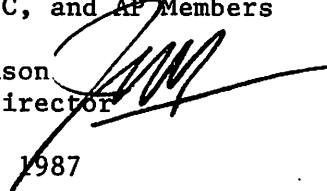


M E M O R A N D U M

TO: Council, SSC, and AP Members

FROM: Jim H. Branson
Executive Director 

DATE: December 2, 1987

SUBJECT: Use of pots for groundfish other than sablefish.

ACTION REQUIRED

Reaffirm Council intent on use of pot gear for groundfish. Consider emergency rule to clarify legal gear restrictions.

BACKGROUND

On November 16, 1987 the Council teleconferenced to discuss industry concerns that the ban on pot gear in the Gulf of Alaska as set out in the domestic groundfish regulations would greatly impede development of a U.S. Pacific cod fishery. They contended it was the Council intent to apply the ban only to sablefish and not to other groundfish. In fact, Amendment 14 to the Gulf of Alaska groundfish FMP is very clear that the allocation scheme and phase-out of pot gear in the Gulf apply only to sablefish. The Council's debate before approving the amendment in 1985 focused only on sablefish, but the regulations implementing the sablefish gear restrictions of Amendment 14 applied the pot ban to all groundfish in the Gulf. The expanded regulatory language has caused problems because several fishermen wish to fish for Pacific cod in the Gulf with pots. A review of this regulation's administrative history has been prepared by Council staff and is included here as item D-2(f)(1).

During the conference call the Council reaffirmed its intent that the pot gear ban applied only to sablefish and directed NMFS to correct the error in the regulation as quickly as possible. During the call several Council members expressed concern that the clarification of the regulations may create a window of opportunity for the use of sunken gillnets in the Gulf. Amendment 16 to the Gulf plan states in part, "This plan authorizes the use of trawls, pot and longline, and hook and longline as legal gear for the commercial harvest of groundfish. All other gear is prohibited." The proposed regulations implementing Amendment 16, however, contain no language specifying the three legal gear types. Because of the Council members' request for a Secretarial change to the sablefish pot regulation, it appears necessary to include language clearly stating that legal gear in the Gulf of Alaska is limited to trawl, pots, and hook and longline. Other forms of gear, including sunken gillnets, could be authorized under research provisions authorized by the Magnuson Act.

The Council may wish to take testimony on this issue and formally reaffirm their earlier decision. You may also want to consider an emergency rule to implement the general regulation, i.e. specify legal gear, until Amendment 16 is implemented in April 1988.

M E M O R A N D U M

TO: Jim Campbell, Chairman
Jim Branson, Executive Director

FROM: Ron Miller *DM*
Special Advisor

DATE: November 13, 1987

SUBJECT: Administrative History of 50 CFR Section 672.24 - Gear Limitations
in the Gulf of Alaska Sablefish Fishery

In response to a request from longline fishermen the Council's Gulf Interim Action Committee met via teleconference in January, 1985 to consider the matter of sablefish allocations to gear groups in the Gulf of Alaska. The Committee recommended Council review of the matter at the February 1985 Council meeting.

The Council met in Sitka on February 4-8, 1985 and adopted an emergency rule restricting sablefish fishing in the Eastern Gulf to longline gear only. This was intended as an interim measure to address a gear conflict problem while the Council considered amending the Gulf of Alaska groundfish plan. The emergency regulation, effective from March 27, 1985 to June 25, 1985, was:

Section 672.24.

Gear limitations.

(b) Eastern Regulatory Area Sablefish Fishery: Hook-and-Line Gear Only. Vessels subject to this part may not use gear other than hook-and-line gear when conducting a directed fishery for sablefish in the Eastern Regulatory Area.

At its March 27-28, 1985 meeting, the Council was presented Amendment 14 to the Gulf groundfish plan and voted to release it for public review. Included in the amendment package were gear and area restrictions for the sablefish fishery. Neither the draft Regulatory Flexibility Analysis, the draft Regulatory Impact Review, nor the draft Environmental Assessment accompanying the proposed amendment discussed gear limits or allocations to gear groups in any Gulf groundfish fishery other than the sablefish fishery. The relevant portion of the amendment summary presented to the Council read as follows:

1. Establish a gear and/or area restriction in the sablefish fishery.
 - a. Alternative 1 - Maintain status quo.
 - b. Alternative 2 - Prohibit all gear but hook and longline for sablefish east of 140°W longitude.
 - c. Alternative 3 - Prohibit all gear but hook and longline for sablefish east of 147°W longitude.

- d. Alternative 4 - Prohibit all gear but hook and longline for sablefish east of 159°W longitude.
- e. Alternative 5 - Prohibit all gear but hook and longline for sablefish east of 170°W longitude.
- f. Alternative 6 - Allocate the sablefish OY to specific gear types.
- g. Alternative 7 - License limitation. (emphasis added)

No draft regulations were included in the package reviewed by the Council in March 1985.

Amendment 14 was before the Council for final action at the May 21-24, 1985 meeting. The meeting tapes reflect no discussion by the Council of gear restrictions in any Gulf fishery other than the sablefish fishery. The FMP amendment language regarding gear limitations follows:

(E) Sablefish Gears and Allocations.

(1) Eastern Area

(a) Legal Gear. Legal gears for the taking of sablefish are trawls and hook-longlines;

(b) Allocation of Sablefish Between Gears. From 1986 forward, vessels using hook and longline gear shall be permitted to take up to 95% of the OY for sablefish. Vessels using trawl gear shall be permitted to harvest up to 5% of the Optimum Yield for sablefish.

(2) Central Area

(a) Legal Gear. In 1986, legal gears for the taking of sablefish are trawls, hooks and longlines, and pot longlines. In 1987, and thereafter, legal gears shall be trawls and hooks and longlines.

(b) Allocation of Sablefish Between Gears. In 1986, vessels using hook and longline gear shall be permitted to take up to 55% of the sablefish OY; vessels using pot-longline gear shall be permitted to take up to 25% of the OY; and trawl vessels shall be permitted to take up to 20% of the OY. In 1987 and thereafter, vessels using hook and longline gear shall be permitted to take up to 80% of the sablefish OY; and vessels using trawl gear shall be permitted to take up to 20% of the OY.

(3) Western Area.

(a) Legal Gear. In 1986, 1987, and 1988, legal gears for the taking of sablefish are hooks and longlines, pot longlines, and trawls. In 1989 and thereafter, legal gears shall be trawls and hooks and longlines.

(b) Allocation of Sablefish Between Gears. In 1986, 1987, and 1988, vessels using hook and longline gear shall be permitted to take up to 55% of the OY for sablefish; vessels using pot longline gear shall be permitted to take up to 25% of the OY; and vessels using trawls may take up to 20% of the OY. In 1989 and thereafter, vessels using hooks and longlines may take up to 80% of the OY; and vessels using trawls may take up to 20% of the OY.

(4) Gear Limitations.

All sablefish pots must have a biodegradeable escape panel, with an opening in the webbing equal in perimeter to the tunnel eye opening. This opening must be laced or otherwise secured with untreated cotton twine or other natural thread no larger than 120 thread."

Draft regulations implementing Amendment 14 were reviewed by the Council and adopted on May 24, 1985. The section of those draft regulations regarding gear restrictions was worded as follows:

7. Section 672.24 is redesignated as Section 672.24(a), and a new subsection (b) is added as follows:

* * * * *

(b) Sablefish Gear Restrictions and Allocations.

(1) In the Eastern Area, no person may use any gear other than hook-and-line gear to engage in directed fishing for sablefish. When vessels using trawl gear have harvested 5 percent of the OY for sablefish in the Eastern Area during any year, the Regional Director shall by field order close that Area to all fishing with trawl gear. No person may use any gear other than hook-and-line and trawl gear in fishing for groundfish in the Eastern Area.

(2) During 1986 in the Central Area, and during 1986, 1987 and 1988 in the Western Area, hook-and-line gear may be used to take up to 55 percent of the OY for sablefish; pot gear may be used to take up to 25 percent of that OY; and trawl gear may be used to take up to 20 percent of that OY. After the years specified above, hook-and-line gear may be used to take up to 80 percent of the sablefish OY in each respective area; and trawl gear may be used to take up to 20 percent of that OY. When the share of the sablefish OY assigned to any type of gear for any year and any area under this paragraph has been taken, the Regional Director shall by field order close that regulatory area and/or district to all fishing for groundfish with that type of gear, subject to Section 672.20(b) of this Part. No person may use any gear other than hook-and-line, pot and trawl gear in fishing for groundfish in each respective area during the years specified above. After those years, no person may use any gear other than hook-and-line and trawl gear in fishing for groundfish in each respective area. (emphasis added)

The tapes of the May 1985 meeting reflect no discussion of the consistency between the amendment language and the draft regulations regarding a ban on pot fishing. The record is clear that the Council took time from its debate to review the draft regulations before adoption. The record is also clear that the Council discussion focussed only on gear restrictions in the Gulf of Alaska sablefish fishery with no mention of other groundfish fisheries.

The Notice of Proposed Rulemaking for Amendment 14 published in the Federal Register on July 26, 1985 (Vol. 50, No. 144, pp. 30481-30489) contained no explanation of the broadened application of the gear restriction and, in fact, included a section with the heading, "1. Allocate sablefish among gear types," that described gear conflicts among sablefish fishermen using longlines and pots and how the sablefish allocation to pot fishermen would be phased out under the amendment.

The regulations as printed in the Notice of Proposed Rulemaking for Amendment 14 appear below:

§672.24 Gear Limitations.

* * * * *

(b) Sablefish gear restrictions and allocations. -- (1) Eastern Area. No person may use any gear other than hook-and-line and trawl gear in fishing for groundfish in the Eastern Area. No person may use any gear other than hook-and-line gear to engage in directed fishing for sablefish. When vessels using trawl gear have harvested as bycatch 5 percent of the OY for sablefish during any year, the Regional Director will close the Eastern Area to all fishing with trawl gear.

(c) Central and Western Areas. During 1986 in the Central Area, and during 1986, 1987 and 1988 in the Western Area, hook-and-line gear may be used to take up to 55 percent of the OY for sablefish; pot gear may be used to take up to 25 percent of that OY; and trawl gear may be used to take up to 20 percent of that OY. After the years specified above, hook-and-line gear may be used to take up to 80 percent of the sablefish OY in each area and trawl gear may be used to take up to 20 percent of that OY. When the share of the sablefish OY assigned to any type of gear for any year and any area or district under this paragraph has been taken, the Regional Director will close that regulatory area or district to all fishing for groundfish with the type of gear, subject to § 1672.2(b) of this part. No person may use any gear other than hook-and-line, pot, or trawl gear in fishing for groundfish in these areas during the years specified above. After those years, no person may use any gear other than hook-and-line or trawl gear in fishing for groundfish in the Gulf of Alaska.

There were only minor changes made to the proposed regulations after adoption by the Council in May 1985 and before publication in the Notice of Proposed Rulemaking in July 1985. Both versions prohibited pot fishing in groundfish fisheries in the Gulf.

The Final Rule implementing Amendment 14 was published in the Federal Register on October 24, 1985 (Vol. 50, No. 206, pp. 43193-43203). Again, no mention of the expanded pot gear prohibition appeared in the explanatory sections of the

Notice. The final regulations were identical to those in the Notice of Proposed Rulemaking except the first sentence in Section 672.24(b)(1) of the final regs was changed to read, "No person may use any gear other than hook and line and trawl gear when fishing for groundfish in the Eastern Area," rather than, "No person may use any gear other than hook and line and trawl gear in fishing for groundfish in the Eastern Area." (emphasis added)

At its January 15-17, 1986 meeting the Council was asked by NMFS to amend Section 672.24 to address the problem of single species closures in the Gulf. The Council voted that the regulation be amended by adding the following language:

"When the Regional Director determines that the share of the sablefish OY assigned to any type of gear for any year and any area or district under this paragraph may be taken before the end of that year, the Regional Director, in order to provide adequate bycatch amounts to ensure continued groundfish fishing activity by that gear group, shall by rule-related notice prohibit directed fishing for sablefish by persons using that type of gear for any period of that year. It is the intent of the regulation to minimize any PSC (waste) over the OY allocation."

In June 1986, Section 672.24 was amended by emergency regulation to include the section adopted by the Council the previous January. No change was made to the language regarding the prohibition against the use of pots. The emergency regulation was made permanent in January 1987, again with no change to the pot ban. (See Federal Register, Vol. 52, No. 14, January 22, 1987, pp. 2412-2415)

Although it was adopted as part of Amendment 14, Section 672.24 was also before the Council during the adoption of Amendment 15 to the Gulf groundfish plan. The Amendment 15 package the Council released for public review at the June 25-26, 1986 meeting contained no draft regulations and no reference to sablefish or groundfish gear restrictions; however, the package presented to the Council for final adoption at the September 25-26 meeting contained the following draft regulation:

"9. In Section 672.24, paragraph (b) is revised, and paragraph (c) is added to read as follows:

Section 672.24 Gear limitations.

* * * * *

(b) Sablefish gear restrictions and allocations.

(1) Eastern Area. No person may use any gear other than hook and line gear and trawl gear when fishing for groundfish in the Eastern Area. No person may use any gear other than hook and line gear to engage in directed fishing for sablefish. When vessels using trawl gear have harvested 5 percent of the TQ for sablefish during any year in any district of the Eastern Area for which TQs are specified, the Regional Director will close that district to all fishing with trawl gear.

(2) Central and Western Area. Hook and line gear may be used to take up to 80 percent and trawl gear may be used to take up to 20 percent-

of the TQ for sablefish in the Central Area. During 1987 and 1988 in the Western Area, hook and line gear may be used to take up to 55 percent of the TQ for sablefish; pot gear may be used to take up to 25 percent of that TQ; and trawl gear may be used to take up to 20 percent of that TQ. After the year specified above, hook and line gear may be used to take up to 80 percent of the sablefish TQ in the Western Area and trawl gear may be used to take up to 20 percent of that TQ. When the share of the sablefish TQ assigned to any type of gear for any year and any area or district under this paragraph has been taken, the Regional Director will close that regulatory area or district to all fishing for groundfish with that type of gear, subject to Section 672.20(b) of this part.

No person may use any gear other than hook and line gear, pot, or trawl gear in fishing for groundfish in these areas during the years specified above. After those years no person may use any gear other than hook and line or trawl gear in fishing for groundfish in the Gulf of Alaska.

The Amendment 15 draft regulations made minor changes to Section 672.24 (including changing "OY" to "TQ") but did not alter the ban on pot fishing for groundfish. The tapes of the September 1986 meeting reflect no Council discussion of that section of the regulations before final adoption. And as in Amendment 14, none of the supporting material for Amendment 15 discussed prohibiting the use of pots in Gulf groundfish fisheries.

The Notice of Proposed Rulemaking for Amendment 15 included no discussion of the ban against pots in the Gulf groundfish fisheries and reprinted the regulations, including Section 672.24, as adopted by the Council at the September 1986 meeting. (See Federal Register, Vol. 51, No. 239, December 12, 1986, pp. 44812-44821)

The Final Rule for Amendment 15 published on March 13, 1987 (Federal Register, Vol. 52, No. 49, pp. 7868-7878) contained the version of §672.24 that is currently in effect and one that differed from the regulation published in the Notice of Proposed Rulemaking in December 1986. The most significant change was in the heading of paragraph (b). The Notice of Final Rulemaking explained this change by stating:

"(6) Section 672.24 is revised by republishing the complete text of paragraph (b) of the final rule published January 22, 1987 (52 F.R. 2412), and by revising the heading of paragraph (b) from "Sablefish Gear restrictions and allocations," to "Gear restrictions and allocations." NMFS at times has been queried as to whether this part addressed only gear used in fishing for sablefish rather than all groundfish. The regulation, however, is directed at all groundfish.

The relevant part of the current regulation prohibiting pot fishing for groundfish in the Gulf is printed below:

"§672.24 GEAR LIMITATIONS

(b) Gear restrictions and allocations.

(1) Eastern Area. No person may use any gear other than hook-and-line and trawl gear when fishing for groundfish in the Eastern Area. No-

person may use any gear other than hook-and-line gear to engage in directed fishing for sablefish. When vessels using trawl gear have harvested as bycatch 5 percent of the TQ for sablefish during any year, further trawl catches of sablefish must be treated as a prohibited species as provided by paragraph (b)(3)(ii) of this section.

(2) Central and Western Areas. During 1987 and 1988 in the Western Area, hook-and-line gear may be used to take up to 55 percent of the TQ for sablefish; pot gear may be used to take up to 25 percent of that TQ; and trawl gear may be used to take up to 20 percent of that TQ. Beginning with 1987 in the Central Area and 1989 in the Western Area, hook-and-line gear may be used to take up to 80 percent of the sablefish TQ in each area and trawl gear may be used to take up to 20 percent of that TQ. No person may use any gear other than hook-and-line, pot, or trawl gear in fishing for groundfish during 1987 and 1988 in the Western Area. Except in the Western Area during 1987 and 1988, no person may use any gear other than hook-and-line or trawl gear in fishing for groundfish in the Gulf of Alaska.

There appears to be no "paper trail" in any of the Council's files explaining the expansion of the FMP's sablefish pot ban by the regulations to apply to all groundfish in the Gulf. There is also no Council discussion of the matter appearing on any of the tapes of the relevant meetings.

In a telephone conversation on November 11, 1987, former NOAA General Counsel for Alaska Pat Travers (the drafter of the Amendment 14 regulations adopted by the Council on May 24, 1985) claimed no detailed recollection of the events surrounding the expansion of the management scheme set out in the amendment but stated that the only reason he could think of for this change was to aid enforcement. The record does not reflect an enforcement concern being raised during Council discussion and NMFS enforcement officer Craig Hammond was unavailable for consultation at the time this memo was prepared.