

**December 2003**  
**Gulf of Alaska Rationalization**  
**Descriptions of Proposed Alternatives**  
**Part 1**

At its October 2003 meeting, the Council received several staff discussion papers concerning the alternatives, elements and options proposed for rationalization of the Gulf of Alaska groundfish fisheries. In response to those discussion papers and public comment the Council developed a revised suite of alternatives and several refinements to the elements and options adopted for analysis at its June 2003 meeting. The alternatives proposed at the October meeting (the "October alternatives") and proposed revisions to the elements and options are shown in the following documents, each of which is attached hereto:

- A1) Modified GOA Groundfish Rationalization Alternatives Tables for Fixed Gear Catcher Vessels, Trawl Catcher Vessels, and Catcher/Processors.
- A2) GOA Motion Addressing 29 Staff Topics
- A3) Options for Halibut and Sablefish IFQ participants and SEO fisheries proposed at the October 2003 Council meeting
- A4) Community protection options - changes proposed at the October 2003 Council meeting
- A5) Proposed staff analysis on salmon and crab bycatch measures

The Council requested staff to provide a simplified discussion paper concerning the proposed revisions to the alternatives, elements, and options to aid the Council in determining whether to adopt those revisions for analysis. This paper, together with annotated motion that follows, is intended to meet that Council request.

**Part I** of this paper describes the October alternatives -- the proposed revised alternatives shown in the tables of Attachment A1. Since those tables define the October alternatives in a relatively simplified manner, a complete understanding of an alternative requires identification of the primary elements and options from which that alternative is constructed. This paper also identifies the elements and options that staff believes would define each of the October alternatives. This further definition of the alternatives is intended to both aid the Council in assessing the merits of advancing the alternatives for analysis and ensure that Council, public, and staff interpretations of alternatives are consistent. Since the Council has expressed its preference for having the ability to select different alternatives for the different sectors and because the alternatives are defined at the sector level, the discussion of the alternatives is separated by sector. This allows the Council to consider the breadth of alternatives created for the different sectors by the October alternatives. To contrast October's proposed alternatives with those adopted for analysis at the June meeting, the portion of the discussion paper comparing the June alternatives prepared by staff for the October meeting is attached as Attachment B. In addition, this paper directly contrasts the October alternatives and June alternatives, focusing on the breadth of the different sets of alternatives.

In considering which alternatives to advance for analysis, the Council should assess the range of alternatives. Each alternative should meet the Council's problem statement, should be feasible, and should be distinguishable from each other alternative. To assist the Council in assessing alternatives, the Council's purpose and need statement are Attachment C to this document. The discussion of alternatives that follows

focuses on the differences between alternatives to enable the Council to assess the degree to which alternatives are distinct, which should aid the Council in selecting a reasonable range of distinguishable alternatives.

To aid the Council in considering which alternatives to advance for analysis, staff has incorporated some preliminary analysis of critical components of the alternatives in this paper. This analysis is adapted from the staff discussion paper presented to the Council at its October meeting, modified to address both the June alternatives and the October alternatives.

Staff has also included in this paper a brief discussion of legal issues that arise under two of the community protection options that the Council is considering, the Community Incentive Fisheries Trust and the Community Fisheries Quota Program. The legal opinion provided by NOAA General Counsel (10/3/03) spurring this discussion is included as Attachment D. This discussion of legal issues is included in the preliminary analysis at the end of this document.

**Part 2** of this paper is an annotated copy of the June Council motion that incorporates the revisions proposed in attachments A2, A3, A4, and A5. The annotated motion also includes staff comments concerning the effects of the revisions. This discussion and preliminary analysis is intended to aid the Council in deciding whether to include the revisions in one or more alternatives for analysis. These proposed revisions are intended to refine and clarify the alternatives for analysis.

### **Description of the October alternatives**

To assist the Council in considering the breadth and contrast of the alternatives, a brief description of rules governing each vessel group under the different rationalization alternatives is contained in this section.<sup>1</sup> At the end of the descriptions for each vessel group, a comparison of the rationalization alternatives for that vessel group is presented. In addition to helping the Council assess the contrast of the alternatives, the Council may use these comparisons to guide its selection of options that would more fully define each alternative. In selecting options for the alternatives, the Council should consider the need for contrast among the alternatives. Greater contrast across the alternatives would allow the analysis to provide a better understanding of the differences between programs that may be reasonable meet the Council's purpose and need statement. In selecting options to make distinctions between the alternatives, the Council might also consider the implications of those choices for the analysis.

### **Catcher/processor alternatives**

#### *October Alternative 2*

Under October Alternative 2,

- Catcher/processor share holders are treated as a single sector.
- Eligible persons with catcher/processor history would be allocated harvest shares based on that catch history.

---

<sup>1</sup> For all sectors, alternative 1 is the status quo. Since the status quo must be analyzed and differs substantially from any rationalization alternative, a discussion of the differences between the status quo and other proposed alternatives is omitted from the paper.

- Exclusive annual allocations would be granted to all holders of shares regardless of cooperative membership (i.e., cooperatives are voluntary).
- Annual allocations of cooperative members would be made to the cooperative and would be fished in accordance with the rules of the cooperative. Individuals that are not cooperative members would receive and fish individual annual allocations.
- Share holders that do not join a cooperative would receive a reduced <sup>PSC - MF edit</sup> bycatch allocation to create an incentive for cooperative membership.

The following elements and options would apply to catcher/processors under October Alternative 2:

- 2.5.3.1 - PSC allocation reduction for non-members of cooperatives (provision is a proposed addition to elements and options from October meeting)
- 4.1, Option 1 - voluntary cooperatives
- 4.2.1 - the sector must be clearly defined under this alternative
- 4.2.1.1 - no processor association for catcher/processor cooperatives
- 4.2.2 - one option should be selected for minimum cooperative membership
- 4.2.3 - defines cooperative agreement duration
- 4.3.1, Option 1 - cooperative will receive the annual allocation of its members (not that of the entire sector)
- 4.4 - include all subsections - define individual and vessel use caps
- 4.4 - bullets may be included
- 4.5.1 - rules concerning movement between cooperatives

### *October Alternative 3*

Under October Alternative 3,

- Catcher/processor share holders are divided into trawl, longline, and pot gear sectors.
- Eligible persons with catcher/processor history would be allocated harvest shares based on that catch history.
- To receive an exclusive annual allocation, the holder of shares would be required to join a cooperative.
- The annual allocation would be made to the cooperative and would be fished in accordance with the rules of the cooperative.
- If the holder of harvest shares chooses not to join a cooperative, the shares of that person would be allocated to an open access fishery of all non-members of cooperatives of the gear type in the catcher/processor sector.
- The bycatch allocation to the open access fishery would be reduced to create an incentive for cooperative membership.

The following elements and options would apply to catcher/processors under October Alternative 3:

- 2.5.3.1 - PSC allocation reduction for non-members of cooperatives (provision is a proposed addition to elements and options from October meeting)
- 4.1, Option 2 - mandatory cooperatives
- 4.2.1, iii or iv - sectors are defined for each gear type
- 4.2.1.1 - no processor association for catcher/processor cooperatives
- 4.2.2 - one option should be selected for minimum cooperative membership

- 4.2.3 - defines cooperative agreement duration
- 4.3.1, Option 1 - the cooperative will receive the allocation of its members (not that of the entire sector)
- 4.4 - including all subsections - define individual and vessel use caps
- 4.4 - bullets may be included
- 4.5.1 - rules concerning movement between cooperatives
- 4.6, Option 1 - defines open access for non-members of cooperatives

### *Comparison of catcher/processor alternatives*

The two October alternatives differ in a few respects. October Alternative 2 is a voluntary cooperative program under which shareholders that choose not to join cooperatives receive individual annual allocations. October Alternative 3 is a mandatory cooperative program, under which shareholders that choose not to join a cooperative do not receive an annual allocation. Instead, annual allocations derived from the shares of non-cooperative members would be allocated to an limited open access fishery that would be fished competitively by all share holders that are not members of a cooperative.

Another possible distinction in the alternatives is the level of aggregation across different gear types in sector definition (i.e., whether catcher/processors form a single sector or three separate sectors, one for each gear type). The table of alternatives suggests that under alternative 2 catcher/processors of all gear types will be considered a single sector, while under alternative 3 the different gear types would be treated as separate sectors. This distinction is suggested by the revision to Section 4.2.1 of the motion at the October meeting.

The voluntary cooperative management of the fishery under October Alternative 2 differs substantially from the mandatory cooperative alternative management of the June alternatives providing analytical contrast not present if only the June alternatives are advanced for analysis. October Alternative 3 is identical to June alternative 3 with the limited open access option for non-members of cooperatives.<sup>2</sup> October Alternative 3 is also very similar to June Alternative 3, with a possible difference being the definition of sectors by gear under June Alternative 3. A complete discussion of the June alternatives appears in Attachment B.

### **Trawl catcher vessels**

#### *October Alternative 2A*

Under October Alternative 2A,

- Trawl catcher vessel share holders are treated as a single sector.
- Eligible persons with trawl catcher vessel history would be allocated harvest shares based on that catch history.
- Exclusive annual allocations would be granted to all holders of shares regardless of cooperative membership (i.e., cooperatives are voluntary).
- Annual allocations of cooperative members would be made to the cooperative and would be fished in accordance with the rules of the cooperative. Individuals that are not cooperative members would receive and fish individual annual allocations.

---

<sup>2</sup> June alternative 3 also contained an option for “no fishing” for non-members of cooperatives that would exclude non-members from the fishery altogether.



- Share holders that do not join a cooperative would receive a reduced bycatch allocation to create an incentive for cooperative membership.
- Each cooperative would be required to deliver a specified percentage of its landings to processors that are members of a closed class. Class membership would be based on processing history.

The following elements and options would apply to trawl catcher vessels under October Alternative 2A:

- 2.5.3.1 - PSC allocation reduction for non-members of cooperatives (provision is a proposed addition to elements and options from October meeting)
- 3.1.1.1, Option 1, ii - a percentage of all deliveries are required to be made to closed class processors
- 3.1.2 - including all subsections is used to define closed class of processors and the rules governing those processors
- 4.1, Option 2 - voluntary cooperatives
- 4.2.1 - define sectors by vessel and gear type (trawl catcher vessel)
- 4.2.1.1 - either Option 1 (no cooperative/processor associations) or Option 2 (cooperatives associate with any qualified closed class processing facility or qualified closed class processing company)
- 4.2.2 - Option 1 - A cooperative is required to have at least 4 distinct and separate harvesters - (other options may not apply since they would result in one cooperative for all trawl catcher vessel participants)
- 4.2.4 - may be included - defines cooperative/processor association
- 4.3.1, Option 1 - allocation of members is made to the cooperative - all bullets may be included
- 4.4 - may include all of these options concerning individual and vessel use caps
- 4.4 - may include all bullets
- 4.5.1 may include provisions concerning movement among cooperatives.

#### *October Alternative 2B*

Under October Alternative 2B,

- Trawl catcher vessel share holders are treated as a single sector.
- Eligible persons with trawl catcher vessel history would be allocated harvest shares based on that catch history.
- Exclusive annual allocations would be granted to all holders of shares regardless of cooperative membership (i.e., cooperatives are voluntary).
- Annual allocations of cooperative members would be made to the cooperative and would be fished in accordance with the rules of the cooperative. Individuals that are not cooperative members would receive and fish individual annual allocations.
- Share holders that do not join a cooperative would receive a reduced ~~bycatch~~ <sup>PSC - MF edit</sup> allocation to create an incentive for cooperative membership.
- Eligibility for cooperative membership would be based on landings, with each share holder eligible to join a single cooperative associated with the eligible processor to which it delivered the most fish during the qualifying period. The cooperative, in turn, would be required to deliver specific percentage of its landings to the associated processor.
- Movement of shares between cooperatives would be subject to a share reduction penalty.

The following elements and options would apply to trawl catcher vessels under October Alternative 2B:

- 2.5.3.1 - PSC allocation reduction for non-members of cooperatives (provision is a proposed addition to elements and options from October meeting)
- 3.1.1.1, Option 1, i - requires delivery to the linked closed class processor
- 3.1.1.2 - used to determine processor linkages
- 3.1.1.3 - specifies penalties for movement of linked shares between processors (Option 4 with open access penalty does not apply)
- 3.1.2 - including all subsections - used to define closed class of processors (needed for linkages)
- 4.1, Option 1 - voluntary cooperatives
- 4.2.1 - define sectors by vessel and gear type (trawl catcher vessel)
- 4.2.1.1, Option 2 - must associate with the linked closed class processing facility or company - (and Option 3, which is redundant with provisions in 3.1.1.2)
- 4.2.2 - Option 1 or Option 4 (cannot have a single cooperative for each sector in a program with multiple licensed processors)
- 4.2.3 - defines cooperative agreement duration
- 4.2.4 - may be included - defines cooperative/processor association
- 4.3.1 - Option 1 (cannot have a single cooperative for the sector in a program with multiple qualified processors) - also may include all bullets
- 4.4 - including all subsections - define individual and vessel use caps
- 4.4 - may include all bullets
- 4.5.1 - rules concerning movement between cooperatives
- 4.5.2 - rules defining effects of processor license transfers on cooperatives (note that this provision should be broadened to include share holders that are not cooperative members)

### *October Alternative 3*

Under October Alternative 3,

- Trawl catcher vessels are treated as a single sector.
- Eligible persons with trawl catcher vessel history would be allocated harvest shares based on that catch history.
- To receive an exclusive annual allocation, the holder of shares would be required to join a cooperative.
- The annual allocation would be made to the cooperative and would be fished in accordance with the rules of the cooperative.
- Eligibility for cooperative membership would be based on landings, with each harvester eligible to join a single cooperative associated with the processor to which it delivered the most fish to during the qualifying period (i.e., processor linkage is required). The cooperative, in turn, would be required to deliver a specific percentage of its landings to the associated processor.
- If the holder of harvest shares failed to join a cooperative, the shares of that person would be allocated to an open access fishery, comprised of all non-members of cooperatives in the trawl catcher vessel sector.
- The bycatch allocation to the open access fishery would be reduced to create an incentive for cooperative membership.
- Movement of shares between cooperatives would be subject to a share reduction penalty or would require participation in the open access fishery for one year.

The following elements and options would apply to trawl catcher vessels under October Alternative 3:

- 2.5.3.1 - PSC allocation reduction for non-members of cooperatives (provision is a proposed addition to elements and options from October meeting)
- 3.1.1.1, Option 1, i - requires delivery to the linked closed class processor
- 3.1.1.2 - used to determine processor linkages
- 3.1.1.3 - specifies penalties for movement of linked shares between processors
- 3.1.2 - including all subsections - used to define closed class of processors (needed for linkages)
- 4.1, Option 2 - mandatory cooperatives
- 4.2.1, iii or iv. - defines sectors by vessel and gear type (trawl catcher vessel)
- 4.2.1.1, Option 2 - must associate with the linked closed class processing facility or company - (and Option 3, which is redundant with provisions of 3.1.1.2)
- 4.2.2 - Option 1 or Option 4 (cannot have a single cooperative for each sector in a program with multiple licensed processors)
- 4.2.3 - defines cooperative agreement duration
- 4.2.4 - may be included - defines cooperative/processor association
- 4.3.1 - Option 1 (cannot have a single cooperative for the sector in a program with multiple qualified processors) - also may include all bullets
- 4.4 - including all subsections - define individual and vessel use caps
- 4.4 - may include all bullets
- 4.5.1 - rules concerning movement between cooperatives
- 4.5.2 - rules defining affects of processor license transfers on cooperatives
- 4.6, Option 1 - non-members of cooperatives would fish in open access

#### *Comparison of trawl catcher vessel alternatives*

October Alternatives 2A and 2B would create a system of voluntary harvester cooperatives with different levels of processor protection. Under October Alternative 2A, each harvest share holder would be required to deliver a specified percentage of its harvests to a licensed closed class processor. The closed class licenses would be allocated to processors that met minimum processing requirements during a defined qualifying period. Under October Alternative 2B, harvests would be linked to processors based on landings histories. Under this approach, each initial allocation would be linked to the processor to which the recipient of the initial allocation delivered the most pounds of primary species during the qualifying period. The harvest share linkage could be severed, but would require the payment of a penalty in the form of reduction of the annual allocation associated with the shares for which the linkage is severed. Although the processor protections of October Alternatives 2A and 2B are similar processor protections in June Alternatives 2 and 3, the voluntary cooperative structure of the October alternatives contrasts substantially with the mandatory cooperative structure of June alternatives.

October Alternative 3 is a mandatory cooperative program with the same processor linkage as used in October Alternative 2B. In a mandatory cooperative program, a harvester will receive an exclusive annual allocation only by joining a cooperative. October Alternative 3 overlaps with both of the June alternatives.

October Alternative 3 is the same as June Alternative 2 with the option for processor linkages.<sup>3</sup> October Alternative 3 is also the same as June Alternative 3 with the option for a limited open access fishery for non-members of cooperatives.<sup>4</sup> Table 1 shows the different structures that can be constructed from the different alternatives for managing trawl catcher vessels.

Table 1. Management Structures of the Trawl Catcher Vessel Alternatives

		<u>Cooperative type</u>	
		voluntary	mandatory
<u>Processor protection</u> share holders are required to deliver some percentage of harvests to:	a closed class of processors	October Alternative 2A	June Alternative 2
	a specific processor that shares are linked to	October Alternative 2B	June Alternative 2 June Alternative 3 October Alternative 3

Although June Alternatives 2 and 3 and October Alternative 3 all can create mandatory cooperative programs with linkage to a specific processor, the Council could create differences in these alternatives by selecting different sets of options to defined the management programs. The most straightforward distinction could be created by varying the penalties for breaking the linkage. The implications of the “open access penalties” differ substantially from share reduction penalties (see Section 3.1.1.3 of the Council motion for different penalty options). A preliminary analysis of the penalty options is presented after the discussion of alternatives below.

### Fixed gear catcher vessels

The October Alternatives 2 and 3 divide fixed gear vessels into differently. October Alternative 2 separates low producing fixed gear vessels and high producing fixed gear vessels. One alternative (“2 Low”) applies to low producing fixed gear vessels under October Alternative 2. Two alternatives (“2 High A” and “2 High B”) based on a similar underlying structure, would apply to high producing fixed gear vessels under October Alternative 2. October Alternative 3 divides fixed gear vessels by gear type.<sup>5</sup> Because of the differences in the way the two alternatives divide the fixed gear vessels, the discussion of the different management alternatives is structured slightly differently from the discussion of the catcher/processor and trawl catcher vessel alternatives above.

<sup>3</sup> June Alternative 2 also contains an option for a closed class of processors without linkages, as would be applied by October Alternative 2A.

<sup>4</sup> June Alternative 3 contains an option for non-cooperative members to either fish in limited open access fishery or be excluded from the fishery altogether. October Alternative 3 would maintain an limited open access fishery for non-members of cooperatives.

<sup>5</sup> June Alternatives 2 and 3 also divide the fixed gear fleet in the same manners as the October alternatives.



## *October Alternative 2*

Under this alternative, fixed gear catcher vessel shares are divided into a high producing vessel sector and a low producing vessel sector based on the amount of history the person receiving the initial allocation.

### *October Alternative 2 Low*

Under October Alternative 2 Low,

- Eligible persons with low producing fixed gear catcher vessel history would be allocated harvest shares based on that catch history.
- Share holders would be permitted to form voluntary cooperatives.
- For cooperative members, the allocation would be made to the cooperative and would be fished in accordance with the rules of the cooperative. For non-members of cooperatives, annual allocations of IFQs would be made to and fished by the individual.

The following elements and options would apply to “low producing” fixed gear catcher vessels under October Alternative 2 Low:

- 3.1.1.1, Option 2 exempts sector from closed class processor delivery requirements
- 3.1.1.4 defines the sector and provides for no processor delivery obligations
- 4.1, Option 1 - voluntary cooperatives
- 4.2.1 - proposed October revision to the motion would create an option that cooperatives can be formed between “low producing” fixed gear participants
- 4.2.1.1 - either Option 1 (no processor associations) or Option 2 (associate with any licensed processing facility or licensed processing company - not closed class)
- 4.2.2 - Option 1 - A cooperative is required to have at least 4 distinct and separate harvesters (only option that would work with this alternative)
- 4.2.3 - used to define duration of cooperative agreements
- 4.2.4 - may be included - defines cooperative/processor association
- 4.3.1, Option 1 - allocation of members is made to the cooperative - all bullets may be included
- 4.4 - may include all of these options concerning individual and vessel use caps
- 4.4 - may include all bullets
- 4.5.1 may include provisions concerning movement between cooperatives.

### *October Alternative 2 High A*

Under October Alternative 2 High A,

- Eligible persons with high producing fixed gear catcher vessel history would be allocated harvest shares based on that catch history.
- Share holders would be permitted to form voluntary cooperatives.
- For cooperative members, the allocation would be made to the cooperative and would be fished in accordance with the rules of the cooperative. For non-members of cooperatives, annual allocations of IFQs would be made to and fished by the individual.
- Each cooperative and individual would be required to deliver a specified percentage of its landings to processors that are members of a closed class. Class membership would be based on processing history.

- The PSC allocation to the non-members of cooperatives would be reduced to create an incentive for cooperative membership.

The following elements and options would apply to “high producing” fixed gear catcher vessels under October Alternative 2 High A:

- 2.5.3.1 - PSC allocation reduction for non-members of cooperatives (provision is a proposed addition to elements and options from October meeting)
- 3.1.1.1, Option 1, ii - must define the closed processors to which the sector must deliver (i.e., fixed gear or any large or small closed class processor depending on the processor licensing scheme)
- 3.1.1.4 defines the low producing sector, effectively defining the “high producing” sector
- 3.1.2 - including all subsections is used to define closed class of processors and the rules governing those processors
- 4.1, Option 1 - voluntary cooperatives
- 4.2.1 - proposed October revision to the motion would include an option that cooperatives can be formed between “high producing” fixed gear participants
- 4.2.1.1 - either Option 1 (no processor associations) or Option 2 (associate with any qualified closed class processing facility or qualified closed class processing company)
- 4.2.2 - Option 1 - A cooperative is required to have at least 4 distinct and separate harvesters - (other options may not apply since they would result in one cooperative for all high producing fixed gear participants)
- 4.2.3 - defines duration of cooperative agreements
- 4.2.4 - may be included - defines cooperative/processor association
- 4.3.1, Option 1 - allocation of members is made to the cooperative - all bullets may be included
- 4.4 - may include all of these options concerning individual and vessel use caps
- 4.4 - may include all bullets
- 4.5.1 - may include provisions concerning movement among cooperatives.

#### *October Alternative 2 High B*

Under October Alternative 2 High B,

- Eligible persons with high producing fixed gear catcher vessel history would be allocated harvest shares based on that catch history.
- Each allocation of quota shares would be “linked” to the qualified processor to which the share holder delivered the most pounds of primary species during the qualifying years. Processor qualification would be based on landings during a processor qualification period.
- Share holders would be permitted to form voluntary cooperatives.
- For cooperative members, the allocation would be made to the cooperative and would be fished in accordance with the rules of the cooperative. For non-members of cooperatives, annual allocations of IFQs would be made to and fished by the individual.
- Each share holder is eligible to join a cooperative associated with the processor to which its shares are “linked”.
- Each share holder and cooperative would be required to deliver a specific percentage of its landings to the “linked” processor.

- The PSC allocation to the non-members of cooperatives would be reduced to create an incentive for cooperative membership.
- Movement of shares between cooperatives would be subject to a share reduction penalty.

The following elements and options would apply to “high producing” fixed gear catcher vessels under October Alternative 2 High B:

- 2.5.3.1 - PSC allocation reduction for non-members of cooperatives (provision is a proposed addition to elements and options from October meeting)
- 3.1.1.1, Option 1, i - requires delivery to a linked closed class processor
- 3.1.1.2 - Used to define processor linkages
- 3.1.1.3 - used for determining penalty for moving shares between qualified processors.
- 3.1.1.4 - defines the low producing sector, effectively defining the “high producing” sector
- 3.1.2 - may include all subsections - used to define closed class of processors and the rules governing those processors
- 4.1, Option 1 - voluntary cooperatives
- 4.2.1 - proposed October revision to the motion would include an option that cooperatives can be formed between “high producing” fixed gear participants
- 4.2.1.1, Option 2 - must associate with the linked closed class processing facility or company - (and Option 3, which is redundant with provisions in 3.1.1.2)
- 4.2.2 - Option 1 or Option 4 (cannot have a single cooperative for each sector in a program with multiple licensed processors)
- 4.2.3 - defines duration of cooperative agreements
- 4.2.4 - may be included - defines cooperative/processor association
- 4.3.1, Option 1 - allocation of members is made to the cooperative - all bullets may be included
- 4.4 - may include all of these options concerning individual and vessel use caps
- 4.4 - may include all bullets
- 4.5.1 - may include provisions concerning movement among cooperatives.
- 4.5.2 - rules defining effects of processor license transfers on cooperatives (note that this provision should be broadened to include share holders that are not cooperative members)

### *October Alternative 3*

Under October Alternative 3,

- Fixed gear catcher vessel share holders are divided into two sectors, pot vessels and longline vessels.
- Eligible persons with fixed gear catcher vessel history would be allocated harvest shares based on that catch history.
- To receive an exclusive annual allocation, the holder of shares would be required to join a cooperative.
- The annual allocation of cooperative members would be made to the cooperative and would be fished in accordance with the rules of the cooperative.
- Eligibility for cooperative membership would be based on landings, with each harvester eligible to join a single cooperative associated with the processor to which it delivered the most fish to during the qualifying period (i.e., processor linkage is required). The cooperative, in turn, would be required to deliver a specific percentage of its landings to the associated processor.

- If the holder of harvest shares failed to join a cooperative, the shares of that person would be allocated to an open access fishery, comprised of all non-members of cooperatives of its gear catcher vessel sector.
- The PSC allocation to the open access fishery would be reduced to create an incentive for cooperative membership.
- Movement of shares between cooperatives would be subject to a share reduction penalty or would require participation in the open access fishery for one year.

The following elements and options would apply to fixed gear catcher vessels under October Alternative 3:

- 2.5.3.1 - PSC allocation reduction for non-members of cooperatives (provision is a proposed addition to elements and options from October meeting)
- 3.1.1.1, Option 1, i - requires delivery to the linked closed class processor
- 3.1.1.2 - used to determine processor linkages
- 3.1.1.3 - specifies penalties for movement of linked shares between processors
- 3.1.2 - including all subsections - used to define closed class of processors (needed for linkages)
- 4.1, Option 2 - mandatory cooperatives
- 4.2.1, iii or iv. - defines sectors by vessel and gear type (pot catcher vessel and longline catcher vessel)
- 4.2.1.1, Option 2 - must associate with the linked closed class processing facility or company - (and Option 3, which is redundant with provisions of 3.1.1.2)
- 4.2.2 - Option 1 or Option 4 (cannot have a single cooperative for each sector in a program with multiple licensed processors)
- 4.2.3 - defines cooperative agreement duration
- 4.2.4 - may be included - defines cooperative/processor association
- 4.3.1 - Option 1 (cannot have a single cooperative for each sector in a program with multiple licensed processors) - also may include all bullets
- 4.4 - including all subsections - define individual and vessel use caps
- 4.4 - may include all bullets
- 4.5.1 - rules concerning movement between cooperatives
- 4.5.2 - rules defining affects of processor license transfers on cooperatives
- 4.6 - Option 1, creates limited open access fishery form non-members of cooperatives

#### *Comparison of fixed gear catcher vessel alternatives*

The October alternatives for fixed gear catcher vessel participants differ substantively from the June alternatives in a few ways. The October alternatives follow the same division of the fixed gear sector, with fixed gear catcher vessel separated into a high producing sector and a low producing sector under October Alternative 2 and fixed gear catcher vessel participants are divided into two sectors by gear type, a longline catcher vessel sector and a pot catcher vessel sector, under October Alternative 3.<sup>6</sup>

---

<sup>6</sup> The division of the sector into “high producers” and “low producers” would not prevent establishment of rules that limit the transfer of shares across gear types. The transfer of shares among gear types could be governed by other rules.

Under October Alternative 2 Low, "low producing" fixed gear catcher vessel participants would be managed under a voluntary cooperative program with no direct processor protection that is not applicable to any other sector under either of the alternatives. October Alternative 2 Low and June Alternative 2 are the same.

Under both October Alternative 2 High A and October Alternative High B, high producing fixed gear catcher vessel participants would be subject to a voluntary cooperative program, under which harvesters would receive an exclusive share allocation but with a reduced PSC allocation. Under October alternative High A share holders and cooperatives would be required to deliver a specific portion of their harvests allocation to a closed class of processors. Under October alternative High B share holders and cooperatives would be required to deliver a specific portion of their harvests to a "linked" processor. Linkages would be initially determined based on landings during the qualifying period. Linkages, however, could be broken subject to a share reduction penalty. On breaking the linkage, a new linkage would be established with another qualified processor selected by the share holder. October Alternatives 2 High A and 2 High B have similar processor protections to those of June Alternative 2 (which has 2 options for processor protection). June Alternative 2, however, is a mandatory cooperative program, while October Alternatives 2 High A and 2 High B create a voluntary cooperative program. October Alternatives 2 High A and 2 High B differ from both of the June alternatives in this respect.

Under October Alternative 3, the fixed gear sector is subject to very similar management as under June Alternative 3. No distinction is made between high producing and low producing share holders. Instead, share holders are divided by gear type. Share holders would be subject to a mandatory cooperative program in which a cooperative would be required to delivery a specific percentage of its allocation to the processor to which its members delivered most of their catch historically (i.e., cooperative linkage would be required). October Alternative 3 would create an open access fishery for non-members of cooperatives, as does June Alternative 3. June Alternative 3 contains an additional option that would not permit non-members to participate in the fisheries. Table 2 shows the different structures that can be constructed from the different alternatives for managing fixed gear catcher vessels.

Table 2. Management Structures of the Fixed Gear Catcher Vessel Alternatives

		<u>Cooperative type</u>	
		voluntary	mandatory
<u>Processor protection</u> share holders are required to deliver some percentage of harvests to:	no direct processor protection	June Alternative 2 October Alternative 2 Low	
	a closed class of processors	October Alternative 2 High A	June Alternative 2
	the specific processor to which the shares are linked	October Alternative 2 High B	June Alternative 2 June Alternative 3 October Alternative 3

In reviewing the alternatives, the Council should note that under October Alternative 2 and June Alternative 2, "low producing" fixed gear catcher vessel participants would be governed by a voluntary cooperative alternative that would not be analyzed for any other sector. The Council provided its rationale for not applying this management to other participants at its June 2003 meeting.<sup>7</sup> It should be noted, however, that the closed class of processors alternative, which is included in Alternative 2 for the trawl catcher vessel sector and the high producing fixed gear catcher vessel sector, is not included in any alternative for the low producing fixed gear vessel sector. **The Council should provide its rationale for excluding a closed class of processors alternative for the low producing fixed gear vessel sector.** In doing so, the Council should explain the rationale for including both the less restrictive voluntary cooperative alternative without direct processor protection (in Alternative 2) and the more restrictive processor linkage alternative (in Alternative 3) for this sector.

**Preliminary discussion**

In June, staff provided the Council with preliminary analyses that could be used for refining elements and options. To aid the Council in assessing the selection of alternatives for analysis, staff has included portions of that analysis here, adapted to address the October alternatives. Finally, staff has also provided a brief discussion of legal issues related to certain aspects of two of the proposed community protection programs, specifically the Community Incentive Fisheries Trust and the Community Fisheries Quota Program. A legal opinion from NOAA General Counsel that describes the basis for those legal concerns is included as Attachment D.

---

<sup>7</sup> The record from the June 2003 meeting shows that the Council believes that the voluntary cooperative structure is not appropriate for other participants in the Gulf fisheries because it would jeopardize the stability of communities and the processing sector.



## Rules Governing Cooperatives under the Alternatives

The general alternative structures, together with several provisions in the Council motion, define the rules for cooperative formation, movement among cooperatives, and participation in the fisheries inside and outside of cooperatives. These provisions together are likely to impact the internal rules of the cooperatives, which in turn will affect the return that different participants are able to realize from their allocations. If these provisions are not carefully developed, some participants may be inadvertently affected by differences in negotiating strength across members of a cooperative. For example, in a cooperative composed primarily of pollock fishermen, a cod fisherman could have little leverage for changing rules to reasonably accommodate cod fishing. In the extreme, share holders with little or no direct activity in fisheries could control the harvests of active participants, if the active participants have no reasonable alternative to joining the cooperative. In considering rules, the Council should be wary of rules that create incentives to modify share holdings. A rule that requires 90 percent of eligible share holders<sup>8</sup> for cooperative formation may create an incentive for a single share holder to subdivide holdings among his friends and family to impose his will on other eligible share holders. This section briefly reviews some of the rules that govern cooperatives and raises several questions concerning the interaction of different influences. In assessing the options, the Council should consider whether adequate information is provided here to make decisions concerning which rules should be advanced and whether additional provisions should be added that might enable the Council to better balance interests of participants.

In analyzing the rules governing cooperatives, it is necessary to consider the different alternatives under consideration. For catcher vessels, these include voluntary cooperatives with no direct processor protection (Fixed Gear October Alternative 2 Low and June Alternative 2), voluntary cooperatives with a closed class of processors (Fixed gear October Alternative 2 High A and Trawl October Alternative 2A), voluntary cooperatives with processor linkages (Fixed gear October Alternative 2 High B and Trawl October Alternative 2B), mandatory cooperatives with a closed class of processors (June Alternative 2), and mandatory cooperatives with processor linkages (Fixed gear October Alternative 3, Trawl October Alternative 3, and June Alternative 3). For catcher/processers the alternatives are voluntary cooperatives (October Alternative 2) and mandatory cooperatives (October Alternative 2, June Alternative 2, and June Alternative 3). Each of these structures is discussed in turn. Before examining the details of the different alternatives, development of a few general concepts help frame the discussion.

In general, the assessment of the relative power of participants in a cooperative depends on several factors. These determinants of negotiating strength can be generalized to two categories, internal and external. Internal effects are generated by the rules governing cooperatives, such as rules of cooperative formation and any rules that define membership. External effects, which are equally important, are generated by the outside options available to a harvester that chooses not to join a cooperative. For example, a person's negotiating leverage with respect to another is highly dependent on the ability to walk away from a transaction and pursue other opportunities. In the context of these cooperatives, the harvester's negotiating strength with respect to members of a particular cooperative depend on the ability of the harvester to choose not to join the cooperative and remain in the fishery. Penalties for choosing not to join a cooperative (such as share reductions for moving between cooperatives and PSC reductions for fishing IFQs) also affect the extent of those opportunities. In the discussion that follows, both internal and external affects are considered.

---

<sup>8</sup> Changing the wording from "the holders of 90 percent of eligible shares" to "90 percent of the holders of eligible shares" substantially changes the incentives.

### **Voluntary cooperatives without direct processor protections**

(October fixed gear Alternative 2 low and low producing fixed gear vessels under June Alternative 2)

A voluntary cooperative program is one in which harvesters receive an exclusive allocation (i.e., IFQs) regardless of cooperative membership. Since a harvester may choose to fish IFQs in a voluntary cooperative program, the negotiating strength within a cooperative is of less concern, particularly if PSC shares are not reduced for those choosing to fish IFQs. If a cooperative arrangement is not in the harvester's interest, the harvester has several options, including joining another cooperative, forming another cooperative, and fishing IFQs. As a consequence, members of a cooperative derive little negotiating leverage with respect to others from the rules that govern cooperatives.

### **Voluntary cooperatives with a closed class of processors**

(October trawl Alternative 2A, October fixed gear Alternative 2 High A)

Under this structure cooperative membership is voluntary, minimizing concerns that a disparity of negotiating leverage will exist across harvesters. Several cooperatives are likely to form based on different harvesting interests and practices, as harvesters will be obliged to deliver a portion of their landings to any of the closed class of processors (rather than to a particular linked processor). Since harvesters would be allowed to join one of several cooperatives the ability of any one cooperative's members to assert bargaining pressure on other harvesters interested in joining the cooperative would be limited. The reduction in PSC for share holders that choose to fish IFQs, rather than join a cooperative, could create a substantial incentive for cooperative membership. The extent of the incentive is likely to depend on the primary, secondary, and PSC holdings of participant, participants need for PSC shares to harvest primary and secondary shares, and the value of PSC shares on transfer.

### **Voluntary cooperatives with processor linkages**

(October Alternative trawl 2B, October Alternative fixed gear 2 High B)

Although this alternative creates a voluntary cooperative structure, depending on the specific elements of the structure some bargaining leverage may be asserted by cooperative members that could not be asserted under the other voluntary structures. Under a program with processor linkages a harvester is required to deliver a specific portion of harvests to a specific processor. Depending on the specific cooperative formation rules, each "linked" processor might be allowed a single associated cooperative.<sup>9</sup> A harvester that did not wish to join the cooperative associated with the processor that its shares are linked to would have a few options. A harvester that does not wish to join the cooperative could choose to remain outside of the cooperative and fish IFQs. Under this structure, however, share holders that choose not to fish in a cooperative would be subject to a PSC share reduction. Although this share reduction might be intended to create an incentive for cooperative membership, it will also have the effect of providing leverage to majority members of a cooperative over share holders eligible to join the cooperative. A minority harvester could be faced with a

---

<sup>9</sup> Having a single cooperative associated with a processor could occur under either of the applicable options governing formation. Under the first applicable option, at least 50 percent of the shares eligible for a cooperative must be held by members for cooperative formation (Section 4.2.2, Option 4). Under this rule, only one cooperative could be formed in association with each processor. Under the second applicable option, four distinct harvest share holders would be required for cooperative formation. Under this rule, some small processors might have a single cooperative. The other two rules governing formation of cooperatives are sectoral rules that do not apply to processor "linked" cooperative structures.

choice of a loss of PSC share or joining a cooperative on less than favorable terms should the cooperative majority wish to exploit the opportunity. Alternatively, if a separate cooperative associated with the processor cannot be formed, a harvester's outside option to participating in the cooperative would be to move to a cooperative associated with a different processor. These movements would be subject to a share reduction penalty, which also provides leverage to the cooperative's majority.

Penalties imposing a loss of shares (either through a penalty for moving or a PSC reduction for fishing IFQs) could provide a cooperative with substantial leverage in dealing with minority members, unless other aspects of the program provide minority members with negotiating strength.

**One reasonable protection that could mitigate harm to minority cooperative members is to require that a cooperative accept membership of any eligible participant subject to the same terms and conditions that apply to other cooperative members (see proposed addition to 4.3.1 of the Council motion).** A provision of this type is included in the AFA cooperative program.<sup>10</sup> This provision, in and of itself, may be inadequate for protecting minority interests particularly if participants have very different portfolios of harvest shares. For example, a cooperative agreement's rules may apply the same to cod fishermen and pollock fishermen, but the rules could favor one group of fishermen over the other.

The specific rules governing cooperative formation also could mitigate the potential for minority interests to be subsumed by a majority in a cooperative. Adoption of a rule that requires holders of 50 percent of the eligible harvest shares for cooperative formation would allow the creation of a cooperative by holder's of that majority subject to rules very favorable to that majority. The rules governing formation would prevent others eligible for the same cooperative from forming a separate cooperative associated with the same processor. On the other hand, if a cooperative is required to have 90 percent of the shares eligible for the cooperative for formation, the holders of the majority of shares would be unable to meet the threshold if they establish rules that are unacceptable to more than 10 percent of eligible shareholders. Although a high threshold for cooperative formation could protect minority members, setting a threshold too high could create difficulties. For example, a high threshold could prevent cooperative formation altogether, if some eligible members are determined to fish IFQs regardless of the terms of the cooperative agreement. Similarly, a high threshold could provide a small minority with excessive leverage in negotiating terms of the cooperative, if a large majority of members would require its consent for cooperative formation.

A potential ancillary effect of structures with processor linkages and penalties on share holders that do not join cooperatives is that the processors could be harmed by actions of their cooperatives. A processor associated with a cooperative that asserts leverage over minority members would be harmed, if minority members choose to move to a new linked processor. Such movements might occur under this structure in the long run, since the penalties for moving between linked processors are one time penalties, while the PSC reductions would occur every year that the share holder elected to fish IFQs independent of the cooperative. The specific effects will depend on the interaction of several factors, including the magnitude of the penalty for moving between cooperatives, the PSC reduction for fishing IFQs, and the extent to which a cooperative might benefit from additional members. These effects are all likely to differ depending on the circumstances of the participants involved.

---

<sup>10</sup> See AFA, section 210(B)(2).

### **Mandatory cooperatives with processor linkages**

(October fixed gear Alternative 3, October trawl Alternative 3, high producing fixed gear catch vessels and trawl catcher vessels under June Alternative 2, and June Alternative 3)

In a mandatory cooperative structure, a harvester will receive an exclusive allocation only by joining a cooperative. In a mandatory cooperative structure with processor linkages, a harvester would receive an exclusive allocation only by joining a cooperative that is associated with a particular processor.

Under this structure, a harvester may have a few outside options to joining a cooperative. Depending on the specific provisions of the alternative, the harvester may be able to elect to participate an open access fishery. The harvester may also be able to change cooperatives. This change of cooperatives could have different consequences for the harvester depending on the specific provisions of the alternative and specific circumstances. If the Council chooses a cooperative formation rule that results in a single cooperative associated with a processor, movement between cooperatives would require changing processors. These movements would be subject to either a share reduction penalty or a penalty year in the open access fishery. As a result, the cooperative could have substantial leverage in dealing with minority members, unless other aspects of the program provide minority members with negotiating strength (see discussion of these penalties below).<sup>11</sup>

If the Council adopts a cooperative formation that allows multiple cooperatives to associate with a processor, eligible share holders that have difficulty reaching compromises concerning harvest of shares with a majority of a cooperative might be able to join a different cooperative without being subject to a penalty for moving to a different processor. Although efficiencies in harvesting and management could be sacrificed if many cooperatives are formed, the interests of the different share holders are less likely to be jeopardized by a cooperative majority. In the long run, losses of efficiency are likely to be minimal.

### **Mandatory cooperatives with a closed class of processors**

(High producing fixed gear catcher vessels and trawl catcher vessels under June Alternative 2)

Under this alternative, a cooperative would receive an exclusive annual allocation based on its members harvest share holdings. Cooperatives would be required to deliver a specified percentage of harvests to processors in a closed class.

Depending on the specific elements defining this structure, participants could have a few outside options to joining a specific cooperative. First, to have a reasonable working system of cooperatives, this structure might best support several cooperatives. In the current options for cooperative formation, only the requirement of four distinct shareholders would allow multiple cooperatives in each sector (4.2.2, Option 1). Assuming that this criterion for formation is used, then several cooperatives could be formed in any sector. Since the only eligibility criterion would be share holdings, a harvester would be able to join one of

---

<sup>11</sup> As under the previously discussed alternative, processors that are associated with a cooperative that asserts this leverage over minority members could be harmed, if minority members move between cooperatives.

several cooperatives limiting the ability of any cooperative to impose unfair or onerous terms for cooperative members.<sup>12</sup>

### **Mandatory cooperative for catcher/processors**

(October catcher/processor Alternative 3 and June Alternatives 2 and 3)

Under these alternatives catcher/processor share holders would be subject to a mandatory cooperative program that would require cooperative membership for an exclusive allocation. The ability of a majority in a cooperative to exert unfair negotiating leverage over minority members will vary with the rules adopted for cooperative formation and the rules governing the open access fishery. If a rule is adopted that requires a majority or more of the harvest share holders or harvest shares for cooperative formation, a harvester in this sector would not have the ability to move among cooperatives in the sector.<sup>13</sup> Depending on whether an open access fishery is available to the share holder and the participation in that open access fishery.

If the Council adopts a rule that requires 4 distinct share holders for cooperative formation, a catcher/processor may be able to join a different cooperative, if the rules of one cooperative are viewed as unfair. The extent of opportunities in this case could depend on whether catcher/processors are considered a single sector or separated into three sectors by gear type. Pot catcher/processors might have only one or two cooperatives because few catcher/processors participate with pots. In any case, additional opportunity for participation in a cooperative would result since each sector could support multiple cooperatives.

### **Voluntary cooperatives for catcher/processors**

(October catcher/processor Alternative 2)

The ability of a cooperative to assert unfair negotiating leverage over other share holders is reduced under this alternative since share holders that choose not to join a cooperative would be able to fish IFQs. Depending on the specific elements of this program, however, a cooperative majority may have substantial leverage over share holders wishing to join the cooperative. If the PSC reduction for non-members of cooperative is large, a cooperative may be able to gain concessions from share holders interested in joining the cooperative to avoid the penalty. The ability to exact concessions would be limited, if the rules governing cooperative formation permit several catcher/processor cooperatives to form. Currently, the only rule that requires four distinct share holders for cooperative formation would provision would permit multiple cooperatives to form.

### **Penalties for Moving Between Linked Processors**

Several of the alternatives provide for a linkage that requires a portion of harvests made with shares to be delivered to a specific processor. The motion provides two potential types of penalties for the movement of

---

<sup>12</sup> A harvester would also have the ability fish in the open access fishery, although the bycatch reductions and uncertainties of the open access fishery limit its appeal.

<sup>13</sup> Depending on the alternatives defined by the Council, an alternative to cooperative membership could be participation in the open access fishery. As noted earlier, any bycatch reduction, the level of competition, and the circumstance of the individual harvester will determine the extent to which the open access fishery is a reasonable option for a harvester faced with an unreasonable cooperative agreement.

these shares between processors (or breaking the linkage with one processor and establishing a new linkage with another processor).<sup>14</sup> In addition, the motion contains provisions that would have no penalty for the movement of shares and a total prohibition on the movement of shares. The Council should consider whether the no penalty option and the no movement option are reasonable alternatives. In the case of the no penalty option, one may question whether the administrative burden of developing an elaborate system of linkages is appropriate, if the linkages are binding in no way. The option that would prevent any movement of shares might be considered unreasonable, if the Council intends any processor competition for landings of A shares or the development of efficiencies in A share landings under the program.

In considering the two different penalty provisions, the Council should consider its purpose for establishing penalty provisions and the potential effects of the different options. The share reduction penalty should provide a relatively clear and predictable indication to harvesters and processors of the cost of the movement of shares that will allow the harvest share holder and both of the processors involved to determine whether to bear the cost movement and the cost of preventing the movement. For example, if a harvester is faced with the opportunity to relocate to a different processor, the cost of a share reduction penalty would be its loss of returns on that year's of the penalty amount. For a harvester to make the move it must believe that the new processor will pay an ex vessel price that will compensate for the penalty. This may take a few years or could be accomplished by the processor paying a bonus in the first year to cover the cost of the penalty to the harvester. For the processor that is trying to attract the harvester, the cost of establishing the new linkage are payments (either ex vessel prices or a one year bonus) that are higher than that of its competitor by enough to cover the one-year penalty. To the processor that may lose the share linkage, the cost of keeping the harvester is the payment of an ex vessel price that is not so far below the price of the competitor's that the one-year penalty would be compensated for by the competitor.

The open access penalty has an entirely different structure that makes it far less predictable. If the open access fishery has several participants that are moderately successful in an open access fishery, a very good competitor in an open access fishery may face a very limited penalty for a year in the open access. Participants in the open access are likely to be less efficient, but it is possible that a competitive participant may be able to make up for the loss of efficiency through increasing harvests. On the other hand, if the open access fishery has many competitive participants, a harvester that is accustomed to working in a cooperative may perceive a large penalty for participating in the open access fishery. This participant is likely to suffer a loss of efficiency and a loss of catch to harvesters that are geared toward participation in an open access fishery. The reduction of the bycatch allocation to the open access will increase the penalty in fisheries that are constrained by their bycatch allocations. Bycatch could also be a much greater constraint on harvests in the open access fishery where harvesters race for catch during a potentially limited season. The penalty of requiring a year in an open access fishery, however, cannot be predicted and may vary over time and across sectors. In some years with few open access participants, the penalty could be minimal. In other years with several competitive participants, the penalty could be great. Participation and competitiveness of participants is likely to vary across sectors. In addition, the penalty is likely to vary substantially across share holders. Share holders that are able to effectively compete in the open access are likely to face a substantially lower penalty from an open access year than share holders that are less able to compete.

---

<sup>14</sup> Under the current alternatives, this would apply only to the movement of shares between cooperatives. The only provisions for an exclusive (or protected) share allocation is within a cooperative.



A second issue that arises in considering whether an open access penalty is workable and reasonable is whether some harvesters may be able to use gamesmanship to take advantage of the open access. For example, a harvester may choose to move small quantities of shares through the open access from year to year to enable participation in the open access. If any share holder that has shares in the open access is permitted to fish the open access, it is possible that some participants may use the open access in this manner. By moving shares a few shares through the open access, the harvester will have the right to participate to the detriment of those harvesters attempting to use the open access as intended. One alternative to overcome this problem is to require that a harvester move all of its shares through the open access. Under this approach, all of a harvester's shares would be effectively blocked, so that any movement or transfer of shares would be all-or-nothing.<sup>15</sup> Using this structure, however, is likely to prevent the realization of efficiencies under the program, as harvesters try to reconfigure from their initial allocations to develop a good working multispecies portfolio of shares. Since some of these trades may be required to be across cooperatives (and processors) a rule that prohibits division of initial allocations may be a hindrance to realizing benefits under the program.

### **Legal Concerns with Community Protection Options**

NOAA GC has provided a legal opinion, dated October 3, 2003, on delegation of authority and the proposed Community Incentive Fisheries Trust (CIFT) Program that is currently included in the Council's options (Section 2.9.4) for Gulf Rationalization. NOAA GC advises that, as currently proposed, the CIFT Program may not be legally viable. This paper briefly outlines the legal opinion and potential application to both the CIFT and the Community Fisheries Quota (CFQ) Program. The legal opinion is provided as Attachment D.

The CIFT Program involves an initial allocation of a portion (10% - 30%) of the overall Gulf harvest shares to the CIFT organization. The CIFT organization holds the shares and reallocates them back to individual fishermen, subject to specific contract terms. The Board of Directors of the CIFT is intended to represent communities, processors, and crewmembers in the region, and its purpose (according to Section 2.9.4) is to direct the use of these shares such that it mitigates impacts directly associated with the implementation of a rationalization program. The majority of the issues associated with the CIFT Program have been deferred to a trailing amendment.

NOAA GC notes that the Secretary of Commerce (Secretary's) initial allocation of quota share (QS) to an organization representing one or more communities is relatively straightforward; it is the part of the CIFT proposal that calls for the annual reallocation of IFQ to individual fishermen that causes legal concern. The opinion states that the authority delegated to the community organization, in this case, a CIFT, cannot be unlimited: "Such sub-allocations of IFQ must be made subject to final approval by the Secretary. Any party aggrieved by such annual adjudications also would have a constitutional right to an agency appeal."

In essence, the legal opinion states that the Secretary could not approve and implement a program in which discretionary authority to reallocate annual IFQ is delegated to a separate entity, without Secretarial approval of those reallocations and a formal appeals process. (In order to have an appeals process, one must have Secretarial approval of the decision being appealed.) There are two elements to Secretarial responsibility that are relevant to this issue: 1) the Secretarial responsibility to determine that rulemaking meets the national standards in the Magnuson-Stevens Act, and 2) the Secretarial responsibility to apply that rulemaking to

---

<sup>15</sup> In the absence of blocking shares, harvesters may be able to use holding companies to create separate interests for portions of their allocation to qualify for the open access fishery.

individual situations. The Secretary cannot delegate these powers when they are considered discretionary, and, in the case of the CIFT, the reallocation of IFQ would require the CIFT to exercise discretion in its decisions. The Secretary can only delegate ministerial functions, or those that do not require judgment.

The opinion notes that the current structure of the CIFT Program creates a problem with both of the above Secretarial responsibilities. The current options do not include a set of standards that the CIFT would apply to determine how to reallocate IFQ to the individuals that will actually fish the shares. Absent such standards, the Secretary cannot know whether the rulemaking to implement the program would meet the requirements of the National Standards. Secondly, there is currently no mechanism for Secretarial review and approval of each and every reallocation from the CIFT to the individual fishermen. As stated above, without this review, there is no mechanism for an appeals process, which is required under the Administrative Procedure Act and the U.S. Constitution.

Based on this opinion, it appears that the details of the CIFT Program would need to be included in the overall Gulf Rationalization analysis prior to Secretarial approval of the entire program. Those details would need to include both the standards or contract terms the CIFT would use to determine how to reallocate shares among individual fishermen, and, should it remain a discretionary decision, a provision for Secretarial review and approval of each reallocation.

NOAA GC has advised staff that the legal concerns discussed in the context of the CIFT Program could likewise be applied to the Community Fisheries Quota (CFQ) Program under Section 2.9.2, as it is currently proposed. The CFQ Program would allow quota to be allocated to a nonprofit entity, which would hold the shares on behalf of a specified list of eligible communities. The primary purpose of the program appears to be for the nonprofit entity to hold the shares and lease the annual quota to eligible community residents in order to allow them an opportunity to participate in the Gulf groundfish fisheries. While a resident may lease CFQ at fair market value, it is also foreseeable that the nonprofit entity would lease quota at less than fair market value (or no cost) in order to meet the intent of providing opportunities and benefits to resident fishermen.

The structure of the program implies that the benefits of the CFQ allocation are intended not only for the nonprofit entity, but also for resident fishermen. In the sense that the nonprofit entity would be given discretionary authority under this program to determine how to further allocate the use of the shares, this triggers the same legal concerns as were discussed under the CIFT.

The program design could potentially be modified to mitigate these concerns. In brief, the CFQ and CIFT proposals would need to be redesigned to:

- Limit the decisionmaking authority of the community administrative entity to ministerial functions (those in which there is no personal discretion or judgment involved); and/or
- Incorporate a mechanism for Secretarial review and approval of each suballocation of annual IFQ from the community administrative entity to the individual fisherman (subject to an administrative appeals process).

The first type of modification would limit the community entity to administering an application process using objective criteria only, which would be established in Federal regulation. Secretarial review of this process would determine whether those objective criteria were applied correctly. By contrast, the community entity could use subjective criteria in the application process, and recommend to NMFS the recipients of the annual CFQs. NMFS would have to review and approve each of those decisions, which could significantly increase the administrative cost to the agency to implement this program.

As an alternative, the CFQ Program design could be modified as follows:

- Change the overall purpose of the program from allocating QS to a community entity to lease to individual residents of eligible communities, to allocating QS to a community entity for the purpose of deriving revenues from leasing the shares to support community development projects in the eligible communities.

This type of modification would revise the purpose of the program, so that the benefits generated from the CFQ would accrue to the community entity itself. The entity could use the shares to meet that intent, either by purchasing a vessel and fishing the shares, or leasing them to another harvester at fair market value. While this change may mitigate the legal concerns, it likely does not meet the goal of the original proponents of the program to increase fishing opportunity for individual community residents.

**The result of the legal opinion is that both the CIFT and the CFQ Program may need to be redesigned to allay the legal concerns associated with the delegation of allocation authority (granting access to the resource) that is currently part of each program. Staff notes that program specifics, modifications, or related future proposals may need to be reviewed by NOAA GC to determine if there are similar legal implications.**