding the Canadian enforcement program and whether it could serve as a template for structuring our monitoring and enforcement program. 'Condition of permit' was one item specifically mentioned to enhance compliance. Enforcement representatives agreed to consult with Canadian DFO representatives regarding penalties, fines, permitting, program costs (including amounts of fee assessments), size of the fishery, length of season, and other comparison features with monitoring and enforcement implications.

The Committee also requests that the Council authorize it to invite a Canadian representative (perhaps a trawl fisherman fishing under the program) to a future Committee meeting for consultation. Staff would extend such invitation after identification of an appropriate individual.

5. How much of the additional enforcement and monitoring activities will be additive to other program requirements, including existing programs and programs to address Magnuson Act requirements (includes discussion of additional requirements of the observer program)?

During discussions of data accuracy and program costs, a key point was raised regarding the incremental requirements of a VBA program. The reauthorized Magnuson Act contains several requirements for 'accurate enumeration' of catch and bycatch, up to and including total weight measurement. If those requirements are met, the additional requirements for the VBA program (and costs directly associated with the VBA program) may not be as substantial as they appear when viewed independently. While those Magnuson Act requirements have not been fully assessed by enforcement (or the observer program), it was agreed that estimates of VBA program costs should be presented, where possible, as incremental to other programs.

#### DISCUSSION OF GULF OF ALASKA CONSIDERATIONS

Because the previous report is specific to the BSAI, the following section discusses aspects relevant to the GOA:

\*In the GOA, there are no crab caps, so for the GOA we're talking about halibut for the time being.

\*In the GOA, as with the BSAI, we don't want to be target fishery-specific once the VBAs are allocated (though we have retained that as an option). In the GOA there are not as many target fishery divisions for the PSC cap as in the BSAI.

\*The predominance of 30% observer coverage vessels in the GOA will make the ability to form vessel pools all the more important.

\* The large fleet of 0% observer coverage vessels has to be considered also; we may want to consider whether they can form a pool, as opposed to being in the default, open access fishery. Possibly this could be accomplished based on historical data, or perhaps with some level of 'pooled' observer coverage. Another option is to look at breaking up the default pool into categories by vessel size, in order to protect them from other fishers.

## ADDITIONAL ISSUES

Some additional issues are identified below for consideration relative to the proposed VBA program.

Economic leverage: The analysis should discuss the potential economic leverage for different fishery sectors which could be created by this program. An example given was a similar issue which arose during pollock IFQ discussions, where a two-pie allocation was proposed to protect shoreside processors from such leverage positions.

Observer related issues: This overlaps to some degree with previous sections of this report, but is discussed here separately. The Committee feels that additional observer coverage will likely be necessary, notwithstanding additional coverages required to comply with other provisions of the Magnuson Act, because individual accountability will likely require even more rigorous standards. The ability to use estimates, as opposed to proving actual, precise quantities may be crucial to the viability of a VBA program. The Committee would expect the analysis to provide estimates of necessary coverage levels for various fisheries and pool 'types' (size of vessels, numbers of vessels, etc.).

Observer program representatives expressed concern that this program could create incentives for vessels to compromise the collection of observer data and will put additional pressure on observers at sea. These pressures could further compromise the collection of all data, including the data directly relevant to VBA monitoring. Decisions will have to be made regarding the prioritization of observer duties – compliance monitoring versus scientific data collection – and potentially vesting observers with some type of enforcement related authorities.



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April 1, 1997

TO: Clarence G. Pautzke  
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FROM: Lisa L. Lindeman  
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SUBJECT: Vessel Bycatch Accounts

This memorandum responds to initial questions raised by the Council regarding sections 313(f), (g) and (h) of the Magnuson-Stevens Fishery Conservation and Management Act (M-S Act), as amended by section 117 of the Sustainable Fisheries Act. We also raise additional issues that should be addressed during the development of a Bycatch Reduction Program (BRP) or a Vessel Bycatch Account (VBA) Program. Our responses might provide a starting point for industry and Council development of these programs.

Background:

Section 117 of the Sustainable Fisheries Act amended section 313 of the M-S Act and applies only to the North Pacific Council. It amended section 313 to redesignate the section as "North Pacific Fisheries Conservation" instead of "North Pacific Fisheries Research Plan." It also added several new subsections to section 313 relating to bycatch reduction, total catch measurement, and increased retention and utilization.

New subsection 313(f) requires that the Council submit to the Secretary conservation and management measures to lower for at least four years the total amount of economic discards<sup>1</sup> occurring

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<sup>1</sup>Economic discards are defined as "fish which are the target of a fishery, but which are not retained because they are of an undesirable size, sex, or quality, or for other economic reasons."



in the fisheries under its jurisdiction.

New subsection 313(g)(1) says, notwithstanding section 304(d) of the Act<sup>2</sup>, that the North Pacific Council may submit a system of "fines,"<sup>3</sup> up to \$25,000 per vessel per season, to provide incentives to reduce bycatch.<sup>4</sup> Any "fines" collected under this section will be deposited in the North Pacific Fishery Observer Fund. The funds may be (1) used to offset costs related to the reduction of bycatch in the fishery from which the penalties were derived, and (2) transferred to the State of Alaska to offset

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<sup>2</sup>Section 304(d)(1) requires the Secretary to establish the level of fees that are authorized to be charged for obtaining fishing permits. Section 304(d)(2) requires the Secretary to collect a fee of up to 3% of the ex-vessel value of fish harvested from any IFQ program or CDQ program that allocates a percentage of the TAC to the CDQ program for recovering the actual costs directly related to the management and enforcement of such programs. The IFQ and CDQ fees are in addition to any other fees authorized under the M-S Act and must be deposited in a Limited Access System Administration Fund (LASAF), except for any amount reserved by the Secretary under 303(d)(4)(A) for the IFQ loan program (the Secretary may reserve 25% of the IFQ/CDQ fees collected under 304(d) for an IFQ loan program for fishermen who fish from small vessels and first-time purchases of IFQ by entry-level fishermen), which is deposited in the Treasury and subject to annual appropriations. Also, if a State applies, the Secretary must transfer 33% of any CDQ fees collected and deposited in the LASAF to reimburse the State for actual costs directly incurred in managing and enforcing the CDQ program.

<sup>3</sup>"Fines" are imposed through the criminal process (see M-S section 309) and are covered by the Federal sentencing guidelines. Since the drafters later refer twice in the section to "such penalties," and knowing the genesis of the term "fines," NOAA-GC will interpret "fines" to mean "civil penalties."

<sup>4</sup>"Bycatch" is defined as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. (Bycatch) does not include fish released alive under a recreational catch and release fishery management program."

costs incurred by the State in the fishery from which the penalties were derived or in fisheries in which the State is directly involved in managing or enforcing and which are directly affected by the fishery from which such penalties were derived.

New section 313(g)(2)(A) says, notwithstanding the IFQ moratorium and in addition to the authority in new section 303(b)(10),<sup>5</sup> that the North Pacific Council may submit conservation and management measures that allocate regulatory discards<sup>6</sup> to individual vessels as an incentive to reduce individual vessel bycatch and bycatch rates in a fishery, provided that the allocations are not transferable for money and are made only on an annual basis and that any measures providing for such allocations ensure accurate catch measurement (as required under 313(h)) and will result in actual reductions in regulatory discards.

New section 313(h) requires that by June 1, 1997, the Council submit to the Secretary conservation and management measures to ensure total catch measurement in each fishery under the jurisdiction of the Council. The measures must ensure accurate enumeration of at least target species, economic discards, and regulatory discards. It also requires, to the extent the measures do not require U.S. fish processors and fish processing vessels (as defined in chapter 21 of title 46, U.S.C.)<sup>7</sup> to weigh

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<sup>5</sup>Section 303(b)(10) allows the Council and Secretary to include in an FMP conservation and management measures that provide harvest incentives for reducing bycatch.

<sup>6</sup>"Regulatory discards" are defined as fish harvested in a fishery which fishermen are required by regulation to discard whenever caught, or are required by regulation to retain but not sell.

<sup>7</sup>46 U.S.C. 2101(11a) defines "fishing vessel" as a vessel that commercially engages in the catching, taking, or harvesting of fish or in an activity that can reasonably be expected to result in the catching, taking, or harvesting of fish. "Fish processing vessel" means a vessel that commercially prepares fish or fish products other than by gutting, decapitating, gilling, skinning, shucking, icing, freezing, or brine chilling.

fish, that the Council and the Secretary must submit a plan to the Congress by January 1, 1998, to allow for weighing, including recommendations to assist such processors and processing vessels in acquiring the necessary equipment, unless the Council determines that such weighing is not necessary to ensure total catch measurement.

Issues Raised by the Council:

1. Can allocations of bycatch be made to pools of vessels or can they be made only to individual vessels?

Answer: Section 313(g) authorizes the Council to submit and the Secretary to approve conservation and management measures that provide allocations of regulatory discards to individual fishing vessels under certain conditions. The M-S Act does not authorize allocations of regulatory discards to pools; however, we believe the Secretary could approve a scheme under which individual vessel accounts could be pooled if such pooling were not more burdensome to enforce and monitor than, and would accomplish the same goals as, individual vessel accounts.

The response to this question depends in large part upon the details of the monitoring and enforcement processes that still need to be worked out. For example, would the pool monitor the collective VBA? Would NMFS deal with the pool or with individual vessels or both? What would be the division of responsibility and liability between the pool and the individual fishermen if a VBA were exceeded? What fish would count against a VBA? What individual vessel and pool accounting systems would be used to allow the pool manager and NMFS to know what each vessel was catching and to allow NMFS to verify the numbers? If a pool reached its collective VBA and an individual member of the pool continued to fish, would NMFS enforce against the pool or the fisherman or both?

2. What is the meaning of "transferred for monetary consideration" relative to the internal workings of a voluntary vessel group or bycatch management partnership?

Answer: This question is difficult to answer without a context. Section 313(g)(2)(A) requires that individual vessel bycatch allocations cannot be "transferred for monetary consideration."

At this point, we interpret this to mean that fishermen could not sell or otherwise transfer their VBAs in exchange for money. We believe Congress' intent was that VBAs should not become "property rights" that acquire a value independent of the fishery.

3. Does the \$25,000 limit on fines (penalties) to encourage reductions in bycatch apply to one specific incentive program or does it apply collectively to all incentive programs such as the current VIP, the IR/IU program recommended by the Council, and the BRP (bycatch reduction program) program?

Answer: As originally proposed, new section 313(g) authorized the Council to recommend a system of fees in a fishery to provide incentives to reduce bycatch and bycatch rates. It limited the fees to no more than 1 percent of the estimated ex-vessel value of the target species in the fishery. At some point, "fees" was changed to "fines."

The new provision for "fines" doesn't repeal the current vessel incentive program (VIP), under which civil penalties in excess of \$25,000 per vessel per year have been assessed. NOAA-GC will continue to process these cases as long as the VIP is in effect. Furthermore, the \$25,000 penalty limit per vessel per season applies only if the Council chooses to recommend to the Secretary a system of penalties to act as incentives to reduce bycatch. Section 313(g) says the Council "may" submit and the Secretary "may" approve such a system of penalties. The statute does not require the Council to submit a system of penalties. Therefore, unless the Council amends the IR/IU program to include a system of penalties and unless the Council chooses to include such a system in any future BRP or other program, the \$25,000 limit would not apply. The level of penalties for violations would be determined by the penalty schedule developed by the agency. Any penalties collected under a system submitted by the Council under section 313(g) would be deposited in the Observer Fund established under 313(d). If the Council does not submit a system of penalties, however, any penalties collected for violations of a BRP would be deposited in the Enforcement Fund under section 311(e).

4. Does the requirement for an accurate measurement of total catch which at a minimum includes the three parts of total catch



listed in the Act (target species, economic discards, and regulatory discards) require an accurate measurement of each of these three parts of total catch or just of the total catch?

Answer: The Senate report says the Council could not submit and the Secretary could not approve any vessel bycatch allocation measures unless they would result in an actual reduction in regulatory discards, and unless an accurate enumeration of the target species, economic discards, and regulatory discards is available in the fishery. Congress intended that the Secretary ensure the accurate enumeration (accurate weight measurement) of each of the three parts of total catch.

5. Would a VBA/BRP program be subject to the IFQ/CDQ cost recovery fees? If so, would the fees be based upon the ex-vessel value of the groundfish, the regulatory discards covered by the program, or both?

Answer: VBAs are a form of IFQs. As a form of IFQs, VBAs might be subject to the provisions of section 304(d)(2) if the Council could figure out how to calculate and assess a fee on the ex-vessel value of fish that are not retained.

6. Does the requirement of an allocation on an annual basis limit the formula that can be used to make the annual allocation? For example, if a 3-year moving average of catch is used, the catch and, therefore, future allocations are principally determined by past allocations. Would this violate the annual basis only rule?

Answer: According to section 313(g)(2)(A)(i), the allocations of regulatory discards to individual fishing vessels must be made on an annual basis. The M-S Act does not address the basis for calculating the allocation.

Additional Issues for Consideration:

Much of our legal analysis and determinations will depend upon the specific elements of any VBA program developed by the Council. All the usual provisions of the M-S Act and other law, however, still apply; proposals made under section 313 must be supported by an administrative record.

A VBA program would be a limited entry program. Therefore, the administrative record would need to show, among other matters, that the Council and the Secretary considered the factors in section 303(b)(6) in the development of the program. Section 303(b)(6) requires that if the Council and the Secretary establish a limited entry system for a fishery in order to achieve optimum yield, they must take into account:

- (A) present participation in the fishery,
- (B) historical fishing practices in, and dependence on, the fishery,
- (C) the economics of the fishery,
- (D) the capability of fishing vessels used in the fishery to engage in other fisheries,
- (E) the cultural and social framework relevant to the fishery and any affected fishing communities, and
- (F) any other relevant considerations.

Other issues (primarily policy issues) that should be addressed by the industry committee, NMFS and the Council include consideration of how a VBA program would fit in with the halibut and sablefish IFQ program, the groundfish and crab moratorium program, and the proposed increased retention/utilization program and the license limitation program.

Considering the potential additional enforcement and monitoring burdens, why would pooling be a more desirable option than individual transferable bycatch quotas for reducing bycatch?

Further, what species would be covered by a VBA program? PSC species are herring, salmon, crab and halibut. Under the current regulations, once a groundfish TAC has been reached, that groundfish species is treated in the same manner as a prohibited species. Would that groundfish be included in a VBA program?

With respect to assessing fees on the exvessel value of fish "harvested" -- if a VBA program included only halibut and crab -- how is the ex-vessel value determined of a halibut that is caught in a trawl fishery and is going to be thrown back?

What would be the basis for the annual allocations to individual vessels? Size of the boat? The last 3-4-5 years of catch?

How would decisions be made regarding what boats were in a pool?  
How would NMFS obtain that information? How would NMFS track  
what boats were in each pool? How would NMFS obtain the data on  
the bycatch of individual vessels and the pools? How would NMFS  
verify the data it received from a pool or vessel?

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