

Agenda Item B-2

National Marine Fisheries Service
Alaska Region
Juneau, Alaska
02/04/97

**Status of Regulatory Actions
Through February 4, 1997**

Authorize blocks of halibut IFQ to be swept up to 3,000 lbs, and blocks of sablefish IFQ to be swept up to 5,000 lbs (Amds 43/43)	Final rule effective December 26, 1996
Interim observer plan (Amds 47/47 & Crab Amd 6)	Final rule effective January 1, 1997
Pacific cod gear allocations in the BSAI (Amd 46)	Final rule effective January 1, 1997
Red King Crab Savings Area, Revised RKC PSC limit, & Northern Bristol Bay Closure (Amd 37)	Final rule effective January 1, 1997
Overfishing definitions (Amd 44/44)	FMP amendments effective January 9, 1997
Require computer and satellite/modem capability by processors for use by NMFS-certified observers	Final rule scheduled to be effective July 1, 1997
Moratorium in the Scallop fishery (Amd 2 to Scallop FMP)	Comments invited through February 10, 1997
Bairdi Tanner crab PSC limits in BSAI (Amendment 41)	Comments invited through February 18, 1997
Revisions to Gulf of Alaska Maximum Retainable Bycatch percentage for sablefish & Allow arrowtooth flounder as a "basis species"	Comments invited through February 5, 1997

Status of Regulatory Actions Through February 4, 1997 (continued)

Halibut quota share limits in Area 4	Final rule being reviewed by WDC offices
1997 BSAI and GOA specifications	Final rule being reviewed by WDC offices
Record keeping & Reporting (3-year processor permit)	Final rule being prepared by Regional Office
Halibut IFQ use limits in Area 4	Final rule being reviewed by WDC offices
IFQ 6-hour prior notice of landings	Proposed rule being reviewed by WDC offices
Seabird avoidance measures for the H&L groundfish fisheries	Proposed rule being reviewed by WDC Offices
Groundfish/Crab License Program and CDQs (Groundfish Amds 39/41 & BSAI Crab Amd 5)	Proposed rule being prepared by Regional Office
Improved retention/utilization of pollock, cod, rocksole, & yellowfin sole in BSAI (Amd 49)	Proposed rule being prepared by Regional Office
"Slime and Ice" rule pertaining to halibut and sablefish IFQ fisheries	Proposed rule being prepared by Regional Office
Consolidate salmon FMP regulations with Part 679	Technical amendment being prepared by Regional Office
Require groundfish vessels fishing on the GOA seamounts to have transponders on board	Proposed regulations being prepared by Regional Office
Require processors to use scales to weigh pollock caught in pollock fisheries	Proposed regulations being prepared by Regional Office
NMFS certified scales program	Proposed regulations being reviewed by WDC offices

Congress of the United States

House of Representatives

Washington, D.C. 20515

February 6, 1997

Dr. D. James Baker
Under Secretary for Oceans and Atmosphere
National Oceanic and Atmospheric Administration
Department of Commerce
14th Street and Constitution Avenue, NW
Washington, D.C. 20230

Dear Dr. Baker:

In June of 1995, the North Pacific Fishery Management Council approved a license limitation package and forwarded it to the National Marine Fisheries Service (NMFS) Alaska regional office in Juneau for preliminary review. This amendment package contains provisions that are of critical importance to the entire fishing industry off Alaska's coasts.

We are concerned that it now appears that the NMFS Alaska regional office is planning on informing the Council that it will not be able to meet the anticipated implementation date of 1998. Obviously, this concerns us greatly. It is unclear what is causing the delay in drafting the regulations and implementing the package. If there are things that we can do to speed the process, we need to be informed and involved. What is unacceptable is for the Council to pass an amendment package, and NMFS to delay implementation for more than three years with little or no explanation.

As you are aware, the North Pacific Fishery Management Council is meeting this week and had assumed that the amendment package and implementation of the regulations would take place before the start of the 1998 fishing season. We now believe that the Alaska regional office of NMFS will announce to the Council that the amendment package cannot be implemented until 1999. As you are aware, both of our offices have constantly asked for progress reports and have been very interested in the timing of the implementation of this package. This new delay takes us by surprise since we have been told for months that the package was "almost ready to come to Washington". We sincerely hope that whatever problems there are with the amendment package can be resolved, with our help if necessary, to implement it on schedule.

As you are also aware, the recently enacted Sustainable Fisheries Act (P.L. 104-297) mandates the creation of a single Community Development Quota (CDQ) program and the beginning of the crab CDQ component in the 1998 fishing season. While these two issues are not directly related to the limited access amendment package, any potential problems with the

- 2 -

implementation of the package could have an effect on your ability to fulfill your statutory duties under the Sustainable Fisheries Act.

We look forward to hearing from you on this important matter and will work with you to resolve whatever problems may exist.

Sincerely,



Senator Ted Stevens



Congressman Don Young



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

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

February 3, 1997

Richard B. Lauber
Chairman
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

Dear Rick:

At its June 1995, meeting, the North Pacific Fishery Management Council approved, for Secretarial review, Amendments 39 and 41 to the Fishery Management Plan (FMP) for Groundfish of the Gulf of Alaska and the FMP for the Bering Sea and Aleutians Islands Area, respectively, and also Amendment 5 to the FMP for the King and Tanner Crab Fishery in the Bering Sea and Aleutian Islands Area. These amendments would authorize the Council's proposed License Limitation Program (LLP) and its multi-species Community Development Quota (CDQ) program.

The Alaska Region has been preparing a draft proposed rule on behalf of the Council that would implement the LLP and the CDQ program should these programs be approved under Magnuson-Stevens Act § 304. The Region anticipates completing this task by early spring.

Although we anticipate that a decision whether to approve these programs will be made by mid-1997, we do not anticipate that either program could be implemented until 1999 at the earliest. If approved, we estimate that 22 months and 15 months, respectively, would be required to implement the LLP and the CDQ program.

The Council's moratorium program, which limits further entry into the Alaska EEZ groundfish and BSAI crab fisheries, is in effect through 1998. This program accomplishes at least some of the Council's LLP objectives through that date. We anticipate no new entry into these fisheries through that date.

The LLP and CDQ program are complex, requiring carefully crafted regulations to implement them if they are to be enforceable. Once regulations are promulgated, substantial resources - fiscal and human - will be required to implement and manage the programs. With respect to the LLP, we estimate that roughly \$1



million dollars will be needed for full implementation by January 1999. Annual operational costs will be about \$0.5 million. Initially, 8 "full time equivalents" (FTEs) would be required for LLP development. Once fully developed, 6 FTEs (reduced from 8) would be required to operate the LLP.

With respect to the CDQ program, we estimate that \$0.5 million would be required for program development through a contract. Annual operational costs would be about \$300k (\$200k for salaries and \$100K for a cooperative agreement with the State of Alaska to inspect and test certified scales, which are needed to measure weights of the CDQ catches. Four new FTEs (3 for CDQ quota monitoring and CDQ program management and 1 for certified scale management) would be required.

The CDQ program will rely heavily on the AFSC's Observer Program Office (OPO) to validate the CDQ catches, including discards on processing and catcher vessels. The OPO will develop and implement the CDQ vessel and plant inspection programs to assure compliance with equipment and operational requirements before CDQ fishing starts. OPO estimates that it needs 9 FTEs (6 to bring the program up to an effective level and 3 to implement the CDQ program), supported by base level funding of \$2.9 million, to be a fully functional observer program given its workload and program expectations.

We informed the Council at its April 1996 meeting that NMFS needs total catch weights, measured with certified scales, to manage the CDQ catches under the Council's program. This program requires CDQ entities to provide reports to NMFS of its total catch weights by species/groups, including discard amounts. CDQ entities intend to transfer to other CDQ entities amounts of species/groups during fishing seasons. Individual CDQ entities will stop fishing once any single species/group amount allocated to that entity has been reached. Accurate weight measurements will be needed to validate these activities.

Although shorebased processing facilities currently weigh fish delivered to them on scales that are certified by the State of Alaska, no program currently exist to certify scales at sea. We have developed, with assistance from a former National Institute of Standards and Technology certified scale expert, a draft proposed rule that would implement a certified scales program at sea. This rule must be implemented before a final rule implementing the CDQ program, which depends on certified scales, can be implemented.

We will continue working toward the completion of regulations that would implement the Council's LLP and CDQ program, should they be approved upon Secretarial review. We believe, however, that these programs will be examined nationally and probably internationally as to their effectiveness once they are in place. We believe correctly implementing these programs at the start with adequate legal structure and resources to support them is imperative.

I'll be available at the Council's February meeting to discuss this issue.

Sincerely,

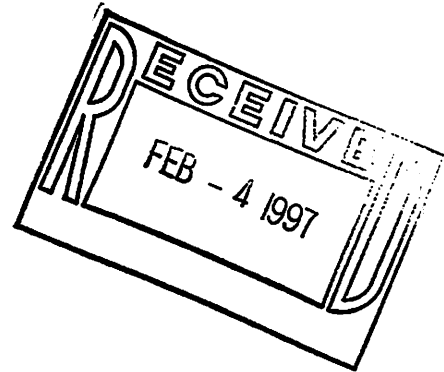


Steven Pennoyer
Administrator, Alaska Region



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

January 31, 1997



Dr. Clarence G. Pautzke
Executive Director
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

Dear Clarence,

Based on a recommendation provided by the North Pacific Fishery Management Council at its December 1996 meeting, National Marine Fisheries Service (NMFS) is pursuing rulemaking to implement seabird avoidance measures. If approved, this rule would require vessel owners/operators that are required to obtain a Federal fisheries permit and that fish for groundfish using hook-and-line gear to employ one or more of the following seabird avoidance measures:

1. Set gear between hours specified in regulation (between the hours of nautical twilight) using only the minimum vessel's lights necessary for safety, or;
2. Tow a streamer line or lines during deployment of gear to prevent birds from settling on hooks, or;
3. Tow a buoy, board, stick or other device during deployment of gear at a distance appropriate to prevent birds from taking hooks. Multiple devices may be employed, or;
4. Deploy hooks underwater through a lining tube at a depth sufficient to prevent birds from settling on hooks during deployment of gear.

In addition, NMFS will encourage fishermen participating in hook-and-line gear operations to:

1. Avoid dumping of offal to the extent practicable while gear is being set or hauled; if discharge of offal is unavoidable, the discharge should take place aft of the hauling station or on the opposite side of the vessel to that where gear is set or hauled.
2. Make every effort to ensure that birds brought aboard alive



are released alive and that whenever possible, hooks are removed without jeopardizing the life of the bird.

3. Use hooks that sink as soon as they are put in the water. This could be accomplished by the use of weighted groundlines and/or thawed bait.

Within the next few weeks, NMFS will be mailing notices to approximately 8000 IFQ permit holders directing them to take precautions to reduce incidental mortality of seabirds, particularly the short-tailed albatross, a species listed as endangered under the Endangered Species Act. Recommendations for avoiding seabirds will be included. Currently, NMFS, in collaboration with representatives of the U.S. Fish & Wildlife Service and the hook-and-line industry, is pursuing appropriate outreach programs to address the seabird bycatch issue in Alaskan fisheries.

Sincerely,

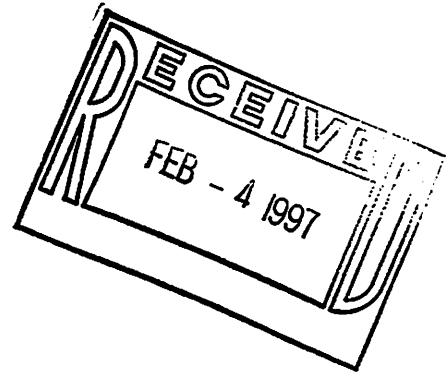


Steven Pennoyer
Administrator, Alaska Region



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Sincerely,



Steven Pennoyer
Administrator, Alaska Region



1997 QS POOLS & TACS

1997 Halibut and Sablefish IFQ QSPs and TACS			
Management Area	1997 Quota Share Pool (units)	1997 IFQ TAC (pounds)	Ratio (QS:IFQ)
Halibut 2C	59,100,570	10,000,000	5.910
3A	184,935,642	25,000,000	7.397
3B	53,909,787	9,000,000	5.990
4A	14,502,966	2,940,000	4.933
4B	9,284,774	2,784,000	3.335
4C	3,969,186	580,000	6.843
4D	4,790,491	812,000	5.900
4E	139,999	0	0
Sablefish SE	65,961,362	8,042,381	8.202
WY	53,189,319	5,048,534	10.536
CG	110,793,607	11,305,189	9.800
WG	35,918,873	3,280,445	10.949
AI	31,518,176	1,587,312	19.856
BS	18,602,398	970,024	19.177

Notes:

- The "ratio" displays the number of QS that yield one pound of 1997 IFQ.
- QSPs include small amounts of QS in "reserve" and amounts which at present are non-issuable but which may be issued during 1997.
- TACs do not include pounds that have been set-aside for the CDQ program.
- Halibut weights are displayed in net pounds, sablefish weights in round pounds.

Verified: February 2, 1997


 Philip J. Smith, Chief, RAM Division
 NMFS, Alaska Region

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AT SEATTLE
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WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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TYSON SEAFOOD GROUP, INC.)
)
 Plaintiff,)
)
 v.)
)
 D. JAMES BAKER, et al.)
)
 Defendants.)

CASE NO. C96-0610C

ORDER

11 This matter comes before the Court on cross-motions for
12 summary judgment. Having heard oral argument, and having
13 reviewed the pleadings, memoranda, exhibits and other documents
14 on file, the Court now finds and concludes as follows:

15 I. BACKGROUND

16 This action challenges a National Oceanic and Atmospheric
17 Administration ("NOAA") determination that Pacific Producer,
18 Inc. ("Pacific Producer"), the predecessor of Tyson Seafood
19 Group, Inc., violated the Magnuson Fishery Conservation and
20 Management Act, 16 U.S.C. § 1801-82. More specifically, the
21 agency declined to review the findings of an Administrative Law
22 Judge ("ALJ") that in May 1991 the PACIFIC ENTERPRISE exceeded
23 the permissible halibut bycatch rate under the Vessel Incentive
24 Program ("VIP").

25 The PACIFIC ENTERPRISE departed Dutch Harbor, Alaska on May
26 5, 1991 to begin a fishing trip in the Bering Sea. On board was

CDC
XCC

1 Jon Hendrix, a National Marine Fisheries Service ("NMFS")
2 certified observer assigned to sample the vessel's catch. The
3 vessel commenced fishing on May 5, 1991. Beginning on May 6,
4 the Observer sampled 63 of the 114 hauls made by the vessel
5 during the trip. Of these, 40 were sampled using the basket
6 sampling method. The balance were sampled using the whole-haul
7 sampling method.¹

8 On June 23, 1992, the agency notified Pacific Producer that
9 it faced three Counts of violating the VIP regulations
10 implemented under the Magnuson Act. In Count 1 the agency
11 alleged that the PACIFIC ENTERPRISE exceeded the allowable
12 halibut bycatch rate during the fishing month in question and
13 was subject to a \$50,000 administrative penalty. It alleged
14 that the PACIFIC ENTERPRISE exceeded the bycatch rates for the
15 weeks ending May 19 and May 26, 1991.

16 On May 11, 1995 a Coast Guard ALJ ruled that the PACIFIC
17 ENTERPRISE had exceeded the halibut bycatch rate as charged.
18 The ALJ reasoned that (1) both the whole-haul and basket
19 sampling methods were permitted by the controlling regulations,
20 50 C.F.R. § 675.26 (1991); and (2) the agency's prosecution was

21 ¹Basket sampling requires the Observer to collect a subset of
22 the haul, i.e. a basket, and compare the amount of halibut in the
23 basket to the amount of groundfish in the basket. See Manual for
24 Biologists Aboard Domestic Groundfish Vessels 59-60
(1991) (hereinafter "Manual for Biologists"). Administrative
Record ("AR") Vol. III, Tab 48.

25 Whole-haul sampling requires the Observer to monitor the
26 entire haul and to remove all of the halibut bycatch. The bycatch
is then counted and weighed. The amount of bycatch is compared to
the amount of predominant species in the haul. *Id.* at 61.

1 not a retroactive application of the regulations.

2 On June 12, 1995 plaintiff filed a petition for
3 discretionary review of the ALJ's decision with the
4 Administrator of NOAA. The petition was denied on March 12,
5 1996 by a NOAA Deputy Under Secretary. The Order Denying
6 Discretionary Review was mailed to plaintiff on March 18, 1996.
7 On April 19, 1996, more than 30 days after the Order was mailed,
8 plaintiff filed its complaint with the Court.

9 II. ANALYSIS

10 Plaintiff argues that it is entitled to summary judgment
11 because the agency proved the violations by using a bycatch rate
12 calculation that is different from the means of calculation
13 prescribed in 50 C.F.R. § 675.26, and improperly applied the
14 regulations retroactively. Defendants controvert these points
15 and cross-move for summary judgment arguing that plaintiff's
16 action is barred by the statute of limitations and in the
17 alternative that the administrative decision should be affirmed
18 on the merits.

19 A. Statute of Limitations

20 Under the Magnuson Act, a plaintiff can only obtain review
21 of an administrative decision in this Court by filing a
22 complaint "within 30 days of the date of such order." 16 U.S.C.
23 § 1858(b). The Under Secretary's decision, however, stated that
24 the Order Denying Discretionary Review "will become effective
25 for the purpose of judicial review on the date of its service,
26 as provided in 15 C.F.R. Part 904." AR Vol I, Tab 39 at 4. The

1 referenced regulations provide that a document is served as of
2 the date of its mailing. 15 C.F.R. § 904.3(c).

3 The Order was postmarked March 18, 1996. The agency argues
4 that plaintiff's action is barred by the Magnuson Act's 30 day
5 statute of limitations because plaintiff filed its complaint on
6 April 19, 1996, 32 days after the Under Secretary's Order was
7 mailed. Plaintiff asserts, however, that Fed. R. Civ. P. 5(b)
8 and 6(e) provided three extra days to file an appeal because the
9 Order denying review was served by mail.² Because the Order was
10 mailed on March 18, 1996, plaintiff claims that it had until
11 April 22, 1996 to file its complaint.

12 The confusion over the proper limitations period arises
13 from the Under Secretary's Order. The Order made reference to
14 regulations which when read with the Federal Rules of Civil
15 Procedure did not give plaintiff clear guidance as to when the
16 limitations period began to run. It would be unfair to allow
17 the agency to take advantage of the confusion created by its own
18 order. See Martinez v. Orr, 738 F.2d 1107, 1111-12 (10th Cir.
19 1984) (concluding that equitable tolling of limitations period
20 was appropriate because plaintiff was misled and lulled into
21 inaction by the EEOC's letter which failed to make clear that
22 plaintiff had to file an appeal within 30 days); see also Irwin

23
24 ²Fed. R. Civ. P. 5(b) provides that "[s]ervice of mail is
25 complete upon mailing." Fed. R. Civ. P. 6(e) provides that
26 "[w]henever a party has the right or is required to do some act or
take some proceedings within a prescribed period after the service
of a notice or other paper upon the party and the notice or paper
is served upon the party by mail, 3 days shall be added to the
prescribed period." (emphasis added).

1 v. Dept. of Veterans Affairs, 498 U.S. 89, 95-96, 111 S.Ct. 453,
2 457 (1990) (holding that equitable tolling of a limitations
3 period may apply to suits against the government). The Court
4 will therefore address the merits of the case.

5 **B. Standard of Review**

6 The Court notes that it is the decision of the NOAA Under
7 Secretary, and not that of the Coast Guard ALJ, that is under
8 review. The decision of the Under Secretary will not be
9 overturned unless it is found to be arbitrary or capricious, an
10 abuse of discretion, or not in accordance with law. 5 U.S.C. §
11 706(2)(A); United States v. F/V Alice Amanda, 987 F.2d 1078,
12 1085 (4th Cir. 1993) (applying arbitrary/capricious standard of
13 review to agency decision in a Magnuson Act enforcement action);
14 see also Wileman Brothers & Elliot, Inc. v. Espy, 58 F.3d 1367,
15 1374-75 (9th Cir. 1995), cert. granted, 116 S.Ct. 1875, and
16 cert. denied, 116 S.Ct. 1876 (1996) (noting that there is no
17 substantial difference between what is required under the
18 arbitrary and capricious test and what would be required by the
19 substantial evidence test).

20 Furthermore, the Under Secretary's decision is entitled to
21 two types of deference. First, an agency is entitled to
22 deference as to technical matters within its area of expertise.
23 See Central Arizona Water Conservation Dist. v. United States
24 EPA, 990 F.2d 1531, 1539-40 (9th Cir.), cert. denied, 510 U.S.
25 828, 114 S.Ct. 94 (1993); National Fisheries Institute, Inc. v.
26 Mosbacher, 732 F. Supp. 210, 223 (D.D.C. 1990). Second, an

1 agency is entitled to deference in interpreting the regulations
2 and statutes it administers. Chevron U.S.A. v. Natural
3 Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct.
4 2778, 2782-83 (1989); Rendleman v. Shalala, 21 F.3d 957, 961
5 (9th Cir. 1994) (noting that an agency's interpretation of its
6 own regulation is entitled to a "high degree of deference and
7 will be upheld as long as it is not plainly erroneous or
8 inconsistent with the regulation") (citations omitted).

9 **C. Bycatch Calculations**

10 Although the PACIFIC ENTERPRISE voyage lasted from May 5 to
11 May 25, 1991, the vessel was determined to be subject to the
12 flatfish VIP regulations at issue in this case for only the
13 weeks ending May 19 and May 26, 1991. For the week ending on
14 May 5, which only included hauls taken on that day, the vessel
15 retained sable fish and Pacific cod. These species are not
16 subject to the bycatch limitations for flatfish in 50 C.F.R.
17 675.26. For the week ending on May 12, the vessel participated
18 in the pollock and arrowtooth flounder fisheries, which are also
19 not subject to the bycatch limitations for flatfish under 50
20 C.F.R. § 675.26.

21 For the weeks ending on May 19 and 26, however, 43 percent
22 of the total amount of groundfish caught consisted of yellowfin
23 sole, rock sole and other flatfish. Thus, pursuant to the
24 definition of flatfish in 50 C.F.R. § 675.26(b)(3), the vessel
25 participated in the flatfish fishery during those two weeks. As
26 a result, it was subject to the halibut bycatch limitations

1 contained in 50 C.F.R. § 675.26.

2 The bycatch calculations for the PACIFIC ENTERPRISE for
3 these weeks were based on samples taken by the NMFS Observer
4 aboard the vessel. He followed the procedures in the Manual for
5 Biologists. During the two weeks in question he sampled 47
6 hauls, seven of which he whole-haul sampled, and 40 of which he
7 basket sampled. During the first week, which ended on May 19,
8 he whole-hauled 7 hauls, and basket sampled 19. During the
9 second week, which ended on May 26, he stopped using the whole-
10 haul method, but instead basket sampled 22 hauls.

11 After the Observer left the PACIFIC ENTERPRISE, NMFS
12 debriefed him, checked and verified his data, and calculated the
13 bycatch rate. NMFS calculated the bycatch rate to be 21.5 kg of
14 halibut per metric ton of groundfish for the weeks ending May 19
15 and May 26, 1991. NMFS then adjusted this estimate downward--to
16 15.7 kg of halibut per metric ton of groundfish--to screen cases
17 where the samples contained inordinately large halibut catches.
18 This adjustment allowed NMFS to be 95 percent confident that the
19 vessel's actual monthly bycatch rate exceeded 15.7 kg per metric
20 ton. The established bycatch rate standard during this period
21 was 3 kilograms of halibut per metric ton of groundfish--
22 therefore the PACIFIC ENTERPRISE's bycatch was five to seven
23 times higher than permitted. See 56 Fed. Reg. 21623.

24 NMFS employed a mathematical statistician, Dr. Russell
25 Kappenman, to calculate the vessel's bycatch rate based on the
26 Observer's samples. Dr. Kappenman was a long-time employee of

1 the Alaska Fisheries Science Center.

2 Dr. Kappenman indicated that the bycatch rate for the
3 PACIFIC ENTERPRISE was not calculated according to the typical
4 NMFS' methodology because the data were not based exclusively on
5 basket samples. He explained that because the data included a
6 mixture of whole-haul samples and basket samples, he had to use
7 a customized statistical technique. AR Vol. II at 102.

8 If the Observer had taken only basket samples, the
9 calculation of the bycatch rate would have been relatively
10 simple. Each basket sampled would have provided two pertinent
11 numbers: the weight of the halibut in the sample and the total
12 weight of the sample. See AR Vol. II at 110. If every haul had
13 been basket sampled, Dr. Kappenman said he "would [have]
14 sum[med] the weights of the halibut in each of the samples and
15 would [have] divide[d] that by the sum of the sample weights."
16 AR Vol. II at 111. The result would have been a ratio of the
17 weight of halibut in the basket samples to the weight of
18 groundfish in the basket samples. This would have been the
19 bycatch rate.

20 Dr. Kappenman could not, however, use this method to
21 calculate the bycatch rate for the PACIFIC ENTERPRISE because
22 the data included both whole-haul samples and basket samples.
23 While basket samples are based on an examination of just a
24 portion of a haul, whole-haul samples are based on an
25 examination of the entire haul. When whole haul sampling, an
26 observer separates and weighs all the halibut in a haul. Thus

1 the entire haul is the sample from which halibut is obtained.
2 From this sampling method the total weight of halibut in each
3 haul can be compared to the total weight of each haul.³ If
4 every haul were whole-haul sampled, the bycatch rate would be
5 calculated by summing the weight of halibut in each haul and
6 dividing that by the sum of all the haul weights. See AR II at
7 109.

8 When both whole-haul samples and basket samples are taken a
9 problem arises because the resulting quantities cannot be
10 directly compared. By definition the weights resulting from
11 whole-haul samples are of a much greater magnitude than the
12 weights resulting from basket samples. Because the whole-haul
13 weights are much larger, if the whole-haul sample and basket
14 sample data were simply summed and divided, the whole-haul data
15 would have an unduly large influence on the resulting bycatch
16 rate.

17 To solve this problem, Dr. Kappenman devised a way to
18 multiply the weights from the basket samples to be comparable in
19 magnitude to the weights of the whole-haul samples. To do this,
20 for each basket sample, he multiplied the actual weight of the
21 haul from which the sample was taken by the ratio of halibut to
22 groundfish in the basket sample. The resulting figure
23 represented the total weight of halibut in the haul. This
24 extrapolated halibut weight for each basket sample was

25 ³The total weight of each haul may be derived from
26 estimations made by the vessel crew or by an observer. Manual for
Biologists at 44-48.

1 accordingly comparable to the halibut weight for each whole-haul
2 sample.

3 Dr. Kappenman then simply summed the extrapolated weights
4 of halibut in the basket samples and the actual weights of
5 halibut in the whole-haul samples, and divided that by the sum
6 of all the actual weights of the sampled hauls. AR Vol. II at
7 109-110. These calculations resulted in the bycatch rate at
8 issue here.

9 Plaintiff complains that the methodology used by the
10 Observer and Dr. Kappenman did not follow the formula mandated
11 in 50 C.F.R. § 675.26(d). The regulation states:

12 The bycatch rate of a vessel for a fishery described
13 under paragraph (b) of this section during a fishing
14 month is a ratio of halibut to groundfish that is
15 calculated by using the total round weight of halibut
16 (in kilograms), . . . in samples during all weekly
17 reporting periods in which the vessel was assigned to
18 that fishery and the total round weight of all
19 groundfish (in metric tons) for which a TAC has been
20 specified under § 675.20 in samples taken during all
21 such periods.

22 50 C.F.R. § 675.26(d)(3)(i)(C) (emphasis added).

23 1. Sample Requirement

24 Plaintiff asserts that the regulation requires a bycatch
25 rate to be based on basket samples. It reasons that the
26 specific references in the regulation to the comparison of
"samples" requires that both the weight of the halibut and the
weight of the sample to which it is compared be derived from
measurements actually taken by an observer. When whole-hauling,
there is no question that the weight of halibut is based on
measurements actually taken by an observer. Plaintiff contends,

1 however, that the total catch weight of the haul to which the
2 weight of halibut is compared is not based on measurements taken
3 by an observer, but is instead improperly based on an
4 "estimate." Such an estimate cannot, plaintiff contends, serve
5 as a sample. The Court disagrees.

6 The Manual for Biologists recognizes whole-hauling as a
7 valid sample method. It states that "[e]ach of the prohibited
8 species groups [which includes halibut] may be either whole-haul
9 sampled or basket sampled" Manual for Biologists at 56.
10 (emphasis added). Furthermore, "[t]he weight of catch which was
11 sorted by the observer is the 'sample weight.' The sample
12 weight will be the [total catch weight] if the whole haul was
13 sorted by the observer." Id. at 56, 61. The total catch weight
14 can be determined in a number of ways. The Manual for
15 Biologists indicates that it can be based on a vessel master's
16 estimate or an observer's estimate. Id. at 44-48. The Observer
17 in the present case chose to base the total catch weights on the
18 master's estimates, which were not much different than his own
19 estimates. AR Vol 5, Tab 69. Thus, he acted in conformance
20 with the Manual for Biologists, which indicates that the whole-
21 haul method is a form of sampling, and that a master's estimate
22 of the total catch weight can serve as the sample weight to
23 calculate a bycatch rate.⁴

24 Plaintiff also asserts that the whole-haul method is

25 ⁴The Court also notes that the plain language of 50 C.F.R. §
26 675.26(d) does not require basket samples and does not prohibit
other types of samples.

1 explicitly proscribed for vessels targeting flatfish. Plaintiff
2 claims that a document entitled "1992 Vessel Incentive Program
3 to Reduce Prohibited Species Bycatch" proves that NMFS prohibits
4 whole-haul sampling for flatfish. See Plaintiff's Supplemental
5 Memorandum in Support of Summary Judgment at 1-2. As
6 defendants' point out, however, the document from which
7 plaintiff quotes states that whole-hauling is prohibited once an
8 Observer knows that a vessel is targeting flatfish. In a
9 passage directly preceding that which plaintiff excerpted, the
10 document approves of other sampling methods, a plain reading of
11 which includes the whole-haul method of sampling, to determine
12 what type of fish is being targeted.

13 Moreover, the corresponding NMFS document for 1991 that was
14 relied on by the Observer aboard the PACIFIC ENTERPRISE,
15 explains that "[i]t may take you a couple of days to realize
16 that your vessel has purposely changed targets [to flatfish],
17 and did not just have a couple of bad days. Do not attempt to
18 change your data for hauls that you have already sampled, simply
19 correct your sampling method from that point on." AR Vol VI,
20 Tab 82.

21 Testimony of the Observer shows that this occurred aboard
22 the PACIFIC ENTERPRISE. See AR Vol. II, Tab 40 at 17-20. The
23 Observer used a combination of sampling methods to determine the
24 target fishery during the week ending May 19, 1991, which had
25 been preceded by a week in which the vessel had participated in
26 the pollock and arrowtooth flounder fisheries. When he

1 determined that flatfish were being targeted, he began using the
2 basket sampling method exclusively. Id.

3 As this situation shows, plaintiff's reading of these
4 guidelines would lead to an unfortunate result. If, as
5 plaintiff asserts, whole-hauling could never be used to
6 calculate a bycatch rate, then vessels would evade application
7 of the VIP regulations whenever an observer whole-haul sampled
8 during a time that a vessel was altering its operations to
9 target the flatfish fishery. Such a reading would undermine the
10 ability of NMFS to monitor and control halibut bycatch rates in
11 the flatfish fishery.

12 Plaintiff also contends that the use of total haul weights
13 to calculate bycatch was at odds with statements made by NMFS in
14 response to public comment during the rulemaking period.
15 Plaintiff points out that NMFS stated to concerned fishermen in
16 the Interim Final Rule that "[e]vidence of a violation will be
17 based upon calculations of bycatch rates using a standard
18 methodology set forth in NMFS incentive program guidelines that
19 will be applied to all vessels" 56 Fed. Reg. 21625.
20 (emphasis added). Defendants assert, however, that NMFS
21 reserved flexibility in calculating a vessel's bycatch. The
22 interim final rule explicitly grants NMFS such flexibility:

23 Although the methodology currently employed by NMFS is the
24 best available for calculating vessel bycatch rates for the
25 purpose of the incentive program, the interim final rule
26 provides NMFS with flexibility to modify the methodology to
incorporate new developments in the collection of larger
sample sizes and computation of total catch weights.

Id. at 21620. The Court concludes that in adopting a standard

1 methodology NMFS did not limit itself to a single sampling
2 method, and moreover that NMFS intended to maintain a certain
3 degree of flexibility in the methods it uses to calculate
4 bycatch.

5 2. Observed Data Requirement

6 Plaintiff asserts that the agency did not rely on "observed
7 data" in calculating the bycatch rate as required by the
8 regulations.⁵ Plaintiff claims that the total catch weights,
9 which were based on the vessel master's estimates, were not
10 observed data. It also contends that the extrapolated halibut
11 weights for basket-sampled hauls, which were used by NMFS to
12 calculate the bycatch rate, were not observed data.

13 As to the total catch weights, the Observer's reliance on
14 the master's estimates was specifically authorized by the Manual
15 for Biologists. See Manual for Biologists at 44-48. In
16 addition, the Observer examined the hauls he sampled and made
17 his own calculations of the total catch weights to check the
18 vessel master's estimates. See AR Vol. IV, Tab 52. This was

19
20 ⁵The VIP regulations provide that "only observed data that
21 has been checked, verified, and analyzed by NMFS will be used to
22 calculate vessel bycatch rates for purposes of this section." 50
23 C.F.R. § 675.26(d)(3)(i)(B) (emphasis added). Furthermore, the
24 regulations state that:

25 For purposes of this section, observed data collected for
26 each haul sampled during a day will include the date,
position (Federal Reporting Area) where the trawl gear for
the haul was retrieved, total round weight of groundfish, in
metric tons, in the portion of the haul sampled . . . , and
total round weight of halibut, in kilograms . . . , in the
portion of the haul sampled.

50 C.F.R. § 675.26(d)(1).

1 also in accord with the Manual for Biologists. Manual for
2 Biologists at 44-48. Both the master's and the Observer's total
3 catch weights were based on their direct observations of the
4 haul, and so were observed data. Moreover, plaintiff provides
5 no basis upon which the Court could conclude that some of the
6 methods prescribed in the Manual for Biologists for acquiring
7 sample weights are considered observed data and others are not.

8 As to the extrapolated halibut weights that NMFS
9 incorporated into its bycatch calculations, those weights were
10 based on basket samples and official total catch weights. Both
11 of those measurements were observed data, and so the
12 extrapolations and other calculations performed by NMFS were
13 based on observed data.

14 In sum, the Court finds that the agency acted within the
15 law in calculating the bycatch rate of the PACIFIC ENTERPRISE
16 based on data collected using the basket and whole-haul sampling
17 methods. The whole-haul method is a sampling method
18 contemplated by the regulations, and the bycatch calculation
19 used by NMFS was based on observed data pursuant to the
20 regulations.⁶

21 **D. Retroactive Application of 50 C.F.R. § 675.26**

22 Section 675.26 was published in the Federal Register on May
23 10, 1991 and was explicitly made effective beginning on May 6,

24
25 ⁶The Court is also convinced that substantial evidence
26 supported the factual finding of the ALJ that the bycatch rate
calculations made by NMFS were accurate, and that the bycatch rate
for the PACIFIC ENTERPRISE greatly exceeded the permitted rate.
AR Vol. I, Tab 33 at 15.

1 1991. See 56 Fed. Reg. at 21620.⁷ The program was to be
2 effective immediately to reduce high bycatch rates which are
3 harmful to species such as halibut. Id. at 21625 ("This rule
4 must be effective immediately to reduce high bycatch rates of
5 halibut and red king crab that occur in fast-paced groundfish
6 fisheries").

7 According to section 675.26(d)(3)(i)(B), an observer must
8 sample at least 50 percent of a vessel's total number of hauls
9 during a fishing month while aboard the vessel. The fishing
10 month at issue in the present case ran from April 29, 1991 to
11 June 2, 1991. The fishing trip began on May 5, 1991. The
12 parties agree that beginning on May 6, 1991, the Observer
13 sampled over 50 percent of the hauls during the fishing month at
14 issue.

15 Plaintiff argues that because NMFS cannot establish the
16 total number of hauls during the duration of the trip without
17 establishing facts that occurred prior to the effective date of
18 the regulations, that this was a retroactive application of the
19 rules and must be set aside. Plaintiff explains that because
20 the agency could not establish that 50 percent of the hauls were
21 sampled without including hauls taken during the first day of
22 the trip, May 5, 1991, it had to rely on facts that occurred

23
24 ⁷The ALJ found that the "respondents were well acquainted
25 with the proposed regulations and had undertaken efforts to make
26 the company's personnel, specifically the licensed Masters[,] aware of the restrictions prior to the effective date of the regulations. Clearly the PACIFIC ENTERPRISE was not taken by surprise or unfairly impacted by the effective date of the regulations." AR Vol. I, Tab 33 at 16-17.

1 prior to the effective date of section 675.26(d).

2 In rejecting the plaintiff's retroactive application
3 argument, the ALJ noted that the violations for which the
4 plaintiff was cited all occurred during the weeks ending May 19
5 and May 26, 1991. See AR Vol. I, Tab 33 at 17. That was the
6 only time period that the vessel was subject to the VIP
7 regulations. Id.; see also 50 C.F.R. § 675.26(b) (VIP bycatch
8 regulations only apply to a vessel in weeks in which it is
9 assigned to one of four specific fisheries, including the
10 "flatfish fishery").


11 The Ninth Circuit has stated that "[a] rule has retroactive
12 effect if an act lawful at the time it was done is rendered
13 unlawful and the actor called to account for a completed, now-
14 condemned deed in the halls of justice." American Mining
15 Congress v. United States EPA, 965 F.2d 759, 769 (9th Cir.
16 1992). NMFS did not make the activity of the PACIFIC ENTERPRISE
17 on May 5, 1991 unlawful. It merely included May 5, 1991 as part
18 of the fishing month during which the violations occurred so
19 that it could demonstrate that more than 50 percent of the hauls
20 taken that month were sampled as required by 50 C.F.R. §
21 675.26(d)(3)(i)(B). See Reynolds v. United States, 292 U.S.
22 443, 448-49, 54 S.Ct. 800, 803 (1934) ("A statute is not
23 rendered retroactive merely because the facts or requisites upon
24 which its subsequent action depends, or some of them, are drawn
25 from a time antecedent to the enactment."). Thus, the Court
26 must reject plaintiff's argument that the inclusion of May 5,

1 1991 within the fishing month at issue precludes application of
2 the regulations.

3 **III. CONCLUSION**

4 The Court GRANTS defendants' motion for summary judgment
5 and DENIES plaintiff's motion for summary judgment. The Under
6 Secretary's decision is AFFIRMED and this action is DISMISSED.
7 The Clerk of the Court is directed to enter judgment
8 accordingly.

9 So ORDERED this 10 day of December, 1996.

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12 _____
13 John C. Coughenour
14 United States District Judge
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AT SEATTLE
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DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TYSON SEAFOOD GROUP, INC.,

Plaintiff,

v.

D. JAMES BAKER, et al.,

Defendant.

CASE NO. C96-610C

JUDGMENT ON DECISION
BY THE COURT

This action came on for consideration before the court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

The Court GRANTS defendants' motion for summary judgment and DENIES plaintiff's motion for summary judgment. The Under Secretary's decision is AFFIRMED and this action is DISMISSED.

DATED this 10 day of December, 1996.

JUDGMENT ON DECISION BY THE COURT

Glenda Marshall
Glenda Marshall, Deputy Clerk of Court

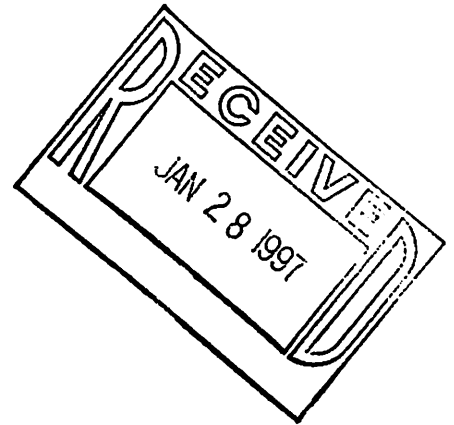
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JUDGMENT ON DECISION BY THE COURT

Case: 2:96-cv-00610

Samuel D Rauch III, Esq.
U.S. DEPARTMENT OF JUSTICE
ENRD, Wildlife & Marine Resources
P O BOX 7369
WASHINGTON, DC 20044-7369

Groundfish Forum, Inc.
4215 21st Avenue West, Suite 201
Seattle, Washington 98199
Phone (206) 301-9504 Fax (206) 301-9508



January 28, 1997

Mr. Ron Berg
Chief, Fisheries Management Division
NMFS- F/AKR
P.O. Box 21668
Juneau, AK 99802

RE: NMFS Management of 10 minute strip for rocksole fishery

Dear Ron:

Amendment 37 to the BS/AI Groundfish Fishery allows the rocksole fishery to fish within the lower ten minutes of latitude in the area now defined as the Red King Crab Savings Area. As you know, the H&G sector fought hard to retain entry to this area. We were finally able to convince the Council to allow entry in years following a harvest guideline for Bristol Bay red king crab. This area has been of major importance to the rocksole fishery and the ten minute strip has historically had manageable red king crab bycatch rates. Given the harvest guideline for red king crab last year, the rocksole fishery is scheduled to gain access into the ten minute strip this year via the (not yet finalized) annual groundfish specifications. A separate cap of approximately 26,000 RKC applies to the area in question.

We pushed hard for this privilege and we do not regard lightly the responsibility of stay within the cap afforded to the area. We also appreciate the cooperation we have received from NMFS in working with us over the last several weeks to craft an opening so as to maximize control over the fishery yet allow an opportunity to take advantage of the high rocksole catch rates that the area has traditionally provided. Up until a few days ago, our plan for a short test fishery and then a fishery of scheduled duration based on the rates during the test fishery seemed the best possible scenario from all perspectives. With the red king crab bycatch rates that the rocksole boats have experienced just south of the ten minute strip over a two day period this year, however, we have had to reconsider our desire to fish within the ten minute strip this year.

When rocksole opened on the 20th of January, approximately 10 vessels began their season just south of the ten minute strip. Many of these vessels experienced RKC rates on some tows that were too high for an orderly fishery in that area. After a day and a half, our Sea State system which plots everyone's rates each day was indicating that rates in this area were high as a rule. The word was quickly sent out to the fleet and all rocksole vessels quickly moved to other areas. Rates are now approximately 300 RKC per day fleet-wide, which is exceptionally low.

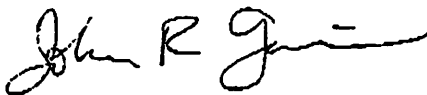
The crux of the matter, Ron, is that if RKC rates this year are high just south of the RKC Savings Area, then we anticipate even higher rates in the ten minute strip. Thus an opening of the ten minute strip at this time is not desirable at this time. Although in the absence of a NMFS action we could very likely restrict all rocksole vessels currently fishing from the area on a voluntary basis (they are all Groundfish Forum vessels), we cannot guarantee that a non-Groundfish Forum vessel, for instance, might not leave another fishery to take advantage of the ten minute strip opening scheduled to take place via the approval of the final specifications. Although that even is somewhat unlikely (because as you know, peer pressure is strong in this business), if it did occur it would be very unfortunate. It would also be unfair to those vessels that are

very much trying to "do the right thing" and work constructively with the crab industry given the RKC situation this year.

Given this set of circumstances, the Groundfish Forum hereby requests that NMFS file a closure notice for the ten minute strip this year prior to the filing of the final specifications. The reason should simply be exceptionally high expected RKC abundance in the ten minute strip. We very much appreciate your willingness (and that of Sue Salvesson and Andy Smoker) to work with us to craft a reasonable plan for fishing within the strip this year. In retrospect, no one could have anticipated the RKC situation this year given how manageable bycatch rates have generally been just south of the ten minute strip over the last two years. Vicissitudes of this business I guess.

Thanks in advance for your help. Please call me if you anticipate any problems putting through the system the request we have made.

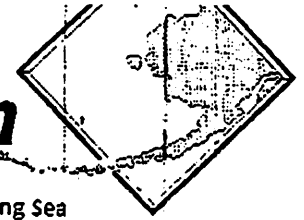
Yours Sincerely,



John R. Gauvin
Director

cc: Chairman Lauber, Groundfish Forum membership

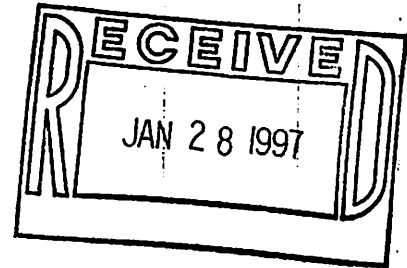
Western Alaska Fisheries Development Association



Coastal Villages Fishing Cooperative • Yukon Delta Fisheries Development Association • Central Bering Sea Fishermen's Association • Norton Sound Economic Development Corporation • Bristol Bay Economic Development Corporation • Aleutian Pribilof Island Community Development Association

January 28, 1997

Mr. Steve Pennoyer, Regional Director
National Marine Fisheries Service, Alaska Region
P.O. Box 21668
Juneau, Alaska 99801



Dear Mr. Pennoyer,

We have recently learned that the National Marine Fisheries Service (NMFS) has decided to delay implementation of the license limitation package, which includes provisions for expanding the CDQ program to include crab and other groundfish species. Up to this point, the CDQ groups and state agencies charged with overseeing the CDQ program have been working with the understanding that the license limitation package would be in place by January, 1998. Now we are told that implementation may not be until January of 1999.

The North Pacific Fishery Management Council adopted the license limitation program in June, 1996 — more than a year and a half ago. Initially, we understood the amendment package would be sent to the Secretary of Commerce in June of 1996, then in September, then in January. During this time we have had very little dialogue with NMFS regarding the problems or concerns the agency may have with the package.

Yesterday I spoke with Ron Berg, Deputy Regional Manager for NMFS, who informed me that the delay is due to internal problems with developing the licensing regime and establishing methods for recording and reporting groundfish harvests. Berg said that NMFS's efforts to develop new recording and reporting methods are the stumbling blocks holding up implementation of the expanded CDQ program. However, he also said that NMFS is looking at options for designing a "scaled down" program that takes advantage of recording and reporting methods currently in place and in use by the rest of the groundfish fleet — but he stressed that this was not NMFS's preferred option.

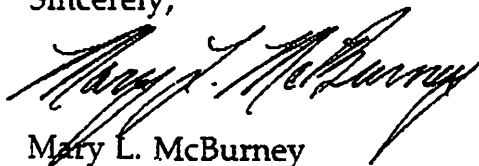
The six CDQ groups have invested a great deal of time, energy and financial resources to prepare for the expanded CDQ fisheries. Many have secured agreements with harvesting partners with the understanding that fishing would begin in 1998. The revelation that the license limitation package won't be ready

for implementation until 1999 not only impacts the CDQ groups' business plans, but also affects implementation of new community development initiatives based on the new CDQ fisheries.

We request your reconsideration of this matter and urge you to implement the expanded CDQ program regardless of the status of other licensing provisions in the license limitation package. The CDQ groups stand ready to work with NMFS to deal with any difficulties related to implementing the expanded CDQ program. There is no compelling reason to not implement the new CDQ fisheries in 1998.

We understand that you are preparing to make a recommendation to the North Pacific Fisheries Management Council next week on the status of the program. We'd like to work with you in any way possible to ensure that the new CDQ fisheries are ready to go in 1998.

Sincerely,



Mary L. McBurney
Executive Director

cc: Secretary Designate, Dept. of Commerce
Sen. Ted Stevens
Sen. Frank Murkowski
Rep. Don Young
Governor Tony Knowles
NPFMC

Seabird Protection

At their December meeting, the Council responded to an industry request for regulations requiring various avoidance measures by the longline fleet to avoid the capture of seabirds. The Council approved gear modifications, seabird avoidance devices, or changes in fishing methods designed to reduce the incidental mortality of seabirds in the directed groundfish and halibut fisheries of the Gulf of Alaska and Bering Sea/Aleutian Islands. Short-tailed albatross are on the endangered species list, and their incidental take in groundfish fisheries is strictly limited. The allowable take is set at two albatrosses. NMFS confirmed that two short-tailed albatross were taken in the 1995 IFQ sablefish fishery. One was taken in 1996.



The proposed rule for the groundfish hook-and-line fisheries will be published in early January 1997. The final rule is expected to be published in mid-March. Halibut regulations will be implemented separately by NMFS after review by the IPHC at their January 1997 meeting. Approved measures to reduce seabird bycatch in hook-and-line fisheries include the following:

- Baited hooks must sink as soon as possible after they are put in the water. This could be accomplished by the use of weighted groundlines or thawed bait.
- The dumping of offal shall be avoided to the extent practicable while gear is being set or hauled; if discharge of offal is unavoidable, the discharge must take place aft of the hauling station or on the opposite side of the vessel to that where gear is set or hauled.
- Every effort shall be made to ensure that birds brought aboard alive are released alive and that wherever possible, hooks are removed without jeopardizing the life of the bird.

One or more of the following measures shall be employed at all times when baited hooks are being set:

- A buoy, board, stick, broom, or other like device shall be towed behind the vessel at a distance appropriate to prevent birds from taking baited hooks. Multiple devices may be employed, or;
- A streamer line designed to effectively discourage birds from settling on baits during deployment of gear, shall be towed, or;
- Gear shall be set only at night (between the times of nautical twilight), and only the minimum vessel's lights necessary for safety shall be used; or
- Baited hooks shall be deployed under water using a lining tube designed and manufactured for such a purpose, or;
- With the approval of the Regional Administrator, other experimental seabird avoidance devices may be substituted for those listed above.

Small skiffs used on inside waters may be exempted from these provisions. Staff contact is Jane DiCosimo.