

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *Chris*
Executive Director

DATE: September 24, 2004

SUBJECT: Central Gulf of Alaska Rockfish Demonstration Program

ESTIMATED TIME
2 HOURS

ACTION REQUIRED

Finalize alternatives and elements for analysis.

Section 802 of Title VIII of the Consolidated Appropriations Act of 2004 directed the Secretary of Commerce to develop a rockfish demonstration program for the Central Gulf of Alaska rockfish fisheries in consultation with the Council. At its April and June meetings, the Council responded to the directive of the legislation, public testimony, and an industry stakeholder proposal, by adopting for analysis a set of alternatives and elements that could be used to select an alternative to establish the demonstration program. At its June meeting, the Council chose to defer until this meeting the identification of sideboards that would limit participation of rockfish program participants in other fisheries during the month of July. In addition, in the preliminary stages of the analysis staff has identified a few other issues that could benefit from Council consideration. Specifically, staff suggests that the Council consider whether to include non-trawl participants in the primary program, as the historic participation of this sector is very limited and may result in qualified participants having a smaller allocation than non-qualified participants that choose to operate in the entry level fishery. Staff has also identified a few minor issues for clarification. Additional information concerning all issues which staff suggests that the Council consider at this time are contained in the discussion paper and its supporting documents, which are attached as Item C-1(a).

**Central Gulf of Alaska Rockfish Demonstration Program
Discussion paper - Report on progress and clarifications
October 2004**

At its April 2004 meeting, the Council adopted for analysis two alternatives, each with several options that would establish a demonstration program to rationalize the Central Gulf of Alaska (CGOA) rockfish fishery. The demonstration program is being developed in consultation with NOAA Fisheries, who was directed by Congressional legislation to establish a pilot rationalization program for the CGOA rockfish fishery. At its June 2004 meeting, the Council made minor amendments to the alternatives. A complete copy of the alternatives, as defined to date, is Attachment 1 to this document.

For this meeting, staff has prepared this document, which briefly outlines the issues in need of clarification or further development for staff to develop the analysis of alternatives requested by the Council.

Inclusion of the non-trawl catcher vessel sector in the primary program

At its June 2004 meeting, the Council expanded the options for defining sectors to include non-trawl catcher vessels as a sector in the primary program. In preliminary analyses, staff has noted that non-trawl participants have very little history in the fisheries. Table 1 below shows the participation of non-trawl vessels between 1996 and 2002, the qualifying years for this program.

Table 1. Participation of non-trawl catcher vessels in the CGOA rockfish fisheries

Year	Pacific Ocean perch		Northern rockfish		Pelagic shelf rockfish	
	Metric tons	Number of vessels	Metric tons	Number of vessels	Metric tons	Number of vessels
1996					*	2
1997			*	1	*	3
1998					*	2
1999					*	2
2000					*	2
2001					4.0	6
2002					2.1	8
Total			*	1	16.8	21
Percent of all catch	0.0		*		0.10	
Total (all participants)	44,847.6	70	18,286.2	68	16,417.6	89

Source: NPFMC Rockfish Database 2004, Version 1

* withheld for confidentiality

The distribution of non-trawl participation over the qualifying period show very few harvesters participating in the rockfish fisheries, with some increase in recent years in the pelagic shelf rockfish fishery. Based on historic participation, if non-trawl catcher vessels are included in the primary program, persons eligible for that sector (at most 21 persons) would share a historic allocation of approximately one-tenth of one percent of the pelagic shelf rockfish fishery, none of the Pacific Ocean perch fishery, and a small amount of the northern rockfish fishery.¹

¹ Although the amount of the northern rockfish allocation cannot be displayed, the allocation is likely to be very small since only a single non-trawl vessel participated in this fishery and only in one of the seven qualifying years.

Under the legislation authorizing this program, any participant that is eligible for the primary program cannot participate in the entry level program. Options proposed for the entry level fishery would allocate a portion of the 3 percent and 5 percent of the rockfish to the entry level program, with a portion that allocated to the non-trawl sector (see 1.2 of the Council motion). So, if non-trawl catcher vessels are included in the primary program, eligible participants (likely the members of the sector with the most experience in the rockfish fisheries) would be precluded from participating in the entry level fishery. The Council might consider whether the minor participation of non-trawl catcher vessels justifies their inclusion in the primary program. The Council might exclude the sector from the primary program, if the allocation to the sector under the entry level program is adequate to support their future participation in these fisheries.

If the Council decides to remove the non-trawl sector from the primary program the following two changes to the motion will accomplish that end:

- 1) delete "Option 3. Non-trawl catcher vessel" from section 3.1.
- 2) delete the words "by any gear type" from the third bullet in section 3.3.

Sideboards

At its June meeting, staff presented the Council with a document that included a discussion of historic participation of harvesters eligible for the rockfish pilot program in other fisheries during the month of July, when the rockfish fisheries are prosecuted. A copy of that portion of the discussion paper and its addendum is Attachment 2 to this document. At the request of industry members, the Council did not specify sideboards to limit participation of rockfish eligible harvesters' activities in other fisheries, instead delaying the definition of specific options for this meeting. To enable staff to complete the analysis, sideboard options should be specified.

In developing sideboards as a part of rationalization programs, the Council typically considers:

- identifying fisheries that are likely to experience increased effort as a result of the rationalization program
- identifying participants with no or minimal history in an identified fishery that should be excluded from the identified fishery
- identifying participants with minimal rockfish history and/or substantial history in an identified fishery, who should be exempt from the sideboard
- determining historic participation in an identified fishery by participants that will be subject to the sideboard, to set the level of the sideboard

Depending on the objectives of the Council, one or more of these considerations could be applied to sideboard activity of rockfish eligible harvesters in other fisheries.

Cooperative formation under alternative 2

In section 5.4 of the Council motion, the minimum number of LLPs necessary for cooperative formation under alternative 2 is not specified. The Council should consider establishing this minimum (or options for establishing the minimum).

Under this alternative, eligible harvesters are required to form a cooperative to participate in the rationalized fishery. Cooperatives must be associated with a licensed processor. The ability of harvesters to use a cooperative formation threshold to assert negotiating leverage over others is likely to be limited provided the threshold is not set so high that only a few cooperatives can form in the sector. A threshold that limits the number of cooperatives that can form could also lead to a licensed processor being precluded from associating with a cooperative, if there are more licenses than possible cooperatives.

The Council could consider limiting the number of cooperatives that may associate with a single processor, as under alternative 3. This limitation could lead a processor to delay its commitment to associate with a cooperative to attract additional members. The limitation could limit flexibility of participants to specify terms in their agreements, however, given that this program pertains to a limited number of species, the loss of flexibility is limited.

Additional clarifications

In addition to the issues above a few other issues should be clarified at this time.

First, in section 5.4 of the Council motion (concerning catcher vessel cooperatives under alternative 2), the provision concerning processor associations in the last bullet should be removed since processor associations are not a part of that alternative.

Second, in section 2.1, Option 3 specifies that the division of the sector allocations between trawl and non-trawl could be proportional to the number of applications received taking into account the harvest capability of the different gear types. The method for implementing this provision is not provided. The provision could be interpreted in several ways, each of which would take substantial effort to analyze. For example, observer data could be analyzed basing the allocations on targeted effort. The data for these analyses are likely to be very limited given the absence of observer requirements on vessels under 60 feet and the very limited participation of the non-trawl sector in the rockfish fisheries. Given that the non-trawl sector has no landings of Pacific Ocean perch and very limited participation in the entry level fishery, a method of administering this provision is not apparent. An alternative approach, to some of which is already included in the motion, would be for the Council to specify weighting for allocations by gear type, basing the allocation to a gear on the number of applications received, and rely on the rollover provision contained in 1.2 to redistribute a portion of the unharvested allocation from non-trawl gear to trawl gear (if necessary).

ATTACHMENT 1 – OCTOBER 2004

**NORTH PACIFIC FISHERY MANAGEMENT COUNCIL
CENTRAL GULF OF ALASKA ROCKFISH PILOT PROGRAM
Council Motion
Updated to June 12, 2004**

PROBLEM STATEMENT

The present management structure of the CGOA rockfish fishery continues to exacerbate the race for fish with:

- Increased catching and processing capacity entering the fishery,
- Reduced economic viability of the historical harvesters (both catcher vessels and catcher processors) and processors,
- Decreased safety,
- Economic instability of the residential processor labor force,
- Reduced product value and utilization,
- Jeopardy to historical groundfish community stability,
- Limited ability to adapt to Magnuson-Stevens Act (MSA) requirements to minimize bycatch and protect habitat.

While the Council is formulating GOA comprehensive rationalization to address similar problems in other fisheries, a short-term solution is needed to stabilize the community of Kodiak. Kodiak has experienced multiple processing plant closures, its residential work force is at risk due to shorter and shorter processing seasons and the community fish tax revenues continue to decrease as fish prices and port landings decrease. Congress recognized these problems and directed the Secretary in consultation with the Council, to implement a pilot rockfish program with the following legislation:

SEC. 802. GULF OF ALASKA ROCKFISH DEMONSTRATION PROGRAM. The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) and historic participation of fish processors (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in Central Gulf of Alaska. Such a pilot program shall (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historical harvesting of such bycatch species. The pilot program will sunset when a Gulf of Alaska Groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from date of implementation, whichever is earlier.

The fishing fleets have had little experience with cooperative fishery management and needs to begin the educational process. For the fishery to be rationalized all aspects of the economic portfolio of the fishery needs to be recognized. To stabilize the fishery economy all the historical players – harvesters (both catcher vessels and catcher processors) and processors need to be recognized in a meaningful way. The demonstration program is designed as a short-term program for immediate economic relief until comprehensive GOA rationalization can be implemented.

Alternatives, Elements and Options

The Council recommends the following elements and options for the CGOA Rockfish Pilot program be included for analysis:

Catcher Vessel Alternatives

- 1) Status Quo
- 2) Cooperative program with license limitation program for processors
- 3) Cooperative program with cooperative/processor associations

Catcher Processor Alternatives

- 1) Status Quo
- 2) Cooperative Program
- 3) Sector Allocation

Alternatives 2 and 3 are defined by the following elements and options. Differences in the elements and options between the two alternatives and across the two sectors are noted.

1 Set-asides

Prior to allocation of catch history to the sectors, NMFS shall set aside:

- 1.1 ICA: An Incidental Catch Allocation (ICA) of POP, Northern rockfish and pelagic shelf rockfish to meet the incidental catch needs of fisheries not included in the pilot program
- 1.2 Entry Level Fishery: A percentage of POP, Northern rockfish and pelagic shelf rockfish for catcher vessels not eligible to participate in the program, as mandated in the Congressional language. For the first year of this program, this set-aside will be: a) 3% b) 4% c) 5% percent of each of these target rockfish species. If this amount is less than 5% and is taken in the first year, the set-aside will be increased to 5% in the second year.
 - o Allocations shall be apportioned between trawl and non-trawl gear:
 - Option 1. 50/50
 - Option 2. proportional to the number of applications received
 - Option 3. proportional to the number of applications received taking into account the harvest capability of the different gear types.
 - o The Council will develop a method for rolling over an allocation to the other entry level sector, in the event a sector is unable to harvest its allocation.
 - Suboption: The rollover from non-trawl to trawl will occur at the end of the third quarter.
 - o Prosecution of the entry level fishery will be supported by general allocations of PSC to the gear type not allocated under 3.3.1.3 and the general allocations of secondary species not allocated under 3.3.1.2

2 Entry-Level Fishery

2.1 Catcher Vessel Participation:

Vessels that can participate in the Entry Level fishery are those vessels that did not qualify for the CGOA rockfish pilot program.

2.2 Processor Participation:

Processors who purchase and process the entry level rockfish quota must be non-qualified processors.

2.3 Fishery participation:

Before the beginning of each fishing year an application must be filed with NMFS by the interested vessel that includes a statement from a non-qualified processor confirming an available market.

2.4 NMFS will determine:

- Whether limits need to be imposed on vessel participation
- If limits need to be imposed, determine the appropriate number of vessel that would be allowed to fish in the entry level fishery
 - Suboption: Equal shares distributions to the vessel applicants
 - Suboption: Limited access competitive fishery
- Entry permits are non-transferable and must be fished by the named vessel

3 Sector Allocations

3.1 Sector Definitions

Option 1. Trawl catcher vessel

Option 2. Trawl catcher processor

A trawl catcher-processor is a trawl vessel that has a CP LLP license and that processes its catch on board.

Option 3. Non-trawl catcher vessel

3.2 Rationalized Areas

- History is allocated for the CGOA only (NMFS statistical areas 620 and 630)

3.3 Sector Allocations

- Catch history is determined by the sector qualified catch in pounds as a proportion of the total qualified catch in pounds.
- Sector allocation is based on individual qualified vessel histories with the drop-2 provision at the vessel level.
- The eligibility for entry into the program is one targeted landing of POP, Northern rockfish or PSR caught in CGOA during the qualifying period by any gear type.
- The CP catch history will be based on WPR data.

3.3.1 Each sector is allocated catch history based on:

Option 1. The sum of all catch history of vessels in that sector for the years 1996-2002, drop two, whether the vessels earned a CGOA LLP endorsement or not.

Option 2. The sum of all catch history of vessels in that sector for which it earned a valid, permanent, fully transferable CGOA LLP endorsement, for the years 1996-2002 drop two.

Suboption: include history of vessels which hold a valid interim endorsement on implementation of the program

3.3.1.1 Target species:

- Qualified target species history is allocated based on retained catch (excluding meal)

- History will be allocated to each sector for POP, Northern rockfish and PSR caught in CGOA based on retained catch during the open season
- Different years may be used for determining the history of each of the three rockfish species.
- Full retention of the target rockfish species required

3.3.1.2 Secondary species:

- Secondary species history is allocated based on
 - a) total catch
 - b) retained catch
 while targeting the primary rockfish species listed above.
- History will be allocated to each sector for sablefish, shortraker/rougheye rockfish, thornyheads and Pacific cod.

Participants must retain all allocated secondary species and stop fishing when cap is reached.

Options for Pacific cod.

Option 1. Allocations of Pacific cod as a secondary species will be at the following rate of harvest history:

 - a. 100 percent
 - b. 90 percent
 - c. 80 percent
 - d. 70 percent

Option 2. Pacific cod history will be managed by MRA for vessels that fish on the offshore pcod quota
- All non-allocated secondary species will be managed by MRA, as in the current regime. This includes Arrowtooth flounder, deep water flatfish, shallow water flatfish, flathead sole, rex sole, pollock, other species, Atka mackerel and other rockfish.
- Secondary species allocations will be based on:

Option 1) Catch by sector of the secondary species caught while targeting rockfish divided by the catch of secondary species by all sectors over the qualifying period. The calculated percentage is multiplied by the secondary species quota for that fishery year and allocated to each sector in the pilot program. (analyze total and retained catch)

Option 2) Percentage of catch by sector of the secondary species within the rockfish target fisheries divided by the total number of years in the qualifying period. The calculated percentage is multiplied by the secondary species quota for that fishery year and allocated to each sector in the pilot program. (analyze total and retained catch)

3.3.1.3 Prohibited species (halibut mortality):

- Allocation to the pilot program will be based on historic average usage, calculated by dividing the total number of metric tons of halibut mortality in the CGOA rockfish target fisheries during the years '96-'02 by the number of years (7). This allocation will be divided between sectors based on:
 - Option 1) The actual usage of each sector
 - Option 2) The relative amount of target rockfish species allocated to each sector.

4 Allocation from Sector to Vessel

4.1 Within each sector, history will be assigned to LLP holders with CGOA endorsement that qualify for a sector under the 'sector allocations' above. The allocations will be to the current owner of the LLP of the vessel which earned the history.

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

4.2.1 Persons who have purchased an LLP, with a CGOA endorsement to remain in the fishery may obtain a distribution of harvest share on the history of either the vessel on which the LLP is based or on which the LLP is used, not both. License transfers for purposes of combining LLPs must have occurred by April 2, 2004.

4.3 Target species:

Each LLP holder will receive an allocation of history equivalent to their proportion of the total of the sector qualifying history.

4.4 Secondary species:

Each LLP holder will receive an allocation of sector history proportional to their allocation of target rockfish history

4.5 PSC (halibut mortality)

- Each LLP holder will receive an allocation of halibut mortality equivalent to their proportion of the sector rockfish history

4.6 Allocations of secondary species:

Option 1) Must be fished in conjunction with the primary species allocations.
(Compliance monitored at offload)

Option 2) May be fished independently of the primary species allocations.

5 Co-op provisions

5.1 Duration of cooperative agreements is 2 years.

5.2 For all sectors

- The co-op membership agreement and the Contract will be filed with the RAM Division. The Contract must contain a fishing plan for the harvest of all co-op fish.
- Co-op members shall internally allocate and manage the co-op's allocation per the Contract.
- Subject to any harvesting caps that may be adopted, allocated history may be transferred and consolidated within the co-op to the extent permitted under the Contract.
- The Contract must have a monitoring program. Co-op members are jointly and severally responsible for co-op vessels harvesting in the aggregate no more than their co-op's allocation of

rockfish species, secondary species and PSC mortality, as may be adjusted by inter-co-op transfers.

- Co-ops may adopt and enforce fishing practice codes of conduct as part of their membership agreement.
- Co-op membership agreements shall allow for the entry of other eligible harvesters into the co-op under the same terms and conditions as agreed to by the original agreement.
- Co-ops will report annually to the Council as per AFA.

5.3 CP sector:

History is allocated to the current owner of the LLP of the vessel that earned the history.

- Owners may fish their allocation independently if the LLP has a CGOA endorsement, or may enter into a cooperative arrangement with other owners.
- More than one co-op may form within the sector
- Any number of eligible LLPs may form a co-op
- Allocations may be transferred between co-ops of at least:
 - Option 1: two LLPs
 - Option 2: three LLPs

5.4 CV sector:

For Alternative 2:

- Voluntary co-ops may form between eligible harvesters.
- All cooperative harvests under this program must be delivered to eligible processors.
- Harvesters may elect not to join a co-op, and continue to fish in an LLP/Open Access fishery. Those LLPs that opt out of the cooperative portion of the pilot program will be penalized 0 to 20% of their historical share (annual allocation). The penalty share will be left with the CV cooperative portion of the rockfish fishery and will be prorated among CV cooperatives based on cooperative share holdings. The LLP's remaining share will be fished in a competitive fishery open to rockfish qualified vessels who are not members of a cooperative and must be delivered to one of the qualified processors.
- An eligible processor is a processing facility that has purchased 250 MT of aggregate Pacific Ocean Perch, Northern Rockfish, and Pelagic Shelf rockfish harvest per year, for 4 years, from 1996 to 2000. Eligible processors will be issued a license under this program. Licenses are not transferable.
- If a processing facility has closed down and another processing facility has acquired that processing history through purchase, for the purpose of determining processor eligibility the history belongs to the facility that purchased that history. That history can only be credited to another facility in the community that it was generated in for purposes of establishing eligibility under this program.

Option. When owner and operator are not affiliated, the license will be issued to the owner and operator, but the operator will receive the right to vessel coop linkages.

- The harvesters that enter into a co-op membership agreement shall be the members of the co-op.
- A pre-season Contract between eligible, willing harvesters is a pre-requisite to a cooperative receiving an annual allocation.
- Co-op membership agreements will specify that processor affiliated harvesters cannot participate in price setting negotiations except as permitted by general antitrust law.
- Catcher vessel cooperatives are required to have at least:
 - ___ eligible LLPs
- Co-ops may engage in inter-cooperative transfers of annual allocations to other cooperatives with agreement of the associated qualified processor.

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For Alternative 3:

- Voluntary co-ops may form between eligible harvesters in association with processors.
- Catcher vessel co-ops must be associated with an eligible processor.
- An eligible processor is a processing facility that has purchased 250 MT of aggregate Pacific Ocean Perch, Northern Rockfish, and Pelagic Shelf rockfish harvest per year, for 4 years, from 1996 to 2000.
- A harvester is eligible to join a cooperative in association with the processing facility to which the harvester delivered the most pounds of the three rockfish species combined during the year's 1996 – 2000 drop 1 year (processor chooses the year to drop, same year for all LLPs)
- Harvesters may elect not to join a co-op, and continue to fish in an LLP/Open Access fishery. Those LLPs that opt out of the cooperative portion of the pilot program will be penalized 0 to 20% of their historical share (annual allocation). The penalty share will be left with the LLP's associated cooperative. The LLP's remaining share will be fished in a competitive fishery open to rockfish qualified vessels who are not members of a cooperative and must be delivered to one of the qualified processors.
- If a processing facility has closed down and another processing facility has acquired that processing history through purchase, the history belongs to the facility that purchased that history. That history must remain in the community that it was generated in.
 - Option. When owner and operator are not affiliated, the license will be issued to the owner and operator, but the operator will receive the right to vessel coop linkages.
- The harvesters that enter into a co-op membership agreement shall be the members of the co-op. The processor will be an associate of the cooperative but will not be a cooperative member.
- A pre-season Contract between eligible, willing harvesters in association with a processor is a pre-requisite to a cooperative receiving an annual allocation.
- Co-op membership agreements will specify that processor affiliated harvesters cannot participate in price setting negotiations except as permitted by general antitrust law.
- Processors are limited to 1 co-op per plant.
- Catcher vessel cooperatives are required to have at least:
 - a) 50-75 percent of the eligible historical shares for each co-op associated with its processor
 - b) Any number of eligible harvesters (allows single person co-op)
- Co-ops may engage in inter-cooperative transfers of annual allocations to other cooperatives with agreement of the associated qualified processor.

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5.5 CP Transfer provisions

CP annual allocations may be transferred within co-ops and between co-ops with at least:

- Option 1: two LLPs each (with CGOA endorsements)
- Option 2: three LLPs each (with CGOA endorsements)

5.6 Sector Transfer provisions

CP annual allocations may be transferred to CV cooperatives. CV annual allocations may not be transferred to CP cooperatives.

All transfers of annual allocations would be temporary and history would revert to the original LLP at the beginning of the next year.

A person holding an LLP that is eligible for this program may transfer that LLP. That transfer will effectively transfer all history associated with the LLP and any privilege to participate in this program that might be derived from the LLP.

6 Co-op harvest use caps

6.1 CV co-ops:

Control of harvest share by a CV co-op shall be capped at:

- Option 1. 30% of aggregate POP, Northern Rockfish and PSR for the CV sector
- Option 2. 40% of aggregate POP, Northern Rockfish and PSR for the CV sector
- Option 3. 50% of aggregate POP, Northern Rockfish and PSR for the CV sector
- Option 4. No cap

6.2 CPs:

Control of harvest share by a CP shall be capped at:

- Option 1: 50% of aggregate POP, Northern Rockfish and PSR for the CP sector
- Option 2: 60% of aggregate POP, Northern Rockfish and PSR for the CP sector
- Option 3: 75% of aggregate POP, Northern Rockfish and PSR for the CP sector
- Option 4: No cap

Eligible CPs will be grandfathered at the current level

7 Shoreside processor use caps

Shoreside processors shall be capped at the entity level.

No processor shall process more than:

- Option 1. 30% of aggregate POP, Northern Rockfish and PSR for the CV sector
- Option 2. 40% of aggregate POP, Northern Rockfish and PSR for the CV sector
- Option 3. 50% of aggregate POP, Northern Rockfish and PSR for the CV sector
- Option 4. No cap

Eligible Processors will be grandfathered.

8 Program Review

Program review the first and second year after implementation to objectively measure the success of the program, including benefits and impacts to harvesters, processors and communities. Conservation benefits of the program would also be accessed.

9 Sideboards

Sideboard provisions will apply to all gear types under all alternatives.

Opt out provision: Qualifying LLPs may choose to opt out of the program on an annual basis. The history of these LLPs will stay with the sector. LLPs which opt out of the program will not be sideboarded in other fisheries if their allocation is less than a) xx b)xx c)xx d)xx (a series of appropriate numbers provided by staff based on catch distribution).

Exemptions from sideboards:

Vessels with rockfish allocations less than the following percentages are exempt from sideboards:
a) xx b)xx c)xx d)xx (a series of appropriate numbers provided by staff based on catch distribution).

- o Allocations may not be leased

Qualifying LLPs which participate in the CGOA rockfish pilot program are limited, in July, in the following fisheries:

CGOA flatfish (all), AI POP, BSAI other flatfish, BSAI yellowfin sole, BSAI pacific cod, WGOA rockfish, WYAK rockfish

1) To fisheries in which the LLP participated in July from 1996 to 2002 for:

- a) Any one year
- b) Any two years
- c) Any four years
- d) Any six years

2) To

1. maximum percentage
2. average percentage

of

1. total catch
2. retained catch

by target, and PSC by target (BSAI) or deep or shallow water complex (GOA) during the month of July in any one year from 1996-2002

Additionally, the Council requests the following:

- Vessels (by name) that made landings in the CGOA target rockfish fishery from 1996-2002 with current endorsement status
- Estimates of TH and RE/SR incidental catch requirements in the sablefish, halibut and pcod LL fisheries. The Council recommends using observer and IPHC data
- Natural divisions in the level of history awarded within each sector (i.e. between vessels with minimal, moderate and high participation)
- For the following fisheries: GOA flatfish (all), AI POP, BSAI other flatfish, BSAI yellowfin sole, BSAI pacific cod, WGOA rockfish, WYAK rockfish:

Participation patterns in these fisheries during the month of July by LLP holders who will receive allocations

Percentage of total catch, by species complex, in the month of July for each year 96-02 by sector

GOA: Deep complex=rex sole, deep water flatfish, arrowtooth flounder

Shallow complex=shallow water flatfish, flathead sole

BSAI: Other flatfish=rocksole, flathead sole, arrowtooth flounder, Alaska plaice, other flatfish

The Council encourages the CP fleet to work with NMFS and NPFMC staff to develop a data format using confidentiality waivers to analyze sideboards. Additionally, include participation data broken out by the three rockfish species based on WPR.

In the event this program has a duration of more than 2 years, the Council will reconsider the issue of use/ownership caps for companies and vessels.

Alternative 3 for the CP Sector

As a separate alternative, the CP sector could choose to fish its sector allocation under the current management regime, with the rockfish fishery starting on July 1st.

Attachment 2 to October 2004 Discussion Paper

Report on Sideboards Central Gulf of Alaska Rockfish Pilot Program June 2004

At its April 2004 meeting the Council requested staff to provide the several items at this meeting to assist the Council in the development of options for sideboards to restrain participants in the Central Gulf of Alaska rockfish pilot program from encroaching on other fisheries. Specifically, the Council requested the following:

- 1) Vessels (by name) that made landings in the CGOA target rockfish fishery from 1996-2002 with current endorsement status
- 2) Estimates of TH and RE/SR incidental catch requirements in the sablefish, halibut and pcod LL fisheries. The Council recommends using observer and IPHC data
- 3) Natural divisions in the level of history awarded within each sector (i.e. between vessels with minimal, moderate and high participation)
- 4) For the following fisheries: GOA flatfish (all), AI POP, BSAI other flatfish, BSAI yellowfin sole, BSAI pacific cod, WGOA rockfish, WYAK rockfish:
- 5) Participation patterns in these fisheries during the month of July by LLP holders who will receive allocations
- 6) Percentage of total catch, by species complex, in the month of July for each year 96-02 by sector
GOA: Deep complex=rex sole, deep water flatfish, arrowtooth flounder
 Shallow complex=shallow water flatfish, flathead sole
BSAI: Other flatfish=rocksole, flathead sole, arrowtooth flounder, Alaska plaice, other flatfish

In response to this request, staff has developed this report, which provides the information requested in 1), 3), 4), and 5). Also, this report provides the percentage of retained catch for possible sideboard fisheries identified in 6). Staff was unable to develop total catch estimates, necessary to provide the information requested in 6). In addition to the information requested by the Council, staff has included a description of landings inside of State waters, intended to verify the extent to which State water issues could arise in the management of these fisheries.

Vessel List for the Pilot Rockfish Program for the Central Gulf

Following is a list of vessels with target rockfish history that may be eligibility for the Central Gulf of Alaska rockfish pilot program. For purposes of generating this list, eligibility for the program is assumed to be based on having one or more targeted landings in the Central Gulf rockfish fishery (i.e., Pacific Ocean perch, northern rockfish, and pelagic shelf rockfish) between 1996 and 2002 and a valid LLP with trawl and Central Gulf endorsements. For catcher vessels, fish ticket data were assigned a weekly target based on retained fish only (not including fish destined for meal production). For catcher/processors, NMFS Blend data weekly target determinations were used.

The list was developed by identifying vessels that:

- 1) have one or more targeted rockfish landings in the CGOA in the month of July in at least one of the years 1996 to 2002, inclusive; and
- 2) received a CGOA trawl endorsed LLP license by
 - a) meeting the requirements for that license; or
 - b) transfer.

For each license/vessel meeting these requirements, the most recent vessel associated with the LLP license is identified below. In the case of licenses that have been transferred, the original vessel is also referenced in parentheses. LLP data, current to May 7, 2004, were used to assess LLP license/vessel associations. If no vessel is currently associated with the LLP, then the original vessel, which generated the LLP license is included on the list. Only vessels that are either currently associated with an LLP license or the original vessel that generated the LLP are included on the list. Only one LLP per vessel is shown; some vessels have more than one Gulf trawl LLP. Also, note that the Intrepid Explorer, received both CV and C/P LLPs through transfer, and is included on both the catcher vessel and the catcher/processor lists.

Note: The list is being produced solely for analytical purposes and to assist industry members in coordinating discussions of the program. The presence or absence of your vessel on these lists does not establish your eligibility for the program. The methodology used is admittedly incomplete, in that it does not capture all transfers or transfer history. Eligibility for the program will be determined by NOAA Fisheries after adoption by the Council and approval by the Secretary of Commerce. Due to confidentiality requirements that protect catch data, this list will not be revised in the analysis, as doing so could compromise some data released concerning landings.

QUALIFIED CATCHER VESSELS

ALASKA BEAUTY	LLG1590
ALASKA DAWN	LLG1905
ALASKAN	LLG3764
AMBER DAWN	LLG2608
BAY ISLANDER	LLG3504
CAPE KIWANDA	LLG2636
CAPT'N ART	LLG2148
CARAVELLE	LLG2973
COHO	LLG4851
COLLIER BROTHERS	LLG1523
COMMODORE	LLG3904
DAWN	LLG2487
DEFIANT	LLG3496
DUSK	LLG2165
ELIZABETH F	LLG1273
EXCALIBUR II	LLG3521
FORUM STAR	LLG2394
GOLD RUSH	LLG3987
GREEN HOPE	LLG2188
GRUMPY J	LLG3604
HAZEL LORRAINE	LLG2567
HICKORY WIND	LLG3600
INTREPID EXPLORER	LLG3756 (NORDIC EXPLORER)
LADY JOANNE	LLG2222
LAURA	LLG3665
LESLIE LEE	LLG1183
MAR DEL NORTE	LLG1841
MAR PACIFICO	LLG2696
MARATHON	LLG2882
MARCY J	LLG2278
MICHELLE RENEE	LLG2550
MISS LEONA	LLG1710
MORNING STAR	LLG2164 (OCEAN HOPE I)
MUIR MILACH	LLG2554
NEW LIFE	LLG1367 (DOMINION)
OCEAN HOPE 3	LLG2683
PACIFIC RAM	LLG3144
PACIFIC STAR	LLG4852

PEGGY JO	LLG3594
PROGRESS	LLG3896
PROVISION	LLG2319
ROSELLA	LLG2364
TAASINGE	LLG2603
TOPAZ	LLG2535
TRAVELER	LLG3463
VANGUARD	LLG2565
WALTER N	LLG1271
WINONA J	LLG2653

(Two catcher vessels have targeted landings that do not appear to have LLP licenses)

QUALIFIED CATCHER/PROCESSORS

ALASKA RANGER	LLG2083 (ALASKA WARRIOR)
ALASKA SPIRIT	LLG3043
ALASKA VICTORY	LLG2080
ALLIANCE	LLG2905
AMERICAN NO 1	LLG2028
BILLIKIN	LLG3744 (BERING ENTERPRISE)
DEFENDER	LLG3217
GOLDEN FLEECE	LLG2524
INTREPID EXPLORER	LLG3741 (HARVESTER ENTERPRISE)
LEGACY	LLG1802
SEAFISHER	LLG2014
SOVEREIGNTY	LLG3740 (AMERICAN ENTERPRISE)
U.S. INTREPID	LLG3662
UNIMAK	LLG3957
VAERDAL	LLG1402

(5 catcher processors have targeted rockfish landings that do not appear to have LLP licenses)

“Natural Divisions” of Eligible Vessels Based on Total Targeted Rockfish Catch History

The Council requested staff to provide information concerning “natural divisions in the level of history awarded within each sector (i.e., between vessels with minimal, moderate and high participation).” Table 1 shows the division of eligible participants into three categories, based on the amount of qualified catch history.

“Natural divisions” in the total qualified harvests of eligible vessels shown have the following characteristics:

- 1) the divisions are based on large breaks in total history of the eligible catcher processors (as no clear dividing points exist for catcher vessels); and
- 2) the divisions are based on total harvests of eligible catcher vessels (no years were dropped in determining these divisions).

Table 1. “Natural Divisions” - Number of eligible participants in each sector by amount of qualified catch history

Total Catch of Targeted Rockfish 1996 to 2002	Catcher Processors	Catcher Vessels
Greater than 3,500 MT	5	0
3,500 MT to 750 MT	5	21
Less than 750 MT	5	27

Participation Patterns in the Targeted Rockfish Fishery

Tables 2 and 3 show participation patterns of eligible catcher processor and catcher vessel participants in the targeted rockfish fishery. These tables include transfer of history that occurred through the transfer of licenses between vessels. In these instances, the combined participation of both vessels is reflected in the table. So, if the original vessel associated with the LLP participated in 1996 and 1997 and the current vessel associated with the LLP participated in 1999, the table would reflect a single vessel that participated in 1996, 1997, and 1999.

Table 2. Participation patterns in the targeted rockfish fishery of eligible catcher processor participants

1996	1997	1998	1999	2000	2001	2002	Number of vessels with pattern	Cumulative number of vessels
X	X	X	X	X	X	X	2	2
	X	X	X	X	X	X	1	3
	X		X	X	X	X	1	4
X	X		X		X	X	1	5
X		X	X	X		X	1	6
X				X	X		1	7
	X	X			X		1	8
	X				X		1	9
X	X	X					1	10
X	X		X				1	11
X	X						2	13
X							1	14
		X					1	15

Table 3. Participation patterns in the targeted rockfish fishery of eligible catcher vessel participants.

1996	1997	1998	1999	2000	2001	2002	Number of Vessels with Pattern	Cumulative Number of Vessels
X	X	X	X	X	X	X	12	12
X	X	X	X		X	X	1	13
X	X	X		X	X	X	1	14
X	X			X	X	X	1	15
	X	X	X	X	X	X	3	18
	X	X		X	X	X	1	19
X		X	X	X	X	X	2	21
X			X	X	X	X	3	24
		X	X	X	X	X	2	26
			X	X	X	X	1	27
					X	X	1	28
X	X		X	X		X	1	29
X	X					X	1	30
X			X			X	1	31
				X		X	1	32
						X	1	33
X	X	X	X	X	X		1	34
X	X	X		X	X		1	35
					X		1	36
X	X	X	X	X			1	37
X	X	X					2	39
X							1	40
		X					4	44
			X				4	48

Table 4 shows the number eligible participants of each type by number of years of participation. The table shows that consistency of participation varies significantly across eligible participants for both sectors.

Table 4. Number eligible participants in each sector by number of years of participation

	years of participation							Total
	1	2	3	4	5	6	7	
Number of catcher processors	2	3	4	0	3	1	2	15
Number of catcher vessels	11	2	4	1	10	8	12	48
Total number of vessels	13	5	8	1	13	9	14	63

Target Participation in Other Fisheries by Eligible for the Rockfish Pilot Program

Tables 5 and 6 show participation patterns in possible sideboard fisheries of catcher processor and catcher vessel participants eligible for the rockfish pilot program. These patterns include all targeted participation by vessels with qualified rockfish participation that are currently associated with a valid, permanent LLP with a Gulf of Alaska trawl endorsement. As with the previous participation tables, these tables include transfer of history that occurred through the transfer of licenses between vessels. In instances when the license of an eligible participant was transferred, the combined participation of both vessels is reflected in the table. So, if the original vessel associated with the LLP participated in 1996 and 1997 and the current vessel associated with the LLP participated in 1999, the table would reflect a single vessel that participated in 1996, 1997, and 1999. Participation in the following fisheries was evaluated:

- Gulf of Alaska flatfish (rex sole, deep water flatfish, arrowtooth flounder, shallow water flatfish, flathead sole)
- Aleutian Islands Pacific Ocean perch
- Bering Sea/Aleutian Islands other flatfish (rocksole, flathead sole, arrowtooth flounder, Alaska plaice, other flatfish)
- Bering Sea/Aleutian Islands yellowfin sole
- Bering Sea Aleutian Islands Pacific cod
- Western Gulf of Alaska rockfish
- Western Yakutat rockfish

The tables show a variety of participation in these other fisheries by rockfish eligible participants. In the catcher processor sector, rockfish eligible participants most frequently participated in the flatfish fisheries in both the Bering Sea/Aleutian Islands and the Gulf. In the catcher vessel sector, rockfish eligible participants also most frequently participated in the flatfish fisheries. Eligible catcher vessel participants, however, participated primarily in the Gulf flatfish fisheries.

Table 5. Target participation in other fisheries by eligible catcher processor participants in the Central Gulf rockfish fishery.

	1996	1997	1998	1999	2000	2001	2002	Number of Participants
Aleutian Islands Pacific Ocean perch			X	X	X	X		2
			X	X	X			1
				X				1
Total Participants								4
Bering Sea/Aleutian Islands other flatfish (rocksole, flathead sole, arrowtooth flounder, Alaska plaice, other flatfish)		X	X	X	X	X	X	1
		X	X	X	X	X		1
		X	X	X				1
		X	X		X	X		1
		X	X		X		X	1
		X	X			X	X	1
		X		X	X	X	X	1
		X		X	X	X	X	1
			X	X		X	X	1
				X		X	X	1
Total Participants								12
Bering Sea/Aleutian Islands Pacific cod		X	X			X		1
		X				X	X	1
		X					X	1
					X		X	1
					X			1
						X	X	1
							X	2
Total Participants								8
Bering Sea/Aleutian Islands yellowfin sole			X			X	X	2
						X	X	5
							X	3
Total Participants								10
Gulf of Alaska flatfish (rex sole, deep water flatfish, arrowtooth flounder, shallow water flatfish, flathead sole)	X	X	X	X	X	X	X	2
	X	X	X		X		X	1
	X	X				X	X	1
	X	X						1
	X		X	X	X	X	X	1
	X							1
		X					X	1
					X		1	
Total Participants								9

Table 5. Target participation in other fisheries by eligible catcher processor participants in the Central Gulf rockfish fishery, Cont.

	1996	1997	1998	1999	2000	2001	2002	Number of Participants
Western Gulf of Alaska rockfish	X	X	X	X	X	X		1
	X	X	X		X	X		1
	X							1
		X	X	X				1
Total Participants								4
Western Yakutat rockfish	X	X	X	X	X	X		1
	X	X						2
	X							1
				X		X		1
Total Participants								5

Table 6. Target participation in other fisheries by eligible catcher vessel participants in the Central Gulf rockfish fishery.

	1996	1997	1998	1999	2000	2001	2002	Number of Participants	
Bering Sea/Aleutian Islands Pacific cod			X					1	
							X	1	
Total Participants								2	
Gulf of Alaska flatfish (rex sole, deep water flatfish, arrowtooth flounder, shallow water flatfish, flathead sole)	X	X	X	X		X	X	1	
	X	X	X		X	X	X	3	
	X	X	X		X		X	1	
	X	X	X		X			1	
	X	X	X			X	X	1	
	X	X	X			X		1	
	X	X	X				X	2	
	X	X	X					6	
	X	X			X	X	X	1	
	X	X			X	X		1	
	X	X				X		1	
	X	X						3	
	X		X			X	X	1	
	X		X			X	X	2	
	X					X	X	1	
	X						X	1	
	X							6	
			X	X		X	X	X	1
			X	X					1
				X				X	1
			X					1	
					X		X	1	
							X	3	
Total Participants								41	

Table 6. Target participation in other fisheries by eligible catcher vessel participants in the Central Gulf rockfish fishery.

	1996	1997	1998	1999	2000	2001	2002	Number of Participants
Western Gulf of Alaska rockfish		X						1
						Total Participants		1
		X						1
Western Yakutat rockfish				X				2
					X			1
						X		1
						Total Participants		5

Table 7 shows the number of rockfish eligible participants that participated in the various fisheries being considered for sideboards by number of years of participation. The table shows that participation in these other fisheries varies substantially across rockfish eligible participants.

Table 7. Number of rockfish eligible participants with target participation in other fisheries by years of participation.

		Years of Participation							Total
		1	2	3	4	5	6	7	
Aleutian Islands	Catcher processors	1	0	1	2	0	0	0	4
Pacific Ocean perch	Catcher vessels	0	0	0	0	0	0	0	0
Bering Sea/Aleutian Islands other flatfish	Catcher processors	0	2	3	4	2	1	0	12
	Catcher vessels	0	0	0	0	0	0	0	0
Bering Sea/Aleutian Islands Pacific cod	Catcher processors	3	3	2	0	0	0	0	8
	Catcher vessels	2	0	0	0	0	0	0	2
Bering Sea/Aleutian Islands yellowfin sole	Catcher processors	3	5	2	0	0	0	0	10
	Catcher vessels	0	0	0	0	0	0	0	0
Gulf of Alaska Flatfish	Catcher processors	2	2	0	1	1	1	2	9
	Catcher vessels	10	7	8	8	4	4	0	41
Western Gulf of Alaska rockfish	Catcher processors	1	0	1	0	1	1	0	4
	Catcher vessels	1	0	0	0	0	0	0	1
Western Yakutat rockfish	Catcher processors	1	3	0	0	0	1	0	5
	Catcher vessels	5	0	0	0	0	0	0	5

State Water Harvests of Targeted Rockfish

A review of fish ticket and blend data reveal three landings in 1996 and one landing in 1999 of harvests identified as from inside State water statistical areas. These landings total 96 metric tons (taken by four vessels). The four vessels all have lengthy harvest histories and are all LLP qualified. The fish tickets that show harvest from statistical areas inside of State waters also had harvest from statistical areas outside of State waters. Possible explanations of these harvests are exploratory fishing or reporting error.

Attachment 2 to October 2004 Discussion Paper - continued

**Addendum to Report on Sideboards
Central Gulf of Alaska Rockfish Pilot Program
June 2004**

Retained Harvests of Other Species by Rockfish Eligible Participants

Tables 8 and 9 show retained harvest from possible sideboard fisheries by rockfish eligible catch processor participants and catcher vessel participants, respectively. To the extent possible, each table shows the percentage of the sector's retained catch and total retained catch taken by rockfish eligible participants. Transfer history is included in the tables by including both the harvests of the vaessel that is currently associated with the LLP license and the vessel that was originally associated with the LLP license, in the case of transferred LLP licenses. The tables include all retained catch by eligible participants regardless of whether the species was targeted. The numbers of participants shown in Tables 6 and 7, which show target fishery participation, differ from the numbers of participants shown in Tables 8 and 9 because these latter tables do not consider targeting.

Data from the following weekending dates were used for generation of sideboard tables. These dates were chosen to estimate July harvests that were specified in the Council motion.

Weekending Dates for Sideboarded Species Table of Retained Harvests

1996	1997	1998	1999	2000	2001	2002
6-Jul	5-Jul	4-Jul	3-Jul	8-Jul	7-Jul	6-Jul
13-Jul	12-Jul	11-Jul	10-Jul	15-Jul	14-Jul	13-Jul
20-Jul	19-Jul	18-Jul	17-Jul	22-Jul	21-Jul	20-Jul
27-Jul	26-Jul	25-Jul	24-Jul	29-Jul	28-Jul	27-Jul
3-Aug	2-Aug	1-Aug	31-Jul		4-Aug	3-Aug

Table 8. Retained harvests of other species by rockfish eligible catcher processor participants

		Eligible catcher processors				Other catcher processors		All catcher processors		All vessels	
		Participants	Retained catch (MT)	Percentage of catcher processor retained catch	Percentage of all retained catch	Participants	Retained catch (MT)	Participants	Retained catch (MT)	Participants	Retained catch (MT)
Aleutian Islands Pacific Ocean perch	1996	5	106	100	100	0	0	5	106	5	106
	1997	0	0	0	0	0	0	0	0	0	0
	1998	3	*	*	*	2	*	5	6,851	5	6,851
	1999	5	*	*	*	1	*	6	10,258	6	10,258
	2000	3	3,873	50	50	3	3,830	6	7,702	6	7,702
	2001	3	2,068	32	32	3	4,413	6	6,481	6	6,481
	2002	0	0	0	0	0	0	0	0	0	0
	Total	5	18,514	59	59	4	12,884	9	31,398	9	31,398
Bering Sea/Aleutian Islands other flatfish (rocksole, flathead sole arrowtooth flounder, Alaska plaice, other flatfish)	1996	6	478	11	11	9	3,877	15	4,355	15	4,355
	1997	9	3,490	33	33	12	7,041	21	10,530	21	10,530
	1998	8	1,244	19	19	10	5,139	18	6,383	18	6,383
	1999	12	2,616	27	27	25	7,005	37	9,621	37	9,621
	2000	6	880	19	19	19	3,835	25	4,716	25	4,716
	2001	11	1,747	25	25	24	5,303	35	7,050	35	7,050
	2002	12	2,485	50	50	25	2,491	37	4,976	37	4,976
	Total	13	12,940	27	27	30	34,691	43	47,631	43	47,631
Bering Sea/Aleutian Islands Pacific cod	1996	6	1,135	54	54	8	974	14	2,109	14	2,109
	1997	9	595	45	45	12	722	21	1,317	21	1,317
	1998	8	434	34	*	10	845	18	1,278	21	*
	1999	12	534	31	31	25	1,162	37	1,696	37	1,696
	2000	6	324	26	25	20	914	26	1,238	51	1,275
	2001	11	1,439	48	37	24	1,550	35	2,989	92	3,899
	2002	12	1,168	43	33	25	1,571	37	2,739	91	3,586
	Total	13	5,628	42	36	29	7,738	42	13,365	116	15,654
Bering Sea/ Aleutian Islands yellowfin sole	1996	0	0	0	0	4	213	4	213	4	213
	1997	8	897	54	54	11	751	19	1,648	19	1,648
	1998	5	1,322	78	78	8	379	13	1,701	13	1,701
	1999	10	1,672	66	66	11	850	21	2,522	21	2,522
	2000	2	*	*	*	4	*	6	340	6	340
	2001	10	2,077	73	73	8	764	18	2,842	18	2,842
	2002	11	7,796	51	51	22	7,482	33	15,279	33	15,279
	Total	12	13,911	57	57	24	10,632	36	24,543	36	24,543

* Withheld for confidentiality

Table 8. Retained harvests of other species by rockfish eligible catcher processor participants (continued)

		Eligible catcher processors				Other catcher processors		All catcher processors		All vessels	
		Participants	Retained catch (MT)	Percentage of catcher processor retained catch	Percentage of all retained catch	Participants	Retained catch (MT)	Participants	Retained catch (MT)	Participants	Retained catch (MT)
Gulf of Alaska flatfish (rex sole, deep water flatfish, arrowtooth flounder, shallow water flatfish, flathead sole)	1996	16	1,567	*	24	7	*	23	*	58	6,451
	1997	14	325	60	10	4	216	18	540	46	3,275
	1998	11	1,110	66	39	5	560	16	1,669	42	2,815
	1999	10	1,138	81	77	5	262	15	1,400	38	1,481
	2000	10	1,754	58	48	5	1,290	15	3,044	33	3,633
	2001	10	861	*	35	3	*	13	*	34	2,441
	2002	5	*	*	*	2	*	7	1,453	30	2,468
	Total	16	7,817	61	35	11	4,900	27	12,717	75	22,564
Western Gulf of Alaska rockfish	1996	7	421	50	50	4	414	11	835	11	835
	1997	4	991	56	*	3	764	7	1,755	9	*
	1998	5	773	86	86	3	126	8	899	8	899
	1999	6	*	*	*	2	*	8	2,468	8	2,468
	2000	5	1,390	76	76	4	444	9	1,835	9	1,835
	2001	5	793	65	65	3	432	8	1,225	8	1,225
	2002	3	*	*	*	2	*	5	48	5	48
	Total	10	6,720	74	*	8	*	18	9,064	20	*
Western Yakutat rockfish	1996	4	*	*	*	1	*	5	2,094	9	2,098
	1997	3	1,293	100	88	0	0	3	1,293	8	1,471
	1998	1	*	*	*	1	*	2	*	5	*
	1999	3	*	*	*	1	*	4	1,297	6	1,374
	2000	1	*	*	*	0	0	1	*	2	*
	2001	1	*	*	*	1	*	2	*	3	*
	2002	0	0	0	0	0	0	0	0	0	0
	Total	5	*	*	*	2	*	7	8,357	21	8,638

* Withheld for confidentiality

Table 8. Retained harvests of other species by rockfish eligible catcher vessel participants

		Eligible catcher vessels				Other catcher vessels		All catcher vessels		All vessels	
		Participants	Retained catch (MT)	Percentage of catcher vessel retained catch	Percentage of all retained catch	Participants	Retained catch (MT)	Participants	Retained catch (MT)	Participants	Retained catch (MT)
Aleutian Islands Pacific Ocean perch	1996	0	0	0	0	0	0	0	5	106	
	1997	0	0	0	0	0	0	0	0	0	
	1998	0	0	0	0	0	0	0	5	6,851	
	1999	0	0	0	0	0	0	0	6	10,258	
	2000	0	0	0	0	0	0	0	6	7,702	
	2001	0	0	0	0	0	0	0	6	6,481	
	2002	0	0	0	0	0	0	0	0	0	
	Total	0	0	0	0	0	0	0	9	31,398	
Bering Sea/Aleutian Islands other flatfish (rocksole, flathead sole arrowtooth flounder, Alaska plaice, other flatfish)	1996	0	0	0	0	0	0	0	15	4,355	
	1997	0	0	0	0	0	0	0	21	10,530	
	1998	0	0	0	0	0	0	0	18	6,383	
	1999	0	0	0	0	0	0	0	37	9,621	
	2000	0	0	0	0	0	0	0	25	4,716	
	2001	0	0	0	0	0	0	0	35	7,050	
	2002	0	0	0	0	0	0	0	37	4,976	
	Total	0	0	0	0	0	0	0	43	47,631	
Bering Sea/Aleutian Islands Pacific cod	1996	0	0	0	0	0	0	0	14	2,109	
	1997	0	0	0	0	0	0	0	21	1,317	
	1998	1	*	*	*	2	*	3	21	*	
	1999	0	0	0	0	0	0	0	37	1,696	
	2000	5	10	26	1	20	27	25	51	1,275	
	2001	10	15	2	0	47	896	57	92	3,899	
	2002	8	156	18	4	46	691	54	91	3,586	
	Total	13	290	13	2	61	1,998	74	116	15,654	
Bering Sea/Aleutian Islands yellowfin sole	1996	0	0	0	0	0	0	0	4	213	
	1997	0	0	0	0	0	0	0	19	1,648	
	1998	0	0	0	0	0	0	0	13	1,701	
	1999	0	0	0	0	0	0	0	21	2,522	
	2000	0	0	0	0	0	0	0	6	340	
	2001	0	0	0	0	0	0	0	18	2,842	
	2002	0	0	0	0	0	0	0	33	15,279	
	Total	0	0	0	0	0	0	0	36	24,543	

* Withheld for confidentiality

Table 8. Retained harvests of other species by rockfish eligible catcher vessel participants (continued)

		Eligible catcher vessels				Other catcher vessels		All catcher vessels		All vessels	
		Participants	Retained catch (MT)	Percentage of catcher vessel retained catch	Percentage of all retained catch	Participants	Retained catch (MT)	Participants	Retained catch (MT)	Participants	Retained catch (MT)
Gulf of Alaska flatfish (rex sole, deep water flatfish, arrowtooth flounder, shallow water flatfish, flathead sole)	1996	33	2,769	*	43	2	*	35	*	58	6,451
	1997	27	2,722	*	83	1	*	28	*	46	3,275
	1998	26	1,145	100	41	0	0	26	1,145	42	2,815
	1999	23	81	100	5	0	0	23	81	38	1,481
	2000	18	589	100	16	0	0	18	589	33	3,633
	2001	19	1,357	*	56	2	*	21	*	34	2,441
	2002	23	1,015	100	41	0	0	23	1,015	30	2,468
	Total	44	9,678	98	43	4	169	48	9,847	75	22,564
Western Gulf of Alaska rockfish	1996	0	0	0	0	0	0	0	0	11	835
	1997	1	*	*	*	1	*	2	*	9	*
	1998	0	0	0	0	0	0	0	0	8	899
	1999	0	0	0	0	0	0	0	0	8	2,468
	2000	0	0	0	0	0	0	0	0	9	1,835
	2001	0	0	0	0	0	0	0	0	8	1,225
	2002	0	0	0	0	0	0	0	0	5	48
	Total	1	*	*	*	1	*	2	*	20	*
Western Yakutat rockfish	1996	4	4	100	0	0	4	4	9	2,098	
	1997	5	178	100	12	0	5	178	8	1,471	
	1998	3	*	*	*	0	0	3	*	5	*
	1999	2	*	*	*	0	0	2	77	6	1,374
	2000	1	*	*	*	0	0	1	*	2	*
	2001	1	*	*	*	0	0	1	*	3	*
	2002	0	0	0	0	0	0	0	0	0	0
	Total	14	282	100	3	0	0	14	282	21	8,638

* Withheld for confidentiality

Public Testimony Sign Up Sheet

Agenda Item C-2 GOA ROCKFISH

	NAME (PLEASE PRINT)	AFFILIATION
13	Tim Blott	Ocean Beauty Seafoods
26	Julie Bonney / Joe Plushin	AG-DB
33	John Whiddon / Heather McClarty	Island Seafoods / Kodiak
43	MATTHEW MOIR	ALASKA PACIFIC SEAFOOD
56	Leslie Smith	Alaska Jig Assoc.
66	Yakov Reutor	K-Bay Fisheries Assoc.
76	Joe Sullivan	Mundo Mac Kodiak
86	Jeff Stephan	UFMA
93	Teressa Kaudraus	Kodiak Fish Co.
106	ED LATHRILL LOUET	
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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

C-2 FOR LOCKER

Handwritten notes on lined paper, including the date 4/19/74 and other illegible text.

Main body of handwritten notes on lined paper, mostly illegible due to fading and bleed-through.

HO AP Rpt. C-2
10/7/04 11 AM

DRAFT

DRAFT

C-2 Central GOA Rockfish Demonstration Pilot Program

The AP recommends to not include the non-trawl sector from the primary program.

1. Delete "Option 3. Non trawl catcher vessel" from section 3.1
2. Delete the words "by any gear type" from the third bullet in section 3.3

Motion passed 14/0

Sideboard Provisions

General Provisions:

There are no exemptions from sideboards, except for CP vessels which opt out of the pilot program.

a. For fisheries that close on TAC in the GOA, the qualified vessels in each sector (trawl CV and trawl CP) would be limited, in aggregate, in the month of July to the historic average total catch of those vessels in the month of July during the qualification years 1996 to 2002. Fisheries that this sideboard provision would apply to include West Yakutat rockfish and WGOA rockfish.

b. For flatfish fisheries in the GOA that close because of halibut bycatch, the qualified vessels in each sector (trawl CV and trawl CP) would be limited, in the aggregate, in the month of July to the historic average halibut mortality taken by those vessels in the target flatfish fisheries in the month of July by deep and shallow complex.

c. In the event that one or more target rockfish fisheries are not open, sideboard restrictions will not apply for those target allocations.

- IFQ halibut and sablefish are exempt from sideboard provisions

CP Specific Sideboard Provisions:

Vessels may decide to opt out of the CGOA pilot program on an annual basis. These vessels may not target POP, Northern rockfish or Pelagic Shelf rockfish in the CGOA in the years they choose to opt out. They may retain these species up to the MRA amount in other fisheries. They will be sideboarded at the sector level in the GOA as referenced in a and b above, but will not be subject to other sideboard restrictions within their sector.

Option 1 -The history of vessels which opt out will remain with the sector.

Option 2 -The history of vessels which opt out will be distributed pro-rata between sectors.

Opting out is an annual decision. Vessels which choose to opt out must so notify NMFS. The decision to opt out should not in any way alter the status of their catch history for future rationalization programs.

For the CP sector, the pilot program fishery will start at the same time as the open access fisheries (in July). CPs which qualify for the CGOA rockfish pilot program, and which do not choose to opt out, are required to harvest 90% of their CGOA rockfish allocation, or to participate in the target rockfish fishery in the CGOA for two weeks (whichever is shorter) before participating in any other BSAI or GOA groundfish fishery. A vessel which has met this requirement can then move into the BSAI or GOA open access fisheries without limitation or restriction, except at the sector level in the GOA as referenced in the CV/CP inter-sector sideboards.

History may be consolidated between vessels, however each individual vessel that transfers its history to another CP or CV must still refrain from operating in any other BSAI or GOA groundfish fishery until 90% of all of the rockfish allocation on the stacked vessel is harvested in the CGOA, or for two weeks (whichever is shorter).

Option: three week stand-down

CV Specific Sideboard Provisions:

- The qualifying vessels in the trawl CV sector cannot participate in the directed yellowfin sole, other flatfish (flathead, etc) or Pacific Ocean perch fisheries in the BSAI in the month of July.
- Qualifying vessels in the trawl CV sector would be limited, in aggregate, in the month of July, to the historic average total catch of those vessels in the BSAI Pacific cod fishery in July during the qualification years 1996 to 2002.
- AFA CVs qualified under this program are subject to the restraints of AFA sideboards and their coop agreement, and not subject to additional sideboards under this program.

Motion passed 16/1

Set Asides

1.2 Entry level fishery: A percentage of POP, Northern rockfish and pelagic shelf fockfish for catcher vessels not eligible to participate in the program, as mandated in the congressional language. For the first year of this program, this set aside will be 5% of each of these target rockfish species.

- Allocations shall be apportioned between trawl and non-trawl gear:
 - Option 1. 50/50
 - Option 2. proportional to the number of applications received
 - Option 3. Increase fixed gear portion of the fixed gear set aside each year by 0.5%/year each year the fixed gear sector catches their full allocation.

Motion passed 11/4

- The Council will develop a method for rolling over an allocation to the other entry level sector, in the event a sector is unable to harvest its allocation.
Suboption: the rollover from any sector will occur at the end of the third quarter, and if the non-qualified vessel quota is not taken by November 1, it will be rolled over to any eligible vessel. *Motion passed 15/0*

The AP notes that estimates of thornyhead and shortraker/rockfish incidental requirements in the sablefish halibut and p.cod longline fisheries have been repeatedly requested yet still not provided. We wish to highlight the importance of having this data available at initial review to allow refinement of the alternatives prior to final action. *Motion passed 15/0*

2.4 NMFS will determine:

- Whether limits need to be imposed on vessel participation
 - If limits need to be imposed, determine the appropriate number of vessels that would be allowed to fish in the entry level fishery
 - Suboption: Equal share distributions to the vessel applicants by sector
 - Suboption: Limited access competitive fishery by sector
 - Entry permits are non-transferrable and must be fished by the named vessel
- Motion passed 16/0*

5.4 CV sector

The AP requests the Council modify the last two bullets for alternative 2 as follows:

- Catcher vessel cooperatives are required to have at least 5-10 eligible LLPs
- ~~Coops may engage in inter-cooperative transfers of annual allocations to other cooperatives with agreement of the associated qualified processor~~
- No processor associations required by coops.

Motion passed 16/0

HO C-2
10/7/04 11:37

Julie Bonney
+ Joe Plecha

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October 5, 2004

Stephanie Madsen
Chair
North Pacific Fisheries Management Council
205 West Fourth Avenue, Suite 306
Anchorage, AK 99501-2252

John Lepor
NOAA
709 West Ninth Street, Suite 909
Juneau, AK 99801

Re: Alaska Ground Fish Databank

Dear Chairperson Madsen and Mr. Lepor:

We have been retained by the Alaska Ground Fish Databank to analyze the antitrust implications, if any, of Rockfish Pilot Program Alternative 3 Co-ops. In particular, we examined the impact of co-op membership by processor-owned catcher vessels ("PCVs"). As detailed below, there is no antitrust issue created by either the co-ops or PCV participation in those co-ops. The co-ops themselves are a well recognized, procompetitive, alternative to the highly inefficient Olympic, or race system. The fact that some PCVs may participate in co-ops does not reduce these efficiencies or render the co-ops anticompetitive. To the contrary, it would be inefficient to exclude the PCVs because their allocations would revert to the open access fishery. In short, participation by PCVs in the co-ops does not create any antitrust issue.

Because the co-op structure does not create an antitrust problem in the first instance, there is no need to determine whether the presence of PCVs in co-ops might somehow impact the fishermen's exemption from the antitrust laws under 15 U.S.C. § 521. Stated otherwise, you do not need to reach the exemption because there is no antitrust violation in the first place.

Even assuming there was an antitrust problem (there clearly is not), the co-ops are exempt from the antitrust laws under 15 U.S.C. § 521. As concluded by the United States Department of Justice in a similar setting, the participation of PCVs in such co-ops does not change or eliminate the exempt status of the co-ops. Given this historical approval, we would be surprised if anyone seriously suggests that PCV participation in co-ops impacts the exemption. The Hinote case which Mr. Lepor mentioned when I spoke to him does not change the analysis. Likewise, the National Broiler case actually supports the application of the exemption in this setting.

Stephanie Madsen
John Lepor, Esq.
October 5, 2004
Page 2

I. Facts

We understand that under Alternative 3, harvesters will be allocated a percentage of the rockfish catch based on their historical participation in the fishery. The eligible harvesters can choose to bring their percentage to, and participate in, an open access, race-type fishery. Alternatively, the eligible harvesters may participate in co-ops. Those co-ops, pursuant to a Contract, will "internally allocate and manage the co-op's [collective] allocation," and the allocated history may be transferred and consolidated within the co-op.

~~Assuming a co-op is formed, the co-op must be "associated with," and deliver its catch to, an eligible processor. Processor eligibility will be determined based on historical participation in the fishery. The co-op's catch can only be sold to a single processor to whom each co-op member has historically delivered the most pounds of fish.~~

The majority of the shore side GOA rockfish fishery is harvested by forty-four independently-owned catcher vessels. There are, however, a handful of PCVs which participate in the fishery. It is possible that some or all of these PCVs will participate in co-ops associated with the processor that owns the PCVs.

The participation of PCVs in co-ops will be limited to agreements among the co-op members allocating the designated catch for the co-op. PCVs will not participate in price setting negotiations "except as permitted by general antitrust law."

II. There Is No Antitrust Violation in the First Instance

The antitrust laws are intended to eliminate anticompetitive conduct among competitors. Such conduct typically includes agreements among competitors to (i) increase prices or (ii) reduce output (which, under the laws of supply and demand, will result in increased prices). The antitrust laws also encourage businesses to achieve "efficiencies," i.e., producing the same output at a lower cost. The reason is obvious. Everyone is better off, for example, if a given amount of fish can be harvested for fifty cents per pound rather than one dollar per pound.

Co-ops, and the allocation agreement among vessels participating in a given co-op, are not anticompetitive. First, they do not reduce output within the fishery. The co-op has every incentive to use its collective allocation to its fullest. The co-op simply divides the harvesting of the governmentally-fixed input in the manner the members best see fit. Second, co-ops produce procompetitive results by creating significant efficiencies. On a fishery-wide basis, they reduce or eliminate the highly inefficient race system. Elimination of the race leads to many efficiencies such as increased product recovery from the raw material, production of a greater percentage of higher quality products, improved safety, reduced by-catch and non-target species of fish and

Stephanie Madsen
John Lepor, Esq.
October 5, 2004
Page 3

reduced pollution (both air pollution from use of fuel and water pollution from discharges of seafood processing waste).

Still more efficiencies are created at the individual co-op level. Under the Contract, the harvester(s) best suited to catch the co-op's allocation will handle the harvest. Thus, one or more harvesters will conduct a harvest that would otherwise be done by multiple harvesters. The same amount of fish will be harvested, but at a lower cost.

Including PCVs in the co-ops does not alter or reduce the efficiencies. In fact, it would be inefficient, and anticompetitive, to exclude PCVs. To the extent PCVs are excluded from co-op participation, their percentage of the harvest reverts to the wasteful and inefficient race system. The resources necessary to harvest in the race system are significantly greater than in the co-op fishing. If PCVs are excluded from co-ops, significantly greater resources will be required, fishery wide, to harvest the same amount of fish.

Under similar circumstances, the United States Department of Justice, Antitrust Division, concluded that an allocation agreement among catcher-processors did not violate the antitrust laws. In 1997, the United States Department of Commerce instituted an inshore/offshore allocation system for the Pacific Whiting fishery. Under the allocation system, however, an Olympic system remained within each sector.

Four integrated catcher/processor vessels eligible to participate in one sector of the fishery sought permission from the Justice Department to create an agreement dividing the sector allocation among themselves. The Justice Department concluded that such an agreement would have no anticompetitive effect, would likely create efficiencies, and would be procompetitive:

From a consumer perspective, the harvesting agreement does not reduce the output of processed Pacific Whiting or the end product into which it is incorporated – surimi. On the contrary . . . eliminating the race will increase processing efficiency and concomitantly the output of Pacific Whiting. Since the prices paid for surimi by consumers, and the prices paid for Pacific Whiting by surimi sellers will be determined by the intersection of supply and demand for surimi, elimination of the race to gather an input whose output is fixed by regulation seems unlikely to reduce output or increase price under any likely scenario.

Ex. 2 at 3.

Stephanie Madsen
John Lepor, Esq.
October 5, 2004
Page 4

From an antitrust perspective, of course, there is no functional or meaningful difference between a catcher processor and a processor that uses its own vessel to harvest fish. Both are integrated to the same extent. Thus, the Whiting analysis applies equally to PCV participation in Rockfish co-ops.

In sum, the co-ops are procompetitive and do not violate the antitrust laws. Participation by PCVs in the co-ops does not change the analysis. If anything, the program will be less efficient if PCVs are excluded.

III. Even If There Were an Antitrust Problem (There Plainly Is Not) The Co-ops Are Exempt

The co-op structure under Alternative 3 does not create any antitrust issues. But even assuming that a co-op allocation agreement would somehow constitute an antitrust violation (it plainly does not), it does not matter. The allocation agreement would be exempt under the Fisherman's Collective Marketing Act, 15 U.S.C. § 521. Participation by PCVs in the co-op would not change the exempt status.

By way of background, 15 U.S.C § 521 entitles fishermen to engage in conduct that would be illegal in other settings. For example, competing grocery stores cannot agree with each other on the price they charge for lettuce. Fishermen, by contrast, can lawfully agree on the price they will charge processors for fish. The exemption for fishermen may be limited, however, if non-fishermen are included in the price-fixing agreement.

In connection with the American Fisheries Act ("AFA"), various persons contended that the presence of PCVs in AFA co-ops would strip the co-op members of their ability under 15 U.S.C. § 521 to agree upon the price to charge processors for the co-op's fish.

These claims were reviewed in great detail by the United States Department of Justice, Antitrust Division, and rejected. Should similar arguments be made here, antitrust officials would look at the AFA analysis, as well as the earlier similar analysis in the whiting industry, as precedent for this situation. Using that precedent, they will quickly conclude that the participation of PCVs in Alternative 3 co-ops does not eliminate the immunity under 15 U.S.C. § 521.

A. The AFA Experience Shows that Congress Envisioned That PCVs Would Participate in Exempt Co-ops.

A brief review of AFA shows that the § 521 antitrust exemption for co-ops applies to co-ops that include PCVs. Similar to Alternative 3, the AFA authorized creation of co-ops in the

Stephanie Madsen
John Lepor, Esq.
October 5, 2004
Page 5

Bering Sea Pollack fishery as an alternative to the Olympic system. Section 210 of the AFA expressly envisioned that co-ops would be formed under 15 U.S.C. § 521. Section 210 also included PCVs within the class of vessels eligible to participate in the fishery, and encouraged these vessels to form co-ops. The United States Department of Justice, in rejecting the contention that participation by PCVs in AFA co-ops took the co-ops outside the exemption, concluded that participation by processor-owned vessels in AFA co-ops would be "unlikely to lead to anticompetitive results."¹ The Justice Department also observed that:

[I]nterpreting the AFA to exclude processor-owned vessels would essentially defeat the primary purpose of the Act, which was to encourage the formation of fishery cooperatives in order to end the annual race for fish.

Ex. 1 at 7.

The Department further explained that allowing PCVs to participate in AFA co-ops:

[B]est gives effect to Congress' express intent: that all catcher vessels, both independently-owned and processor-owned participate in FCMA fishery cooperatives under the AFA so that the race for fish in the BSAI Fishery can be ended.

Id. at 14.

Based on these and other considerations, the Justice Department concluded that there was no antitrust problem created by PCV participation in AFA co-ops.

The AFA analysis was not the first time that the Justice Department concluded that integrated catcher processors can participate in co-ops without creating antitrust issues. As noted, the Whiting allocation agreement among catcher processors was approved by the Department in 1997.

In short, the Justice Department has consistently encouraged the participation of PCVs in co-ops and allocation agreements. The result would be the same with Alternative 3 co-ops. Indeed, given the consistent historical approval of PCV participation in co-ops, we will be surprised if this is even an issue.

¹ Ex.1 at n.6.

Stephanie Madsen
John Lepor, Esq.
October 5, 2004
Page 6

IV. The Hinote Case Is Plainly Distinguishable

The only case addressing the fishermen's exemption under 15 U.S.C. § 521 this issue is United States v. Hinote, 823 F. Supp. 1350 (S.D. Miss. 1993). Hinote analyzed the application of 15 U.S.C. § 521 to fully-integrated catfish processors who had conspired to fix the price of "finished catfish products." Id. at 1359. Although Hinote held that the processors involved in that case were not entitled to the immunity, the facts here are readily distinguishable.

Most importantly, the defendants in Hinote did not contend that the conspiratorial activity involved "collective handling and processing – the very activities for which the exemption was created." Id. at 1358, quoting National Broiler Marketing Ass'n v. United States, 436 U.S. 816, 835 (1978) (Brennan, J., concurring). Here, by contrast, the collective conduct goes to the heart of the exemption — fishermen acting in their capacity as fishermen. The collective conduct does not involve, or even impact, the price of finished product or any other aspect of the business.

In a similar vein, Hinote held that it was important that the conspiratorial activity in that case did not involve farming per se:

The court would further note that it is not the activity of the processors acting as farmers that is being challenged in this case, but rather it is their conduct in selling finished catfish products. . . .

Hinote, 823 F. Supp. at 1359.

Here, in contrast to Hinote, the collective activity will be limited to processors acting as fishermen.

In sum, the facts in Hinote are dramatically different from the issues here. Hinote is of little precedential value.

V. National Broiler Supports the Participation of PCVs in Co-ops

The only Supreme Court case touching on the issue, National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978), expressly left open the question of whether integrated farmer/processors, as distinguished from pure farmers, fell within Capper-Volstead immunity. The concurring opinion suggested that in certain circumstances, integrated farmer/processors would not so qualify because they were not equivalent to the independent farmers which the act was designed to protect. The concurring opinion concluded, however, that a case-by-case analysis is required. Id. at 836. Among the factors to be considered are the nature of the

Stephanie Madsen
John Lepor, Esq.
October 5, 2004
Page 7

association's activities, the degree of integration, and the functions historically performed by farmers. Id.

Applying these considerations to the facts at hand, the "nature of the activity" falls within the core of the exemption – fishermen engaged in fishing. The nature of the collective activity also promotes the fishermen's ability to fish efficiently. Absent co-ops, all will be forced into an inefficient Olympic system. Absent PCV participation, a greater percentage of the harvest will be subject to an Olympic system.

As to the degree of integration, the processors are only minimally integrated -- fishing and processing. Significantly, both of these activities are within the express scope of the exempt activities under 15 U.S.C. § 521 -- catching and processing fish.

Finally, as to historical functions, inshore processors have been integrated since the fishery began. Thus, the history of the market supports the concept that integrated processors qualify for the exemption.

In short, National Broiler supports the conclusion that the participation of PCVs in co-ops would not impact the exemption.

VI. Conclusion

The inclusion of PCVs in Rockfish co-ops does not violate the antitrust laws. It does not reduce output, and provides more efficient harvesting of that output. In fact, it is procompetitive -- producing efficiencies and increased output. Even if PCV participation somehow violated the antitrust laws (which it does not), it is nevertheless exempt from the antitrust laws under 15 U.S.C. § 521.

Very truly yours,

BYRNES & KELLER LLP


Paul R. Taylor

EXHIBIT 1



U.S. Department of Justice
Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

December 10, 1999

MEMORANDUM FOR ANDREW J. PINCUS
GENERAL COUNSEL
DEPARTMENT OF COMMERCE

From: Randolph D. Moss **ROM**
Acting Assistant Attorney General
Office of Legal Counsel

Re: Participation by Processor-Owned Catcher Vessels in Inshore Cooperatives Under the American Fisheries Act of 1998

You have requested our advice as to the appropriate construction of section 210(b) of the American Fisheries Act, Pub. L. No. 105-277, 112 Stat. 2681-616, 2681-629 (1998) ("AFA"). Specifically, you have asked whether catcher vessels owned by shoreside processors may participate in fishery cooperatives in the inshore sector of the Alaska pollock fishery, which are authorized under section 210(b) of the AFA, or whether participation in such cooperatives is limited to independently owned catcher vessels. Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Andrew J. Pincus, General Counsel, Department of Commerce (Aug. 10, 1999) ("Commerce Letter"). As explained more fully below, we conclude that section 210(b) does permit processor-owned catcher vessels to join AFA-authorized fishery cooperatives.

I. BACKGROUND

A. The BSAI Fishery

The Bering Sea and Aleutian Islands ("BSAI") fishery, located in the Bering Sea off the coast of Alaska, is the largest single-species groundfish fishery in the world. In recent years, growing market demand for the Alaskan pollock -- a fish used in the United States primarily as an ingredient in breaded fish products and used worldwide for processing into the protein paste surimi -- has spurred tremendous growth in the BSAI fishery, with increasing numbers of vessels entering the fishery each year to compete for a share of the annual catch.

The pollock harvested in the BSAI fishery are processed by two competing sectors, inshore (including shoreside) and offshore processors. Inshore processors operate traditional land-based processing plants and floating processors that are moored in a single location for the entire year. They obtain fish either from catcher vessels that are independently owned ("independent catcher vessels") or from vessels in which they or other processors have an ownership interest ("processor-owned catcher vessels"). Offshore processing takes place on factory trawlers (also known as "catcher-processors") or motherhips. Catcher-processors are large vessels that harvest pollock and process their own catch. They also purchase fish harvested by catcher vessels and process that catch. Mothership processors are vessels engaged solely in processing; they operate at sea by taking deliveries of fish harvested by catcher vessels and processing them.

The BSAI fishery is managed by the Secretary of Commerce ("Secretary") through the National Marine Fisheries Service ("NMFS") and the North Pacific Fishery Management Council ("Council"). The Council acts as an advisory board and recommends fishery management actions to the Secretary. See generally 16 U.S.C. § 1852 (1994). Among the Council's responsibilities is to recommend to the NMFS a "total allowable catch" ("TAC") for each species of fish in the BSAI fishery. See 50 C.F.R. § 679.20 (1998). The TAC represents the maximum amount of fish that can be harvested in any given fishing season.

Before 1998, the Council was responsible for recommending to the Secretary how the annual TAC for Alaskan pollock should be allocated between the offshore and inshore components of the BSAI fishing industry. In 1992, the Council recommended an allocation that permitted the offshore sector to harvest sixty-five percent of the pollock TAC, and the inshore sector to harvest thirty-five percent. See General Accounting Office, Fishery Management: Market Impacts of the American Fisheries Act on the Production of Pollock Fillets 3 (June 1999). Not surprisingly, that percentage allocation was the subject of bitter dispute each year between the offshore and inshore sectors. Moreover, although the Council's allocation formula limited the amount of pollock each sector could harvest, it did not regulate the amount of pollock that individual catcher vessels or catcher-processors could catch. As a result, a "race for fish" ensued within this open access system: each fishing season, vessels within each sector raced to catch as much pollock as possible until their allocation was reached and the season closed. Those vessels that caught the most fish made the most money. Over the years, as more and more vessels joined the race in response to increased market demand for pollock, the fishery suffered increasingly from overcapitalization and inefficiency.

B. The American Fisheries Act of 1998

In 1998, Congress enacted the AFA to address some of these problems. Senator Breaux, one of the AFA sponsors, described the legislation as "another major milestone in our long efforts to reserve U.S. fishery resources for bona fide U.S. citizens as well as take steps to substantially improve the conservation and management of our Nation's fishery resources through a reduction in the overcapitalization of our fishing fleets." 143 Cong. Rec. S10,299

(daily ed. Oct. 1, 1997) (statement of Sen. Breaux). The sponsors of the ARA thus sought to accomplish three goals - "Americanization, decapitalization, and rationalization" of the BSAI fishery. See 144 Cong. Rec. 512,801 (daily ed. Oct. 21, 1998) (statement of Sen. Gorton); see also 144 Cong. Rec. 512,777 (daily ed. Oct. 21, 1998) (statement of Sen. Stevens).

Subtitle I of the AFA attempts to achieve "Americanization" by imposing new ownership requirements on U.S. flag vessels. See § 202. Subtitle I also partly addresses the problem of overcapitalization of the fishery by placing limits on the size of new vessels in U.S. waters. *Id.*

Subtitle II of the AFA advances the goals of "decapitalization" and "rationalization" through various provisions that reduce excess capacity in the fishery and substitute a comprehensive management scheme for the pre-existing open access system. Section 205 deals with the question of the appropriate allocation of the pollock TAC by establishing statutory allocations for the offshore and inshore sectors. After setting aside ten percent of the TAC as a directed fishing allowance for the western Alaska community development quota program, section 206 divides the remainder of the TAC equally between the inshore and offshore processing sectors. See § 206(a)-(b)(1). The offshore sector allocation is split further, with catcher processors and the catcher vessels supplying them receiving forty percent of the TAC and the catcher vessels harvesting pollock for motherhips receiving ten percent. See § 206(b)(2)-(b)(3).

Sections 207 and 209 provide for a buyout of nine predominantly foreign-owned catcher processors that will be inoperative by the time of the BSAI fishery. Section 208 limits participation in the fishery by establishing strict eligibility requirements for vessels and catcher vessels delivering to shore-side processors. See § 208(a) (eligibility requirements for catcher vessels delivering to shore-side processors); § 208(b) (listing eligible catcher vessels delivering to catcher processors); § 208(c) (listing eligible catcher vessels delivering to other catcher processors and eligibility criteria for other catcher vessels delivering to motherhips); § 208(d) (listing eligible catcher vessels delivering to motherhips); § 208(e) (listing eligible catcher-processor); § 208(f) (eligibility criteria for shore-side processors).

Section 210 of the AFA, the provision at issue here, seeks to eliminate the race for fish by providing a framework for the formation of fishery cooperatives in each of the BSAI processing sectors. See § 210(b) (cooperatives of catcher vessels delivering fish to shore-side processors); § 210(c) (cooperatives of catcher vessels delivering fish to catcher processors); § 210(d) (cooperatives of catcher vessels delivering fish to motherhips). Although certain types of fishery cooperatives were already authorized under the Fishermen's Collective Marketing Act of 1934, 15 U.S.C. § 521 (1994) ("FCMA"), section 210 provides a powerful incentive for the creation of fishery cooperatives: it reserves a certain percentage of the TAC for the members of each cooperative, thereby guaranteeing them a share of the fish that they

can harvest at their own pace.

The precise criteria for the establishment of AFA fishery cooperatives in the inshore processing sector are set out in subsection 210(b). Under those criteria, if eighty percent or more of the "qualified catcher vessels" that delivered pollock to a particular shoreside processor the previous year sign "a contract implementing a fishery cooperative under subsection (a)" — i.e., a contract under section 1 of the FCMA — and if these vessels further agree to deliver pollock only to that particular shoreside processor (and the processor agrees to process the pollock), then the Secretary of Commerce may establish a separate allocation for the cooperative. § 210(b)(1). That allocation would be equal to the average percentage of the TAC that the vessels in the cooperative caught during 1995, 1996 and 1997. *Id.* If a fishery cooperative is formed, section 210(b)(2) requires the cooperative to permit other catcher vessels that delivered most of their catch to that shoreside processor to join the cooperative under the same terms and conditions as member vessels. § 210(b)(2).

Catcher vessels that participate in a fishery cooperative under section 210(b) may harvest only the pollock that is allocated to them by the Secretary; they are not allowed to harvest any of the pollock that remains in the "open access" portion of the inshore allocation under section 206(b)(1). § 210(b)(5). The open access allocation is equivalent to that portion of the inshore allocation that has not been reserved by the Secretary for fishery cooperatives. *Id.*

II. DISCUSSION

The question before us is whether catcher vessels that are owned by shoreside processors may participate in fishery cooperatives under section 210(b) of the AFA. Section 210(b)(1), which creates the entitlement of fishery cooperatives to a portion of the TAC, provides:

(b) Catcher Vessels Onshore -

(1) Catcher vessel cooperatives. — Effective January 1, 2000, upon the filing of a contract implementing a fishery cooperative under subsection (a) which —

(A) is signed by the owners of 80 percent or more of the qualified catcher vessels that delivered pollock for processing by a shoreside processor in the directed pollock fishery in the year prior to the year in which the fishery cooperative will be in effect; and

(B) specifies, except as provided in paragraph (6), that such catcher vessels will deliver pollock in the directed pollock fishery only to such shoreside processor during the year in which the fishery cooperative will be in effect and

that such shoreside processor has agreed to process such pollock, the Secretary shall (set aside a fishing allowance from the inshore allocation of the TAC for that fishery cooperative).

Section 210(b)(1) points to two possible statutory bases for limiting eligibility to independently owned vessels. First, the AFA by its own terms might impose the limitation. Second, the reference in section 210(b)(1) to "a contract implementing a fishery cooperative under subsection (a)" might effectively incorporate limits from the FCMA, since subsection (a) refers to "a contract implementing a fishery cooperative" under the FCMA.

A. Language and Legislative History of AFA

Taken by itself, the AFA does not restrict eligibility to independently owned catcher vessels. Section 210(b)(3) defines "qualified catcher vessel" as follows:

Qualified catcher vessel. — For the purposes of this subsection, a catcher vessel shall be considered a "qualified catcher vessel" if, during the year prior to the year in which the fishery cooperative will be in effect, it delivered more pollock to the shoreside processor to which it will deliver pollock under the fishery cooperative in paragraph (1) than to any other shoreside processor.

Nothing in this definition suggests an ownership limitation. Pursuant to section 210(b)(3), whether or not a catcher vessel is "qualified" under the AFA to participate in a fishery cooperative linked to a particular shoreside processor depends upon whether the vessel delivered the majority of its catch to that processor, not upon its ownership structure.

Nor does the definition of the underlying term "catcher vessel" contain any ownership-based restriction. "Catcher vessel" is defined in section 205(3) of the AFA as "a vessel that is used for harvesting fish and that does not process pollock onboard." What this definition excludes are boats that process fish onboard — catcher/processors (see § 205(2)) and motherships (see § 205(8)) — but it does not, by its own terms, exclude vessels on the basis of ownership.

Further clarification of the scope of the term "catcher vessel" appears in subsections 208(a) and (c). Section 208 generally sets forth eligibility criteria for catcher vessels participating in the inshore and offshore sectors of the BSAI fishery. Under section 208(a), eligibility to harvest pollock for the inshore sector is limited to those catcher vessels that: (1) either have delivered at least 250 metric tons of pollock to a shoreside processor in 1996, 1997 or 1998, or are less than sixty feet long and have delivered at least forty metric tons of pollock to a shoreside processor in any of those years; (2) have an approved license to harvest pollock; and (3) are not listed in subsection 208(b) (which lists catcher vessels eligible to deliver pollock to catcher/processors). See § 208(a)(1). None of these eligibility criteria

relates in any way to ownership of the catcher vessel.

Subsection 208(c), which defines the eligibility of catcher vessels delivering pollock to motherships, also offers textual support for an interpretation of "catcher vessel" that makes no distinction based on ownership. Section 208(c) lists specifically named "catcher vessels" that remain eligible to harvest the portion of the TAC allocated to motherships. While some of the catcher vessels identified in section 208(c) are independently owned, many of those listed are owned wholly or in part by a mothership. See Robert Halvorsen et al., "Discussion Paper on Inshore Sector Catcher Vessel Cooperatives in the Bering Sea/Aleutian Islands Pollock Fisheries" at Appendix C (Sept. 13, 1999) ("University of Washington Discussion Paper") (listing vessels participating in BSAI fishery and their ownership structure). By including both independently owned vessels and mothership-owned vessels within the list of eligible "catcher vessels," section 208(c) extends the scope of that term to vessels owned by an entity within one of the processing sectors. Although none of the vessels listed in section 208(c) is owned by a shoreside processor,¹ section 208(c) makes clear that the term "catcher vessel" is not limited to non-processor-owned boats. Since there is nothing in the definition of "catcher vessel" to distinguish between different types of processor owners, it follows that the term "catcher vessel" should include boats owned by shoreside processors as well.

The overall purpose animating section 210(b), as revealed in the language and history of the provision, supports this inclusive definition. Rather than placing any ownership limitation on vessel participation in cooperatives, section 210(b) expressly encourages broad participation in inshore cooperatives by all vessels. Section 210(b)(2) provides that "[a]ny contract implementing a fishery cooperative under paragraph (1) must allow the owners of other qualified catcher vessels to enter into such contract after it is filed . . . under the same terms and conditions as the owners of the qualified catcher vessels who entered into such contract upon filing." The conference report to the AFA explains that this provision extends the authority to join cooperatives to all qualified catcher vessels "on a class-wide basis":

If a fishery cooperative is formed, other catcher vessels that delivered most of their catch to that shoreside processor would be required to be allowed to join the fishery cooperative under the same terms and conditions as other participants at any time before the calendar year in which fishing under the cooperative will begin. . . . The vessels eligible to harvest pollock allocated for processing by shoreside processors would continue to have the authority to form a fishery cooperative on a class-wide basis as well.

144 Cong. Rec. S12,780 (daily ed. Oct. 21, 1998).

¹ This comes as no surprise, since a catcher vessel owned by a shoreside processor would likely be delivering the majority of its catch to that shoreside processor, not to a mothership.

Moreover, the manner in which Congress chose to structure fishery cooperatives for the inshore sector requires the participation of shoreside processor-owned catcher vessels in order to achieve the goal for which AFA cooperatives were being established to end the race for fish. In order for a fishery cooperative to be formed under section 210(b), the owners of eighty percent or more of the qualified catcher vessels that delivered pollock to a particular shoreside processor in the previous year must agree to join the cooperative. See § 210(b)(1). In 1998, however, processor-owned vessels apparently made up over twenty percent of the total number of vessels delivering pollock to six out of seven shoreside processors. See University of Washington Discussion Paper, at 46. Thus, if processor-owned vessels were excluded from participating in AFA cooperatives, six out of seven of the potential cooperatives that might be formed under the AFA could not reach the eighty percent threshold for vessel participation. In other words, if participation in AFA cooperatives was limited to independently owned vessels, only one cooperative could be formed pursuant to the requirements of section 210(b). See Commerce Letter at 2.

Similarly, if processor-owned vessels were excluded from AFA cooperatives, none of the fishery cooperatives that Congress intended to create within the motherhip sector pursuant to section 210(d) could be formed. Like section 210(b), section 210(d) permits "the filing of a contract implementing a fishery cooperative under [section 1 of the FCMA]. " § 210(d)(1). These contracts must be entered into "by the owners of 80 percent or more of the catcher vessels eligible under 208(c)." *Id.* The latter provision lists 19 named vessels, 13 of which are processor-owned. Section 208(c) includes a provision allowing additional vessels to be added to this list, but only if the Secretary of Commerce makes certain factual findings and the new vessel is eligible to harvest pollock under a license limitation program recommended by the North Pacific Council. § 208(c)(2)(A), (B). Unless an additional 46 independently owned boats were added to this list by January 1, 2000, there would be no possibility that 80 percent of the catcher vessels eligible under section 208(c) could be independently owned. Because one of the central aims of the AFA was to reduce excess capacity in the fishery, it is obvious that Congress did not intend to authorize the creation of FCMA cooperatives within the motherhip sector only if the number of catcher vessels within that sector more than tripled, from 19 to 65. Section 210(d), therefore, confirms that Congress expected processor-owned vessels to enter into contracts "implementing a fishery cooperative under" the FCMA.

Thus, interpreting the AFA to exclude processor-owned vessels would essentially defeat the primary purpose of the Act, which was to encourage the formation of fishery cooperatives in order to end the annual race for fish. As noted above, see supra at 4, under section 210(b)(5), catcher vessels that do not participate in a fishery cooperative may harvest pollock from that portion of the inshore allocation that is reserved for open access. If only a small number of catcher vessels join cooperatives, the percentage of the TAC set aside for cooperatives will also be small, leaving a correspondingly greater percentage of the TAC available for open access, with a large number of non-cooperative vessels competing for a portion of that catch. The race for fish would continue.

The legislative history of the AFA likewise confirms that Congress intended fishery cooperatives to play a critical role in ending the race for fish. As Senator Murray explained during the Senate debate on the AFA,

This bill relies in great measure on the ability and willingness of the North Pacific pollock fishery sectors to form fishery cooperatives. Fishery cooperatives, authorized under current law, are a privately negotiated allocation on a company-by-company or vessel-by-vessel basis of a portion of the total allowable catch. Similar to an individual fishing quota program, cooperatives provide fishery participants with the certainty they need to stop the race for fish, and harvest and process the fish on a more flexible schedule with greater attention to bycatch, efficiency, and safety. The existing fishery cooperative in the offshore sector of the Pacific Whiting fishery has shown tremendous benefits in these regards and has helped rationalize the fishery. It is hoped that cooperatives can do the same in the pollock fishery.

144 Cong. Rec. S12,708 (daily ed. Oct. 20, 1998) (statement of Sen. Murray).

It can reasonably be assumed that, in crafting cooperatives as a solution to the open access problem, Congress was familiar with the BSAI fishing industry and its various components. Cf. Rodriguez v. Peas, 63 F.3d 546, 567 (7th Cir. 1995). More particularly, it is clear that Congress was aware of the extent to which the shorewide processing sector was vertically integrated, and that Congress did not intend to omit processor-owned boats from the fishery cooperatives whose formation was essential to the purposes of section 210. The clear language of the AFA and its legislative history and purpose thus demonstrates a congressional intent to include processor-owned vessels in fishery cooperatives under section 210(b).²

B. Section 210(b) Reference to FCMA Cooperatives

We now turn to the question whether the reference in subsection 210(b) to "fishery cooperative[s]" under subsection (a),³ which refers to the fishery cooperative provision of the FCMA, 15 U.S.C. § 521, places any limitations on the formation of cooperatives under the AFA. The National Oceanographic and Atmospheric Administration ("NOAA") does not dispute the conclusion that the text and legislative history of the AFA indicate a congressional intent to include processor-owned vessels in cooperatives under section 210(b). However, NOAA argues that, by referring to FCMA fishery cooperatives under section 210(b), Congress necessarily incorporated into the AFA cooperatives those eligibility restrictions that apply to FCMA cooperatives. See Letter for Randolph Moss, Acting Assistant Attorney General,

² To be sure, the purpose of section 210(b) could also be achieved if processors sold their catcher vessels to independent operators. The legislative history, however, makes no reference to such divestiture, and it seems unlikely that Congress, without even referring to divestiture, would make the entire success of section 210(b) rest on this contingency.

Office of Legal Counsel, from Monica P. Medina, General Counsel, National Oceanographic and Atmospheric Administration (June 7, 1999) ("NOAA Letter"). And because NOAA interprets the FCMA to preclude the participation of processor-owned vessels, it concludes that, likewise, processor-owned vessels are ineligible to participate in cooperatives under § 210(b) of the AFA. *Id.* at 5.

Because the question of the interplay between the FCMA and the AFA is relevant to a proper interpretation of section 210(b), we will briefly discuss the antitrust exemption under the FCMA and the statute upon which it is modeled, the Capper-Volstead Act, 7 U.S.C. § 291 (1994), before returning to the AFA.

1. Integrated Processors under the FCMA and the Capper-Volstead Act

The FCMA grants an exemption from antitrust liability for certain collective activities in the fishing industry. Specifically, it provides:

Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged. . . . Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes.

15 U.S.C. § 521. The FCMA exemption was patterned after a similar antitrust exemption for agricultural activities, set forth in section 1 of the Capper-Volstead Act, 7 U.S.C. § 291. In fact, the only court that has considered the scope of the FCMA exemption concluded that "though there are some differences between Capper-Volstead and the Fisherman's Act, the two Acts provide exemptions from antitrust liability for essentially the same activities." United States v. Hince, 823 F. Supp. 1350, 1354 n.7 (S.D. Miss. 1993).

The Supreme Court considered the scope of the Capper-Volstead exemption in National Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978) ("NEMA"). In NEMA, the United States brought a civil action against a nonprofit cooperative association of producers of broiler chickens – the NEMA – alleging a conspiracy in violation of section 1 of the Sherman Act. The question before the Court was whether a producer of broiler chickens, which did not own a breeder flock or hatchery, could nevertheless qualify as a "farmer" within the meaning of the Capper-Volstead Act. *Id.* at 817. After reviewing the legislative history of the Capper-Volstead Act, the Court concluded that it could not:

We, therefore, conclude that any member of NEMA that owns neither a breeder flock nor a hatchery, and that maintains no grow-out facility at which the flocks

to which it holds title are raised, is not among those Congress intended to protect by the Capper-Volstead Act. The economic role of such a member in the production of broiler chickens is indistinguishable from that of the processor that enters into a purchasing contract with its supplier, or from that of a packer that assists its supplier in the financing of his crops. . . . We hold that such members are not "farmers," as that term is used in the Act, and that a cooperative organization that includes them - or even one of them - as members is not entitled to the limited protection of the Capper-Volstead Act.

Id. at 827-29 (footnotes omitted).

In coming to this conclusion, the Court specifically reserved the question of the status of the integrated producer:

[W]e need not consider here the status under the Act of the fully integrated producer that not only maintains its own breeder flock, hatchery, and grow-out facility, but also runs its own processing plant. Neither do we consider the status of the less fully integrated producer that, although maintaining a grow-out facility, also contracts with independent growers for a large portion of the broilers processed at its facility.

Id. at 829 n.21. In a concurring opinion, Justice Brennan did address these questions reserved by the Court. He reviewed the legislative history of the Capper-Volstead Act, and asserted that "Congress' manifest purpose to protect the small, individual economic units engaged in farming," *id.* at 835 (Brennan, J., concurring), precluded automatic extension of the exemption to the integrated producer:

I seriously question the validity of any definition of "farmer" in § 1 which does not limit that term to exempt only persons engaged in agricultural production who are in a position to use cooperative associations for collective handling and processing - the very activities for which the exemption was created. At some point along the path of downstream integration, the function of the exemption for its intended purpose is lost, and I seriously doubt that a person engaged in agricultural production beyond that point can be considered to be a farmer. . . . Thus, in my view, the nature of the association's activities, the degree of integration of its members, and the functions historically performed by farmers in the industry are relevant considerations in deciding whether an association is exempt.

Id. at 835-36.

Only one court has actually ruled on the question whether an integrated producer is entitled to Capper-Volstead or FCMAA exemption. In *United States v. Egan*, 823 F. Supp.

1350 (S.D. Miss. 1993), the district court, relying largely upon Justice Brennan's concurrence, concluded that catfish processors could not take advantage of the antitrust exemption under the FCMA solely by purchasing or leasing some interest in a catfish farming operation. *Id.* at 1359. The court reasoned that if it were to come to the opposite conclusion,

large integrated agribusinesses organized to market and sell agricultural products could exempt themselves from the antitrust laws by the simple expedient of purchasing and/or leasing some interest in a farming operation, no matter how de minimis the interest. Such a result, however, would undermine Congress' express purpose in enacting both the Sherman and Capper-Volstead Acts.

Id. There is certainly support in the legislative history of the Capper-Volstead Act for this conclusion, much of which is catalogued by Justice Brennan in his *NEMA* concurrence. However, as Justice White recognized in his dissent in *NEMA*, there is also conflicting evidence in the history and language of the statute that might lead to the opposite conclusion. 436 U.S. at 844-49.

While we understand that it is generally assumed that integrated producers and processors may not participate in exempted cooperatives, the sparse case law interpreting the scope of the FCMA and Capper-Volstead exemptions cannot be said to have dispositively resolved the question. However, as we discuss in the next section, we need not decide that question in order to determine whether processor-owned vessels may participate in the cooperatives authorized under section 210(b).

2. Reconciling the FCMA with the AFA

It is a well-established principle of statutory interpretation that the law favors rational and sensible construction. 2A Norman J. Singer, *Sutherland Statutory Construction*, § 45.12 (5th ed. 1992). Thus, if there exists some reasonable interpretation that reconciles two otherwise allegedly inconsistent statutes in a manner that does not destroy or hinder the intent or meaning of either one, that interpretation is favored. *Id.* Moreover, if a statute is capable of more than one interpretation, it should be construed to effectuate its underlying purpose. *Norwest Bank of North Dakota, N.A. v. Doth*, 159 F.3d 328, 332 (8th Cir. 1998); cf. *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) (in expounding statute, court must look to provisions of law as whole and to its object and policy). Applying these principles to the case before us, we must, if possible, construe the cross-reference to FCMA cooperatives in section 210(b) in a reasonable manner that is both consistent with the purposes of the AFA and compatible with section 1 of the FCMA.

Congress's primary purpose in enacting section 210 was to encourage the formation of as many fishery cooperatives as possible in order to rationalize the BSAI fishery and end the race for fish. See *supra* at 7-8. Congress chose to effectuate this purpose for the inshore sector of the BSAI fishery by creating "catcher vessel cooperatives" under section 210(b).

Congress chose also to define section 210(b) cooperatives by cross-referencing the FCMA. Because the participation of processor-owned vessels in section 210(b) cooperatives was critical to achieving Congress's purpose, Congress must have intended that such vessels would be included in cooperatives under the FCMA.³ In interpreting section 210(b)'s cross-reference to the FCMA, therefore, we are presented with three possibilities: 1) Congress was mistaken about the scope of the FCMA, which excludes such integrated processors, and processor-owned vessels may not participate in cooperatives under § 210(b); 2) Congress correctly understood the FCMA, to include integrated processors, and processor-owned vessels may participate in cooperatives under § 210(b); or 3) Congress has in the AFA effectively declared that, regardless of the actual scope of the FCMA in other contexts, processor-owned vessels may participate in FCMA fishery cooperatives in the BSAI fishery. Of these three possible interpretations, we must reject the first because it so plainly frustrates the purpose of the AFA. We need not decide between the second and third possible interpretations, however, because, under either, it is clear that catcher vessels owned by shoreside processors may participate in the fishery cooperatives authorized by section 210(b) of the AFA.

The first of these interpretations assumes the conclusion reached by NOAA, namely that the FCMA does not permit integrated processors to participate in cooperatives under 15 U.S.C. § 521. To argue further, as NOAA does, that this cross-reference necessarily incorporates the limitations of FCMA cooperatives into the AFA scheme requires us to conclude that Congress mistakenly assumed that FCMA cooperatives could include integrated processors and, as a result, enacted a provision that cannot operate as Congress intended. Moreover, as we have already observed, if processor-owned vessels are excluded from participating in cooperatives under section 210(b), only one fishery cooperative could be formed under section 210(b), thereby thwarting the primary purpose of section 210. Thus if we accept this first interpretation, we render section 210(b) practically ineffective.⁴

We are reluctant to adopt a construction of a statute that presumes congressional error and that renders its provisions either ineffective or contrary to stated legislative objectives. The "unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce

³ Of course, it might be argued that Congress deliberately referred to the FCMA cooperatives in section 210(b) in order to exclude processor-owned boats from AFA cooperatives. However, there is nothing in the legislative history of the statute to support such an assertion, and there is significant evidence to the contrary. See supra at 4-8. Thus, we do not think this interpretation of the reference to the FCMA merits consideration.

⁴ It might be argued that the fact that one cooperative of independently owned catcher vessels could be formed under the provisions of section 210(b) is sufficient to render this interpretation viable. However, in light of Congress's clear intent in section 210(b) to encourage the formation of cooperatives on a "class-wide basis," we think such an interpretation would in fact "thwart the obvious purpose of the statute." In *Re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). Moreover, as noted above, see supra at 7, this interpretation would completely nullify section 210(d).

a reasonable result." 2A Singer, *supra* at § 45.12; see also American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid . . . unreasonable results whenever possible.").

We therefore look to the two other proposed interpretations to see if they offer a more reasonable result that achieves the AFA's underlying purposes. The second interpretation accomplishes these goals because it would allow processor-owned catcher vessels to join cooperatives under both the FCMA and the AFA. Of course, this interpretation would require us to determine that integrated processors may participate in fishery cooperatives under the FCMA, a conclusion that cannot be said to be settled under the case law and that we understand may have profound implications for both the fishing and other industries. We are therefore reluctant to rely upon this conclusion, and need not do so because, even if the FCMA exemption does not cover integrated processors, we believe Congress's intent to permit the formation of cooperatives under section 210(b) that include processor-owned vessels can still be given effect under the third interpretation.

The third interpretation posits that Congress declined to express or assume a view concerning the scope of the FCMA generally and instead decided that, regardless of whether processor-owned vessels are permitted to participate in all cooperatives under the FCMA, they should participate in the FCMA cooperatives authorized by the AFA. By referring to the FCMA in a statute that intended to include integrated processors in its fishery cooperatives, Congress effectively determined that, at least for the purpose of BSAI directed pollock fisheries, processor-owned vessels are entitled to participate in cooperatives that enjoy FCMA antitrust immunity.

"[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Loillard v. Pong, 434 U.S. 575, 581 (1978). Here, however, as noted above, there was no dispositive judicial interpretation of the scope of either the FCMA or the Copper-Volstead Act to guide Congress when it enacted the AFA in 1998. Moreover, because it was not actually amending the FCMA, Congress had no reason in the AFA to settle this far-reaching issue. Cf. Pierce v. Underwood, 487 U.S. 552, 567 (1988) ("it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means"); Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 508-09 (1982) (according interpretive weight to views of a subsequent Congress where that Congress acted in light of settled rule that exhaustion is not required in section 1983 actions and imposed an exhaustion requirement for a discrete class of 1983 claims). Rather, all that was required was for Congress to determine that processor-owned vessels should be allowed to participate in AFA cooperatives that enjoy FCMA immunity.

The language of section 210 offers textual support for the view that Congress legislated

in this limited manner. Notably, while it authorized the execution of contracts "implementing a fishery cooperative under" the FCMA, Congress did not describe the signatories to such contracts by cross-reference to the FCMA. Thus, it did not authorize "fishermen, within the meaning of the FCMA, who own qualified catcher vessels" to enter into contracts under section 210. Nor did it authorize "owners of qualified catcher vessels otherwise eligible to form FCMA cooperatives" to do so. Indeed, Congress did not use any of the FCMA's operative terms -- "persons," "fishermen," "planters" -- in specifying who could participate in section 210(b) cooperatives entitled to antitrust immunity. Instead, Congress provided that FCMA contracts under section 210(b)(1) be signed by "owners" of "qualified catcher vessels," and nothing in the statutory definition of "qualified catcher vessels" suggests any limitation based on ownership or vertical integration. The text of the statute is thus entirely consistent with a congressional intent to permit integrated processors to participate in FCMA cooperatives for purposes of the AFA, whether or not such entities can participate in FCMA cooperative generally. *See Lorillard v. Pong*, 434 U.S. at 582 (construing one statute in light of congressional "selectivity . . . in incorporating provisions and modifying certain . . . practices" under an earlier statute that Congress incorporated by reference in the subsequent statute).

Unlike the first interpretation we outlined above, the third interpretation effectuates Congress's underlying purpose in the AFA while simultaneously reconciling the AFA with the FCMA. It best gives effect to Congress's express intent: that all catcher vessels, both independently-owned and processor-owned, participate in FCMA fishery cooperatives under the AFA so that the race for fish in the BSAI fishery can be ended. Particularly in light of the fact that there is no clearly settled law on the question whether, and if so, under what circumstances, integrated processors can participate in FCMA cooperatives, that congressional intent should control here.⁵

This interpretation does not require us to accept or reject Justice Brennan's interpretation of the Copper-Volstead Act or the *Hinote* court's view concerning the scope of the FCMA. As we read section 210, Congress did not take any position on the scope of the FCMA -- a statute it left entirely undisturbed -- and instead effectively declared that, whatever the scope of that statute generally, processor-owned vessels could participate in pollock fishery cooperatives entitled to FCMA immunity.

⁵ In fact, as noted above, under this interpretation, the scope of the FCMA in other contexts is irrelevant to the result. If the FCMA permits integrated processors to participate in cooperatives in other contexts, then the AFA simply makes clear that this authority applies to all catcher vessels in the BSAI fishery, including those owned by processors, and encourages them to take advantage of the existing authority by offering catcher vessel cooperatives a guaranteed allocation of the TAC. If the FCMA does not permit integrated processors to participate in cooperatives in other contexts, Congress's intent that they be permitted to participate in FCMA cooperatives for the purpose of harvesting pollock in the BSAI fishery is a decision to extend FCMA immunity to a limited group of processor-owned vessels operating in a single fishery.

In any event, Justice Brennan's analysis in NEMA is simply inapplicable here. In his concurring opinion, Justice Brennan concluded that the Capper-Volstead exemption should not extend to those who are not "in a position to use cooperative associations for collective handling and processing, 436 U.S. at 835-36, presumably those who already have their own processing capacity. The purpose of cooperatives under the AFA, however, is not to facilitate collective processing - in fact, each cooperative that might be formed under section 210(b) is expressly tied to an existing shoreside processor that is responsible for processing the catch of the cooperative. Rather, cooperatives under the AFA are formed for the purpose of receiving a guaranteed allocation of the pollock TAC, thereby permitting members of the cooperative to fish more efficiently and safely. It thus makes no sense to evaluate the eligibility of participants in AFA cooperatives on the basis of their ability to use the cooperative only for purposes of collective processing.

We do not share NOAA's concern that this third interpretation is inconsistent with section 210(d), which expressly extends the antitrust exemption under the FCMA to processing activities by motherships. NOAA argues that, because Congress expressly extended the reach of the FCMA to include one type of processor in § 210(d), we should not read such an extension into § 210(b) on an implied basis. NOAA Letter at 4 n.4. However, the principle *expressio unius est exclusio alterius* is a canon of statutory construction, not a rule of law, and can be overcome by a showing of contrary legislative intent or policy: "[W]hether the specification of one matter means the exclusion of another is a matter of legislative intent for which one must look to the statute as a whole." 2A Singer, Sutherland Statutory Construction, at § 47.25 n.1 (citing Massachusetts Trustees of E. Gas & Fuel Assoc. v. United States, 312 F.2d 214 (9th Cir. 1963); see also United States v. Bangs, 222 U.S. 513, 519 (1912) ("The maxim invoked [*expressio unius*] expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. In such instances it is of deciding importance; in others, not."). Given the strong evidence in the AFA that Congress intended integrated processors to participate in all fishery cooperatives in the BSAI fishery, we do not find the maxim persuasive here.

NOAA also urges a narrower reading of section 210(b) based upon the rule that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored," United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963). This rule comes into play, however, only if the FCMA does not extend to processor-owned vessels, a question we need not decide. Moreover, even if we assume that the FCMA does not include such vessels, we believe that this is one of those unusual situations that presents a case of "plain repugnancy between the antitrust and regulatory provisions," *id.* at 351, a rare exception to the general rule. Where, as here, "Congress has made a judgment that [certain] restrictions on competition might be necessitated by the unique problems of" a particular industry, "the antitrust laws must give way if the regulatory scheme established" by that statute is to work. United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694, 729-30 (1975). Congress's purpose in enacting the AFA was to increase efficiency by decreasing

excess capitalization and ending the race for fish, and its mechanism for achieving that purpose was the creation of fishery cooperatives that are necessarily exempt from antitrust liability.

Indeed, in the context of the BSAI fishery, where there is a fixed quota of fish in a highly regulated industry, the creation of fishery cooperatives does not undermine the goals of the antitrust laws. In the related context of the Pacific Whiting fishery, the Antitrust Division recognized that "reliance on an Olympic race system to gather a fixed quota of fish 'is both inefficient and wasteful,'" and concluded that "eliminating the race will increase processing efficiency and concomitantly the output of [fish]." Letter for Joseph M. Sullivan, Esq., Munch, MacGregor, Hoppel, Falconer, Zulauf & Hall, from Joel L. Klein, Acting Assistant Attorney General, Antitrust Division, at 3 (May 20, 1997). The Antitrust Division further determined that, in such a fixed quota setting, elimination of the race for fish was unlikely to have an anticompetitive effect: "[E]limination of the race to gather an input whose output is fixed by regulation seems unlikely to reduce output or increase price under any likely scenario." *Id.* Thus, from the perspective of antitrust principles, there is no reason to read section 210(b) narrowly; on the contrary, reading section 210(b) broadly to facilitate the formation of as many fishery cooperatives as possible would ultimately allow for greater efficiency in processing and might have procompetitive effects.⁶ *Cf. id.* at 3-4 ("To the extent that the proposed agreement allows for more efficient processing that increases the usable yield (output) of the processed Pacific Whiting and/or reverses the inadvertent catching of other fish species whose preservation is also a matter of regulatory concern, it could have procompetitive effects.").

In short, there exists at least one interpretation of section 210(b) that is consistent with its text and effectuates the purposes of the AFA. Because a statute should be interpreted whenever possible to effectuate Congress's purposes, and because it is possible to do so here, we conclude that processor-owned vessels may participate in section 210(b) cooperatives. In light of this conclusion, we need not resolve the further question whether the FCMA generally permits such vessels to participate in cooperatives that enjoy antitrust immunity.

⁶ Our conclusion that processor-owned vessels may participate in FCMA cooperatives under the AFA is therefore unlikely to lead to anticompetitive results. Nevertheless, to minimize the possibility of negative effects on the fishing industry, Congress included within the AFA several provisions designed to eliminate potentially adverse economic consequences. *See*, e.g., § 213(c)(1) (granting the North Pacific Council the authority to recommend conservation and management measures "that supersede the provisions of this title . . . to mitigate adverse effects in fisheries or on catches of fewer than three vessels in the directed pellict fishery caused by . . . fishery cooperatives in the directed pellict fishery"); *see also* 144 Cong. Rec. S17,708 (daily ed. Oct. 20, 1998) (statement of Sen. Murray) ("In the interest of ensuring that small, independent fishermen are the true beneficiaries of fishery cooperatives, the bill includes a number of requirements for fishery cooperatives in all three sectors which are designed to provide these small, independent fishermen with sufficient leverage in the negotiations to protect their interests."). Thus, should shore-side processors in the BSAI fishery affiliate with catcher vessels for no purpose other than to engage in anticompetitive conduct under the umbrella of antitrust exemption, the AFA would appear to give the Council the authority to check such abuses.

CONCLUSION

The language and the legislative history of the AFA indicate that Congress intended processor-owned catcher vessels to participate in inshore cooperatives under the AFA. Because section 210(b) can be read in a manner consistent with that intention, we conclude that processor-owned catcher vessels may join fishery cooperatives under the AFA.

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EXHIBIT 2

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DEPARTMENT OF JUSTICE
Antitrust Division

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May 20, 1997

Joseph M. Sullivan, Esq.
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Seattle, Washington 98104-4082

Dear Mr. Sullivan:

This is in response to your request on behalf of the Whiting Conservation Cooperative ("WCC") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department of Justice's antitrust enforcement intentions with respect to the proposal of WCC and its members to allocate amongst themselves the fixed quota of Pacific Whiting that Department of Commerce regulations allow to be taken from U.S. Pacific waters by the group of processors to which the members belong.

The United States Government, for environmental and economic reasons, has determined to limit the amount of certain species of fish that may be harvested from U.S. waters in a given year. This conservation policy is administered by the Department of Commerce ("DOC"). An annual harvest quota has been established for the species that is the subject of this business review request -- Pacific Whiting (also referred to as "hake"). In addition to determining the maximum amount of Pacific Whiting that may be harvested from U.S. waters, DOC's regulatory program divides the total quota between three groups of processors. For the years 1997-2001, the Pacific Whiting Fishery Plan allocates 42% of the total quota to on-shore processing plants, 24% to "Mothership" processors, ships that have on-board processing capabilities but do not catch the fish, and 34% to vessels that catch and process their own fish on-board ("catcher/processors" or "C/Ps"). Entry into the

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Page 2

Whiting fishery is limited. Licenses were issued to qualifying vessels at a prior qualifying date and are transferable.

Under the regulatory plan, the entire sub-allocation of each group of processors may be harvested by each licensed participant. This is referred to as an "olympic" system because it provides each individual processor with the incentive to harvest as much as possible of its sector's total allotment as fast as it can (any amount not harvested by one member of the group will be lost to other members of the group).

The Whiting Conservation Cooperative will be created by the four members of the proposed harvesting agreement - Alaska Ocean Seafood (one C/F ship), American Seafoods (five C/F vessels), Glacier Fish Co. (one C/F ship), and Tyson Seafood Group (three C/F ships). They hold all of the licenses issued for the catcher/processor segment of the industry. Alaska Ocean, American and Glacier are also members of an export trading company licensed by DOC to agree on prices and output for surimi in certain export markets. Tyson is not a member of that export trading co.

Under the harvesting agreement, the total C/F allotment provided for in the regulatory plan would be divided among the four members in specified proportions. The agreement limits only the harvesting activities of its members. It disclaims any intent to constrain the production or marketing practices of the member companies. No joint discussions of purchasing, processing, marketing or sales will be engaged in other than as appropriate as part of the DOC regulatory process or as permitted by the DOC-certified export committees to which three of the members belong. Each member agrees to carry DOC-certified observers on each of its vessels so that compliance with the agreement can be monitored. Financial penalties are provided for noncompliance. The members agree to contribute money for research and publication designed to increase the yield of processing and reduce incidental by-catch of non-target species.

Pacific Whiting generally is not sold as an end product directly to consumers. Rather, it is primarily used to produce "surimi", a protein paste made by repeatedly macerating and washing the flesh of the fish to remove all water soluble fats and other impurities and blending it with certain compounds. Surimi is used as a component in various consumer products in Japan and artificial crab meat in the U.S. U.S. Pacific Whiting surimi production constitutes approximately 4% of worldwide surimi production and approximately 6% of Pacific Coast/North Pacific

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production. By contrast, Alaskan Pollock (from U.S., Russian and Japanese North Pacific fisheries) account for 60% of worldwide surimi production. U.S. produced surimi is primarily shipped abroad. In 1995, approximately 87% was exported to Asia.

You have asserted that the proposed sub-allocation of the quota for catcher/processors amongst all the licensed C/Ps will allow them to avoid the inefficiencies encouraged by the "olympic" system. By removing the artificial urgency from their harvesting, you claim that WCC's members will be able to increase the efficiency of their on-vessel processing (you predict an 18-24% productivity increase from reduced costs and increased yield of finished product from the fish caught), and reduce the amount of incidental by-catch of other fish species that the Government seeks to protect.

On the basis of the information and assurances that you have provided to us, it does not appear that the proposed elimination of the olympic system race to gather the governmentally-fixed quota of Pacific Whiting would have any incremental anticompetitive effect in the regulated output setting in which the harvesting agreement would take place. The Department of Justice has previously stated that reliance on an olympic race system to gather a fixed quota of fish "is both inefficient and wasteful" because it is likely to generate "inefficient over-investment in fishing and processing capacity."¹ From a consumer perspective, the harvesting agreement does not reduce the output of processed Pacific Whiting or the end product into which it is incorporated - surimi. On the contrary, if the Applicant's assertion that "haste makes waste" is true, then eliminating the race will increase processing efficiency and concomitantly the output of Pacific Whiting. Since the prices paid for surimi by consumers, and the prices paid for Pacific Whiting by surimi sellers will be determined by the intersection of supply and demand for surimi, elimination of the race to gather an input whose output is fixed by regulation seems unlikely to reduce output or increase price under any likely scenario.

To the extent that the proposed agreement allows for more efficient processing that increases the usable yield (output) of the processed Pacific Whiting and/or reduces the inadvertent catching of other fish species whose preservation is

¹ Comments of the Department of Justice filed in Department of Commerce Docket No. 911215-1315, January 30, 1992 (involving Alaskan Pollock).

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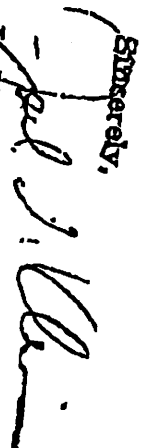
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Page 4

also a matter of regulatory concern, it could have procompetitive effects.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against the proposed harvesting agreement. This letter, however, expresses the Department's current enforcement intention. This agreement proves to be anticompetitive in any purpose or effect. In agreement reserves the right to bring

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review supporting data will be made publicly available immediately, and any letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

Joel I. Klein
Acting Assistant Attorney General

Received Time Oct 5