


MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver 
Executive Director

DATE: February 1, 2005

SUBJECT: IR/IU

ESTIMATED TIME 2 HOURS

ACTION REQUIRED

Review progress on Amendment 80 and legal issues, and take action as necessary.

BACKGROUND

In October 2004, the Council made major modifications to Amendment 80 components and options. Primary among these modifications was the removal of the sector allocations of groundfish, other than yellowfin sole, rock sole, flathead sole, Atka mackerel, Aleutian Islands Pacific ocean perch, Alaska plaice, and arrowtooth flounder to the Non-AFA Trawl Catcher Processor sector. In December 2004, the Council finalized the suite of components and options for the purpose of analysis. A copy of the current Amendment 80 motion is included in the progress report that is attached as Item C-4(a). Also included in the progress report is a Amendment 80 decision diagram, revised strawman alternatives, and a revised allocation table.

In November, Congress passed the FY 2005 Appropriations Act, which contained a BSAI Catcher Processor Capacity Reduction Program. The program authorizes \$75 million to reduce the capacity of the catcher processor fleets operating in the BSAI. The program also limits access to the non-pollock groundfish fisheries. In December 2004, the Council asked NOAA GC to provide clarification at the February 2005 meeting of the BSAI Catcher Processor Capacity Reduction Program. Included under B-1 is a Council letter listing the specific clarifications needed. Many of the issues addressed in the letter are specific to the LLP program and would not directly effect the Amendment 80 action. However, three issues could impact the proposed action and may require Council action depending on NOAA GC report.

- 1) Section 219(7) defines the Non-AFA Trawl Catcher Processor subsector with specific eligibility criteria. Although the Council has not selected eligibility criteria for the sector, can the Council adopt a more stringent eligibility requirement for the sector than what is in the non-pollock buyback program?
- 2) Relative to further development of the proposed action, if the Council continues its current course and does not include allocation of the primary target species to the AFA sectors, would that in any way compromise these sectors' eligibility for the legislated non-pollock buyback program?
- 3) Should the ongoing Amendment 80 analysis incorporate the assumed license reductions effected by the legislation? Depending on the recommendations of NOAA GC on these specific issues, the Council may have to modify the suite of components and options for the proposed action.

**North Pacific Fishery Management Council
Amendment 80 Progress Report
February 1, 2005**

In December 2004, the Council finalized the components and options for Amendment 80. The Council removed Alaska plaice and arrowtooth flounder as an allocated species. To minimize the impacts from latent trawl licenses, the Council established catch history requirements for trawlers operating in the BSAI groundfish limited access fishery. The Council also simplified the PSC apportionment options, and reinserted the threshold fishery concept but only for yellowfin sole. Finally, the Council clarified that vessels less than 125' LOA that join a Non-AFA Trawl Catcher Processor cooperative will be required to have NMFS approved flow scales onboard and maintain observer coverage of every haul. Presented below are the revised components and options with some minor comments from staff and revised strawman alternatives. Also included is a decision diagram for Amendment 80 and a revised allocation table.

Currently, Amendment 80 is scheduled for initial review in April. However, the dataset needed for the analysis, although nearly completed, is not yet available. Given this delay, the Council may want to revise their schedule for Amendment 80. One suggestion is to schedule a preliminary review in April followed by initial review in June and final review in October. This would allow ample time to meet the estimated 2007 implementation date for the proposed action.

Revised Amendment 80 Problem Statement:

The Council's primary concern is to maintain a healthy marine ecosystem to ensure the long-term conservation and abundance of the groundfish and crab resources. To this end, the Council is committed to reducing bycatch, minimizing waste, and improving utilization of fish resources to the extent practicable in order to provide the maximum benefit to present generations of fishermen, associated fishing industry sectors, communities, and the nation as a whole, while at the same time continuing to look for ways to further rationalize the fisheries. Focusing on reduction of bycatch and the attendant benefits of cooperatives in meeting bycatch reduction objectives is an initial step towards rationalization of the BSAI groundfish fisheries. Bycatch reduction measures for the Non-AFA Trawl Catcher Processor sector is a priority focus in this step toward rationalization given this sector's historical difficulty in achieving acceptable bycatch levels. Allocations to this sector associated with cooperative management of catch and bycatch provide the opportunity for participants in this sector to mitigate the cost, to some degree, associated with bycatch reduction. In addition to reducing bycatch in one sector, assurance should be provided to minimize negative impacts on others.

Revised Amendment 80 Component and Options:

Issue 1: Sector Allocation of BSAI Non-Pollock Groundfish to the Non-AFA Trawl Catcher Processor Sector and CDQ Program

Component 1 Allocate only the following primary target species to the Non-AFA Trawl Catcher Processor sector: yellowfin sole, rock sole, flathead sole, Atka mackerel, and Aleutian Islands Pacific Ocean Perch. Species could be added or deleted through an amendment process.

Component 2 CDQ allocations for each primary target (Component 1) species in the program and associated secondary species taken incidental in the primary trawl target fisheries shall be removed from the TACs prior to allocation to sectors at percentage amounts equal to one of the following.

- Option 2.1 7.5%
- Option 2.2 10%
- Option 2.3 15%

Component 3 Identifies the sector allocation calculation (after deductions for CDQs). For purpose of allocation to the Non-AFA Trawl Catcher Processor sector, each primary species allocation will be based upon the years and percentage of average catch history selected in Component 5 using one of the following:

- Option 3.1 Total legal catch of the sector over total legal catch by all sectors
- Option 3.2 Retained legal catch of the sector over retained legal catch by all sectors
- Option 3.3 Total legal catch over TAC
- Option 3.4 Retained legal catch of the sector over total legal catch by all sectors

- Suboption 1 Allocations will be managed as a hard cap. When the allocation is reached, further fishing will be prohibited.
- Suboption 2 Allocations will be managed as a soft cap. When the allocations is reached, species will be prohibited status.

The remaining portion of primary species included in this program will be allocated to the BSAI limited access fishery. Vessels other than Non-AFA Trawl Catcher Processor with (retained) trawl catch history from 1995-2004 and with appropriate LLP endorsements may fish in the BSAI limited access fishery.

Based on the language associated with the trawl limited access fishery, it is assumed that eligible trawl participants with trawl catch history between 1995 and 2004 and the proper LLP endorsement will receive an additional LLP endorsement that allows trawl participants (other than H&G participants) to fish in the Amendment 80 BSAI limited access trawl fishery. Further, it is assumed that the need for an additional endorsement to fish the Amendment 80 fisheries does not apply to the fixed gear sectors.

Component 4 Catch history years used to determine the allocation to the Non-AFA Trawl Catcher Processor sector in Component 3.

- Option 4.1 1995-2003
- Option 4.2 1998-2002
- Option 4.3 1998-2004
- Option 4.4 1999-2003
- Option 4.5 2000-2004

Option 4.6 The Council can select percentages for each of the species allocated to the Non-AFA Trawl Catcher Processor sector.

Issue 2: PSC Allowance for the Non-AFA Trawl Catcher Processor Sector and the CDQ Program

Component 5 PSC is allocated to the CDQ program as PSQ reserves (except herring) is proportional to the CDQ allocation under Component 2 for each PSC limit

Component 6 PSC allowance for the Non-AFA Trawl Catcher Processor Sector.

Option 6.1 Apportion PSC to Non-AFA Trawl Catcher Processor sector:

Suboption 6.1.1 Allocation based on historical usage of PSC.

Suboption 6.1.2 Percentage allocations (estimates for PSC associated with Pacific cod catch will be based on the process laid out in Component 3) selected in Component 3 multiplied by the relevant total PSC catch *by all trawl vessels* in each PSC fishery group.

Option 6.2 Select a Non-AFA Trawl Catcher Processor sector PSC reduction option from the following that would apply to any PSC apportionment suboption selected in 6.1. PSC reduction options can vary species by species.

Suboption 6.2.1 Reduce apportionments to 60% of calculated level.

Suboption 6.2.2 Reduce apportionments to 75% of calculated level.

Suboption 6.2.3 Reduce apportionments to 90% of calculated level.

Suboption 6.2.4 Reduce apportionments to 95% of calculated level.

Suboption 6.2.5 Do not reduce apportionments from calculated level.

Option 6.3 The Council can select percentages and/or amounts for PSC allocated to the Non-AFA Trawl Catcher Processor sector.

Issue 3: Cooperative Development for the Non-AFA Trawl Catcher Processor Sector

In April 2004, the Council clarified that Amendment 80 was a license based program. At the same time, it was also noted the program would be based on one catch history per license. However, no specific language reflecting the treatment of catch history associated with a license was added to the proposed action. The following general language, which provides specifics on the treatment of catch history associated with a license, was included in the Gulf of Alaska Rockfish Pilot Program. The Council may wish to include the same general language in the Amendment 80 motion to eliminate any confusion surrounding the treatment of catch history associated with licenses. The following language is from the GOA Rockfish Program:

Basis for the distribution to the LLP license holder is the catch history of the vessel on which the LLP license is based and shall be on a fishery-by-fishery basis. The underlying principle of this program is one history per license. In cases where the fishing privileges (i.e., moratorium qualification or LLP license) of an LLP qualifying vessel have been transferred, the distribution of harvest shares to the LLP shall be based on the aggregate catch histories of (1) the vessel on which LLP license was based up to the date of transfer, and (2) the vessel owned or controlled by the LLP license holder and identified by the license holder as having been operated under the fishing privileges of the LLP qualifying vessel after the date of transfer. (Only one catch history per LLP license.)

Component 7 Identifies the license holders that are in the Non-AFA Trawl Catcher Processor sector which would receive Sector Eligibility Endorsements. Non-AFA qualified license holders with a trawl and catcher processor endorsement would be issued a Sector Eligibility Endorsement that will be attached to that holder's LLP identifying it as a member of the Non-AFA Trawl Catcher Processor sector. Only vessels that qualify for a sector eligibility endorsement may participate in cooperative under this program.

- Option 7.1 Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1998-2002
- Option 7.2 Qualified license holders must have caught 1,000 mt. of groundfish with trawl gear and processed that fish between 1998-2002
- Option 7.3 Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1997-2002
- Option 7.4 Qualified license holders must have caught 1,000 mt. of groundfish with trawl gear and processed that fish between 1997-2002
- Option 7.5 Qualified license holders must have caught 150 mt. of groundfish with trawl gear and processed that fish between 1997-2002

Component 8 Establishes the percentage of eligible licenses that must join a cooperative before the cooperative is allowed to operate. There may be more than one cooperative formed. No later than December 1 of each year, an application must be filed with NOAA fisheries by the cooperative with a membership list for the year. In order to operate as a cooperative, members, as a percent of eligible LLP licenses with Non-AFA Trawl Catcher Processor endorsement, must be:

- Option 8.1 At least 30 percent
- Option 8.2 At least 67 percent
- Option 8.3 At least 100 percent
- Option 8.4 All less one distinct and separate harvesters using the 10 percent threshold rule.

Component 9 Determines the method of allocation of PSC limits and groundfish between the cooperative and eligible Non-AFA Trawl Catcher Processor participants who elect not to be in a cooperative.

- Option 9.1 Catch history is based on total catch
- Option 9.2 Catch history is based on total retained catch

Component 10 Determines which years of catch history are used for establishing cooperative allocations. The allocation of groundfish between the cooperative and those eligible participants who elect not to join a cooperative is proportional to the catch history of groundfish of the eligible license holders included in each pool. Applicable PSC limits are allocated between the cooperative and non-cooperative pool in same proportions as those species that have associated PSC limits. The catch history as determined by the option selected under this component will be indicated on the Sector Eligibility Endorsement, which indicates the license holder's membership in the Non-AFA Trawl Catcher Processor sector. The aggregate histories will then be applied to the cooperative and the non-cooperative pool.

- Option 10.1 1995-2003, but each license holder drops its 3 lowest annual catches by species during this period

- Option 10.2 1997-2003, but each license holder drops its lowest annual catch by species during this period
- Option 10.3 1998-2002, but each license holder drops its lowest annual catch by species during this period
- Suboption 10.3.1 Each license holder does not drop its lowest annual catch by species during this period
- Option 10.4 1998-2003, but each license holder drops its lowest annual catch by species during this period
- Suboption 10.4.1 Each license holder drops two years during this period
- Option 10.5 1999-2003, but each license holder drops its lowest annual catch by species during this period

Component 11 Determines if excessive share limits are established in the Non-AFA Trawl Catcher Processor sector.

- Option 11.1 There is no limit on the consolidation in the Non-AFA Trawl Catcher Processor sector.
- Option 11.2 Consolidation in the Non-AFA Trawl Catcher Processor sector is limited such that no single company *or person* can use more than a fixed percentage of the overall sector apportionment history. The cap will be applied across the total allocation to the sector of all species combined. The cap will be applied using the individual and collective rule. Persons (individuals or entities) that exceed the cap in the initial allocation would be grandfathered.

Component 12 Establishes measures to maintain relative amounts of non-allocated species until such time that fisheries for these species are further rationalized in a manner that would supersede a need for these sideboard provisions.

- Option 12.1 Sideboards for the Non-AFA Trawl Catcher Processor sector would be established by regulation using the same years used to calculate the apportionment of PSC and groundfish between the Non-AFA Trawl Catcher Processor and limited access pool until such time as these other fisheries are rationalized, when the allocations are determined in these newly rationalized fisheries.

 Suboption 12.1.1 Sideboards will be allocated between cooperative and non-cooperative LLP holders.

- Option 12.2 Sideboards for the Non-AFA Trawl Catcher Processor sector can be established by establishing percentages and/or amounts for the species/fisheries not included in this program. These measures maintain relative amounts of non-allocated species until such time that fisheries for these species are further rationalized in a manner that would supersede a need for these sideboard provisions.

 Suboption 12.2.1 Sideboards will be allocated between cooperative and non-cooperative LLP holders.

Issue 4: Development of a Yellowfin Sole Threshold Fishery

Component 13 A threshold level may be established for yellowfin sole. TAC below the threshold level will be allocated to the Non-AFA Trawl Catch Processor sector based on the

formula determined in Components 3 and 4. TAC in excess of the threshold level will be available to other sectors as well as to the Non-AFA Trawl Catcher Processor sector. Threshold levels for other species may be developed at a later date.

For yellowfin sole, the threshold will be:

Option 13.1	80,000 MT
Option 13.2	100,000 MT
Option 13.3	125,000 MT
Option 13.4	150,000 MT
Option 13.5	175,000 MT

Allocate the threshold reserve to the Non-AFA Trawl Catcher Processor sector and the BSAI limited access fishery using one of following suboptions :

- Suboption 1 30% Non-AFA Trawl Catcher Processor sector and 70% limited access fishery
- Suboption 2 50% Non-AFA Trawl Catcher Processor sector and 50% limited access fishery
- Suboption 3 70% Non-AFA Trawl Catcher Processor sector and 30% limited access fishery

The Council may want to change TAC to ITAC in the motion language for the yellowfin sole fishery. Using TAC as the point at which the threshold reserve is implemented could create some confusion when TAC is greater than the threshold by 0 to 15 percent. One could see a situation were the threshold exceeds the TAC, but after deducting CDQ allocations and the reserves, the available catch falls below the threshold. To alleviate this problem, the Council could simple change TAC to ITAC in the motion language.

Other Elements of Amendment 80

This section provides additional specifics and elements for the Non-AFA Trawl Catcher processor cooperative program. These specifics and elements are common for any cooperative program that might be developed.

- The cooperative program developed in Amendment 80b will not supersede pollock and Pacific cod IRU programs.
- The Groundfish Retention Standards (GRS) (Amendment 79) will be applied to the cooperative as an aggregate on an annual basis and on those vessels who do not join a cooperative as individuals. Vessels less than 125' LOA participating in a cooperatives are required to have on board NOAA Fisheries approved scales to determine total catch and either maintain observer coverage of every haul for verification that all fish are being weighed or use an alternative scale-use verification plan approved by NOAA Fisheries.
- Non-AFA Trawl Catcher Processor sector participants that elect not to join a cooperative will be subject to all current regulations including all restrictions of the LLP and the GRS if approved.
- All qualified license holders participating in the fisheries of the Non-AFA Trawl Catcher Processor sector will need to have trawl and catcher processor endorsements with general licenses for BSAI and the additional sector eligibility endorsement. Length limits within the license will also be enforced such that any new vessel entering the fishery may not exceed the Maximum Length Overall (MLOA) specified on the license.
- Permanent transfers of Sector Eligibility Endorsements will be allowed if transferred with the associated Groundfish LLP. Sector Eligibility Endorsement, the associated groundfish LLP license, and associated catch histories would not be separable or divisible. All transfers must reported to NOAA Fisheries in order to track who owns the Sector

Eligibility Endorsements. The purchaser must be eligible to own a fishing vessel under MarAd regulations or must be a person who is currently eligible to own a vessel.

- Annual allocations to the cooperative will be transferable among cooperative members. Such transfers would not need to be approved by NOAA Fisheries. Any member of the cooperative will be eligible to use the catch history of any other member regardless of vessel length limitations of the LLP that carries the catch history.
- Any non-trawl or non-BSAI catches by qualified license holders that are considered part of the Non-AFA Trawl Catcher Processor sector will not be included in the defined cooperative program. In addition, these non-trawl or non-BSAI catches allocated to the non-AFA trawl catcher processor sector would not necessarily be excluded from other rationalization programs.
- All catch history used for allocation and eligibility purposes will be legal and documented catch.
- Disposition of groundfish species not allocated to the Non-AFA Trawl Catcher Processor sector will not change as a result of the cooperative program developed in Amendment 80.
- The developed cooperative program will limit its scope to selected groundfish and prohibited species catches with trawl gear by qualified license holders in the Non-AFA Trawl Catcher Processor sector in the BSAI. Groundfish species not included in the program as well as other non-specified fish species or marine resources will not be explicitly managed within the defined cooperative program. The defined cooperative program would not supersede existing regulations regarding these other marine resources.
- PSC limits for the following species will be created and allocated between the Non-AFA Trawl Catcher Processor cooperative(s) and those sector participants that elect not to join a cooperative.
 - BSAI Non-AFA Trawl Catcher Processor multi-species halibut cap consisting of an apportionment of species identified in Component 1.
 - BSAI Non-AFA Trawl Catcher Processor multi-species red king crab cap consisting of an apportionment of the current Pacific cod trawl cap and caps for the flatfish fisheries.
 - BSAI Non-AFA Trawl Catcher Processor multi-species snow crab (*C. opilio*) cap consisting of an apportionment of the current Pacific cod trawl cap and caps for the flatfish fisheries (includes apportionments of the trawl sablefish/turbot/arrowtooth limits).
 - BSAI Non-AFA Trawl Catcher Processor multi-species Tanner crab (*C. bairdi*) Zone 1 cap consisting of an apportionment of the current Pacific cod trawl cap and caps for the flatfish fisheries.
 - BSAI Non-AFA Trawl Catcher Processor multi-species Tanner crab (*C. bairdi*) Zone 2 cap consisting of an apportionment of the current Pacific cod trawl cap and caps for the flatfish fisheries.
- Bycatch limits for non-specified species or marine resources specifically for this program will not be established. However, should unreasonable bycatch or other interactions occur, specific regulations to minimize impacts will be considered.
- The cooperative(s) will have adequate internal rules. Evidence of binding private contracts and remedies for violations of contractual agreements will be provided to NOAA Fisheries. The cooperative must demonstrate an adequate mechanism for monitoring and reporting prohibited species and groundfish catch. Participants in the cooperative must agree to abide by all cooperative rules and requirements.
- Specific requirements for reporting, monitoring and enforcement, and observer protocols will be developed in regulations for participants in the cooperative program and will not be the purview of the cooperative. The Council and the Non-AFA Trawl Catcher Processor sector should specify their goals and objectives for in-season monitoring and program evaluation. Recordkeeping and reporting portions of the program can then be

developed to ensure that goals and objectives of the program are met in a cost effective manner.

- A detailed annual report will be required from cooperative(s) formed. Fishery managers will review the annual report and determine if the program is functioning as desired. It is recommended that in-depth assessments of program be undertaken under the auspices of the Council/NOAA Fisheries periodically (for example, every five years). In-depth studies will report the accomplishments of the program and indicate whether any changes are necessary.
- An economic and socioeconomic data collection initiative will be developed and implemented under the Non-AFA Trawl Catcher Processor Cooperative Program. The collection would include cost, revenue, ownership, and employment data on a periodic basis to provide the information necessary to study the impacts of the program. This program will be similar to the data collection program in the BSAI crab rationalization program. Details of the collection will be developed in the analysis of the alternatives.

Amendment 80 Decision Process

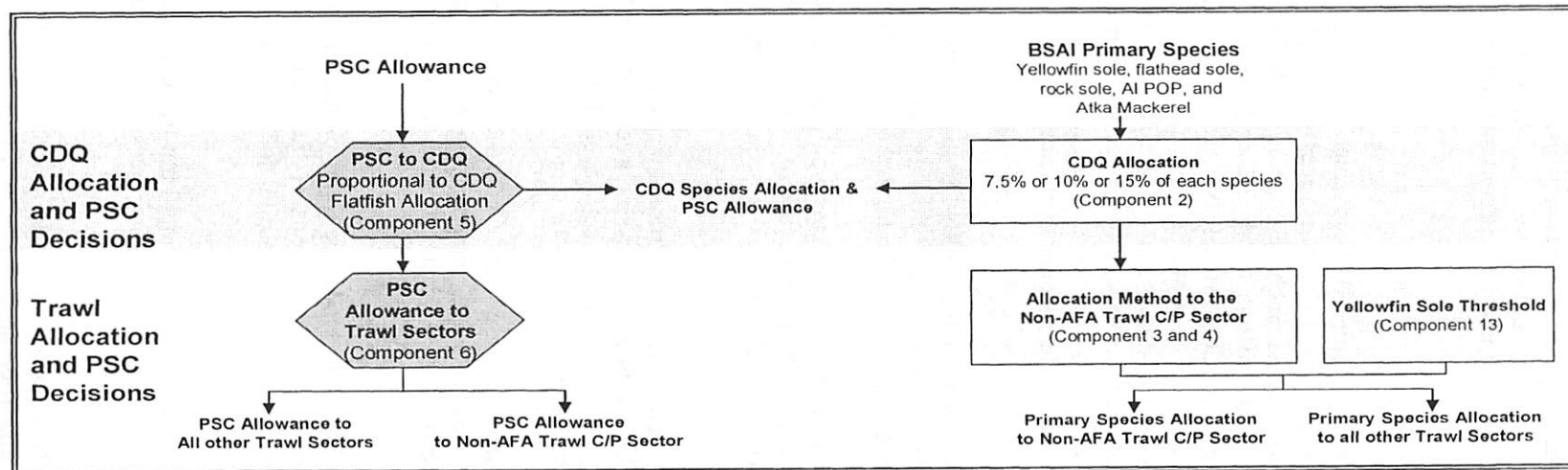
This section presents a general overview of the decision process necessary for the proposed action. As noted in the diagram below, the outcome of the proposed action is a cooperative program for the Non-AFA Trawl Catcher Processor sector. To accomplish this end, the Council will need to make several key decisions.

The first group of decisions is the allocation of the primary target species. In December 2004, the Council selected yellowfin sole, rock sole, flathead sole, AI POP, and Atka mackerel as the species allocated to the Non-AFA Trawl Catcher Processor sector. However, before the Council can allocate these species to the Non-AFA Trawl Catcher Processor sector, they first need to allocate 7.5, 10, or 15 percent of these primary species and those secondary species taken incidental to the primary species to the CDQ program. Since the Council eliminated all of the PSC allocation options for the CDQ program except one, PSC allocations to the CDQ program will be proportional to the percent of target species allocated to the program.

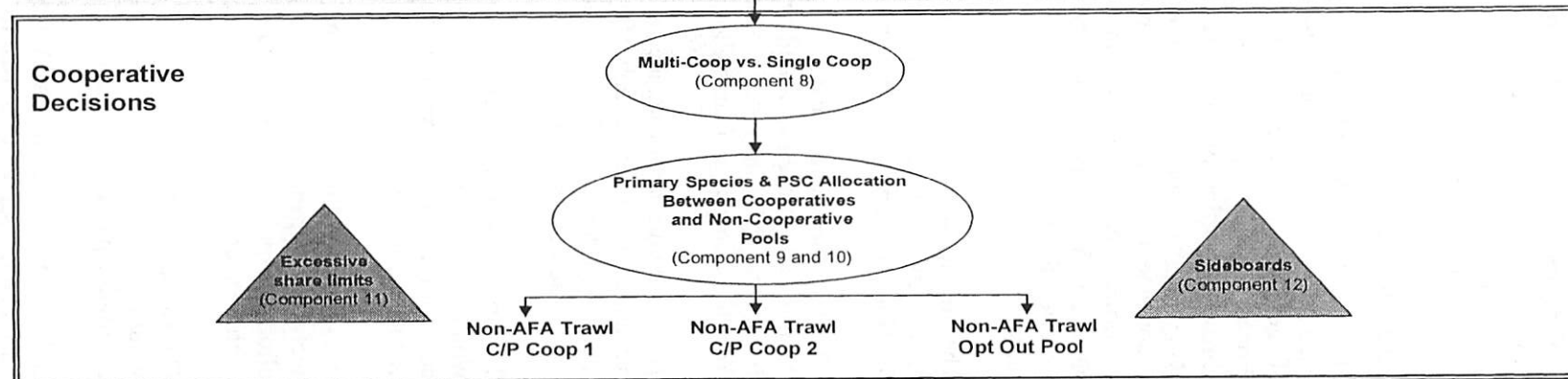
The next group of decisions is the allocation of the Amendment 80 primary species to the Non-AFA Trawl Catcher Processor sector. This step will involve picking a set of catch history years and a catch ratio method. Also included in this step will be the selecting of options associated with the yellowfin sole threshold, which include a threshold amount and an allocation method. The final decision in this step is determining the PSC allowance for the Non-AFA Trawl Catcher Processor sector.

The final group of decisions involves developing the cooperative structure for the Non-AFA Trawl Catcher Processor sector. The first decision is to develop a multiple cooperative program or a single cooperative program. Second is to determine eligibility for the Non-AFA Trawl Catcher Processor sector. Once eligibility has been determined, the Council will need to divide the sector's allocation between eligible participants who join a cooperative and those that do not. Finally, decisions on sideboards and excessive share limits will need to be made.

Amendment 80 Decision Process Boxes represent decision points



Eligibility Decision



Revised Alternatives for Amendment 80

Alternative 1: No Action

Under this alternative, current management of groundfish and PSC limits in the BSAI would remain in effect. A management measure pending Secretary of Commerce approval is the groundfish retention standard (GRS). Although not yet submitted to the Secretary, implementation is scheduled for 2006. For the purposes of the analysis, it is assumed that Amendment 79 will phase in a minimum retention standard for Non-AFA Trawl Catcher Processors longer than 125 feet length overall over a three-year period starting in 2006 at 75 percent and culminating in 2008 at 85 percent.

Alternative 2: Multiple Cooperatives

This alternative would allocate yellowfin sole, rock sole, flathead sole, Atka mackerel, and Aleutian Island Pacific Ocean perch to the Non-AFA Trawl Catcher Processor sector. Allocation of these primary target species will be equal to retained catch of the Non-AFA Trawl Catcher Processor sector relative to the retained catch by all vessels for the years 1998 to 2002. The remaining portion of the primary target species not allocated will be reserved for the limited access fishery for vessels other than Non-AFA Trawl Catcher with the appropriate LLP endorsements and for trawlers with groundfish catch history from 1995 to 2004. Allocations of the primary target species to the Non-AFA Trawl Catcher Processor sector will be managed as a hard cap. When the sector harvests all of its allocation of a primary target species, all directed fisheries for that species and fisheries which catch the species incidental would close to the sector.

The alternative would include a threshold allocation for the yellowfin sole fishery of 125,000 metric tons. A TAC over the threshold would be allocated in the following manner: 30 percent to the Non-AFA Trawl Catcher Processor sector and 70 percent to the limited access trawl fishery.

The PSC allowance to the Non-AFA Trawl Catcher Processor sector would be broken out from the trawl allowance and would be based on the sector's historical usage of PSC between 1998 and 2002. The PSC allowance for the Non-AFA Trawl Catcher Processor sector will not be reduced from the sector's calculated allowance.

To be eligible to participate in the Non-AFA Trawl Catcher Processor sector, each qualified participant must have caught 500 mt of groundfish with trawl gear and processed that fish during the years 1998 to 2002. Those licenses failing to qualify for the sector would be restricted to the limited access fishery outside the Non-AFA Trawl Catcher Processor sector.

To form a cooperative, 30 percent of the eligible Non-AFA Trawl Catcher Processor participants would have to agree to form a cooperative. Those participants who elect not to join a cooperative could either try to form their own cooperative or elect to participate outside a cooperative but within the sector.

Allocation of the primary target species and PSC allowances between cooperatives and those sector participants who elect not to join a cooperative is proportional to the retained catch of the allocated species of the eligible license holders included in each pool for the years 1998-2002, with no years of catch history excluded.

Consolidation in the Non-AFA Trawl Catcher Processor sector would not be constrained. There would be no limit on the percentage of the Non-AFA Trawl Catcher Processor sector allocation that an eligible participant (individuals or entities) can use.

Sideboards for the Non-AFA Trawl Catcher Processor sector would be established by regulation based on the same years used to calculate the apportionment of PSC and groundfish between the

Non-AFA Trawl Catcher Processor sector and the open access pool. The sideboards would remain in place until such time as these other fisheries are rationalized. Within the Non-AFA Trawl Catcher Processor sector, sideboards will be allocated between cooperative and non-cooperative LLP holders based on the same years used to allocate groundfish species to the sector.

CDQ allocations for each of the groundfish species noted in Component 1 and associated secondary species taken incidental in the primary trawl target fisheries would remain at 7.5 percent. The PSC allocated to the CDQ program as PSQ reserves would be issued at the same percentage as the CDQ groundfish allocation.

The table below shows further details on the components, options, and suboptions selected for Alternative 2.

Table 1. Components, options, and suboptions for Alternative 2 of Amendment 80.

Component	Option	Description
1	n/a	Allocate only the following primary target species: Yellowfin sole, rock sole, flathead sole, Atka mackerel, and AI POP.
2	2.1	7.5% CDQ allocation of each species noted in Component 1 and associated secondary species taken incidental in the primary trawl target fisheries.
3	3.2	For purposes of apportionments, allocation to the Non-AFA Trawl Catcher Processor shall be based on retained catch of the sector over retained catch by all sectors.
3	1	Allocations will be managed as a hard cap.
4	4.2	Catch history years used to determine the allocations to the Non-AFA Trawl Catcher Processor sector will be 1998-2002.
5	n/a	PSC is allocated to the CDQ program as PSQ reserves (except herring) is proportional to the CDQ allocation under Component 2 for each PSC limit.
6	6.1.1	Apportion PSC allowance to the Non-AFA Trawl Catch Processor sector based on historical usage of PSC.
6	6.2.5.	Do not reduce PSC apportionments to the Non-AFA Trawl Catcher Processor sector from the calculated level.
7	7.1	Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1998 and 2002 to be eligible for the Non-AFA Trawl Catcher Processor sector.
8	8.1	At least 30 percent of the eligible licenses must join a cooperative before the cooperative is allowed to operate.
9	9.2	Catch history is based on retained catch
10	10.3	Years of catch history used to calculate allocation of groundfish and PSC allowances between the cooperative and non-cooperative participants are 1998-2002, with no dropped year.
11	11.1	There is no limit on the consolidation of shares in the Non-AFA Trawl Catcher Processor sector.
12	12.1	Sideboards for the Non-AFA Trawl Catcher Processor sector would be established by regulation.
12	12.1.1	Sideboards will be allocated between cooperative and non-cooperative LLP holders.
13	13.1	For yellowfin sole, the threshold will be 125,000 mt
13	1	Allocate 30% of the threshold reserve to the Non-AFA Trawl Catcher Processor sector and 70% to the limited access trawl fishery.

Alternative 3: Single Cooperative

This alternative would allocate yellowfin sole, rock sole, flathead sole, Atka mackerel, and Aleutian Island Pacific Ocean perch to the Non-AFA Trawl Catcher Processor sector. Allocation of these primary target species will be equal to total catch of the Non-AFA Trawl Catcher Processor sector relative to the TAC for the years 1995 to 2003. The remaining portion of the primary target species not allocated will be reserved for a limited access fishery for vessels other than Non-AFA Trawl Catcher Processor with the appropriate LLP endorsements and for trawlers with groundfish catch history during 1995-2004. Allocations of the primary target species to the Non-AFA Trawl Catcher Processor sector will be managed as a soft cap. When the sector harvests all of its allocation of a primary target species, the species will be placed on prohibited species status.

The alternative would include a threshold allocation for the yellowfin sole fishery. The program would establish a threshold of 100,000 metric tons. Any TAC over this threshold will be allocated in the following percentages: 70 percent to the Non-AFA Trawl Catcher Processor sector and 30 percent to the limited access trawl fishery.

The PSC allowance to the Non-AFA Trawl Catcher Processor sector would be broken out from the trawl allowance and would be based on the PSC usage by all trawl vessels from 1995 to 2002 multiplied by the Non-AFA Trawl Catcher Processor sector's percent of groundfish allocated from Component 3. The PSC allowance for the Non-AFA Trawl Catcher Processor sector will be reduced to 95 percent of calculated level before the sector allocation is made.

To be eligible to participate in the Non-AFA Trawl Catcher Processor sector, each qualified participant must have caught 500 mt of groundfish with trawl gear and processed that fish during the years 1997 to 2002. Those licenses failing to qualify for the sector would be restricted to the limited access fishery outside the Non-AFA Trawl Catcher Processor sector.

To form a cooperative, 67 percent of the eligible Non-AFA Trawl Catcher Processor participants would have to agree to form a cooperative. Those qualified participants who elect not to join a cooperative would participate outside a cooperative but within the sector.

Allocation of the primary target species and PSC allowances between the cooperative and those sector participants who elect not to join the cooperative are proportional to the total catch of the allocated species of the eligible license holders included in each pool for the years 1995-2003. Each license holder must drop its three lowest annual catches by species during this period.

Consolidation in the Non-AFA Trawl Catcher Processor sector is limited such that no single company or person can use more than a fixed percentage of the overall sector apportionment history. The cap will be applied across the total allocation to the sector of all species combined. The cap will be applied using the individual and collective rule. Persons (individual or entities) that exceed the cap in the initial allocation would be grandfathered.

Sideboards for the Non-AFA Trawl Catcher Processor sector would be established by regulation based on the 1995-2003 years. The sideboards would remain in place until such time as other BSAI and GOA fisheries are rationalized. Within the Non-AFA Trawl Catcher Processor sector, sideboards will be allocated between cooperative and non-cooperative LLP holders based on the same years used to allocate groundfish species to the sector.

CDQ allocations for each of the groundfish species noted in Component 1 and associated secondary species taken incidental in the primary trawl target fisheries would remain at 10 percent. The PSC allocated to the CDQ program as PSQ reserves would be issued at the same percentage as the CDQ groundfish allocation.

The table below shows further details on the components, options, and suboptions selected for Alternative 3.

Table 2. Components, options, and suboptions for Alternative 3 of Amendment 80.

Component	Option	Description
1	n/a	Allocate only the following primary target species: Yellowfin sole, rock sole, flathead sole, Atka mackerel, and AI POP.
2	2.2	10% CDQ allocation of each species noted in Component 1 and associated secondary species taken incidental in the primary trawl target fisheries.
3	3.3	For purposes of apportionments, allocation to the Non-AFA Trawl Catcher Processor shall be based on retained catch of the sector over TAC
3	2	Allocations will be managed as a soft cap.
4	4.1	Catch history years used to determine the allocations to the Non-AFA Trawl Catcher Processor sector will be 1995-2003.
5	5.1	PSC allocated to the CDQ program in proportion to the CDQ allocation under Component 3 for each PSC limit.
6	6.1.2	Apportion PSC allowance to the Non-AFA Trawl Catch Processor sector based on historical usage of PSC by all trawl sectors multiplied by the groundfish allocation percentage from Component 3 .
6	6.2.4	Reduce PSC apportionments to 95% of the Non-AFA Trawl Catcher Processor sector from the calculated level.
7	7.3	Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1997 and 2002 to be eligible for the Non-AFA Trawl Catcher Processor sector.
8	8.2	At least 67 percent of the eligible licenses must join a cooperative before the cooperative is allowed to operate.
9	9.1	Catch history is based on total catch
10	10.1	Years of catch history used to calculate allocation of groundfish and PSC allowances between the cooperative and non-cooperative participants are 1995-2003. Each license holder drops its 3 lowest annual catches by species during this period.
11	11.2	Consolidation is limited such that no single company can use more than a fixed percentage of the overall sector apportionment history.
12	12.1	Sideboards for the Non-AFA Trawl Catcher Processor sector would be established by regulation.
12	12.1.1	Sideboards will be allocated between cooperative and non-cooperative LLP holders.
13	13.5	For yellowfin sole, the threshold will be 100,000 mt
13	13.3	Allocate 70% of the threshold reserve to the Non-AFA Trawl Catcher Processor sector and 30% to the limited access trawl fishery.

Revised allocation table of the primary target species to the Non-AFA Trawl Catcher Processor sector

Species	Years	Year Option	TAC	Total Retained for the H&G Sector	Total Harvest for the H&G Sector	Total Retained for all Sectors	Total Harvest for all Sectors	Option 4.1 (Total/Total)	Option 4.2 (Retain/Retain)	Option 4.3 (Total/TAC)	Option 4.4 (Retain/Total)
Atka Mackerel	1995-2003	5.1	639,557	407,127	471,522	479,295	556,155	84.8%	84.9%	73.7%	73.2%
	1998-2002	5.2	326,700	197,199	219,493	205,190	250,532	87.6%	96.1%	67.2%	78.7%
	1998-2003	5.3	386,700	234,956	268,435	243,038	304,816	88.1%	96.7%	69.4%	77.1%
	1999-2003	5.4	322,400	195,045	224,823	195,746	248,943	90.3%	99.6%	69.7%	78.3%
	2000-2003	5.5	249,100	150,833	176,353	151,095	195,299	90.3%	99.8%	70.8%	77.2%
Flathead Sole	1995-2003	5.1	439,300	95,255	111,969	107,875	161,438	76.4%	88.3%	28.1%	59.0%
	1998-2002	5.2	315,800	61,226	76,444	62,528	94,904	80.5%	97.9%	24.2%	64.5%
	1998-2003	5.3	335,800	70,351	87,781	71,693	108,682	80.8%	98.1%	26.1%	64.7%
	1999-2003	5.4	235,800	54,846	68,159	55,843	84,297	80.9%	98.2%	28.9%	65.1%
	2000-2003	5.5	158,500	43,214	53,751	44,049	66,455	80.9%	98.1%	33.9%	65.0%
Pacific Ocean Perch	1995-2003	5.1	108,370	75,996	87,895	82,100	97,015	90.6%	92.6%	81.1%	78.3%
	1998-2002	5.2	60,280	38,846	44,141	38,848	47,328	93.3%	100.0%	73.2%	82.1%
	1998-2003	5.3	72,970	48,669	55,984	49,051	61,239	91.4%	99.2%	76.7%	79.5%
	1999-2003	5.4	60,870	40,967	47,458	41,348	52,191	90.9%	99.1%	78.0%	78.5%
	2000-2003	5.5	47,370	31,387	36,678	31,768	40,312	91.0%	98.8%	77.4%	77.9%
Rock Sole	1995-2003	5.1	181,656	117,179	262,340	181,656	398,698	65.8%	64.5%	25.2%	29.4%
	1998-2002	5.2	768,000	59,375	135,662	61,919	194,004	69.9%	95.9%	17.7%	30.6%
	1998-2003	5.3	812,000	72,757	162,450	75,340	229,338	70.8%	96.6%	20.0%	31.7%
	1999-2003	5.4	712,000	63,421	139,941	65,520	195,695	71.5%	96.8%	19.7%	32.4%
	2000-2003	5.5	403,000	53,520	113,853	55,220	155,184	73.4%	96.9%	28.3%	34.5%
Yellowfin	1995-2003	5.1	1,525,750	467,024	607,824	732,247	898,903	67.6%	63.8%	39.8%	52.0%
	1998-2002	5.2	822,000	227,505	295,208	257,121	388,718	75.9%	88.5%	35.9%	58.5%
	1998-2003	5.3	905,750	281,811	359,183	314,424	463,115	77.6%	89.6%	39.7%	60.9%
	1999-2003	5.4	685,750	228,106	287,267	249,971	361,961	79.4%	91.3%	41.9%	63.0%
	2000-2003	5.5	473,750	192,395	238,487	207,418	294,641	80.9%	92.8%	50.3%	65.3%

Source: Data summarized from 1995-2003 NMFS Weekly Production Reports and 1995-2003 ADFG groundfish fish tickets.

Total harvest for all sectors is from NMFS blend data (1995-2002) and Catch Accounting System (2003).

The 2003 fish ticket data should be considered preliminary.



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F/T Seafreese Alaska • F/T Ocean Peace • F/T Ocean Alaska • F/V Ocean Hope III • F/V Alaska Beauty

January 31, 2005

Ms. Stephanie Madsen, Chair
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99601

Re: C-4 IR/IU

Dear Madam Chair:

I am writing this letter to comment on agenda item C-4 IR/IU Amendment 80. United States Seafoods, LLC ("USSF") manages three non-AFA trawl catcher processors that will be greatly affected by Amendment 80.

USSF believes that the recent modifications to Amendment 80 have been quite positive, and that we are moving in the right direction with this package. However, we also recognize that there is more work to be done before Amendment 80 is ready for final action. Amendment 80 currently lacks a mechanism to balance allocations on an in-season management basis between the Non-AFA catcher processor sector and the limited access fishery. The lack of a balancing mechanism raises the potential that fish will be stranded in the limited access fishery at years end. In our view, the simplest way to address this is through a rollover provision. Our request at this meeting is that you add roll-over language to Components 4 and 15.

1. Component 4 Rollovers:

In its current construction Amendment 80 will apportion certain target species (Atka Mackerel, POP, Yellowfin sole, Rock sole, and Flathead sole) and PSC between the non-AFA trawl catcher processor sector and the limited access fishery. Depending on the allocation methodology (the Component 4 years and/or percentages that you chose at final action) and the status of the major BSAI stocks it is possible, and even likely under certain scenarios, that some amount of fish could be left un-harvested in the limited access fishery. Beyond the potential for stranding

fish, this inability to balance fish between the sectors will also make the TAC setting negotiations more difficult and more contentious than they already are. Therefore, we ask that you consider adding the following sub-option to Component 4.

- *Sub-option -- Target Species Rollover: Any unharvested portion of the Amendment 80 target species in the limited access fishery that is projected to remain unused, (by a specific date, say August 1st or September 1st) shall be rolled over to the Amendment 80 sector.*

2. Component 15 -- Threshold Rollovers:

The potential for stranding fish in the limited access fishery also exists for the Component 15 threshold fishery. The IR/IU technical committee, which I am a member of, recognized this potential problem and included a rollover provision when it developed the threshold concept. Unfortunately, at the December meeting the threshold concept was not added back into Amendment 80 in its entirety, and now the current threshold component lacks a rollover provision. I do not recall any discussion at the last meeting surrounding the threshold rollover and believe that this omission was a simple oversight which could be corrected at this meeting. Therefore, we ask that you consider adding the IR/IU technical committee's original threshold rollover sub-option back into Component 15.

- *Sub-option -- Threshold Rollover:*
 - Sub-option 1: No Rollover Provision.*
 - Sub-option 2: Any un-harvested portion of the threshold reserve allocated to the limited access fishery that is projected to remain unused by a specific date (August 1st or September 1st) shall be reallocated to the other trawl sectors. These rollovers will be in a hierarchical nature flowing to the sector most similar before flowing to the less similar sectors.*

Thank you for the opportunity to submit these brief comments. I look forward to discussing this program with you and other Council members in greater detail at the February meeting.

Sincerely yours,



David Wood
Counsel
United States Seafoods, LLC

Groundfish Forum

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Seattle, WA 98199
(206) 213-5270 Fax (206) 213-5272
www.groundfishforum.org

February 1, 2005

Ms. Stephanie Madsen, Chairman
North Pacific Fishery Management Council
605 West 4th Ave.
Anchorage, AK 99501
FAX: 907-271-2817

Re: Agenda Item C-4, IRIU

Dear Madam Chair,

Groundfish Forum is a trade organization representing 19 'head-and-gut' trawl catcher processors which target non-pollock species in the Bering Sea, Aleutian Islands and Gulf of Alaska. We represent 90% of the capacity of the non-AFA trawl catcher-processor sector.

Amendment 80 (rationalization of the non-AFA trawl CPs in the BSAI) revolves around the allocation of catch history in the BSAI non-pollock, non-cod fisheries. This is a critical concern for the non-AFA trawl CP fleet, which depends on these fisheries for survival. As Council analysis shows, non-AFA trawl CPs harvest the vast majority of the yellowfin sole, rock sole, flathead sole, Atka mackerel and rockfish in the BSAI.

The Council has expressed its intent to reserve some portion of the yellowfin sole fishery for other sectors (particularly AFA sectors) in the process of rationalization. This is unprecedented; no other rationalization program reserved the right for other sectors to target on the rationalized species. It is particularly ironic, given that the American Fisheries Act granted exclusive access to the largest fishery in the Bering Sea to these few named vessels, with no option for other vessels to participate no matter how high the pollock TAC is set.

Regardless of the irony, we recognize that the will of the Council is to allow this future access. Since AFA operators themselves have admitted that they do not currently have time to target yellowfin sole, there is no reason to reserve a portion of the current TACs for their use – especially since these TACs have been severely reduced specifically to accommodate a high pollock TAC. Allocation formulas which reduce the H&G sector's portion up front (retained over total and total over TAC) are inappropriate.

The only logical way to allocate history is by using a catch-based system – either retained catch over retained catch, or total catch over total catch. Any other formula (using TAC or ABC) ties the allocation either to a number which is dependent on the pollock TAC (TAC) or to one which does not reflect the actual amount which the fleet could legally harvest (ABC). Using a mixed formula (retained over total) ignores the reality that many of the flatfish fisheries have inevitable discard levels, and will have discards (or fish going to meal) no matter who harvests them.

Allocating on either retained over retained or total over total, using recent history, results in a realistic representation of the current use of and dependency on these fisheries. This is today's world. AFA vessels which occasionally target yellowfin sole still have access to that history. Non-AFA vessels which are dependent on these fisheries have access to what they have been catching. Nothing changes until the balance of TACs changes.

As you have seen in previous presentations, pollock and sole TACs have oscillated inversely (largely due to the constraints of the 2.0 million ton cap and high flatfish ABCs). When pollock is low, flatfish has been high and vice versa. The proposed 'threshold' program, which allows greater access to yellowfin sole as the pollock TAC drops and flatfish TACs increase, could incorporate this phenomena with the relative needs of the H&G and non-H&G sectors. When pollock TACs are high and other TACs are compressed, most of the fish would go to the H&G sector, which is most dependent on it. As pollock TACs drop and other TACs are able to rise, vessels outside the H&G sector have more access to yellowfin sole.

We feel compelled to comment on the issue of AFA sideboards. The sideboards are based on the history of the AFA vessels from 1995-1997, prior to implementation of AFA. The world of the North Pacific fisheries changed with the passage of the American Fisheries Act, and it will never change back. The situation will never be the same, regardless of the amount of pollock TAC, because non-AFA vessels will *never* be able to target pollock in the BSAI. *Ever*.

At the December 2004 Council meeting, during discussion by the Council, the comment was made that "There just isn't enough fish ... to give the H&G guys what they want, to protect the AFA CP sideboards, to protect the AFA CV sideboards and whatever else is there." AFA sideboards were imposed as *limits* on AFA participation, not as *allocations*. They were intended to protect non-AFA fishermen from harm as a result of the benefits given to AFA fishermen. There is no need, nor any mandate, to 'protect' AFA sideboards.

In summary, we ask the Council to remove history allocation provisions (total over TAC and retained over total) which do not reflect the current use and dependency of the various sectors. The threshold program, which would provide a gradual increase in the allocation to the non-H&G sector as the TACs rise, deserves further analysis and consideration. Finally, AFA sideboards were developed to protect other sectors from the significant advantages given to the qualifying vessels, and are irrelevant in the current rationalization program.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script, appearing to read 'T. Luttrell', written in black ink.

T. Edward Luttrell
Executive Director

Ho Before NMFS
Feb. 02 C-4 Supplemental
February 2005

Catch Monitoring and Accounting Issues Associated with Amendment 80

Overview

Amendment 80 would establish sector allocations for certain primary targets and PSC species. The exact species to be allocated and how is still unknown, but probably allocations will be made for: Atka mackerel, flathead sole, Aleutian Islands POP, rock sole, and yellowfin sole as well as halibut PSC. Allocations of target may be managed as hard caps or as soft caps where, when the allocation is reached, the species will go on prohibited status. Other species would be managed as sideboards or softcaps that could probably only be retained up to the MRA amount.

Amendment 80 allows the formation of coops but does not require that vessels join them. It is possible that a very small group of vessels would choose not to participate in a coop and would continue to fish the non-coop quota. However, because of the limited number of participants and the closed nature of the remaining quota, this portion of the fleet would be expected to behave as if they were fishing in an individual quota fishery.

This paper discusses some of the catch accounting and monitoring issues that may arise as part of Amendment 80. In order to simplify that discussion it compares Amendment 80 with the AFA pollock fishery under the premise that the AFA pollock catcher/processor monitoring program "works" and meets NMFS goals for an individual quota program. In other words it provides sufficiently accurate and precise data with sufficient protection from data fouling and misreporting. It does this at a reasonable cost to industry without putting an undue burden on NMFS or NMFS-certified observers.

Species composition is more complex in the H&G fisheries.

As can be seen from Table 1, The H&G fisheries are far more complex than the AFA pollock fishery. There are five primary targets instead of one and to some extent the targets overlap. In some of the H&G targets there are large associated catches of other groundfish that will not be allocated as part of this program. Further, the AFA fleet is not functionally limited by its bycatch of non-quota groundfish nor, in most cases, by PSC catch. Thus, from a quota accounting perspective, monitoring the pollock fishery involves monitoring the catch of a single target species and, to a secondary extent, monitoring bycatch of salmon.

Table 1. Comparison between AFA pollock and H&G target fisheries 2001-2004. Data are highly preliminary.

	target percent	percent other allocated targets	percent other non-allocated groundfish	common non-allocated groundfish species
AFA pollock	98%	NA	< 2%	none
Atka Mackerel	86%	3%	11%	Northern rockfish
AI POP	74%	9%	18%	Northern rockfish, Atka mackerel
Flathead sole	41%	14%	40%	Pollock, Pacific cod, Arrowtooth
Rock sole	46%	18%	28%	Pollock, Pacific cod, Alaska plaice
Yellowfin sole	65%	7%	22%	Pollock, Alaska plaice, Pacific cod

Catch accounting in the AFA c/p fleet is based on the following steps:

1. Each haul is weighed individually to determine OTC
2. The observer samples a portion of each haul to determine the species composition.
3. The sampled species composition is extrapolated by the OTC to estimate the weight of each species.
4. The extrapolated weight of pollock is debited from the Coop's quota.

If the species composition of the sample is different from the actual species composition of the haul, an "incorrect" amount of quota will be debited. However, because the pollock fishery consists of over 98% pollock, a large error in the estimation of the non-pollock catch composition would be required to have a significant effect on the pollock estimate.

This may not be the case with the H&G fleet because the percentage of the OTC made up of the target species is considerably lower. Where sampling is not deliberately biased in some manner, sampling is probably quite accurate even for less common species. In other words, across longer periods of time and larger numbers of boats, the sum of the extrapolated basket samples is probably quite close to the actual amount of a given species harvested. However, in an individual quota based fishery, the precision of sampling becomes an issue because vessel owners and coop managers are more likely to focus on anomalous samples that possibly overestimate the abundance of a given limiting species while being unlikely to focus on those samples which underestimate the abundance of that species. To the extent that pressure can be applied to the observer or NMFS to eliminate the data from those unfavorable hauls, the overall trend is to reduce the estimated removals of the limiting species and increase the estimated removals of non-limiting species. This has been an issue in the MS CDQ program when groups

have failed to allocate sufficient amounts of incidental catch to the various targets and have found themselves unable to fully harvest the target quota. In those cases, the industry has frequently attempted to make a case that the observer sampling overestimates the amount of the limiting species.

H & G Boats are smaller and working conditions are not as good

H&G boats are not pollock boats. The average H&G boat is 172 feet LOA, only 60% of the size of the average pollock c/p. In terms of tonnage, the average H&G boat has less than 1/3 of the average displacement of a pollock c/p. Most H&G boats are older, living conditions are not as good, and working spaces are more cramped. This creates accounting issues for two reasons. First, while effective observing on these boats requires comparatively more skill and training, the average observer has less training than the average observer on a pollock c/p. In most cases, new observers are assigned to these vessels. Once an observer has experience, most will choose to be deployed in the pollock fleet if they can do so. Second, there is less room for observers to perform their sampling duties. Depending on catch composition and physical sampling constraints, an observer may choose whether to basket, partial haul or whole haul sample for any given species. Partial haul samples are larger than basket samples and give a more precise estimate of composition, whole haul samples represent a census for the sampled species and, in theory, precision is no longer an issue on the haul level. Often the observer will use more than one technique on a given haul and may, for example, basket sample for target and secondary species composition, and whole haul for prohibited species. Many of the catch accounting issues associated with basket sampling can be eliminated if the observer is able to partial or whole haul sample. Unfortunately, very few H&G boats, even those with flow scales, provide sufficient space for an observer to effectively partial haul and all sampling is based on basket samples.

Quota harvest is often limited by bycatch caps

The AFA pollock fishery is not limited by bycatch of prohibited species. On occasion, high salmon bycatch may cause the closure of certain areas. While these closures may inconvenience the fishing industry, they do not prevent the full harvest of the quota. Thus, there is limited incentive for vessel crew to deliberately attempt to manipulate observer estimates of bycatch.

The H&G flatfish fisheries, on the other hand, are generally closed because of halibut bycatch. In the past five years, approximately 9 out of 10 closures in the flathead, rock and yellowfin sole fisheries have been because of halibut bycatch. While halibut has not closed the Atka mackerel or POP fisheries, there have been past closures of the Atka mackerel fishery because bycatch of shortraker/rougheye and northern rockfish caused those species to approach the overfishing level.

Also, in most years red king crab caps cause the closure of the red king crab savings area (the 10 minute strip). Given the complex and rapidly changing nature of fish value, it is probable that other species that currently do not drive closures will become issues at some point in the future. At this point arrowtooth flounder, for example, is increasing rapidly in value as new markets appear.

Even without the incentive of individual quotas, manipulation of halibut bycatch numbers by the fishing industry appears to be endemic. Vessel crew attempt to deliberately discard halibut

before the observer can sample, or “game” the observer sampling so that high bycatch tows occur when the observer is not on duty. Crew also pressure observers to change their sampling or report different numbers when halibut bycatch is high. Individual or sector bycatch quotas will increase the incentive to engage in these behaviors dramatically.

Quota harvest may be limited by hard caps on other quota species

Catch of multiple targets in the H&G fisheries is unavoidable. Table 2 shows, for example, significant amounts of yellowfin and flathead sole are caught in the rock sole target and significant amounts of Atka mackerel are caught in the POP target. At this time, there is little incentive on the part of the fishing industry to avoid this bycatch. However, under Amendment 80 there may be an incentive to minimize or misreport cross-target catch depending on whether the Council chooses to allocate targets as hard caps or soft caps. Depending on market conditions, one fishery or another will always be more valuable and it is in the quota holder’s best interest to ensure that the most valuable quotas are fully used and not limited by other quota species. The MS CDQ program has shown, however, that quota managers do not always leave enough of one allocated species to feed the bycatch needs of another allocated species. In the event that vessels perceive the potential that the bycatch of one target will impact their ability to fully harvest another target, NMFS can expect the same issue of observer pressure and deliberate attempts to manipulate sample composition that are currently a problem with halibut PSC.

Table 2. Crosswalk showing the percentage mixing of targets in the H &G fisheries for 2002-2004. For example, for hauls where flathead sole was the target (i.e. the most abundant species by weight in the haul was flathead sole), the ratio of rock sole to flathead sole was approximately 16%. Data are highly preliminary.

Non Target Allocated species	Target				
	Atka Mackerel	Pacific Ocean Perch	Flathead Sole	Rock Sole	Yellowfin Sole
Atka Mackerel	NA	8%	< 1%	< 1%	~ 0%
Pacific Ocean Perch	3%	NA	< 1%	~ 0%	~0%
Flathead Sole	< 1%	< 1%	NA	4%	2%
Rock Sole	< 1%	~ 0%	16%	NA	9%
Yellowfin Sole	~ 0%	~ 0%	17%	36%	NA

Developing the SF databases for catch accounting will be extremely complex.

Open/limited access and individual quota fisheries demand very different sorts of data. Programs such as this that create hybrid fisheries where a given vessel may or may not have an individual quota depending on season or target create unique difficulties for management. At the very least, NMFS will be required to track a dramatically increased number of quota categories. The

Council motion is not clear on who will be responsible for ensuring that fishing stops when a quota is met and how NMFS can determine whether catch is, for example, bycatch in the Pacific cod fishery, or target catch in the quota fishery.

To the extent that Amendment 80 is designed around a system of verified industry self reporting, NMFS must ensure that systems are in place to compare industry reports with observer reports. This has been an issue since implementation of the AFA. In some cases, such as catcher/processor and mothership catch, comparing industry and NMFS data is fairly straightforward and can be easily automated. In other cases, such as the delivery of presorted catcher vessel catch to a shoreplant, comparing NMFS and industry data has proven to be very time consuming and difficult. Given that this program envisions far more total quota categories for NMFS to track or verify, it will be critical to examine whether a coherent catch accounting system can be developed before final Council action is taken.

Possible solutions.

- Increased potential for halibut presorting
 - video monitoring
 - remove incentive for presorting
 - eliminate halibut cap
 - use an assumed rate based on historical data
 - reduce incentive for presorting
 - use fleet wide rates
 - allow groundfish fleet to “purchase” halibut IFQ
 - larger sample sizes
 - regulate line layout to eliminate mechanical presorting and increase visibility of flow of fish between bin and scale
 - develop new techniques for determining sampling times to reduce crew ability to manipulate fishing/processing

Public Testimony Sign-Up Sheet

and

**Handouts Received During the
Meeting on this Agenda Item**

Public Testimony Sign Up Sheet

Agenda Item C-4 IRIU

	NAME (PLEASE PRINT)	AFFILIATION
1	Dave Wood	US Seafoods
2	3 Michelle Redgeray	
3	6 ERZ OLSON	BBEDC
4	3 GERRY MEYERSON	PROWL FISHRIES
5	6 LORI SWANSON / ED LUTTRELL	GFF
6	3 Donna Parker	?
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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.

Ho Before MHej.
Feb. 02 C-4 Supplemental
February 2005
(from Jane Dicosimo)

Catch Monitoring and Accounting Issues Associated with Amendment 80

Overview

Amendment 80 would establish sector allocations for certain primary targets and PSC species. The exact species to be allocated and how is still unknown, but probably allocations will be made for: Atka mackerel, flathead sole, Aleutian Islands POP, rock sole, and yellowfin sole as well as halibut PSC. Allocations of target may be managed as hard caps or as soft caps where, when the allocation is reached, the species will go on prohibited status. Other species would be managed as sideboards or softcaps that could probably only be retained up to the MRA amount.

Amendment 80 allows the formation of coops but does not require that vessels join them. It is possible that a very small group of vessels would choose not to participate in a coop and would continue to fish the non-coop quota. However, because of the limited number of participants and the closed nature of the remaining quota, this portion of the fleet would be expected to behave as if they were fishing in an individual quota fishery.

This paper discusses some of the catch accounting and monitoring issues that may arise as part of Amendment 80. In order to simplify that discussion it compares Amendment 80 with the AFA pollock fishery under the premise that the AFA pollock catcher/processor monitoring program "works" and meets NMFS goals for an individual quota program. In other words it provides sufficiently accurate and precise data with sufficient protection from data fouling and misreporting. It does this at a reasonable cost to industry without putting an undue burden on NMFS or NMFS-certified observers.

Species composition is more complex in the H&G fisheries.

As can be seen from Table 1, The H&G fisheries are far more complex than the AFA pollock fishery. There are five primary targets instead of one and to some extent the targets overlap. In some of the H&G targets there are large associated catches of other groundfish that will not be allocated as part of this program. Further, the AFA fleet is not functionally limited by its bycatch of non-quota groundfish nor, in most cases, by PSC catch. Thus, from a quota accounting perspective, monitoring the pollock fishery involves monitoring the catch of a single target species and, to a secondary extent, monitoring bycatch of salmon.

C-4 handed from Jane D

have failed to allocate sufficient amounts of incidental catch to the various targets and have found themselves unable to fully harvest the target quota. In those cases, the industry has frequently attempted to make a case that the observer sampling overestimates the amount of the limiting species.

H & G Boats are smaller and working conditions are not as good

H&G boats are not pollock boats. The average H&G boat is 172 feet LOA, only 60% of the size of the average pollock c/p. In terms of tonnage, the average H&G boat has less than 1/3 of the average displacement of a pollock c/p. Most H&G boats are older, living conditions are not as good, and working spaces are more cramped. This creates accounting issues for two reasons. First, while effective observing on these boats requires comparatively more skill and training, the average observer has less training than the average observer on a pollock c/p. In most cases, new observers are assigned to these vessels. Once an observer has experience, most will choose to be deployed in the pollock fleet if they can do so. Second, there is less room for observers to perform their sampling duties. Depending on catch composition and physical sampling constraints, an observer may choose whether to basket, partial haul or whole haul sample for any given species. Partial haul samples are larger than basket samples and give a more precise estimate of composition, whole haul samples represent a census for the sampled species and, in theory, precision is no longer an issue on the haul level. Often the observer will use more than one technique on a given haul and may, for example, basket sample for target and secondary species composition, and whole haul for prohibited species. Many of the catch accounting issues associated with basket sampling can be eliminated if the observer is able to partial or whole haul sample. Unfortunately, very few H&G boats, even those with flow scales, provide sufficient space for an observer to effectively partial haul and all sampling is based on basket samples.

Quota harvest is often limited by bycatch caps

The AFA pollock fishery is not limited by bycatch of prohibited species. On occasion, high salmon bycatch may cause the closure of certain areas. While these closures may inconvenience the fishing industry, they do not prevent the full harvest of the quota. Thus, there is limited incentive for vessel crew to deliberately attempt to manipulate observer estimates of bycatch.

The H&G flatfish fisheries, on the other hand, are generally closed because of halibut bycatch. In the past five years, approximately 9 out of 10 closures in the flathead, rock and yellowfin sole fisheries have been because of halibut bycatch. While halibut has not closed the Atka mackerel or POP fisheries, there have been past closures of the Atka mackerel fishery because bycatch of shortraker/rougeye and northern rockfish caused those species to approach the overfishing level. Also, in most years red king crab caps cause the closure of the red king crab savings area (the 10 minute strip). Given the complex and rapidly changing nature of fish value, it is probable that other species that currently do not drive closures will become issues at some point in the future. At this point arrowtooth flounder, for example, is increasing rapidly in value as new markets appear.

Even without the incentive of individual quotas, manipulation of halibut bycatch numbers by the fishing industry appears to be endemic. Vessel crew attempt to deliberately discard halibut

↑
Little
bycatch is very
inflammatory
(3)



No before mtg.
UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

*Agenda C-4
Supplemental
February 2005*

February 4, 2005

Russell W. Pritchett
Pritchett and Jacobson, P.S.
870 Democrat Street
Bellingham, WA 98229

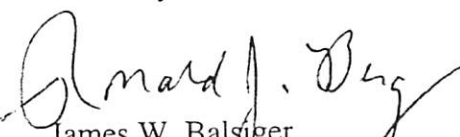
Dear Mr. Pritchett:

Thank you for your letter expressing your clients' view that they have been adversely impacted by the American Fisheries Act (AFA) and requesting that the National Marine Fisheries Service take prompt action to ameliorate these impacts under Section 211(c) of the AFA. You have notified us that our failure to notify you promptly of steps to initiate protection to your clients will compel you to commence litigation.

Consistent with section 211(c)(1)(A) of the AFA, the North Pacific Fishery Management Council (Council) recommended and we implemented under 50 CFR 679.64(b) groundfish sideboard amounts to limit the harvest of non pollock groundfish and prohibited species by the AFA catcher vessel fleet to protect against competitive harm that could arise from AFA cooperatives. We acknowledge that you and your clients have been before the North Pacific Fishery Management Council on numerous occasions to present information on why you believe that these actions do not provide adequate protection from grounds preemption and reduced catch rates of Pacific cod in the geographic area your clients prefer to fish.

While competition on fishing grounds is an inherent element of the North Pacific groundfish fisheries, neither we nor the Council can see clear evidence that your client's assertion of reduced catch rates is a result of the AFA inshore cooperatives versus other factors that can impact variability of Pacific cod catch rates on a spatial and temporal basis. Further, the Council is engaged in the process of developing a new allocation program for Pacific cod that could provide for a separate allocation of Pacific cod to the sector that your clients participate in--the non AFA trawl catcher vessel fleet. Competition for Pacific cod by non AFA trawl CVs, particularly in near shore waters, is increasing, independent of the AFA. The allocation issues that arise from this competition are best addressed through the development of long term rationalization of the fishing sectors that target Pacific cod, which is the process the Council currently is engaged in. We encourage you and your clients to continue to provide input to the Council during the development of a rationalization program for Pacific cod, regardless of your decision on whether or not to litigate under the AFA.

Sincerely,

For

James W. Balsiger
Administrator, Alaska Region



C-4 Supple Ho



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

2-10-05

February 9, 2005

MEMORANDUM FOR: Chris Oliver, Executive Director
North Pacific Fishery Management Council

THROUGH: Lisa L. Lindeman
Alaska Regional Counsel

FROM: Lauren M. Smoker
Attorney-Advisor

SUBJECT: Responses to Council Questions 4.b and 6 concerning the BSAI non-pollock groundfish fisheries

This memorandum responds to your letter of December 29, 2004, requesting legal guidance on several issues concerning the statutory provisions for the BSAI non-pollock groundfish fishery and the BSAI Catcher Processor Capacity Reduction Program (hereinafter referred to as the "Capacity Reduction Program") that are included in the Department of Commerce and Related Agencies Appropriations Act, 2005, which is included in Public Law No. 108-447 (hereinafter referred to as the "Act").¹ For convenience, a copy of the Act is attached to this memorandum. We are providing responses to Questions 4.b and 6. We have not fully developed responses to the remaining questions. We will provide those to you as soon as possible and before the April 2005 Council meeting.

The questions the Council has posed involve issues of statutory interpretation. Therefore, the following brief overview of two main tenets or rules of statutory construction is provided as a starting point for our responses. First, under the rules of statutory construction, the language of a statute is controlling and takes precedence over the language of a regulation if the regulation is not consistent with the statutory language.² A statute is the charter for the administrative agency charged with implementing it.³ A regulation issued by an agency under the authority of a

¹Your letter also contained questions for NOAA General Counsel in other topic areas, such as Gulf of Alaska rockfish and observers. Our office has responded or will respond to those questions separately.

²Singer, Norman J., Sutherland Statutory Construction §31:02 (5th ed. 1992).

³*Id.*



particular statute therefore must be authorized by and consistent with the statute, and administrative action cannot be in excess of the authority conferred by the statute.⁴ Because Congress is the source of a federal administrative agency's powers, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation implementing that statute.⁵

Second, when the language of a statute is clear and unambiguous and not unreasonable or illogical in its operation, a court may not go outside the language of the statute for its meaning.⁶ This is known as the plain meaning rule. Only statutes that are ambiguous are subject to the process of statutory interpretation.⁷ Ambiguity exists when a statute is capable of being understood by reasonably well informed persons in two or more different senses.⁸ Even if a specific provision is clearly worded, ambiguity can exist if some other section of the statutory program expands or constricts the provision's meaning, if the plain meaning of the provision is repugnant to the general purview of the act, or if the provision when considered in conjunction with other provisions of the statutory program import a different meaning.⁹

The Council's questions 4.b and 6 and NOAA GC's responses are provided below.

Council Question 4.b: Section 219(a)(7) defines the Non-AFA Trawl Catcher Processor subsector as the owner of each trawl catcher processor that is not an AFA trawl catcher processor, that holds a valid LLP license with Bering Sea or Aleutian Islands endorsement, and that the Secretary determines has harvested with trawl gear and processed not less than a total of 150 metric tons of non-pollock groundfish during the period January 1, 1997 through December 31, 2002:

- b. Given that the Council is currently developing a cooperative program for the non-AFA trawl catcher processors along with allocations for the non-pollock groundfish fisheries in Amendment 80, can the Council adopt a more stringent eligibility requirement for participation in non-AFA trawl catcher processor cooperatives than the eligibility requirement set out in the Act?

⁴*Id.*

⁵*Id.*

⁶*Id.*, at §46:01 (6th ed. 2000).

⁷*Id.*

⁸*Id.*, at §46:04.

⁹*Id.*, at §46:01.

eligibility criteria for harvesting cooperatives are more restrictive than the criteria for subsector eligibility. Under this example, only those persons that would meet the more stringent harvesting cooperative eligibility criteria would be eligible to participate in the non-AFA trawl catcher processor subsector, impermissibly amending the statutory criteria for participation in that subsector.

Council Question 6: Relative to further development of Amendment 80 (allocations of flatfish species and cooperative development for the H&G catcher/processor sector), if the Council continues its current course and does not include allocations of those species to AFA sectors, would that in any way compromise those sectors' eligibility for the legislated non-pollock buyback program?

NOAA GC response: For the following reasons, NOAA General Counsel has determined that the ability of the four catcher processor subsectors, as defined in the Act, to participate in the Act's Capacity Reduction Program is not dependent on the receipt of an allocation of non-pollock groundfish. Therefore, the catcher processor subsectors as defined in the Act, including the AFA trawl catcher processor subsector, are not precluded from participation in the Capacity Reduction Program if the Council continues its current course and does not include allocations of non-pollock groundfish to those catcher processor subsectors in Amendment 80.

The Act, in sections 219(b) through (f), establishes the voluntary Capacity Reduction Program.¹² Under section 219(e)(1), participation in the Capacity Reduction Program begins with the development of a capacity reduction plan by the members of a catcher processor subsector, and submission of that capacity reduction plan to the Secretary of Commerce (Secretary) after notice to the Council. None of the statutory provisions in the Act concerning the Capacity Reduction Program tie Amendment 80 to participation in the Capacity Reduction Program or make a subsector's inclusion in Amendment 80 a prerequisite for that subsector's participation in the Capacity Reduction Program. In fact, the statutory language of the Act makes no specific reference to Amendment 80 at all.

More importantly, the ability of a catcher processor subsector to participate in the Capacity Reduction Program is not dependent on first receiving an allocation of BSAI non-pollock groundfish. There is no statutory provision within sections 219(b) through (f) of the Act that makes an allocation of non-pollock groundfish to a catcher processor subsector a criterion for participation in the Capacity Reduction Program or a criterion for the development and submission of a capacity reduction plan to the Secretary. Because a subsector's participation in

¹²Section 219(b) establishes the authority for the Capacity Reduction Program; section 219(c) addresses the availability of Capacity Reduction Program funds to the four defined catcher processor subsectors; section 219(d) contains requirements for binding reduction contracts; section 219(e) contains the provisions concerning the development, approval and notification of catcher processor subsector capacity reduction plans; and section 219(f) addresses the actions that are to be undertaken by other federal agencies upon the request of the Secretary of Commerce.

the Capacity Reduction Program is not dependent on first receiving an allocation of non-pollock groundfish, each subsector defined in the Act is capable of participating in the Capacity Reduction Program regardless of whether it is included in Amendment 80.

Attachment

NOAA GC response: Section 219(a)(7) reads as follows:

(7) Non-AFA Trawl Catcher Processor Subsector.— The term “non-AFA trawl catcher processor subsector” means the owner of each trawl catcher processor—

- (A) that is not an AFA trawl catcher processor;
- (B) to whom a valid LLP license that is endorsed for Bering Sea or Aleutian Islands trawl catcher processor fishing activity has been issued; and
- (C) that the Secretary determines has harvested with trawl gear and processed not less than a total of 150 metric tons of non-pollock groundfish during the period January 1, 1997 through December 31, 2002.

Section 219(a)(7) of the Act sets forth the criteria for eligibility to the non-AFA trawl catcher processor subsector. Although there are some questions that have been raised by the Council as to how to interpret the individual criteria contained within the Act’s definition of non-AFA trawl catcher processor subsector,¹⁰ it is quite clear from the language used in the definition that there are three criteria for eligibility in the subsector. Additionally, it is clear from the language used that all the criteria must be met by the owner of a trawl catcher processor in order to be eligible for the non-AFA trawl catcher processor subsector given Congress’ use of the word “and” at the end of subsection 219(a)(7)(B).

The Council’s current options for eligibility criteria for both the non-AFA trawl catcher processor sector and harvesting cooperatives formed within the sector are contained in Component 9 of the Council’s December 2004 motion on Amendment 80. Component 9 currently reads as follows:

Component 9 Identifies the license holders that are in the Non-AFA Trawl Catcher Processor sector which would receive Sector Eligibility Endorsements. Non-AFA qualified license holders with a trawl and catcher processor endorsement would be issued a Sector Eligibility Endorsement that will be attached to that holder’s LLP identifying it as a member of the Non-AFA Trawl Catcher Processor sector. Only vessels that qualify for a sector eligibility endorsement may participate in cooperative under this program.

Option 9.1 Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1998-2002.

Option 9.2 Qualified license holders must have caught 1,000 mt. of groundfish with trawl gear and processed that fish between 1998-2002.

Option 9.3 Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1997-2002.

Option 9.4 Qualified license holders must have caught 1,000 mt. of groundfish with trawl gear and processed that fish between 1997-2002.

Option 9.5 Qualified license holders must have caught 150 mt. of groundfish with trawl

¹⁰See Council Questions, 1, 3, and 4.a.

gear and processed that fish between 1997-2002.

Under this component of Amendment 80, if a person meets the criteria within the options under consideration, then that person would be a member of the non-AFA trawl catcher processor sector and would be eligible to join a harvesting cooperative within that sector. With the exception of Option 9.5,¹¹ all of the options currently under consideration by the Council differ from the Act's sector eligibility criterion in section 219(a)(7)(C) either in qualifying harvest tonnage amounts or qualifying years, or both.

The statutory language used in section 219(a)(7) or in other sections of the Act does not include words that permit the Council or NOAA Fisheries to amend Congress' enumerated subsector qualification criteria. Additionally, there is no statutory language in section 219(a)(7) or elsewhere in the Act that would permit the application of more restrictive, or more lenient, subsector qualification criteria by the Council or NOAA Fisheries. Because the language of the Act is clear and unambiguous and is not unreasonable or illogical in its operation, there is no need to go outside of the language of the Act for its meaning. Congress did not provide the Council or NOAA Fisheries with any ability to make adjustments to the specific statutory criteria addressing eligibility in any of the subsectors. As explained earlier, under statutory rules of construction, the language of the Act is controlling and would take precedence over the language of a regulation if the regulation were not consistent with the statutory language. While the Council and NOAA Fisheries may continue to examine alternative eligibility options for the non-AFA trawl catcher processor subsector in the analysis for Amendment 80, the criteria as to who is eligible to be a member of the non-AFA trawl catcher processor subsector has been decided by Congress, and the Council and NOAA Fisheries cannot select or impose different, including more stringent, eligibility requirements for entrance to the non-AFA trawl catcher processor subsector.

Although the Act defines who is eligible for the non-AFA trawl catcher processor subsector, the Act does not address the issue of eligibility in a harvesting cooperative *within* the non-AFA trawl catcher processor subsector. The imposition of more restrictive eligibility criteria for the formation of harvesting cooperatives does not appear to be prohibited by the Act. If the Council chooses, the Council could examine eligibility requirements for harvesting cooperative formation within the non-AFA trawl catcher processor subsector that would be more stringent than the subsector's eligibility requirements, and adopt such measures if the measures are consistent with the requirements of the Magnuson-Stevens Act and other applicable law, including the Act. It is important to note, however, that the Council could not use harvesting cooperative eligibility requirements as a means to effect changes to the Act's eligibility criteria for the non-AFA trawl catcher processor subsector. For example, if the Council would make an allocation of BSAI non-pollock groundfish to the non-AFA trawl catcher processor subsector, the Council could not allocate all the subsector's allocation to harvesting cooperatives within that subsector if the

¹¹The Council added Option 9.5 at their December meeting because of the Act's criterion at section 219(a)(7)(C).

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be deposited in the NOAA Operations, Research, and Facilities Appropriations Account and treated as an offsetting collection and only be available for financing additional scholarships.

Sec. 215. Section 402(f) of Public Law 107-372 is amended—

(1) in paragraph (1), by striking "All right" and inserting "For the period ending April 3, 2008, all right"; and

(2) in paragraph (3), by inserting "for the period ending April 3, 2008" after "and annually thereafter".

Sec. 216. Of the amounts made available under this heading for the National Oceanic and Atmospheric Administration, the Secretary of Commerce shall pay by March 1, 2005, \$5,000,000 to the National Marine Sanctuaries Foundation to capitalize a fund for ocean activities.

Sec. 217. Any funding provided under this title used to implement the Department of Commerce's E-Government Initiatives shall be subject to the procedures set forth in section 605 of this Act.

Sec. 218. A fishing capacity reduction program for the Federal Gulf of Mexico Reef Fish Fishery Management Plan principally intended for commercial long line vessels is authorized to be financed through a capacity reduction loan of \$35,000,000 pursuant to sections 1111 and 1112 of title XI of the Merchant Marine Act of 1936 (46 U.S.C. App. 1279f and 1279g) subject to the conditions of this section. In accordance with the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.), \$350,000 is hereby appropriated for the subsidy cost of the loan authorized under this section and shall remain available until expended. The Secretary of Commerce, working in close coordination with active fishery participants, is hereby authorized to design and implement a comprehensive voluntary capacity reduction program using the loan authorized under this section. The Secretary shall set the loan term at 35 years and repayment shall begin within 1 year of final implementation of the program. In addition to the authority of the Gulf of Mexico Regional Fishery Management Council to develop and recommend conservation and management measures for the Gulf of Mexico reef fish fishery, the Secretary of Commerce is authorized to develop and implement a limited access program pursuant to the standards set forth in section 303(b)(6) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1853(b)(6)).

Sec. 219. (a) DEFINITIONS.—In this section:

(1) AFA TRAWL CATCHER PROCESSOR SUBSECTOR.—The term "AFA trawl catcher processor subsector" means the owners of each catcher/processor listed in paragraphs (1) through (20) of section 208(a) of the American Fisheries Act (16 U.S.C. 1851 note).

(2) BSAI.—The term "BSAI" has the meaning given the term "Bering Sea and Aleutian Islands Management Area" in section 679.2 of title 50, Code of Federal Regulations (or successor regulation).

(3) CATCHER PROCESSOR SUBSECTOR.—The term "catcher processor subsector" means, as appropriate, one of the following:

(A) The longline catcher processor subsector.

(B) The AFA trawl catcher processor subsector.

(C) The non-AFA trawl catcher processor subsector.

(D) The pot catcher processor subsector.

(4) COUNCIL.—The term "Council" means the North Pacific Fishery Management Council established in section 302(a)(1)(G)



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of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(G)).

(5) **LLP LICENSE.**—The term "LLP license" means a Federal License Limitation program groundfish license issued pursuant to section 679.4(k) of title 50, Code of Federal Regulations (or successor regulation).

(6) **LOGLINE CATCHER PROCESSOR SUBSECTOR.**—The term "logline catcher processor subsector" means the holders of an LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher processor fishing activity, C/P, Pcod, and hook and line gear.

(7) **NON-APA TRAWL CATCHER PROCESSOR SUBSECTOR.**—The term "non-APA trawl catcher processor subsector" means the owner of each trawl catcher processor—

(A) that is not an APA trawl catcher processor;

(B) to whom a valid LLP license that is endorsed for Bering Sea or Aleutian Islands trawl catcher processor fishing activity has been issued; and

(C) that the Secretary determines has harvested with trawl gear and processed not less than a total of 150 metric tons of non-pollock groundfish during the period January 1, 1997 through December 31, 2002.

(8) **NON-POLLOCK GROUNDFISH FISHERY.**—The term "non-pollock groundfish fishery" means target species of Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, or yellowfin sole harvested in the BSAI.

(9) **POT CATCHER PROCESSOR SUBSECTOR.**—The term "pot catcher processor subsector" means the holders of an LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher processor fishing activity, C/P, Pcod, and pot gear.

(10) **SECRETARY.**—Except as otherwise provided in this Act, the term "Secretary" means the Secretary of Commerce.

(b) **AUTHORITY FOR BSAI CATCHER PROCESSOR CAPACITY REDUCTION PROGRAM.**—

(1) **IN GENERAL.**—A fishing capacity reduction program for the non-pollock groundfish fishery in the BSAI is authorized to be financed through a capacity reduction loan of not more than \$75,000,000 under sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f and 1279g).

(2) **RELATIONSHIP TO MERCHANT MARINE ACT, 1936.**—The fishing capacity reduction program authorized by paragraph (1) shall be a program for the purposes of subsection (e) of section 1111 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f), except, notwithstanding subsection (b)(4) of such section, the capacity reduction loan authorized by paragraph (1) may have a maturity not to exceed 30 years.

(c) **AVAILABILITY OF CAPACITY REDUCTION FUNDS TO CATCHER PROCESSOR SUBSECTORS.**—

(1) **IN GENERAL.**—The Secretary shall make available the amounts of the capacity reduction loan authorized by subsection (b)(1) to each catcher processor subsector as described in this subsection.

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(2) **INITIAL AVAILABILITY OF FUNDS.**—The Secretary shall make available the amounts of the capacity reduction loan authorized by subsection (b)(1) as follows:

(A) Not more than \$36,000,000 for the longline catcher processor subsector.

(B) Not more than \$6,000,000 for the AFA trawl catcher processor subsector.

(C) Not more than \$31,000,000 for the non-AFA trawl catcher processor subsector.

(D) Not more than \$2,000,000 for the pot catcher processor subsector.

(3) **OTHER AVAILABILITY OF FUNDS.**—After January 1, 2009, the Secretary may make available for fishing capacity reduction to one or more of the catcher processor subsectors any amounts of the capacity reduction loan authorized by subsection (b)(1) that have not been expended by that date.

(d) **BINDING REDUCTION CONTRACTS.**—

(1) **REQUIREMENT FOR CONTRACTS.**—The Secretary may not provide funds to a person under the fishing capacity reduction program authorized by subsection (b) if such person does not enter into a binding reduction contract between the United States and such person, the performance of which may only be subject to the approval of an appropriate capacity reduction plan under subsection (e).

(2) **REQUIREMENT TO REVOKE LICENSES.**—The Secretary shall revoke all Federal fishery licenses, fishery permits, and area and species endorsements issued for a vessel, or any vessel named on an LLP license purchased through the fishing capacity reduction program authorized by subsection (b).

(e) **DEVELOPMENT, APPROVAL, AND NOTIFICATION OF CAPACITY REDUCTION PLANS.**—

(1) **DEVELOPMENT.**—Each catcher processor subsector may, after notice to the Council, submit to the Secretary a capacity reduction plan for the appropriate subsector to promote sustainable fisheries management through the removal of excess harvesting capacity from the non-pollock groundfish fishery.

(2) **APPROVAL BY THE SECRETARY.**—The Secretary is authorized to approve a capacity reduction plan submitted under paragraph (1) if such plan—

(A) is consistent with the requirements of section 312(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851a(b)) except—

(i) the requirement that a Council or Governor of a State request such a program set out in paragraph (1) of such subsection; and

(ii) the requirements of paragraph (4) of such subsection;

(B) contains provisions for a fee system that provides for full and timely repayment of the capacity reduction loan by a catcher processor subsector and that may provide for the assessment of such fees based on methods other than ex-vessel value of fish harvested;

(C) does not require a bidding or auction process;

(D) will result in the maximum sustained reduction in fishing capacity at the least cost and in the minimum amount of time; and

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(K) permits vessels in the catcher processor subsector to be upgraded to achieve efficiencies in fishing operations provided that such upgrades do not result in the vessel exceeding the applicable length, tonnage, or horsepower limitations set out in Federal law or regulation.

(3) APPROVAL BY REFERENDUM.—

(A) **IN GENERAL.**—Following approval by the Secretary under paragraph (2), the Secretary shall conduct a referendum for approval of a capacity reduction plan for the appropriate catcher processor subsector. The capacity reduction plan and fee system shall be approved if the referendum votes which are cast in favor of the proposed system by the appropriate catcher processor subsector are—

(i) 100 percent of the members of the AFA trawl catcher processor subsector; or

(ii) not less than 75 percent of the members of—

(I) the longline catcher processor subsector;

(II) the non-AFA trawl catcher processor subsector; or

(III) the pot catcher processor subsector.

(B) **NOTIFICATION PRIOR TO REFERENDUM.**—Prior to conducting a referendum under subparagraph (A) for a capacity reduction plan, the Secretary shall—

(i) identify, to the extent practicable, and notify the catcher processor subsector that will be affected by such plan; and

(ii) make available to such subsector information about any industry fee system contained in such plan, a description of the schedule, procedures, and eligibility requirements for the referendum, the proposed program, the estimated capacity reduction, the amount and duration, and any other terms and conditions of the fee system proposed in such plan.

(4) IMPLEMENTATION.—

(A) **NOTICE OF IMPLEMENTATION.**—Not later than 90 days after a capacity reduction plan is approved by a referendum under paragraph (3), the Secretary shall publish a notice in the Federal Register that includes the exact terms and conditions under which the Secretary shall implement the fishing capacity reduction program authorized by subsection (b).

(B) **INAPPLICABILITY OF IMPLEMENTATION PROVISION OF MAGNUSON.**—Section 312(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(e)) shall not apply to a capacity reduction plan approved under this subsection.

(5) **AUTHORITY TO COLLECT FEES.**—The Secretary is authorized to collect fees to fund a fishing capacity reduction program and to repay debt obligations incurred pursuant to a plan approved under paragraph (3)(A).

(6) **ACTION BY OTHER ENTITIES.**—Upon the request of the Secretary, the Secretary of the Department in which the National Vessel Documentation Center operates or the Secretary of the Department in which the Maritime Administration operates, as appropriate, shall, with respect to any vessel or any vessel named on an LLP license purchased through the fishing capacity reduction program authorized by subsection (b)—

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(1)(A) permanently revoke any fishery endorsement issued to the vessel under section 12108 of title 46, United States Code;

(B) refuse to grant the approval required under section 9(c)(2) of the Shipping Act, 1916 (46 U.S.C. App. 808(c)(2)) for the placement of the vessel under foreign registry or the operation of the vessel under the authority of a foreign country; and

(C) require that the vessel operate under United States flag and remain under Federal documentation; or

(2) require that the vessel be scrapped as a reduction vessel under section 600.1011(c) of title 50, Code of Federal Regulations.

(g) NON-POLLOCK GROUND FISH FISHERY.—

(1) PARTICIPATION IN THE FISHERY.—Only a member of a catcher processor subsector may participate in—

(A) the catcher processor sector of the BSAI non-pollock groundfish fishery; or

(B) the fishing capacity reduction program authorized by subsection (b).

(2) PLANS FOR THE FISHERY.—It is the sense of Congress that—

(A) the Council should continue on its path toward rationalization of the BSAI non-pollock groundfish fisheries, complete its ongoing work with respect to developing management plans for the BSAI non-pollock groundfish fisheries in a timely manner, and take actions that promote stability of these fisheries consistent with the goals of this section and the purposes and policies of the Magnuson-Stevens Fishery Conservation and Management Act; and

(B) such plans should not penalize members of any catcher processor subsector for achieving capacity reduction under this Act or any other provision of law.

(h) REPORTS.—

(1) REQUIREMENT.—The Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Resources of the House of Representatives 5 reports on the fishing capacity reduction program authorized by subsection (b).

(2) CONTENT.—Each report shall contain the following:

(A) A description of the fishing capacity reduction program carried out under the authority in subsection (b).

(B) An evaluation of the cost and cost-effectiveness of such program.

(C) An evaluation of the effectiveness of such program in achieving the objective set out in section 312(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(b)).

(3) SCHEDULE.—

(A) INITIAL REPORT.—The Secretary shall submit the first report under paragraph (1) not later than 90 days after the date that the first referendum referred to in subsection (e)(3) is held.

(B) SUBSEQUENT REPORTS.—During each of the 4 years after the year in which the report is submitted under subparagraph (A), the Secretary shall submit to Congress an annual report as described in this subsection.




C-4 Supple.
2-10-05 3:00p

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

February 9, 2005

MEMORANDUM FOR: Chris Oliver, Executive Director
North Pacific Fishery Management Council

FROM: Lisa L. Lindeman
Alaska Regional Counsel 

SUBJECT: Non-Pollock Catch History of the Nine Catcher Processors Listed
in Section 209 of the American Fisheries Act

This responds to your request for reaffirmation or clarification of any previous NOAA General Counsel legal opinions regarding the above-referenced subject. By this memorandum, we reaffirm the legal opinion we issued on June 4, 2004. We are attaching a copy of the opinion for the Council's further consideration.

In summary, the opinion states that pursuant to section 211(b)(2) of the American Fisheries Act (AFA)¹, the Council may consider the combined non-pollock groundfish fishing history of the twenty catcher processors listed in section 208(e) and the nine vessels listed in section 209 of the AFA in determining non-pollock groundfish sector allocations during its development of Amendment 80 to the Bering Sea and Aleutian Islands Fishery Management Plan (proposed allocations of flatfish species and development of a cooperative management structure for the head-and-gut catcher processor sector). However, under the AFA, this combined non-pollock groundfish fishing history is in the nature of a cap, not an allocation to which the twenty catcher processors have a statutory right under the AFA. In addition, the opinion points out that in making such non-pollock groundfish sector allocations, section 211(a) of the AFA requires that the Council consider conservation and management measures necessary to protect the other participants in the non-pollock groundfish fisheries from any adverse impacts from the increased competition caused by the AFA or fishery cooperatives in the directed pollock fishery.

Attachment

cc: Sam Rauch

¹Div. C, Title II, Pub. L. No. 105-277, 112 Stat. 2681 (1998), 16 U.S.C. 1851nt.





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

DATE: June 4, 2004

FOR: Chris Oliver
Executive Director
North Pacific Fishery Management Council

THROUGH: Lisa L. Lindeman *Lisa Lindeman*
Alaska Regional Counsel
NOAA General Counsel

FROM: Robert Babson *RB*
Attorney
NOAA General Counsel, Alaska Region

SUBJECT: Non-Pollock Catch History of the Nine Catcher Processors Listed in
Section 209 of the American Fisheries Act.

This responds to your February 11, 2004, request for a legal opinion regarding whether the twenty catcher processors listed in section 208(e) of the American Fisheries Act (AFA) can claim the non-pollock fishing history of the nine catcher processors removed from the fishery pursuant to section 209 of the AFA. The issue has been raised relative to consideration by the North Pacific Fishery Management Council (Council) of Amendment 80 to the Bering Sea and Aleutian Islands (BSAI) groundfish fishery management plan under which the Council is considering sector allocations of BSAI groundfish and prohibited species catch limits based on each sector's catch history. In order to answer the question, the provisions of both sections 209 and 211(a) and (b) must be analyzed.

Discussion

Section 209 of the AFA provides, in pertinent part:

Effective December 31, 1998, the following vessels shall be permanently ineligible for fishery endorsements, and any claims (including relating to **catch history**) associated with such vessels that could qualify any **owners** of such vessels for any present or future limited access system



permit in any fishery within the exclusive economic zone of the United States (including a vessel moratorium permit or license limitation program permit in fisheries under the authority of the North Pacific Council) are hereby extinguished....(emphasis added.)

On October 21, 1998, the AFA's primary sponsor, Senator Stevens, inserted a section-by-section analysis of the AFA in the Congressional Record.¹ The analysis explains section 209 in the following manner.

Section 209 identifies nine catcher/processors that, effective December 31, 1998, are permanently ineligible for fishery endorsements. Section 209 also extinguishes all claims associated with vessels that could qualify the owners of the vessels for any limited access system permit. (Emphasis added.)

144 Cong. Rec. S12780 (daily ed. Oct. 21, 1998). By its own terms, and its legislative history, it is clear that section 209 extinguishes only future claims of the owners of the nine listed vessels.

Section 211 of the AFA (entitled "PROTECTIONS FOR OTHER FISHERIES; CONSERVATION MEASURES") deals with the non-pollock fishing history of both the nine vessels listed in section 209 and the twenty vessels listed in section 208(e) of the AFA and provides in pertinent part:

(a) General.---The North Pacific Council shall recommend for approval by the Secretary such conservation and management measures as it determines necessary to protect other fisheries under its jurisdiction and the participants in those fisheries, including processors, from adverse impacts caused by this Act or fishery cooperatives in the directed pollock fishery.

(b) Catcher/Processor Restrictions.---

* * * *

(2) Bering Sea Fishing.—The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) are hereby prohibited from, in the aggregate—

(A) exceeding the percentage of the harvest available in the offshore component of any Bering Sea and Aleutian Islands groundfish fishery (other than the pollock fishery) that is equivalent to the total harvest by such catcher/processors and the catcher/processors

¹This section-by-section analysis, along with the comments made by the AFA's sponsors, printed in the Congressional Record, constitute the legislative history of the AFA.

listed in section 209 in the fishery in 1995, 1996, and 1997 relative to the total amount available to be harvested by the offshore component in the fishery in 1995, 1996, and 1997;

(B) exceeding the percentage of the prohibited species available in the offshore component of any Bering Sea and Aleutian Islands groundfish fishery (other than the pollock fishery) that is equivalent to the total of the prohibited species harvested by such catcher/processors and the catcher/processors listed in section 209 in the fishery in 1995, 1996, and 1997 relative to the total amount of prohibited species available to be harvested by the offshore component in the fishery in 1995, 1996, and 1997;....

In accordance with the title of section 211 of the AFA, the purpose of subsection (a) is explained in Senator Steven's section-by-section analysis as follows:

Subsection (a) of section 211 directs the North Pacific Council to submit measures for the consideration and approval of the Secretary of Commerce to protect other fisheries under its authority and the participants in those fisheries from adverse impacts caused by the subtitle II of the American Fisheries Act or by fishery cooperatives in the BSAI directed pollock fishery. **The Congress intends for the North Pacific Council to consider particularly any potential adverse effects on fishermen in other fisheries resulting from increased competition in those fisheries from vessels eligible to fish in the BSAI directed pollock fishery or in fisheries resulting from any decreased competition among processors. (Emphasis added.)**

144 Cong. Rec. S12781 (daily ed. Oct. 21, 1998). The section-by-section analysis goes on to explain the purpose of subsection (b)(2) of section 211 as follows:

Subsection (b) includes specific measures to restrict the participation in other fisheries of the catcher/processors eligible to participate in the BSAI directed pollock fishery (other than the vessel or vessels eligible under paragraph (21) of section 208(e)). While these types of limitations are appropriately for the North Pacific Council to develop, the catcher/processors eligible under section 208(e) may form a fishery cooperative for 1999 before the North Pacific Council can recommend (and the Secretary approve) necessary limitations. The restrictions in subsection (b) would therefore take effect on January 1, 1999, and remain in effect thereafter unless the North Pacific Council recommends and the Secretary approves measures that supersede (sic) the restrictions. **Subparagraphs (A) and (B) of paragraph (2) prohibit the catcher/processors eligible to participate in the BSAI directed pollock fishery from exceeding the aggregate amounts of targeted species and bycatch in other fisheries that catcher/processors from the BSAI directed pollock fishery caught on average in 1995, 1996,**

and 1997.... The limitations in subparagraphs (A), (B), and (C) do not ensure that the BSAI pollock eligible catcher/processors will be able to harvest any amount of fish, they simply establish additional caps after which those catcher/processors, as a class, will be prohibited from further fishing. (Emphasis added.)

Id.

The overall purpose of section 211, including the subsections discussed above, also was discussed by Senator Murray in her comments to the Senate.

In addition, the bill attempts to ensure adequate protections for other fisheries in the North Pacific and Pacific from any potential adverse impacts resulting from the formation of fishery cooperatives in the pollock fishery. The formation of fishery cooperatives will undoubtedly free up harvesting and processing capacity that can be used in **new or expanded ways in other fisheries**. Although many of these vessels and processors have legitimate, historic participation in these other fisheries, they should not be empowered by this legislation to gain a competitive advantage in these other fisheries to the detriment of participants who have not benefitted from the resolution of the pollock fishery problems.

While we have attempted to include at least a minimum level of protections for these other fisheries, it is clear to many of us that unintended consequences are likely. It is therefore imperative that the fishery management councils not perceive the protections provided in this bill as a statement by Congress that these are the only protections needed. In fact, the opposite is true. Although the protections provided for the head and gut groundfish offshore sector from the pollock offshore sector are more highly developed and articulated in the bill, the protections for other fisheries are largely left for the Councils to recommend. Those of us involved intimately in the development of this legislation **strongly urge the Councils to monitor the formation of fishery cooperatives closely and ensure that other fisheries are held harmless to the maximum extent possible**. (Emphasis added.)

144 Cong. Rec. S12708 (daily ed. Oct. 20, 1998) (statement by Sen. Murray).

Conclusion

Senator Stevens' section-by-section analysis states that the Council may consider the combined non-pollock fishing history of the twenty catcher processors listed in section 208(e) and the nine vessels listed in section 209 of the AFA in determining the overall percentage of harvest and prohibited species available for the twenty catcher processors in the non-pollock fishery. This combined non-

pollock fishing history is in the nature of a cap, not an allocation to which the twenty catcher processors listed in section 208(e) have a statutory right.²

Accordingly, in making sector allocations under Amendment 80, the Council may consider the combined non-pollock fishing history of the twenty vessels listed in section 208(e) and the nine vessels listed in section 209, except that allocations based upon the non-pollock fishing history of the section 209 vessels may not be made to the owners of those vessels and any allocation must comply with the overall caps set forth in section 211(b). Section 211(a) of the AFA, however, also requires the Council to recommend conservation and management measures to protect the participants in non-pollock fisheries. Such recommended conservation and management measures must protect other fisheries under the jurisdiction of the Council (and the participants in those fisheries, including processors) from adverse impacts caused by the AFA or fishery cooperatives in the directed pollock fishery. As indicated by the legislative history, these recommendations should include conservation and management measures to protect other fishermen from adverse impacts resulting from increased competition.

cc: Jane Chalmers
Sam Rauch
Jim Balsiger

²This is also made clear in the language of section 208 itself. Subsection (I) provides in pertinent part:

(i) Eligibility Not a Right - Eligibility under this section shall not be construed –

*

(2) to create any right, title, or interest in or to any fish in any fishery;. . .

North Pacific Fishery Management Council

Stephanie Madsen, Chair
Chris Oliver, Executive Director



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February 11, 2004

Lisa Lindeman
NOAA General Council
P.O. Box 21109
Juneau, AK 99802-1109

RECEIVED FEB 18 2004

Dear Ms. Lindeman:

In April 2003, the Council expanded Amendment 80 to include sector allocations of BSAI groundfish and PSC. Sector allocations will be primarily based on each sector's catch history. The Council is considering catch history ranging from 1995 to 2003. The question has been raised whether the owners of the 20 catcher processors listed in section 208 (e) of the American Fisheries Act (AFA) can claim the non-pollock catch history of the nine catcher processors (AFA 9) that were retired on Dec 31, 1998, under section 209 of the AFA, for the purpose of sector allocations in Amendment 80a.

The confusion surrounding the fishing history of the AFA 9 stems from different interpretations of section 209 and section 211 (b)(2)(A) and (B) of the AFA by the industry. Paraphrasing section 209 of the AFA, it states that all catch history associated with the AFA 9 that could be used to qualify for any present or future limited access permit system in any fishery within the EEZ is extinguished. However, section 211(b)(2)(A) and (B) states that catch history of the AFA 9 is used to determine the catcher processor sideboards and PSC limits for the remaining 20 AFA vessels identified in section 208 (e).

To help clarify the confusion surrounding the AFA 9 catch history prior to final action on Amendment 80, the Council, at the December 2003 meeting, asked NOAA GC to provide a formal legal opinion concerning the status of the catch history associated with the AFA 9 and the implications of section 209 and section 211(b) for any sector allocations of non-pollock groundfish that may be granted to the 20 catcher processor vessels identified in Section 208 (e). The Council has asked that the NOAA GC legal opinion be available prior to Amendment 80 final action which is scheduled for October 2004. However, if at all possible, the Council would benefit from a NOAA GC opinion prior to initial review of Amendment 80 which is scheduled in June 2004.

Sincerely,

Chris Oliver
Executive Director

cc: Jim Balsiger
Sue Salvesson



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

*Rec'd from Lisa Lindeman
for our files*

February 9, 2005

MEMORANDUM FOR: Chris Oliver, Executive Director
North Pacific Fishery Management Council

THROUGH: Lisa L. Lindeman
Alaska Regional Counsel *Lisa Lindeman*

FROM: *Lauren M. Smoker*
Lauren M. Smoker
Attorney-Advisor

SUBJECT: Responses to Council Questions 4.b and 6 concerning the BSAI
non-pollock groundfish fisheries

This memorandum responds to your letter of December 29, 2004, requesting legal guidance on several issues concerning the statutory provisions for the BSAI non-pollock groundfish fishery and the BSAI Catcher Processor Capacity Reduction Program (hereinafter referred to as the "Capacity Reduction Program") that are included in the Department of Commerce and Related Agencies Appropriations Act, 2005, which is included in Public Law No. 108-447 (hereinafter referred to as the "Act").¹ For convenience, a copy of the Act is attached to this memorandum. We are providing responses to Questions 4.b and 6. We have not fully developed responses to the remaining questions. We will provide those to you as soon as possible and before the April 2005 Council meeting.

The questions the Council has posed involve issues of statutory interpretation. Therefore, the following brief overview of two main tenets or rules of statutory construction is provided as a starting point for our responses. First, under the rules of statutory construction, the language of a statute is controlling and takes precedence over the language of a regulation if the regulation is not consistent with the statutory language.² A statute is the charter for the administrative agency charged with implementing it.³ A regulation issued by an agency under the authority of a

¹Your letter also contained questions for NOAA General Counsel in other topic areas, such as Gulf of Alaska rockfish and observers. Our office has responded or will respond to those questions separately.

²Singer, Norman J., Sutherland Statutory Construction §31:02 (5th ed. 1992).

³*Id.*



particular statute therefore must be authorized by and consistent with the statute, and administrative action cannot be in excess of the authority conferred by the statute.⁴ Because Congress is the source of a federal administrative agency's powers, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation implementing that statute.⁵

Second, when the language of a statute is clear and unambiguous and not unreasonable or illogical in its operation, a court may not go outside the language of the statute for its meaning.⁶ This is known as the plain meaning rule. Only statutes that are ambiguous are subject to the process of statutory interpretation.⁷ Ambiguity exists when a statute is capable of being understood by reasonably well informed persons in two or more different senses.⁸ Even if a specific provision is clearly worded, ambiguity can exist if some other section of the statutory program expands or constricts the provision's meaning, if the plain meaning of the provision is repugnant to the general purview of the act, or if the provision when considered in conjunction with other provisions of the statutory program import a different meaning.⁹

The Council's questions 4.b and 6 and NOAA GC's responses are provided below.

Council Question 4.b: Section 219(a)(7) defines the Non-AFA Trawl Catcher Processor subsector as the owner of each trawl catcher processor that is not an AFA trawl catcher processor, that holds a valid LLP license with Bering Sea or Aleutian Islands endorsement, and that the Secretary determines has harvested with trawl gear and processed not less than a total of 150 metric tons of non-pollock groundfish during the period January 1, 1997 through December 31, 2002:

- b. Given that the Council is currently developing a cooperative program for the non-AFA trawl catcher processors along with allocations for the non-pollock groundfish fisheries in Amendment 80, can the Council adopt a more stringent eligibility requirement for participation in non-AFA trawl catcher processor cooperatives than the eligibility requirement set out in the Act?

⁴*Id.*

⁵*Id.*

⁶*Id.*, at §46:01 (6th ed. 2000).

⁷*Id.*

⁸*Id.*, at §46:04.

⁹*Id.*, at §46:01.

NOAA GC response: Section 219(a)(7) reads as follows:

- (7) Non-AFA Trawl Catcher Processor Subsector.— The term “non-AFA trawl catcher processor subsector” means the owner of each trawl catcher processor—
- (A) that is not an AFA trawl catcher processor;
 - (B) to whom a valid LLP license that is endorsed for Bering Sea or Aleutian Islands trawl catcher processor fishing activity has been issued; and
 - (C) that the Secretary determines has harvested with trawl gear and processed not less than a total of 150 metric tons of non-pollock groundfish during the period January 1, 1997 through December 31, 2002.

Section 219(a)(7) of the Act sets forth the criteria for eligibility to the non-AFA trawl catcher processor subsector. Although there are some questions that have been raised by the Council as to how to interpret the individual criteria contained within the Act’s definition of non-AFA trawl catcher processor subsector,¹⁰ it is quite clear from the language used in the definition that there are three criteria for eligibility in the subsector. Additionally, it is clear from the language used that all the criteria must be met by the owner of a trawl catcher processor in order to be eligible for the non-AFA trawl catcher processor subsector given Congress’ use of the word “and” at the end of subsection 219(a)(7)(B).

The Council’s current options for eligibility criteria for both the non-AFA trawl catcher processor sector and harvesting cooperatives formed within the sector are contained in Component 9 of the Council’s December 2004 motion on Amendment 80. Component 9 currently reads as follows:

Component 9 Identifies the license holders that are in the Non-AFA Trawl Catcher Processor sector which would receive Sector Eligibility Endorsements. Non-AFA qualified license holders with a trawl and catcher processor endorsement would be issued a Sector Eligibility Endorsement that will be attached to that holder’s LLP identifying it as a member of the Non-AFA Trawl Catcher Processor sector. Only vessels that qualify for a sector eligibility endorsement may participate in cooperative under this program.

Option 9.1 Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1998-2002.

Option 9.2 Qualified license holders must have caught 1,000 mt. of groundfish with trawl gear and processed that fish between 1998-2002.

Option 9.3 Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1997-2002.

Option 9.4 Qualified license holders must have caught 1,000 mt. of groundfish with trawl gear and processed that fish between 1997-2002.

Option 9.5 Qualified license holders must have caught 150 mt. of groundfish with trawl

¹⁰See Council Questions, 1, 3, and 4.a.

gear and processed that fish between 1997-2002.

Under this component of Amendment 80, if a person meets the criteria within the options under consideration, then that person would be a member of the non-AFA trawl catcher processor sector and would be eligible to join a harvesting cooperative within that sector. With the exception of Option 9.5,¹¹ all of the options currently under consideration by the Council differ from the Act's sector eligibility criterion in section 219(a)(7)(C) either in qualifying harvest tonnage amounts or qualifying years, or both.

The statutory language used in section 219(a)(7) or in other sections of the Act does not include words that permit the Council or NOAA Fisheries to amend Congress' enumerated subsector qualification criteria. Additionally, there is no statutory language in section 219(a)(7) or elsewhere in the Act that would permit the application of more restrictive, or more lenient, subsector qualification criteria by the Council or NOAA Fisheries. Because the language of the Act is clear and unambiguous and is not unreasonable or illogical in its operation, there is no need to go outside of the language of the Act for its meaning. Congress did not provide the Council or NOAA Fisheries with any ability to make adjustments to the specific statutory criteria addressing eligibility in any of the subsectors. As explained earlier, under statutory rules of construction, the language of the Act is controlling and would take precedence over the language of a regulation if the regulation were not consistent with the statutory language. While the Council and NOAA Fisheries may continue to examine alternative eligibility options for the non-AFA trawl catcher processor subsector in the analysis for Amendment 80, the criteria as to who is eligible to be a member of the non-AFA trawl catcher processor subsector has been decided by Congress, and the Council and NOAA Fisheries cannot select or impose different, including more stringent, eligibility requirements for entrance to the non-AFA trawl catcher processor subsector.

Although the Act defines who is eligible for the non-AFA trawl catcher processor subsector, the Act does not address the issue of eligibility in a harvesting cooperative *within* the non-AFA trawl catcher processor subsector. The imposition of more restrictive eligibility criteria for the formation of harvesting cooperatives does not appear to be prohibited by the Act. If the Council chooses, the Council could examine eligibility requirements for harvesting cooperative formation within the non-AFA trawl catcher processor subsector that would be more stringent than the subsector's eligibility requirements, and adopt such measures if the measures are consistent with the requirements of the Magnuson-Stevens Act and other applicable law, including the Act. It is important to note, however, that the Council could not use harvesting cooperative eligibility requirements as a means to effect changes to the Act's eligibility criteria for the non-AFA trawl catcher processor subsector. For example, if the Council would make an allocation of BSAI non-pollock groundfish to the non-AFA trawl catcher processor subsector, the Council could not allocate all the subsector's allocation to harvesting cooperatives within that subsector if the

¹¹The Council added Option 9.5 at their December meeting because of the Act's criterion at section 219(a)(7)(C).

eligibility criteria for harvesting cooperatives are more restrictive than the criteria for subsector eligibility. Under this example, only those persons that would meet the more stringent harvesting cooperative eligibility criteria would be eligible to participate in the non-AFA trawl catcher processor subsector, impermissibly amending the statutory criteria for participation in that subsector.

Council Question 6: Relative to further development of Amendment 80 (allocations of flatfish species and cooperative development for the H&G catcher/processor sector), if the Council continues its current course and does not include allocations of those species to AFA sectors, would that in any way compromise those sectors' eligibility for the legislated non-pollock buyback program?

NOAA GC response: For the following reasons, NOAA General Counsel has determined that the ability of the four catcher processor subsectors, as defined in the Act, to participate in the Act's Capacity Reduction Program is not dependent on the receipt of an allocation of non-pollock groundfish. Therefore, the catcher processor subsectors as defined in the Act, including the AFA trawl catcher processor subsector, are not precluded from participation in the Capacity Reduction Program if the Council continues its current course and does not include allocations of non-pollock groundfish to those catcher processor subsectors in Amendment 80.

The Act, in sections 219(b) through (f), establishes the voluntary Capacity Reduction Program.¹² Under section 219(e)(1), participation in the Capacity Reduction Program begins with the development of a capacity reduction plan by the members of a catcher processor subsector, and submission of that capacity reduction plan to the Secretary of Commerce (Secretary) after notice to the Council. None of the statutory provisions in the Act concerning the Capacity Reduction Program tie Amendment 80 to participation in the Capacity Reduction Program or make a subsector's inclusion in Amendment 80 a prerequisite for that subsector's participation in the Capacity Reduction Program. In fact, the statutory language of the Act makes no specific reference to Amendment 80 at all.

More importantly, the ability of a catcher processor subsector to participate in the Capacity Reduction Program is not dependent on first receiving an allocation of BSAI non-pollock groundfish. There is no statutory provision within sections 219(b) through (f) of the Act that makes an allocation of non-pollock groundfish to a catcher processor subsector a criterion for participation in the Capacity Reduction Program or a criterion for the development and submission of a capacity reduction plan to the Secretary. Because a subsector's participation in

¹²Section 219(b) establishes the authority for the Capacity Reduction Program; section 219(c) addresses the availability of Capacity Reduction Program funds to the four defined catcher processor subsectors; section 219(d) contains requirements for binding reduction contracts; section 219(e) contains the provisions concerning the development, approval and notification of catcher processor subsector capacity reduction plans; and section 219(f) addresses the actions that are to be undertaken by other federal agencies upon the request of the Secretary of Commerce.

the Capacity Reduction Program is not dependent on first receiving an allocation of non-pollock groundfish, each subsector defined in the Act is capable of participating in the Capacity Reduction Program regardless of whether it is included in Amendment 80.

Attachment

be deposited in the NOAA Operations, Research, and Facilities Appropriations Account and treated as an offsetting collection and only be available for financing additional scholarships.

SEC. 215. Section 402(f) of Public Law 107-372 is amended—

(1) in paragraph (1), by striking "All right" and inserting "For the period ending April 3, 2008, all right"; and

(2) in paragraph (3), by inserting "for the period ending April 3, 2008" after "and annually thereafter".

SEC. 216. Of the amounts made available under this heading for the National Oceanic and Atmospheric Administration, the Secretary of Commerce shall pay by March 1, 2005, \$5,000,000 to the National Marine Sanctuaries Foundation to capitalize a fund for ocean activities.

SEC. 217. Any funding provided under this title used to implement the Department of Commerce's E-Government Initiatives shall be subject to the procedures set forth in section 605 of this Act.

SEC. 218. A fishing capacity reduction program for the Federal Gulf of Mexico Reef Fish Fishery Management Plan principally intended for commercial long line vessels is authorized to be financed through a capacity reduction loan of \$35,000,000 pursuant to sections 1111 and 1112 of title XI of the Merchant Marine Act of 1936 (46 U.S.C. App. 1279f and 1279g) subject to the conditions of this section. In accordance with the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.), \$350,000 is hereby appropriated for the subsidy cost of the loan authorized under this section and shall remain available until expended. The Secretary of Commerce, working in close coordination with active fishery participants, is hereby authorized to design and implement a comprehensive voluntary capacity reduction program using the loan authorized under this section. The Secretary shall set the loan term at 35 years and repayment shall begin within 1 year of final implementation of the program. In addition to the authority of the Gulf of Mexico Regional Fishery Management Council to develop and recommend conservation and management measures for the Gulf of Mexico reef fish fishery, the Secretary of Commerce is authorized to develop and implement a limited access program pursuant to the standards set forth in section 303(b)(6) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1853(b)(6)).

SEC. 219. (a) DEFINITIONS.—In this section:

(1) AFA TRAWL CATCHER PROCESSOR SUBSECTOR.—The term "AFA trawl catcher processor subsector" means the owners of each catcher/processor listed in paragraphs (1) through (20) of section 208(e) of the American Fisheries Act (16 U.S.C. 1851 note).

(2) BSAI.—The term "BSAI" has the meaning given the term "Bering Sea and Aleutian Islands Management Area" in section 679.2 of title 50, Code of Federal Regulations (or successor regulation).

(3) CATCHER PROCESSOR SUBSECTOR.—The term "catcher processor subsector" means, as appropriate, one of the following:

- (A) The longline catcher processor subsector.
- (B) The AFA trawl catcher processor subsector.
- (C) The non-AFA trawl catcher processor subsector.
- (D) The pot catcher processor subsector.

(4) COUNCIL.—The term "Council" means the North Pacific Fishery Management Council established in section 302(a)(1)(G)



of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(G)).

(5) **LLP LICENSE.**—The term “LLP license” means a Federal License Limitation program groundfish license issued pursuant to section 679.4(k) of title 50, Code of Federal Regulations (or successor regulation).

(6) **LONGLINE CATCHER PROCESSOR SUBSECTOR.**—The term “longline catcher processor subsector” means the holders of an LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher processor fishing activity, C/P, Pcod, and hook and line gear.

(7) **NON-AFA TRAWL CATCHER PROCESSOR SUBSECTOR.**—The term “non-AFA trawl catcher processor subsector” means the owner of each trawl catcher processor—

(A) that is not an AFA trawl catcher processor;

(B) to whom a valid LLP license that is endorsed for Bering Sea or Aleutian Islands trawl catcher processor fishing activity has been issued; and

(C) that the Secretary determines has harvested with trawl gear and processed not less than a total of 150 metric tons of non-pollock groundfish during the period January 1, 1997 through December 31, 2002.

(8) **NON-POLLOCK GROUND FISH FISHERY.**—The term “non-pollock groundfish fishery” means target species of Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, or yellowfin sole harvested in the BSAI.

(9) **POT CATCHER PROCESSOR SUBSECTOR.**—The term “pot catcher processor subsector” means the holders of an LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher processor fishing activity, C/P, Pcod, and pot gear.

(10) **SECRETARY.**—Except as otherwise provided in this Act, the term “Secretary” means the Secretary of Commerce.

(b) **AUTHORITY FOR BSAI CATCHER PROCESSOR CAPACITY REDUCTION PROGRAM.**—

(1) **IN GENERAL.**—A fishing capacity reduction program for the non-pollock groundfish fishery in the BSAI is authorized to be financed through a capacity reduction loan of not more than \$75,000,000 under sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f and 1279g).

(2) **RELATIONSHIP TO MERCHANT MARINE ACT, 1936.**—The fishing capacity reduction program authorized by paragraph (1) shall be a program for the purposes of subsection (e) of section 1111 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f), except, notwithstanding subsection (b)(4) of such section, the capacity reduction loan authorized by paragraph (1) may have a maturity not to exceed 30 years.

(c) **AVAILABILITY OF CAPACITY REDUCTION FUNDS TO CATCHER PROCESSOR SUBSECTORS.**—

(1) **IN GENERAL.**—The Secretary shall make available the amounts of the capacity reduction loan authorized by subsection (b)(1) to each catcher processor subsector as described in this subsection.

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(2) **INITIAL AVAILABILITY OF FUNDS.**—The Secretary shall make available the amounts of the capacity reduction loan authorized by subsection (b)(1) as follows:

(A) Not more than \$36,000,000 for the longline catcher processor subsector.

(B) Not more than \$6,000,000 for the AFA trawl catcher processor subsector.

(C) Not more than \$31,000,000 for the non-AFA trawl catcher processor subsector.

(D) Not more than \$2,000,000 for the pot catcher processor subsector.

(3) **OTHER AVAILABILITY OF FUNDS.**—After January 1, 2009, the Secretary may make available for fishing capacity reduction to one or more of the catcher processor subsectors any amounts of the capacity reduction loan authorized by subsection (b)(1) that have not been expended by that date.

(d) **BINDING REDUCTION CONTRACTS.**—

(1) **REQUIREMENT FOR CONTRACTS.**—The Secretary may not provide funds to a person under the fishing capacity reduction program authorized by subsection (b) if such person does not enter into a binding reduction contract between the United States and such person, the performance of which may only be subject to the approval of an appropriate capacity reduction plan under subsection (e).

(2) **REQUIREMENT TO REVOKE LICENSES.**—The Secretary shall revoke all Federal fishery licenses, fishery permits, and area and species endorsements issued for a vessel, or any vessel named on an LLP license purchased through the fishing capacity reduction program authorized by subsection (b).

(e) **DEVELOPMENT, APPROVAL, AND NOTIFICATION OF CAPACITY REDUCTION PLANS.**—

(1) **DEVELOPMENT.**—Each catcher processor subsector may, after notice to the Council, submit to the Secretary a capacity reduction plan for the appropriate subsector to promote sustainable fisheries management through the removal of excess harvesting capacity from the non-pollock groundfish fishery.

(2) **APPROVAL BY THE SECRETARY.**—The Secretary is authorized to approve a capacity reduction plan submitted under paragraph (1) if such plan—

(A) is consistent with the requirements of section 312(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(b)) except—

(i) the requirement that a Council or Governor of a State request such a program set out in paragraph (1) of such subsection; and

(ii) the requirements of paragraph (4) of such subsection;

(B) contains provisions for a fee system that provides for full and timely repayment of the capacity reduction loan by a catcher processor subsector and that may provide for the assessment of such fees based on methods other than ex-vessel value of fish harvested;

(C) does not require a bidding or auction process;

(D) will result in the maximum sustained reduction in fishing capacity at the least cost and in the minimum amount of time; and

(E) permits vessels in the catcher processor subsector to be upgraded to achieve efficiencies in fishing operations provided that such upgrades do not result in the vessel exceeding the applicable length, tonnage, or horsepower limitations set out in Federal law or regulation.

(3) APPROVAL BY REFERENDUM.—

(A) **IN GENERAL.**—Following approval by the Secretary under paragraph (2), the Secretary shall conduct a referendum for approval of a capacity reduction plan for the appropriate catcher processor subsector. The capacity reduction plan and fee system shall be approved if the referendum votes which are cast in favor of the proposed system by the appropriate catcher processor subsector are—

- (i) 100 percent of the members of the AFA trawl catcher processor subsector; or
- (ii) not less than 75 of the members of—
 - (I) the longline catcher processor subsector;
 - (II) the non-AFA trawl catcher processor subsector; or
 - (III) the pot catcher processor subsector.

(B) **NOTIFICATION PRIOR TO REFERENDUM.**—Prior to conducting a referendum under subparagraph (A) for a capacity reduction plan, the Secretary shall—

- (i) identify, to the extent practicable, and notify the catcher processor subsector that will be affected by such plan; and
- (ii) make available to such subsector information about any industry fee system contained in such plan, a description of the schedule, procedures, and eligibility requirements for the referendum, the proposed program, the estimated capacity reduction, the amount and duration, and any other terms and conditions of the fee system proposed in such plan.

(4) IMPLEMENTATION.—

(A) **NOTICE OF IMPLEMENTATION.**—Not later than 90 days after a capacity reduction plan is approved by a referendum under paragraph (3), the Secretary shall publish a notice in the Federal Register that includes the exact terms and conditions under which the Secretary shall implement the fishing capacity reduction program authorized by subsection (b).

(B) **INAPPLICABILITY OF IMPLEMENTATION PROVISION OF MAGNUSON.**—Section 312(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(e)) shall not apply to a capacity reduction plan approved under this subsection.

(5) **AUTHORITY TO COLLECT FEES.**—The Secretary is authorized to collect fees to fund a fishing capacity reduction program and to repay debt obligations incurred pursuant to a plan approved under paragraph (3)(A).

(f) **ACTION BY OTHER ENTITIES.**—Upon the request of the Secretary, the Secretary of the Department in which the National Vessel Documentation Center operates or the Secretary of the Department in which the Maritime Administration operates, as appropriate, shall, with respect to any vessel or any vessel named on an LLP license purchased through the fishing capacity reduction program authorized by subsection (b)—

(1)(A) permanently revoke any fishery endorsement issued to the vessel under section 12108 of title 46, United States Code;

(B) refuse to grant the approval required under section 9(c)(2) of the Shipping Act, 1916 (46 U.S.C. App. 808(c)(2)) for the placement of the vessel under foreign registry or the operation of the vessel under the authority of a foreign country; and

(C) require that the vessel operate under United States flag and remain under Federal documentation; or

(2) require that the vessel be scrapped as a reduction vessel under section 600.1011(c) of title 50, Code of Federal Regulations.

(g) NON-POLLOCK GROUND FISH FISHERY.—

(1) PARTICIPATION IN THE FISHERY.—Only a member of a catcher processor subsector may participate in—

(A) the catcher processor sector of the BSAI non-pollock groundfish fishery; or

(B) the fishing capacity reduction program authorized by subsection (b).

(2) PLANS FOR THE FISHERY.—It is the sense of Congress that—

(A) the Council should continue on its path toward rationalization of the BSAI non-pollock groundfish fisheries, complete its ongoing work with respect to developing management plans for the BSAI non-pollock groundfish fisheries in a timely manner, and take actions that promote stability of these fisheries consistent with the goals of this section and the purposes and policies of the Magnuson-Stevens Fishery Conservation and Management Act; and

(B) such plans should not penalize members of any catcher processor subsector for achieving capacity reduction under this Act or any other provision of law.

(h) REPORTS.—

(1) REQUIREMENT.—The Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Resources of the House of Representatives 5 reports on the fishing capacity reduction program authorized by subsection (b).

(2) CONTENT.—Each report shall contain the following:

(A) A description of the fishing capacity reduction program carried out under the authority in subsection (b).

(B) An evaluation of the cost and cost-effectiveness of such program.

(C) An evaluation of the effectiveness of such program in achieving the objective set out in section 312(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(b)).

(3) SCHEDULE.—

(A) INITIAL REPORT.—The Secretary shall submit the first report under paragraph (1) not later than 90 days after the date that the first referendum referred to in subsection (e)(3) is held.

(B) SUBSEQUENT REPORTS.—During each of the 4 years after the year in which the report is submitted under subparagraph (A), the Secretary shall submit to Congress an annual report as described in this subsection.

(1) **CONFORMING AMENDMENT**—Section 214 of the Department of Commerce and Related Agencies Act, 2004 (title II of division B of Public Law 108-199; 118 Stat. 75) is amended by striking “that” and all that follows, and inserting “under the capacity reduction program authorized in section 219 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005.”

Sec. 220. None of the funds appropriated in this Act or any other Act may be used to disqualify any community which was a participant in the Bering Sea Community Development Quota program on January 1, 2004, from continuing to receive quota allocations under that program.

Sec. 221. In addition to amounts made available under section 214 of the Department of Commerce and Related Agencies Appropriations Act, 2004 (title II of division B of Public Law 108-199; 118 Stat. 75), of the funding provided in this Act under the heading “NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, OCEANOGRAPHY, RESEARCH, AND FACILITIES”, \$250,000, to remain available until expended, for the Federal Credit Reform Act cost of a reduction loan under sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f and 1279g), not to exceed an additional \$25,000,000 in principal, for the capacity reduction program authorized in section 219.

This title may be cited as the “Department of Commerce and Related Agencies Appropriations Act, 2005”.

TITLE III—THE JUDICIARY

SUPREME COURT OF THE UNITED STATES

SALARIES AND EXPENSES

For expenses necessary for the operation of the Supreme Court, including purchase or hire, driving, maintenance, and operation of an automobile for the Chief Justice, not to exceed \$10,000 for the purpose of transporting Associate Justices, and hire of passenger motor vehicles as authorized by 31 U.S.C. 1343 and 1344; not to exceed \$10,000 for official reception and representation expenses; and for miscellaneous expenses, to be expended as the Chief Justice may approve, \$58,122,000.

CARE OF THE BUILDING AND GROUNDS

For such expenditures as may be necessary to enable the Architect of the Capitol to carry out the duties imposed upon the Architect by the Act approved May 7, 1934 (40 U.S.C. 13a-13b), \$9,979,000, which shall remain available until expended.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SALARIES AND EXPENSES

For salaries of the chief judge, judges, and other officers and employees, and for necessary expenses of the court, as authorized by law, \$21,780,000.