

# Public Testimony Sign Up Sheet

Agenda Item C-5 Salmon Bycatch

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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.

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *Chris*  
Executive Director

ESTIMATED TIME 2 HOURS
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DATE: March 31, 2005

SUBJECT: BSAI Salmon Bycatch

**ACTION REQUIRED**

- (a) Report from pollock cooperatives
- (b) Finalize alternatives/review and revise problem statement

**BACKGROUND**

The Council is currently working to address salmon bycatch management issues in the BSAI groundfish trawl fisheries following reports of an increasing problem with both chum and Chinook salmon bycatch in 2003 and 2004 and suggestions that the current regulatory measures could be improved to address bycatch situations similar to that of the past two years. In December, the Council drafted a problem statement and draft alternatives to address alternative means of salmon bycatch management in the BSAI pollock trawl fisheries. At their February 2005 meeting, the Council bifurcated these alternatives into two amendment packages, with the first package receiving prioritization for analysis. A summary of the alternatives (following their prioritization) and the draft problem statement for the analysis from the February 2005 Council motion are attached as Item C-5(a).

Prior to initiating an analysis, the Council requested further clarification from staff and the industry on several remaining questions with respect to the alternatives for analysis. These are the following:

- 1) Rulemaking requirements. The Council requested additional guidance on the rulemaking requirements and timeline for implementing either of the alternatives which repeal (Alternative 2) or suspend (Alternative 3) the existing regulatory closures.
- 2) Revised Inter-cooperative Agreement. The Council requested that the pollock cooperatives provide additional information on how their existing inter-cooperative agreement would be modified to account for the bycatch reduction criteria, CDQ group participation and additional comments as contained in the February 2005 Council motion.

Staff has prepared a brief discussion paper which reviews the Council's concerns regarding these issues and outlines clarifications remaining for the Council in refining the alternatives for analysis. This discussion paper is attached as Item C-5(b).

A summary from NOAA GC of information on the notice and comment rulemaking requirements under APA is provided under Item C-5(c).

Representatives from the inter-cooperative bycatch program will be available at the meeting to discuss their progress toward revising their agreement to meet the Council's requests.

At this meeting the Council will need to clarify the alternatives, review and refine the problem statement and establish a prioritization of the timeline for the analysis of both amendment packages.

## BSAI Salmon Bycatch February 2005 Council Action

*After drafting alternatives in December for managing an increasing problem with Chinook and chum salmon bycatch in the BSAI pollock fishery, the Council moved to bifurcate the alternatives into two separate analyses based upon the relative analytical timing constraints of the draft alternatives.*

### **Immediate Analysis**

Alternative 1: Status quo

Alternative 2: Eliminate the regulatory salmon savings area closures

Alternative 3: Suspend the regulatory salmon savings area closures on a year-by-year basis so long as the pollock cooperatives have in place a salmon bycatch "hot spot" closure system

### **Problem statement for the first analytical package (for immediate analysis)**

*In the mid-1990s, the Council and NMFS implemented regulations to control the bycatch of chum salmon and Chinook salmon taken in BSAI trawl fisheries. These regulations established closure areas in areas and at times when salmon bycatch had been highest based on historical observer data. Unfortunately, these regulations did not appear to have been effective in 2003 and 2004, when record amounts of salmon bycatch were taken. Information from the fishing fleet indicates that bycatch was exacerbated by the regulations, as much higher salmon bycatch rates were encountered outside of the closure areas. Some of these bycaught salmon include Chinook and chum stocks of concern in western Alaska. Further, the closure areas impose increased costs on the pollock fleet. To address this immediate problem, the Council will examine and consider other means to control salmon bycatch.*

Further clarification on these alternatives:

- AFA co-ops will regulate themselves by rolling hot spot closures.
- There are no hard caps under this system, monitoring will be done by SeaState, understanding that caps may be contemplated under future bycatch accountability programs.
- CDQ groups are to be included in the inter co-op salmon avoidance program.

The Council moved to require an annual report on the results of the salmon bycatch by the cooperatives should the closures be suspended. The industry is requested to include in their bycatch cooperative agreement a list of considerations by which the annual review of performance will be evaluated. The industry agreement which is to be drafted (or revised from its current state) should include the following in their bycatch reduction criteria:

- Evidence of moving the fleet away from hot spots-this is dependant on trigger rates, the spread of bycatch rates between areas, and the size of area closed.
- Trigger rates-These should recognize abundance, so rates are lower in years of low abundance and higher in years of high abundance. Guidelines for setting initial trigger rates and generally acceptable total catches are probably needed. An annual review of performance will be essential.

- Individual accountability-while there is a certain amount of randomness in salmon bycatch, there are also measures vessels can take to minimize bycatch. The co-ops should be encouraged to continue work on bycatch avoidance and individual accountability and required to report annually on these efforts.
- Review of the reliability of the total bycatch estimates

The first amendment package is prioritized for immediate analysis and contains alternatives to eliminate or suspend the regulatory salmon savings area closures. The Council further requests that discussion at the April meeting be tailored towards providing additional information from the cooperatives on their internal methodology for reducing bycatch in the fleet as well as an update from NMFS on the feasibility of suspending the closures and the regulatory requirements of doing so.

The following are the alternatives (numbered based on initial draft 5 alternatives) for secondary analysis. No problem statement has yet been drafted nor timeline for analysis agreed upon by the Council. The Council moved to revise these alternatives to add two suboptions under Alternative 5. The Council moved to remove the suboption under Alternative 3 and moved it to the analysis for secondary prioritization (given concerns expressed regarding the difficulty in developing this program immediately).

### **Secondary Priority**

Suboption (formerly under Alternative 3): Develop an individual vessel accountability program that may be implemented if, after three years, it is determined the pollock cooperatives' "hot zone" closure system has not reduced salmon bycatch.

Alternative 4: Establish new regulatory salmon savings area closures based on current salmon bycatch data

Alternative 5: Develop a regulatory individual vessel salmon bycatch accountability program.

Suboption a: at the individual level

Suboption b: at the co-op level

The second analytical package includes alternatives for establishing new salmon savings area closures as well as the development of a regulatory individual vessel salmon bycatch accountability program at both the individual vessel level as well as at the co-op level. The Council requests (under Alternative 4) the inclusion of an analysis of the confidence intervals on salmon numbers by level of observer coverage and how that affects the reliability of the total bycatch estimate.

## Bering Sea Aleutian Islands Salmon Bycatch

### April 2005 Staff Discussion Paper

In December 2004, the Council approved a draft problem statement and preliminary alternatives to address an increasing problem with salmon bycatch in the Bering Sea and Aleutian Islands trawl fisheries. In February 2005 the Council bifurcated the analysis and requested additional information from staff and industry personnel in order to refine the alternatives for analysis. This discussion paper provides a description of the current regulations, suite of draft alternatives, the issues in need of clarification for the Council and remaining concerns in order to move forward with an analysis following the April meeting.

### Considerations and Decisions for this Council Meeting

The Council needs to clarify the following during the April meeting:

1. Clarify the existing alternatives in amendment package A (repealing or suspending closures)
2. Review and revise Problem Statement for these alternatives as necessary to ensure it is in agreement with any change to the draft suite of alternatives
3. Determine a timeline and prioritization for both analyses

### Update on 2005 fishery

As reported to the Council in February, Chinook and chum salmon bycatch in recent years has been much higher than the long-term average.

#### BSAI salmon bycatch:

	Chinook	Chum
1990-2001 average	37,819	69,332
2002	36,385	81,470
2003	54,911	197,091
2004	62,493	465,650

Catch data from the A season fishery in 2005 indicates that Chinook bycatch is again elevated. According the NMFS catch accounting data, as of March 26, 25,400 Chinook salmon had been taken in the pelagic pollock trawl fishery. This is approximately 95% of the available 26,825 Chinook salmon limit for non-CDQ fleet. According to the regulations, if the limit is triggered prior to April 15, the areas will close through April 15 and then again from September 1–December 31.

#### Review of current regulations:

The Chum Salmon Savings Area was established in 1994 (Figure 1). This area is closed to all trawling from August 1 through August 31. The area remains closed if 42,000<sup>1</sup> ‘other’ salmon are caught in the CVOA during the period August 15–October 14.

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<sup>1</sup> This number is inclusive of the allocation to CDQ groups. Non-CDQ Chinook salmon limit is 26,825 , and non-CDQ other salmon limit is 38,850.

The Chinook Salmon Savings areas were established in 1996 (Figure 2). These areas close to pollock trawling if 29,000<sup>1</sup> Chinook salmon are taken. The timing of the closure depends upon when the limit is reached:

1. If the limit is triggered before April 15, the areas close immediately through April 15. After April 15, the areas re-open, but are again closed from September 1 through December 31.
2. If the limit is reached after April 15, but before September 1, the areas would close on September 1 through the end of the year.
3. If the limit is reached after September 1, the areas close immediately through the end of the year.

Bycatch by week of Chinook salmon versus groundfish catch in 2004 (Figure 3) showed high numbers of Chinook bycatch in both A and B seasons. The Chinook Salmon Savings Area closed to directed fishing for non-CDQ pollock with trawl gear on September 5, 2004 for the remainder of the year following the limit for Chinook salmon being exceeded. It seems likely that given the current Chinook bycatch numbers, the trigger will be reached again and the Chinook Salmon Savings Area closure will occur in 2005.

### **Council Action at the February 2005 meeting**

In February 2005, the Council chose to bifurcate the existing suite of alternatives and prioritize the first three for immediate analysis. The alternatives are currently packaged into two separate analyses and prioritized for immediate analysis and follow up analysis (A and B, respectively). These alternatives are as follows:

#### **Amendment Package A (for immediate analysis):**

Alternative 1: Status quo

Alternative 2: Eliminate the regulatory salmon savings area closures

Alternative 3: Suspend the regulatory salmon savings area closures on a year-by-year basis so long as the pollock cooperatives have in place a salmon bycatch "hot spot" closure system

#### **Problem Statement for Amendment Package A:**

*In the mid-1990's, the Council and NMFS implemented regulations to control the bycatch of chum salmon and Chinook salmon taken in BSAI trawl fisheries. These regulations established closure areas in areas and at times when salmon bycatch had been highest based on historical observer data. Unfortunately, these regulations did not appear to have been effective in 2003 and 2004, when record amounts of salmon bycatch were taken. Information from the fishing fleet indicates that bycatch was exacerbated by the regulations, as much higher salmon bycatch rates were encountered outside of the closure areas. Some of these bycaught salmon include Chinook and chum stocks of concern in western Alaska. Further, the closure areas impose increased costs on the pollock fleet. To address this immediate problem, the Council will examine and consider other means to control salmon bycatch.*

#### **Amendment Package B (secondary priority):**

Alternative 1: Establish new regulatory salmon savings area closures based on current salmon bycatch data

Alternative 2: Develop a regulatory individual vessel salmon bycatch accountability program.  
Suboption a: at the individual level  
Suboption b: at the co-op level

Suboption: Develop an individual vessel accountability program that may be implemented if, after three years, it is determined the pollock cooperatives' "hot zone" closure system has not reduced salmon bycatch.

To date no specific problem statement has been established by the Council for amendment package B.

### **Necessary Clarifications for Analysis**

The first amendment package is prioritized for immediate analysis and contains alternatives to eliminate or suspend the regulatory salmon savings area closures. The Council had considerable discussion in February regarding the feasibility of suspending these closures and the means by which the pollock cooperatives would regulate themselves. The Council clarified in their motion that the CDQ groups are to be included in the inter co-op salmon avoidance program. The Council further requested that discussion at the April meeting be tailored towards providing additional information from the cooperatives on their internal methodology for reducing bycatch in the fleet as well as an update from NMFS on the feasibility of suspending the closures and the regulatory requirements of doing so.

The following questions remain prior to an initiation of an analysis of the draft alternatives (in amendment package A) and are addressed in the next sections:

- 1- Salmon Bycatch Objectives: How can consideration be given to eliminating or suspending the regulatory salmon bycatch closures while still maintaining the Council (and National Standard 9) objectives to minimize bycatch? How will the Council evaluate the effectiveness of any new bycatch avoidance program?
- 2- Rulemaking Requirements: What are the regulatory and rulemaking requirements for suspending or eliminating the existing closures? Can the old closures be reinstating if the new system proves less effective? Are the alternatives appropriately crafted to meet regulatory requirements?
- 3- Revised Inter-cooperative Agreement: How will the pollock inter-cooperative agreement be modified if the closures are suspended or eliminated? How will trigger rates and closures be identified? How will enforcement be enacted in the absence of regulatory closures? How will CDQ groups be incorporated in the program?

### **Salmon bycatch objectives**

The Council has several mandates to guide it in managing bycatch. The first mandate is National Standard 9 which states:

*Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.*

In addition to this over-arching mandate, the Council has proactively revised their BSAI groundfish FMP (following action on the PSEIS in 2004) and selected several policy-level objectives which reflect the

Council's direction in the management of bycatch. These objectives are the following (from the BSAI groundfish FMP):

***Manage Incidental Catch and Reduce Bycatch and Waste:***

14. Continue and improve current incidental catch and bycatch management program.
15. Develop incentive programs for bycatch reduction including the development of mechanisms to facilitate the formation of bycatch pools, vessel bycatch allowances, or other bycatch incentive systems.
16. Encourage research programs to evaluate current population estimates for non-target species with a view to setting appropriate bycatch limits, as information becomes available.
17. Continue program to reduce discards by developing management measures that encourage the use of gear and fishing techniques that reduce bycatch which includes economic discards.
18. Continue to manage incidental catch and bycatch through seasonal distribution of total allowable catch and geographical gear restrictions.
19. Continue to account for bycatch mortality in total allowable catch accounting and improve the accuracy of mortality assessments for target, prohibited species catch, and non-commercial species.
20. Control the bycatch of prohibited species through prohibited species catch limits or other appropriate measures.
21. Reduce waste to biologically and socially acceptable levels.

Further direction is provided by the Council's groundfish policy workplan under the general priority of "Bycatch Reduction" where item "c" states: "explore incentive-based bycatch reduction programs".

Suspending or eliminating the closure and relying upon the industry's incentive-based bycatch reduction program certainly fits under both the Council's approved policy workplan as well as several of the Council's objectives for managing incidental catch and reducing bycatch and waste.

**Questions remaining for clarification**

- What defines the incentive in the absence of regulatory closures?
- How will bycatch compliance and bycatch reduction be evaluated and on what timeline?

The first question regarding the incentive will be discussed under the section on the revised inter-cooperative agreement as the incentive for compliance is a fundamental aspect of the IC agreement. In order to evaluate the compliance with and evaluation of bycatch reduction, the Council requested that an annual performance review be established whereby the industry reports to the Council on a series of pre-determined performance criteria. While the Council has not yet defined what these specific criteria are, they have given some guidance to the industry upon which aspects these criteria will be based (see section on Revised Inter-Cooperative Agreement).

In addition to an annual performance review, the Council may wish to consider the following as a means to evaluate the effectiveness of whichever alternative the Council selects. In selecting the elimination or suspension of alternatives as a priority for analysis, the Council also chose to likewise pursue the amendment package B on a timeline to be determined. The Council could choose to initiate an analysis on amendment package B, understanding that these alternatives require sufficient staff time to analyze and thus the resulting analysis may take well into 2006 prior to being available for Council review. At the time of its availability for Council review, the Council could then examine these new alternatives together with the results of its current program (either repealing the closures or suspending them) and would then



have the ability to evaluate to what extent the Council feels that the new program is adequate or if any of the other alternative means of salmon bycatch management would be preferable. Therefore the timeline for an evaluation of (and potential closing date on) the selected program from amendment package A would be the availability of the analysis of amendment package B for Council consideration.

### **Council considerations under salmon objectives**

- Consider initiating an analysis of the amendment package B alternatives
- Consider analyzing the effectiveness of the new program at such a time that the additional alternatives (from amendment package B) are available for review by the Council (i.e. this becomes timeline for examining to what extent the new program is working)
  - If at that time, the Council feels that the new program is not working, the Council may select a different program (either the old system of closures, a new system of closures or one of the other alternatives examines)

### **Rulemaking Requirements**

At the February 2005 meeting, the Council requested guidance regarding the rulemaking requirements and timing for suspending the closures as listed under alternative 3 (of amendment package A). Notice and comment rules for any change in regulation must follow the guidelines of the Administrative Procedures Act. General guidance from NMFS has indicated that prior notice and comment (proposed and final rulemaking) for any change in regulations, including a suspension or reactivation of the Salmon Savings Areas, would be at best a 5-6 month process *after* the preparation of Council analyses and relevant decision-making has occurred (i.e. an EA/RIR/IRFA preparation followed by initial and final review by Council then 5-6 months timing for rulemaking). Realistically this may take considerably longer. The APA contains provisions for a case-by-case waiver of prior notice and comment. This would have the effect of going directly to a final rule. The criteria for pursuing an action such as this, however, would be similar to criteria necessary for undertaking an emergency rule.

Some additional considerations with respect to Alternative 3 (to suspend the closures) are summarized below.

The current alternative states that area closures would be suspended on a "year-by-year basis". Even if the Council had the ability to evaluate the efficacy of the new system annually, rulemaking requirements, requisite analyses and subsequent timing make this timeline infeasible. Therefore the alternative would need to be revised such that the timing of the suspension is in keeping with the agency's and Council's ability to provide the requisite analytical documentation and rulemaking requirements of repealing or continuing to suspend the closures.

The problem statement states that the current system is likely exacerbating salmon bycatch. If that is correct, there would arguably be no justification for the fallback mechanism of re-imposing the "old" system of SSA closures. Given that no analysis has been provided at this point to verify why bycatch has been elevated in 2003, 2004 and potentially 2005, it might be advisable for the Council to revise its problem statement such that it is not a forgone conclusion that these closures are exacerbating the problem. The analysis will likely show that the closures are appropriate under some conditions and possibly less appropriate under other conditions, but in the end a more flexible solution could be sought in order to respond to changing conditions. If the more flexible solution does not pan out in the long run, the Council could still consider returning to the previous system.

Currently alternative 3 relies upon co-op agreements for implementation and compliance based upon the "hot spot" closure system to control bycatch. For Chinook salmon, this is appropriate, where only the AFA/CDQ pollock fisheries are held accountable. However, for "other salmon" (or chum salmon), bycatch measures apply to all of the vessels using trawl gear in all fisheries. While the co-ops could likely control the bycatch of chum salmon by their participants, the agreements do not extend to all trawl vessels fishing for groundfish in the BSAI. This would mean that the co-ops would be providing a "hot spot" closure system for only part of the BSAI trawl fleet. If this is acceptable to the Council, it should be acknowledged in the annual performance review and criteria imposed by the Council to monitor the effectiveness of the program. The co-ops should not be held accountable for compliance by vessels outside of their agreement.

### **Council considerations under rulemaking requirements**

- Revising the timing for the suspension of closures under alternative 3
- Revising the problem statement such that it is not assumed prior to analysis that the current system is flawed. This would enable the Council to consider returning to the current system at some time in the future (if the Council determined this was preferable at that time).
- Consider how to account for contribution to the bycatch of 'other salmon' from the trawl fleet that does not participate in the cooperative within the annual performance review of the inter-cooperative's bycatch management program.

### **Revised Inter-Cooperative Agreement**

At the February 2005 meeting, the Council made specific requests of the industry for inclusion in a revised inter-cooperative agreement to manage and determine the success of any "hot spot" closure system in the absence of regulatory closures. These requests (as detailed in the Council motion from February 2005) are summarized below.

Specific details on how the inter-cooperative would function are the following:

- The AFA co-ops will regulate themselves by rolling hot spot closures.
  - There are no hard caps under this system, monitoring will be done by Sea State, understanding that caps may be contemplated under future bycatch accountability programs.
- CDQ groups are to be included in the inter co-op salmon avoidance program.

The Council also moved to require an annual report on the results of the salmon bycatch by the cooperatives should the closures be suspended. The industry was requested to include, in their bycatch cooperative agreement, a list of considerations by which the annual review of performance will be evaluated. The industry agreement which is to be drafted (or revised from its current state) should include the following in their bycatch reduction criteria:

- Evidence of moving the fleet away from hot spots-this is dependant on trigger rates, the spread of bycatch rates between areas, and the size of area closed.
- Trigger rates-These should recognize abundance, so rates are lower in years of low abundance and higher in years of high abundance. Guidelines for setting initial trigger rates and generally acceptable total catches are probably needed. An annual review of performance will be essential.

- Individual accountability-while there is a certain amount of randomness in salmon bycatch, there are also measures vessels can take to minimize bycatch. The co-ops should be encouraged to continue work on bycatch avoidance and individual accountability and required to report annually on these efforts.
- Review of the reliability of the total bycatch estimates

The industry members participating in the salmon bycatch inter-cooperative have been working toward a revised agreement since the February Council meeting. Some specific details of the revised IC agreement have been decided upon while others are still being considered. Similar to the current agreement, it was determined that monitoring and enforcement of the bycatch agreement is done by SeaState using a predetermined bycatch rate (or "Base Rate") as a trigger for Savings Area closures and determining the Tier Assignment of the coop. The Base Rate is established prior to the start of the season and is based upon the previous seasons' bycatch experience. Additionally, the Inter-cooperative is studying the feasibility of including a mechanism for an in-season adjustment of the Base Rate based upon in-season bycatch conditions.

Enforcement measures are based upon the Tier level to which a vessel is assigned, and tiers are based upon comparison of the coop bycatch rate with the Base Rate. For example, Tier Assignments may be established as follows:

#### Tier Assignment rates

- i. Tier 1 – coops with bycatch rates less than 75% of Base Rate.
- ii. Tier 2 – coops with bycatch rates equal to or greater than 75% of the Base Rate and equal to or less than 125% of the Base Rate.
- iii. Tier 3 – coops with bycatch rates greater than 125% of the Base Rate.

Coops which have been assigned to Tiers 2 and 3 are restricted from specific savings closures for a period of 4 days (Tier 2) to 7 days (Tier 3) days. Closure areas are rolling and are determined by SeaState based upon the bycatch rate with specified areas. Closure areas may be up to 1000 square miles for Chinook salmon and up to 4000 square miles for chum salmon. Bycatch for a specified area must be over the Base Rate for the area to be eligible as a Savings Closure area. Up to two Savings Closures may be established at any one time. Penalties for violating the closures are enacted in the form of liquidated damages which increase with repeat offenses.

Additional enforcement measures include "Dirty Twenty Lists". These lists include the 20 vessels with the highest Chinook (or chum) bycatch rates (over the Base Rate). Lists are published by highest rate by week, highest rate for the past 2 weeks, and highest rates for the season-to-date. Only vessels with more than 500 mt of groundfish catch are included in the season-to-date list.

In order to respond to the request for an annual performance review by the Council, the inter-cooperative would produce a report to the NPFMC which would contain the following:

1. Number of salmon taken by species and season
2. Estimated number of salmon avoided.
3. Changes to the Agreement, if any.
4. A compliance/enforcement report.
5. Results of the compliance audit.
6. Results of an outside audit, if done.

7. List of each vessels number of appearances on the weekly dirty 20 lists.

Additional information on the status of the inter-cooperative's progress towards revising their agreement to meet the Council's directive will be provided by the cooperative manager at the April Council meeting. Some remaining issues for the inter-cooperative to resolve include the incorporation of the CDQ groups in the agreement and the actual Base Rate which will be used as a starting point, as well as the feasibility of adjusting this rate in-season.

### **Council considerations under revised inter-cooperative agreement**

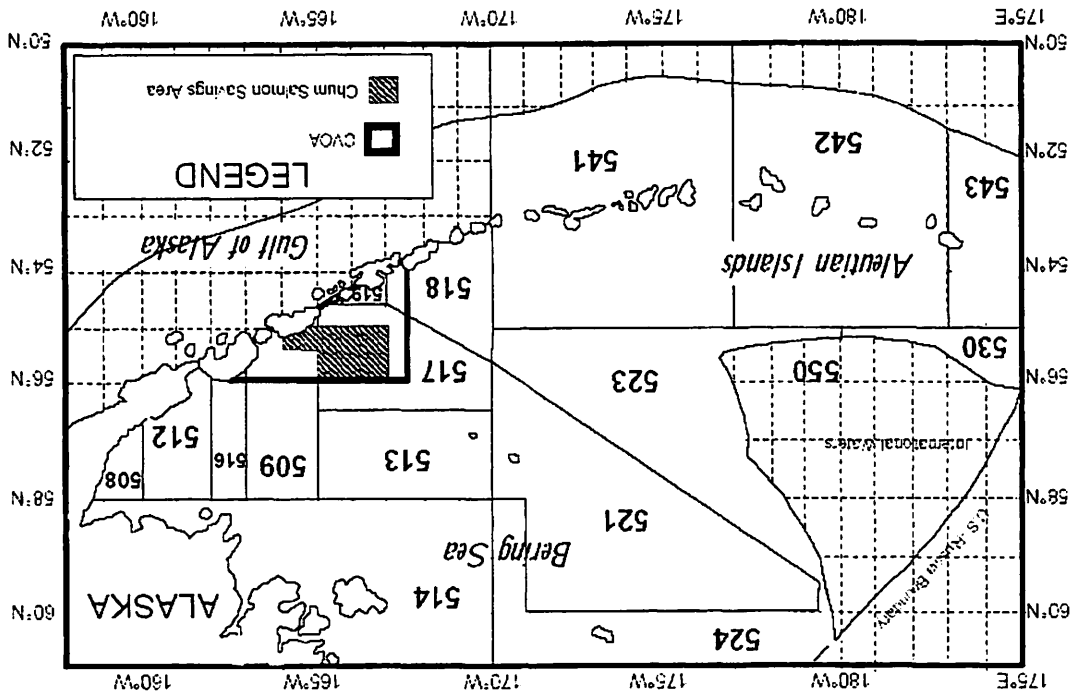
- Are the proposed revisions to the inter-cooperative agreement sufficient to meet the Council's requests at the February meeting, including the specific materials to be included in the annual performance review?
  - How will the reliability of bycatch estimates be reviewed?
  - How will "evidence of moving the fleet away from hot spots" be evaluated?
  - How will trigger rates (or Base Rates) be adjusted to account for changes in abundance?
  - How will CDQ groups be included?
- Will the same provisions of the inter-cooperative accountability and requirements apply under alternative 2 (to repeal the closure)?

### **Other considerations for the Council at this meeting**

In addition to the considerations listed above, the Council should discuss the timeline and the relative prioritization (amongst other Council staffing priorities) for this analysis. As discussed in February, the analysis of the alternatives to repeal or suspend the closures (amendment package A), would require an EA/RIR/IRFA, and data for location-specific salmon bycatch would be necessary for several years, from at least 2002 (prior to the observed bycatch increase) through 2004. Given the analytical burden, this analysis could likely be brought back to the Council for initial review in June 2005 depending upon staffing considerations and the prioritization of this within the context of other Council initiated analyses. If initial review were to occur in June, final action on this analysis would likely occur in October 2005. This schedule would not allow for the regulations implementing this action to be in place in time for the start of the 2006 fishery. However, the regulations implementing this action would likely be in place by the Spring or early Summer of 2006 and prior to the Chum Salmon Savings Area annual closure on August 1. If this action is not available for initial review until October, with final action in December, it is likely that the regulations implementing it would not be in place prior to the annual closure August 1.

Finally, if the Council initiated an analysis of amendment package B, consideration in the future will need to be given to refining the alternatives in that package. Monitoring and enforcement concerns were raised at the February Council meeting regarding the individual vessel accountability program. These and other issues (e.g., review of proposed closures) would need to be clarified in the future through the Council process in order to effectively evaluate these as viable alternative mechanisms for managing salmon bycatch.

Figure 1: Chum Salmon Savings Area and Catcher Vessel Operational Area (CVOA)



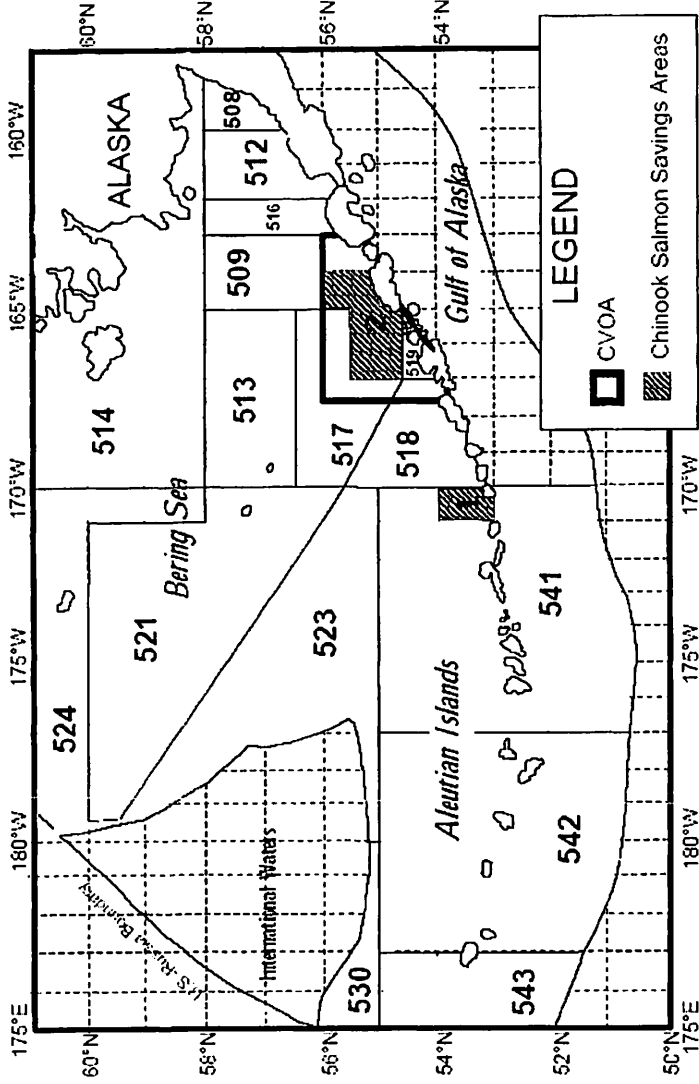
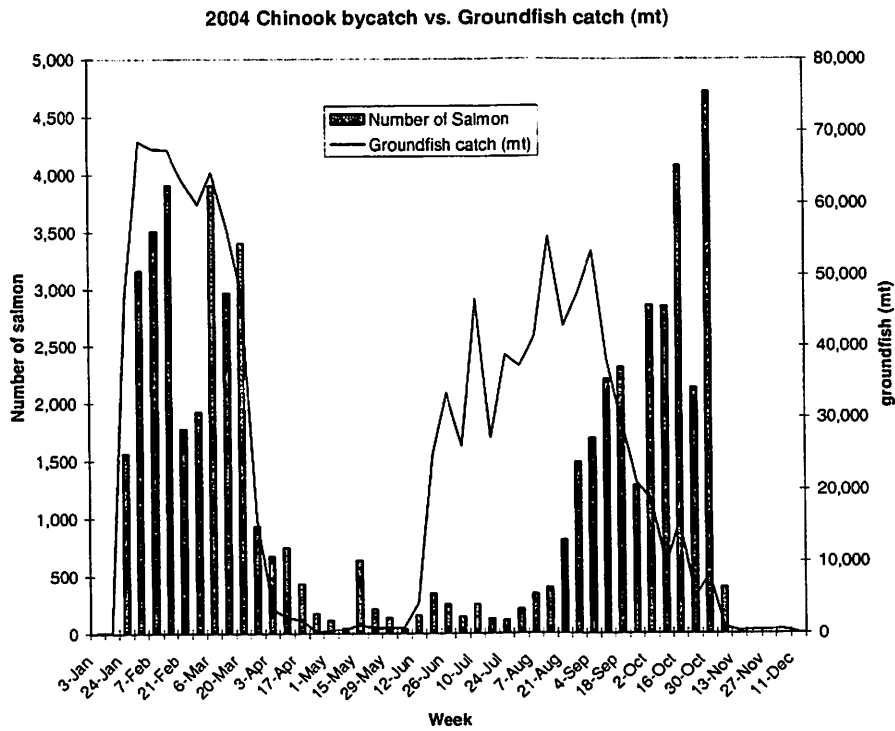


Figure 2: Chinook Salmon Savings Area and Catcher Vessel Operational Area (CVOA)



**Figure 3: Bycatch of Chinook salmon by week in the BSAI (2004) with groundfish catch (mt)**

**Waiver of APA Notice and Comment Rulemaking Requirements:**

Section 553 of the APA specifies general requirements for rulemaking by federal agencies. Unless one of the APA's exemptions applies, agency rulemaking must comply with the following minimum procedural requirements:

- (1) a notice of proposed rulemaking must be published in the Federal Register, such notice to include a statement of the time, place and nature of the public rulemaking proceeding; a reference to the legal authority under which the rule is proposed; and either the terms or a description of the subjects and issues to be addressed by the proposed rule;
- (2) interested persons must be given an opportunity to submit written data, views or arguments on the proposed rule; and
- (3) publication of the final rule must occur not less than 30 days before its effective date.

Section 553(b)(B) of the APA authorizes agencies to waive for "good cause" the opportunity for notice and comment and delayed effectiveness for a particular rule based upon a finding that compliance with these rulemaking requirements is "impracticable" and "contrary to the public interest." The good cause waiver for prior notice and comment is to be "narrowly construed and only reluctantly countenanced." *Utility Solid Waste Activities Group, et al., v. EPA*, 236 F.3d 749 (D.C. Cir. 2001); *Independent Guard Assn. of Nevada Local No. 1 v. O'Leary*, 57 F.3d 786 (9th Cir. 1995); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Courts apply this exception narrowly to prevent it from swallowing the notice and comment requirement. *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795 (D.C. Cir. 1983). "Emergencies, though not the only situations constituting good cause, are the most common." *Riverbend Farms, Inc., v. Madigan*, 958 F.2d 1479, 1484 n. 2 (9th Cir. 1992); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). The Ninth Circuit's inquiry into whether an agency properly invoked the good cause waiver "proceeds case-by-case, sensitive to the totality of the factors at play . . . ." *Natural Resources Defense Council*, 316 F.3d at 911. The Ninth Circuit Court of Appeals has stated that the good cause exception "authorizes departure from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission.," *Cal-Almond*, 14 F.3d 429, 441 (9th Cir. 1993) (quoting *Riverbend Farms*, 958 F.2d at 1485), or when "delay would do real harm." *Hawaii Helicopter Operators Assn. v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995).

In *Riverbend Farms*, the Secretary of Agriculture set orange volume restrictions by convening public meetings each Tuesday to make initial calculations, then publishing a final rule each Friday in the Federal Register for the next week. The weekly rules stated the Secretary's finding that it was impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register. However, the *Riverbend Farms* court concluded that the Secretary lacked good cause for failing to give notice in the Federal Register of the weekly meetings and failing to solicit written public comments and that actual notice of the weekly meetings to the affected industry did not satisfy APA's requirement of notice to the general public. *Riverbend Farms*, 958 F.2d at 1486-87. In addition, the court found that the Secretary failed to demonstrate that "it would be impracticable to publish a notice in the Federal Register a few days before the . . . meeting, advising the public of the time and place of the meeting, the legal authority for the proposed volume restrictions and the proposed volume restrictions." *Riverbend Farms*, 958 F.2d at 1486.

The Ninth Circuit has confirmed the *Riverbend Farms* analysis in subsequent cases. In *Cal-Almond*, the U.S. Department of Agriculture established budget estimates and annual assessment rates for almonds from 1980 to 1986, each year asserting that the rate could not be formulated with prior notice and comment and a delayed effective date. To formulate the rate, a government-appointed California Almond



Board held meetings each July to gather crop projection information for that year and receive comments from interested parties. After deciding on its recommendations, the Board gave each almond handler notice of the proposed rate, then submitted the rate to the Secretary of Agriculture, who issued final rules without first publishing a proposed rule and requesting public comment. The Secretary of Agriculture apparently contended that "since the Board's annual harvest forecast and proposed budget depended on the crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA." *Cal-Almond*, 14 F.3d at 441. The court disagreed based on its opinion in *Riverbend Farms*. The court stated that it could find no good cause to waive notice and comment for "annual meetings and rules" in the instant case where it had "found no reason in *Riverbend Farms* to depart from the notice-and-comment procedure for weekly meetings and rules." *Cal-Almond*, 14 F.3d at 441-442.

In *Natural Resources Defense Council*, the Ninth Circuit found that NOAA's National Marine Fisheries Service Fisheries (NMFS) failed to "engage in any context-specific analysis of the circumstances giving rise to good cause" when it promulgated its 2001 Pacific Coast groundfish fishery specifications. *Natural Resources Defense Council*, 316 F.3d at 912. In its Federal Register notice at 66 Fed. Reg. 2372 (January 11, 2001), NMFS asserted the following "good cause" justification for waiving the APA requirement for prior notice and opportunity for comment on the specifications:

This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late implementation. Much of the data necessary for these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, SSC, and Council meetings in September and November 2000 where these recommendations were formulated. Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register.

The court ultimately found the waiver language merely repeated generic concerns about timing and the complexity of fishery management. The court concluded that

[i]f there were no good cause in *Riverbend Farms* for failure to publish notice of weekly meetings advising the public of proposed volume restrictions on the marketing of oranges, despite the fact that the committee responsible for recommending to the Secretary of Agriculture weekly volume restrictions was constantly revising projections right up until, and occasionally even during, the week in question, then, as we said in

*Cal-Almond*, the timeliness of rulemaking on an annual basis cannot constitute good cause.

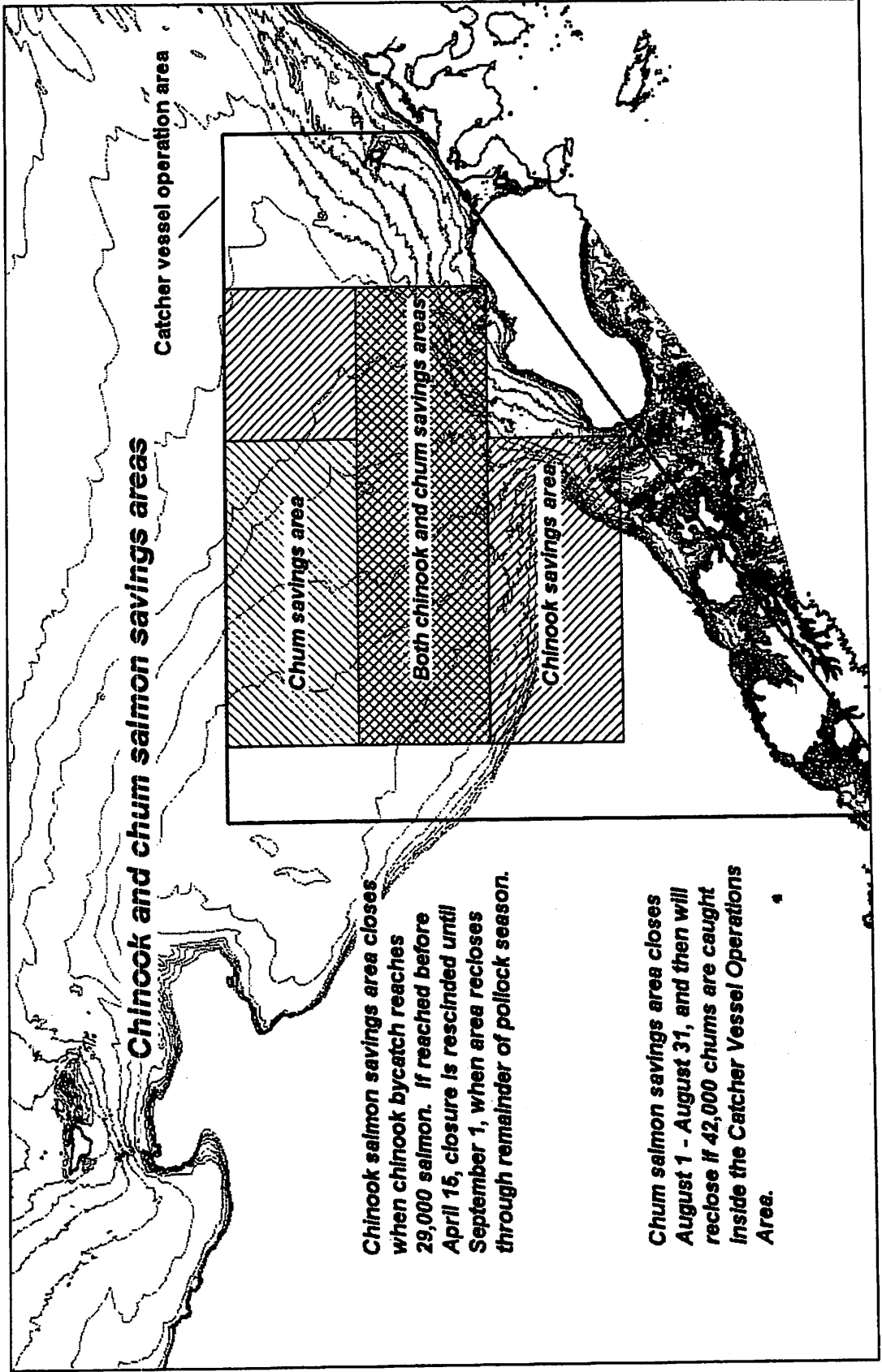
*Natural Resources Defense Council*, 316 F.3d at 912 (citations omitted) (emphasis in original). The court reasoned directly from its holding in *Cal-Almond*, noting in each case the decision maker issued a final rule without first publishing a proposed rule for public comment, asserting that the timing of key studies did not allow for publication of a proposed rule before the scheduled effective date of the final rule. Although the court held that NMFS failed to make a sufficient showing that “good cause” existed for the 2001 Pacific Coast groundfish fishery specifications and management measures, the court observed that “habitual invocation of the good cause exception” is not necessarily improper. However, in this case, NMFS needed to show that some “exigency apart from generic data collection and timing constraints interfered with its ability to promulgate [the] specifications and management measures.” *Natural Resources Defense Council*, 316 F.3d at 912.

In any framework requiring or authorizing publication of a regulation, the Council’s regulations should authorize NMFS to either: (1) commence notice-and-comment rulemaking with the publication of a proposed rule in the Federal Register for public comment, or (2) publish a final rule in the Federal Register with a waiver of notice and comment and delayed effectiveness for “good cause” pursuant to the APA. The framework must not by design prospectively *compel* waiver of notice and comment and delayed effectiveness; instead, it would *authorize* NMFS to invoke the “good cause” exception on a case-by-case basis only when analysis of the context-specific circumstances supports it. A framework that allows invocation of the “good cause” exception only when circumstances warrant obviously would not violate the APA; however, neither would the APA permit NMFS to base a waiver on generic concerns about timing and the complexity of fishery management.

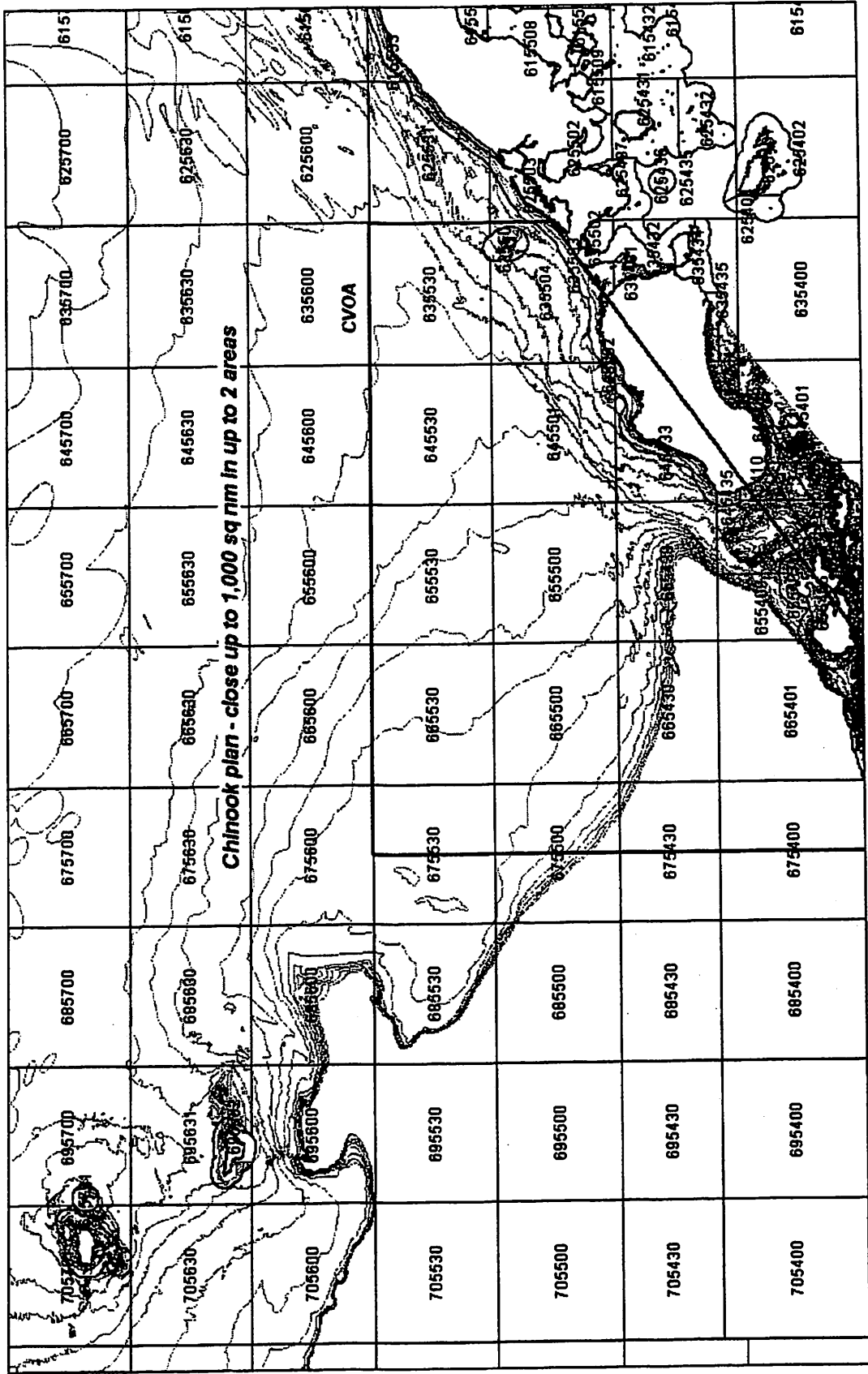
Intercoop salmon bycatch  
program (details currently under  
discussion)

John Carlson  
The Sullivan  
Carl Holmquist

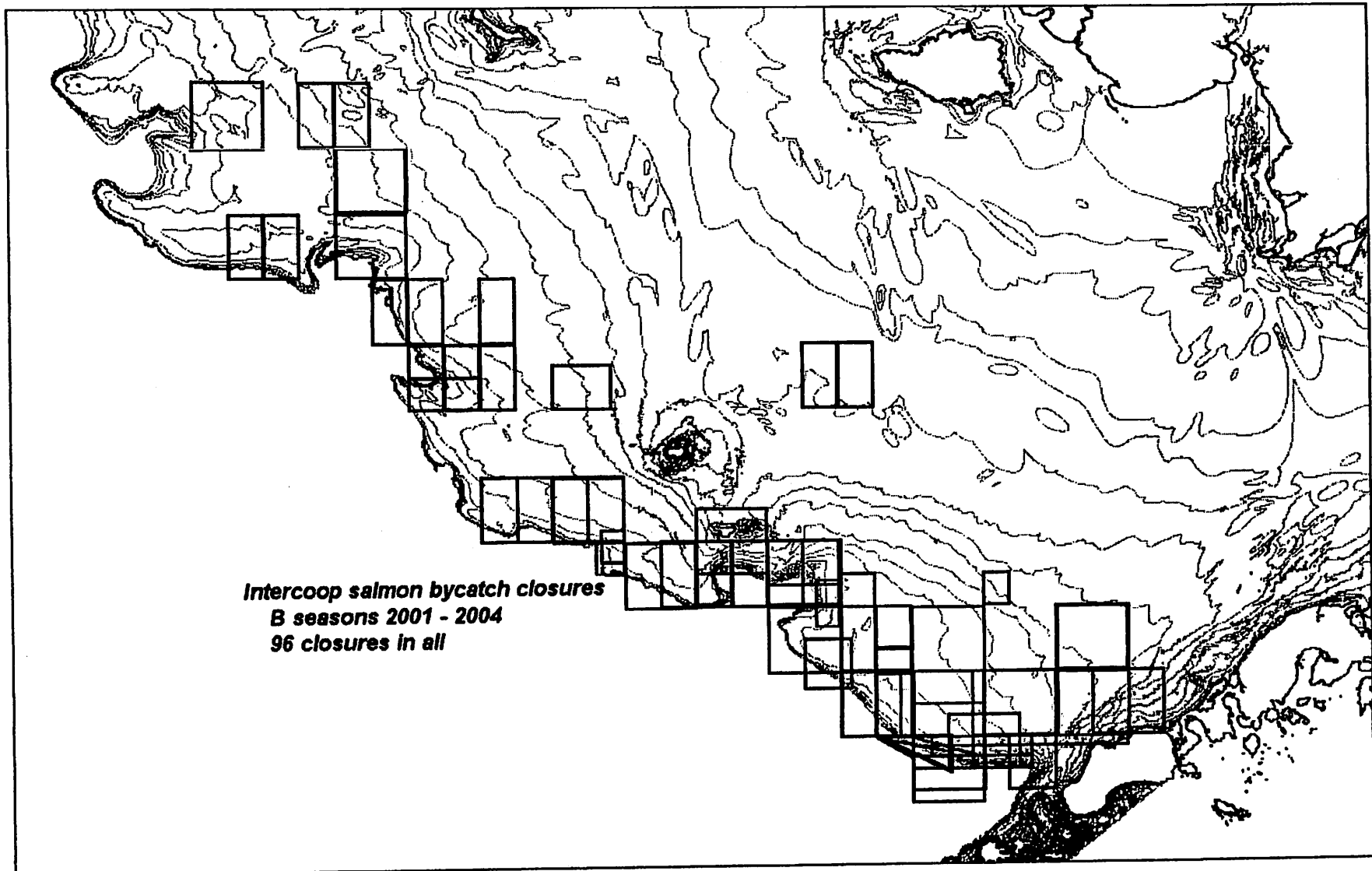
# Salmon savings areas, current management regime



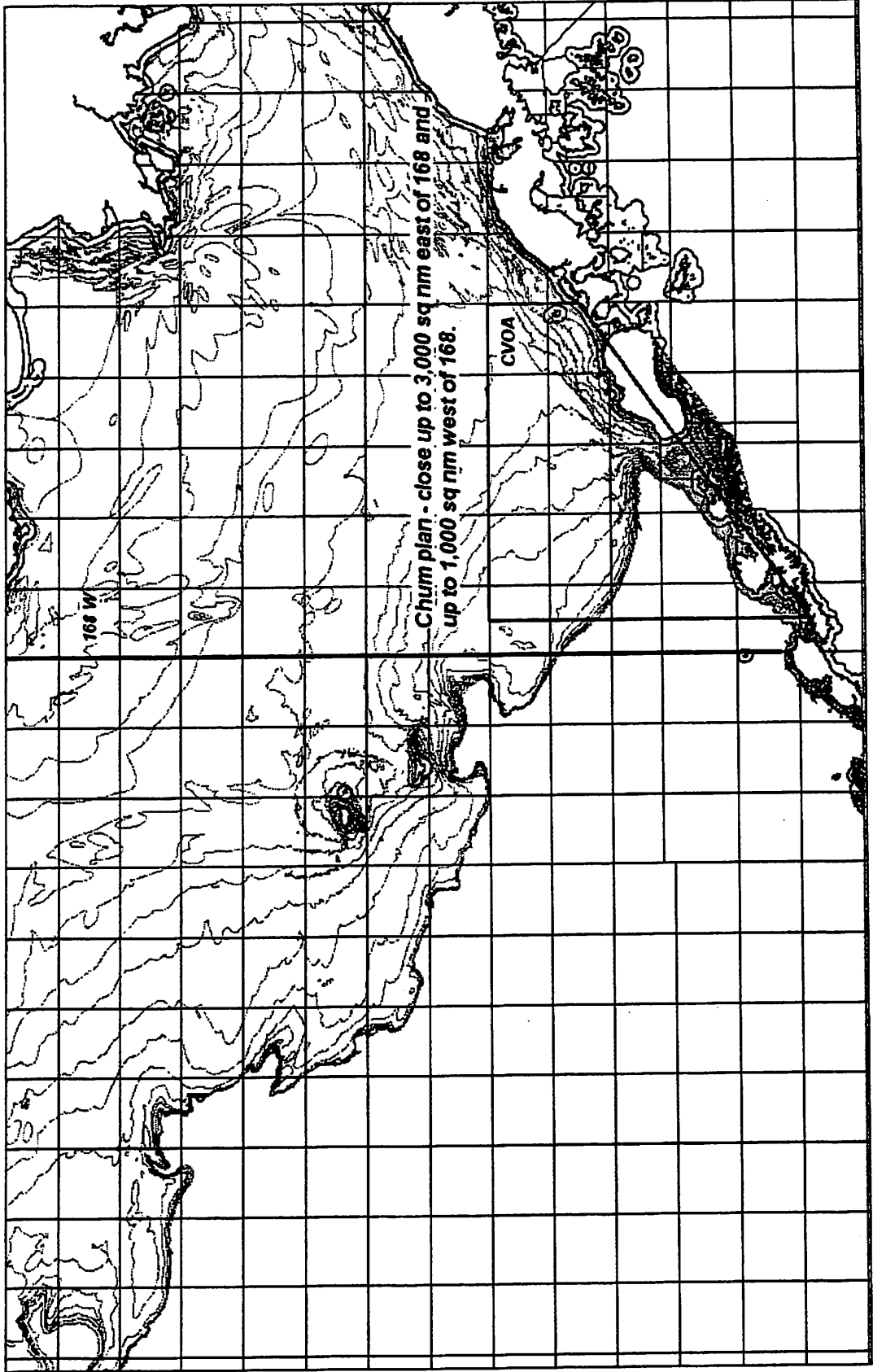
Intercoop plan is based on smaller area closures approximately the size of ADFG statistical areas



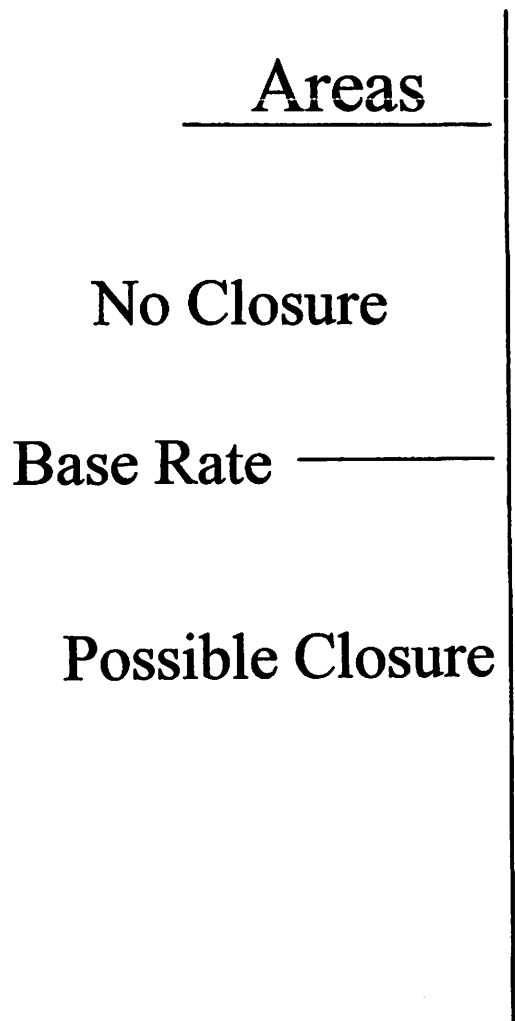
# IC salmon management closures, B season 2001 - 2004, 96 closures in all



# Chum plan areas

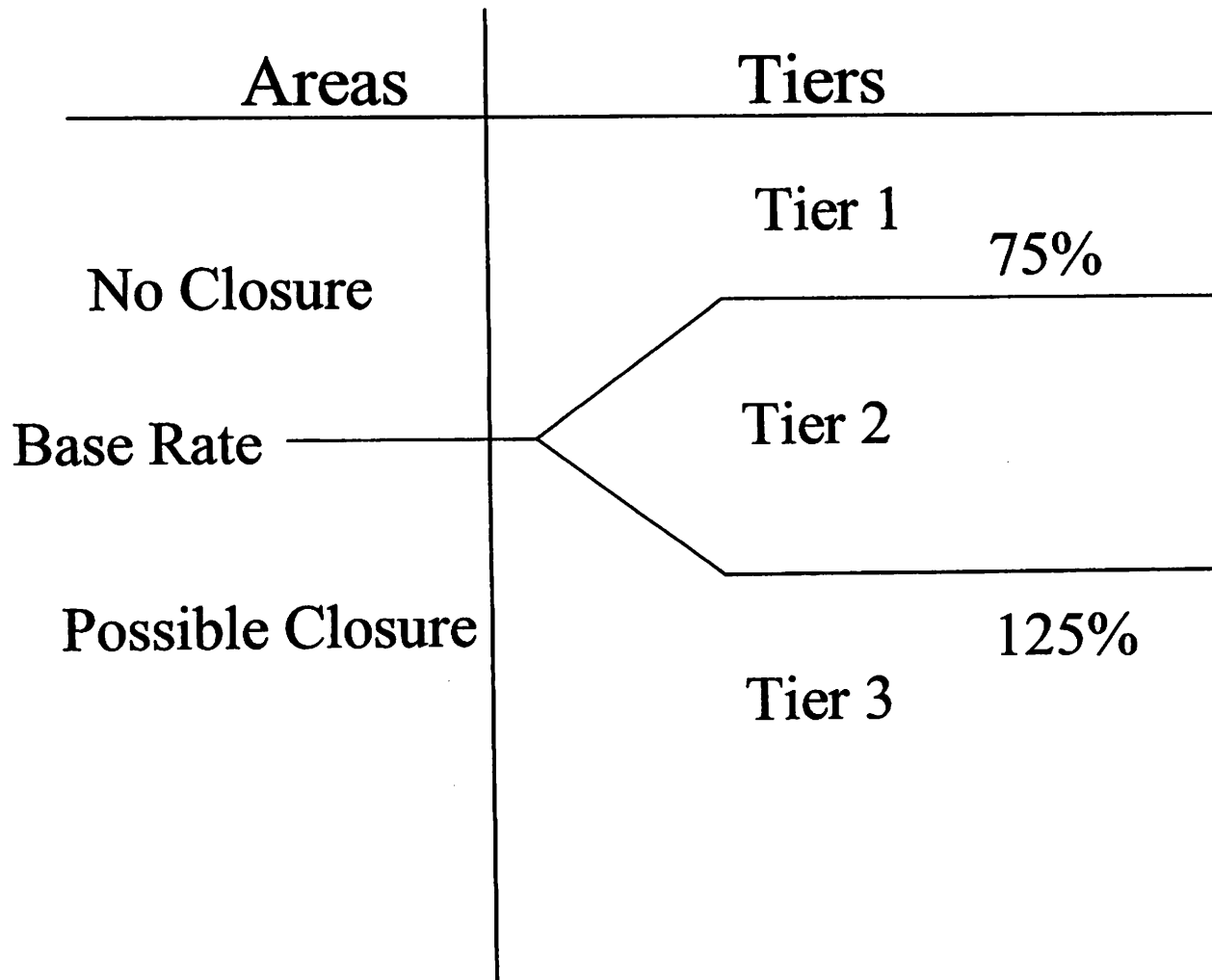


Base Rate determines whether or not a stat area is a candidate for closure. If rates in multiple stat areas exceed the base rate, areas with the highest rates are closed up to the maximum closure area for each species (chinook and other salmon).





The base rate also determines the tier status for each coop.  
Tier 1: < 75%, Tier 2: 75% - 125%, Tier 3: > 125 of base



Tier levels determine how many days a coop must observe the closure

Areas	Tiers		Days closed
No Closure	Tier 1	75%	0
Base Rate	Tier 2		4
Possible Closure	Tier 3	125%	7

)

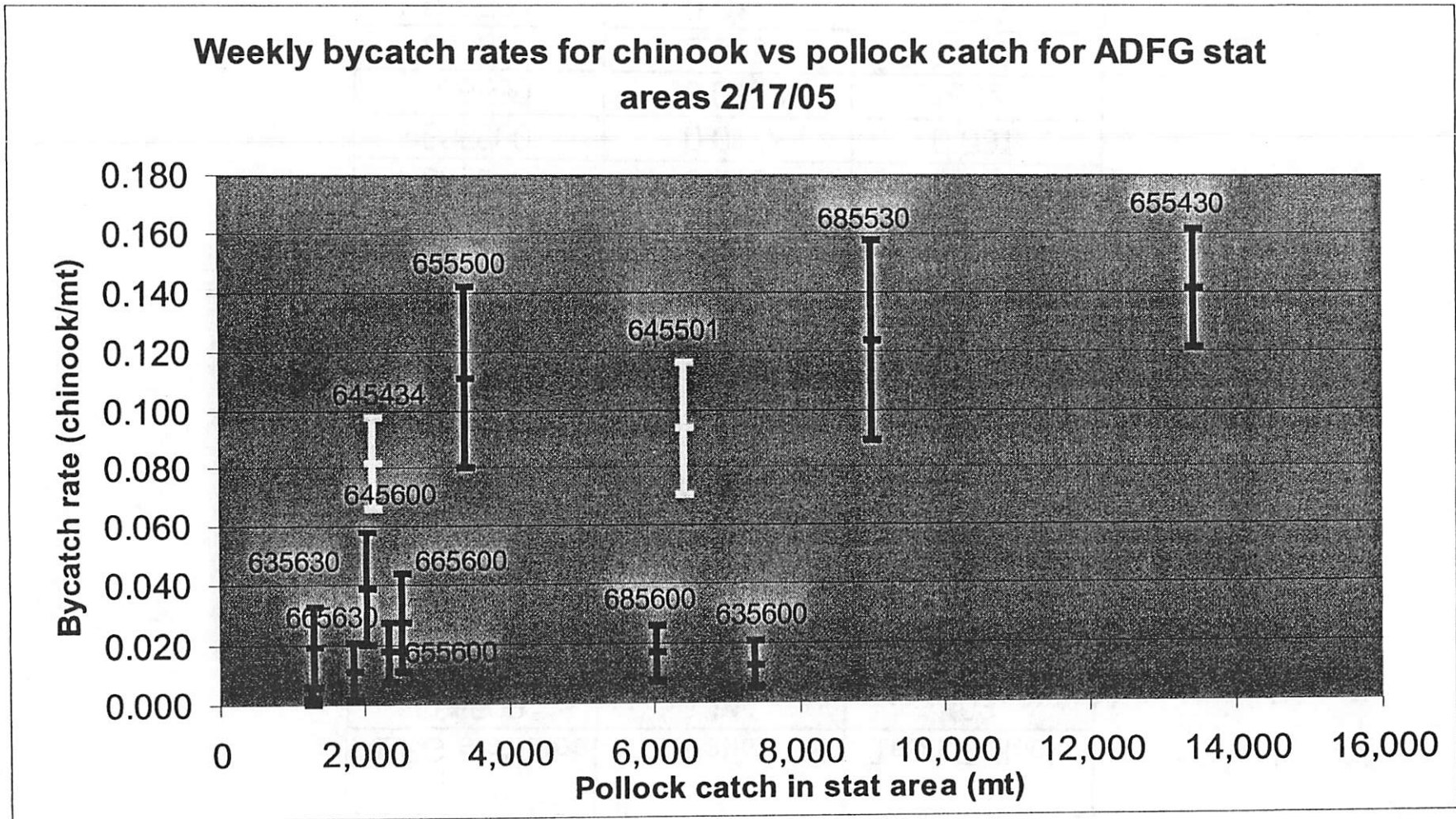
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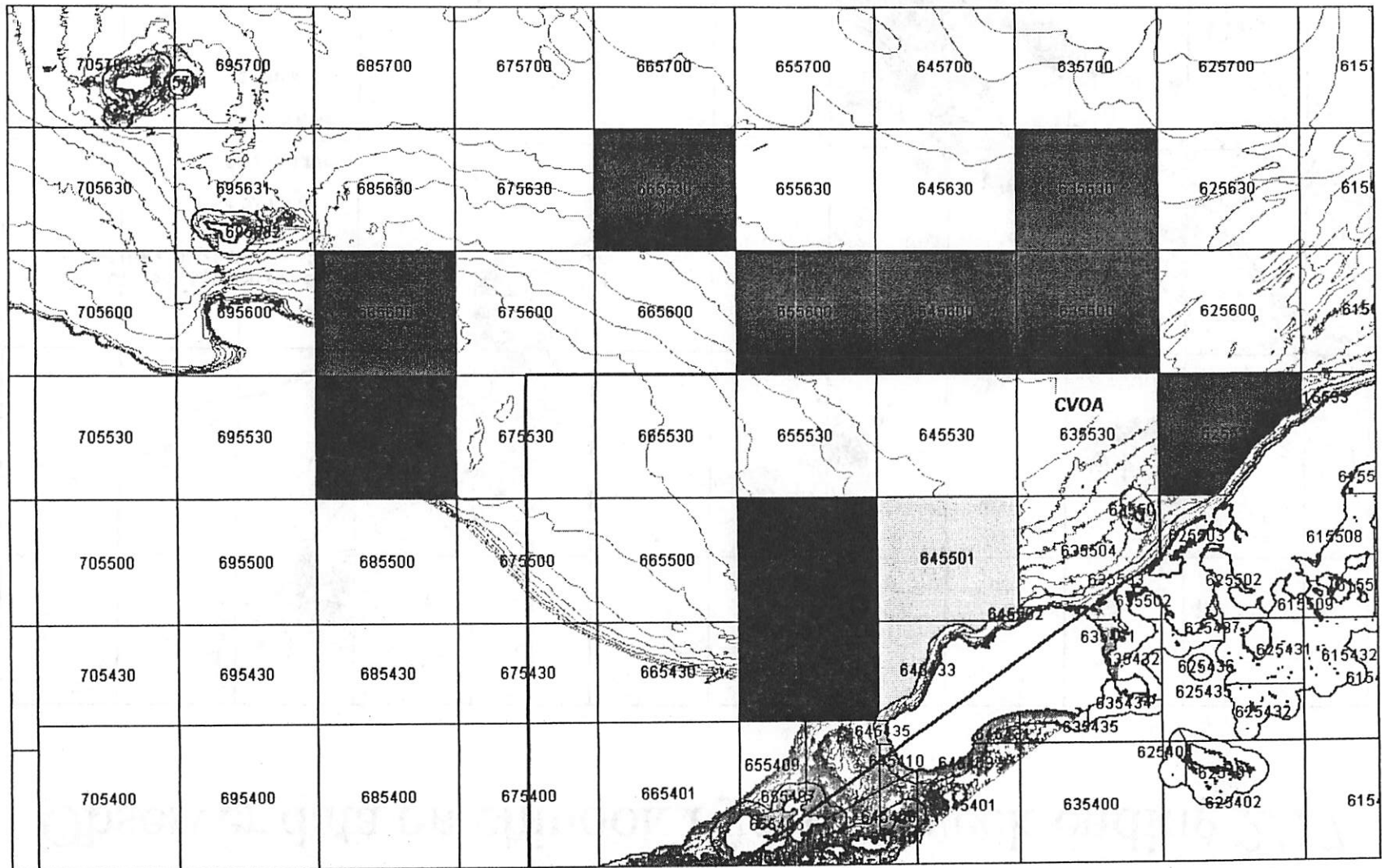
## Starting point - catch bycatch and rate by ADFG stat area

ADFG stat area	Ratio	Total Pollock
695600	0.144	409
655430	0.141	13,430
685530	0.124	9,009
655500	0.111	3,373
645501	0.093	6,400
645434	0.082	2,124
685630	0.040	862
645600	0.039	2,017
665600	0.028	2,525
645530	0.025	346
655501	0.022	231
635630	0.019	1,305
655600	0.018	2,331
685600	0.017	6,031
675630	0.014	632
635600	0.013	7,367
635504	0.011	677
655630	0.011	735
665630	0.011	1,840
625531	0.002	1,281

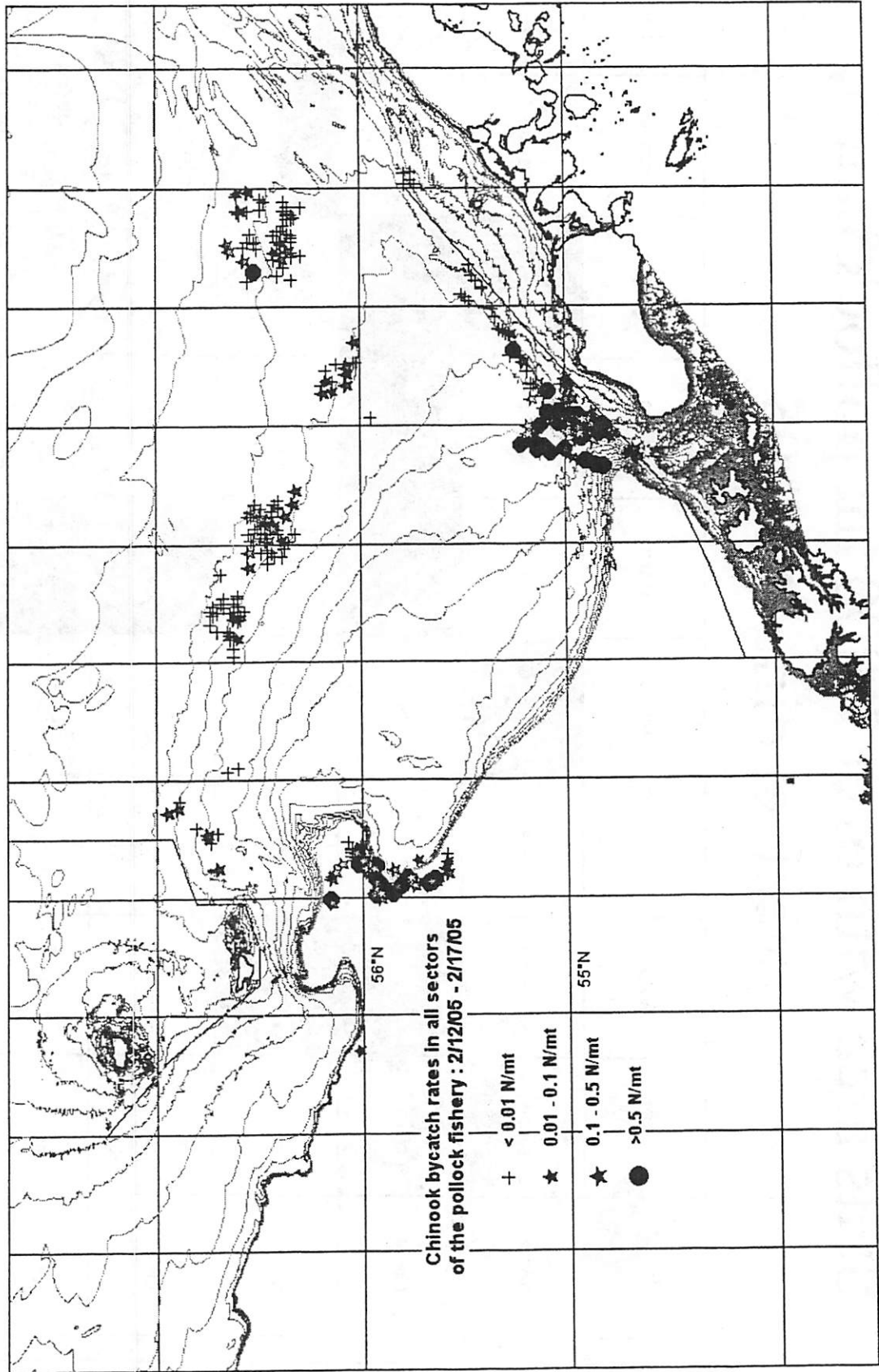
# Bycatch rate and std err with 95% CI vs pollock catch



# Stats area with over 1,000 mt pollock catch, week ending 2/17/05

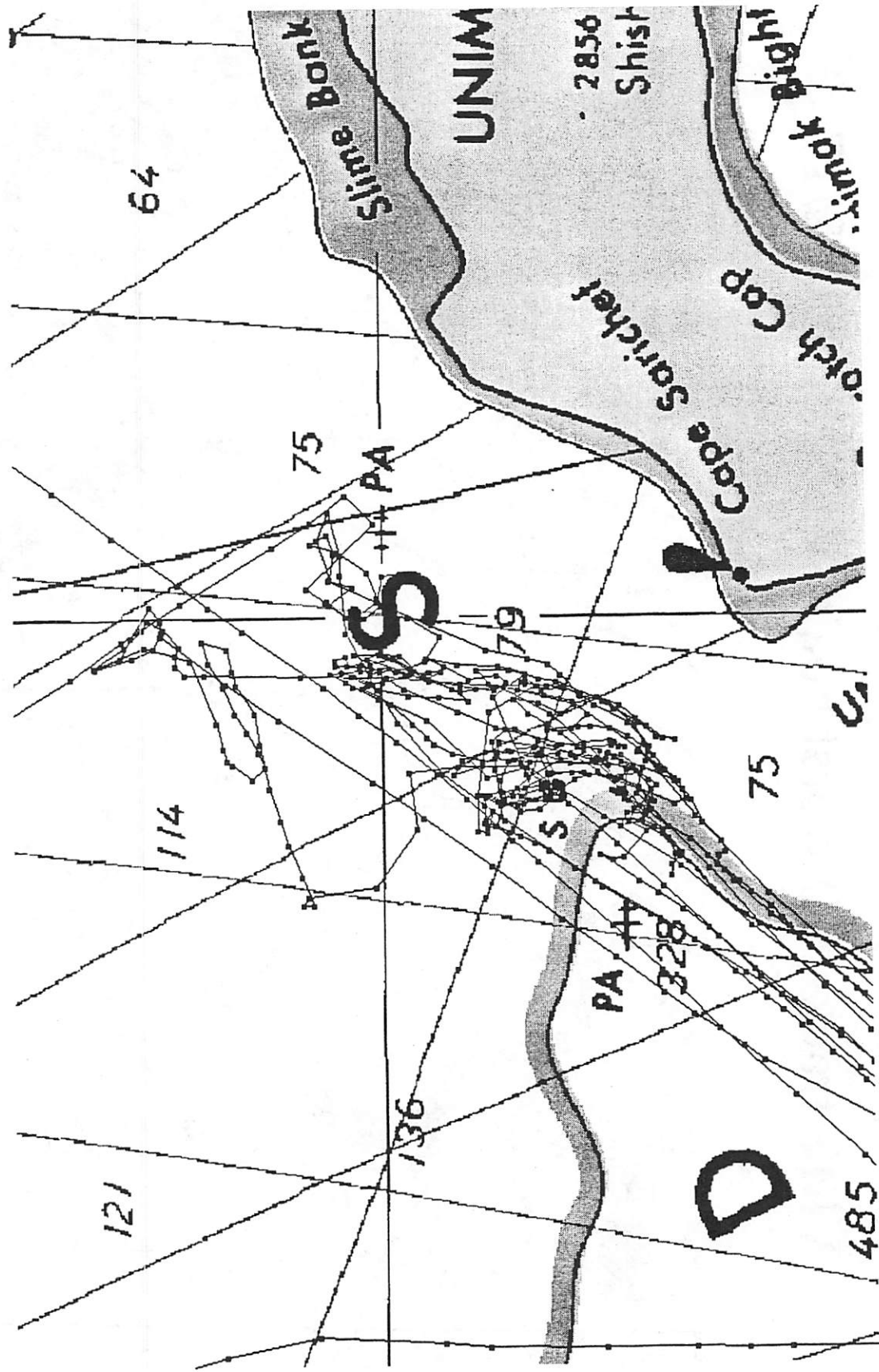


# Observer data on chinook bycatch, week ending 2/17



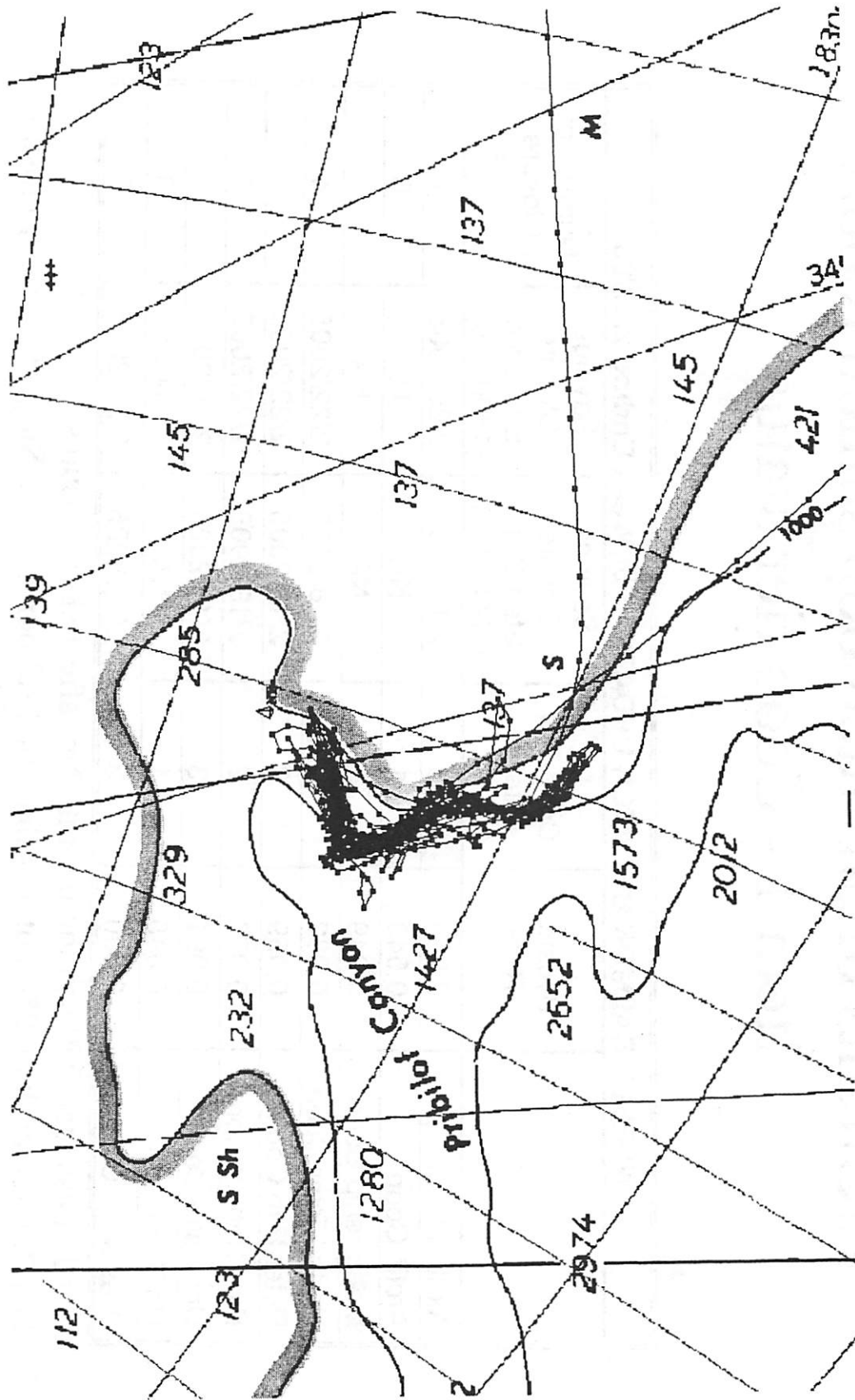


# VMS tracks, 10 worst boats, week ending 2/17





# VMS tracks, 10 worst boats, week ending 2/17



# Elements of an Intercoop samon report

## Item 1 - Coop tier status

<b>WEEKLY SALMON BYCATCH UPDATE - For Week Ending 2/17/05</b>					
Coop	Bycatch Rate	Coop Tier Status	Savings Closure Start Date (1800 Hrs.)	Savings Closure End Date (1800 Hrs.)	Number of Closure Days
Akutan Coop	0.089	3	2/18/2005	2/25/2005	7
Arctic Coop	0.043	1	NA	NA	0
Mothership Coop	0.049	1	NA	NA	0
North Victor Coop	0.082	2	2/18/2005	2/22/2005	4
Peter Pan Coop	0.059	2	2/18/2005	2/22/2005	4
Plck Cons. Coop	0.073	2	2/18/2005	2/22/2005	4
Unalaska Coop	0.091	3	2/18/2005	2/25/2005	7
UniSea Coop	0.045	1	NA	NA	0
Westward Coop	0.089	3	2/18/2005	2/25/2005	7

Tier 1: Less than .050 salmon per mt. Not affected by closures

Tier 2: Greater than .050 but less than .084 salmon per mt. Subject to 4-day closure

Tier 3: Greater than .084 salmon per mt. Subject to 7-day closure

## Element 2: bycatch rates by area

<b>Bycatch rates by area for week ending 2/17/05</b>			
<b>Stat Area</b>	<b>Rate</b>	<b>Stat Area</b>	<b>Rate</b>
685530	0.150	635530	0.030
655430	0.143	645600	0.029
695600	0.140	685600	0.024
655530	0.140	645530	0.020
655501	0.140	635630	0.020
645434	0.079	635600	0.013
645501	0.076	675630	0.010
695530	0.040	655630	0.010
685630	0.040	665630	0.000
665600	0.037	635504	0.000
655600	0.030		

# Element 3: Closure description

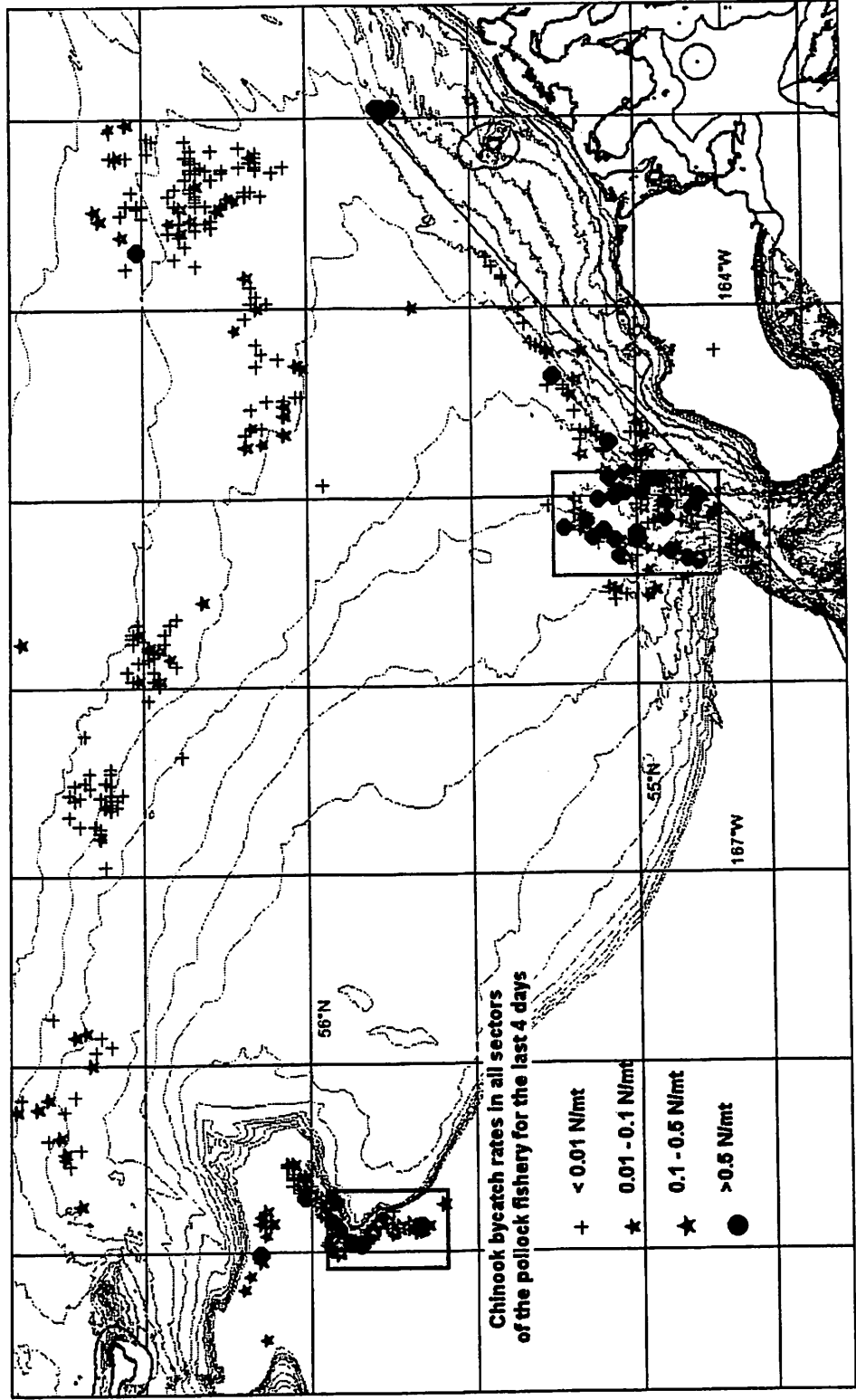
“We have split the closures between the two areas with the highest rates (685530 and 655430) because there is certainly no statistically significant difference between their rates (.150 and .143 respectively). The total closure area amounts to a bit over 900 sq nm, and while we have kept them rectangular, they aren't perfect subsets of stat areas. The closure down near the horseshoe in particular straddles four ADFG stat areas.”

Closure boundaries:

Area1: 54 45N to 55 15N  
164 52W to 165 25W

Area2: 55 35N to 55 57N  
168 40W to 169 05W

# Element 4: Map



# Dirty 20 Lists: Element 5 Dirty 20

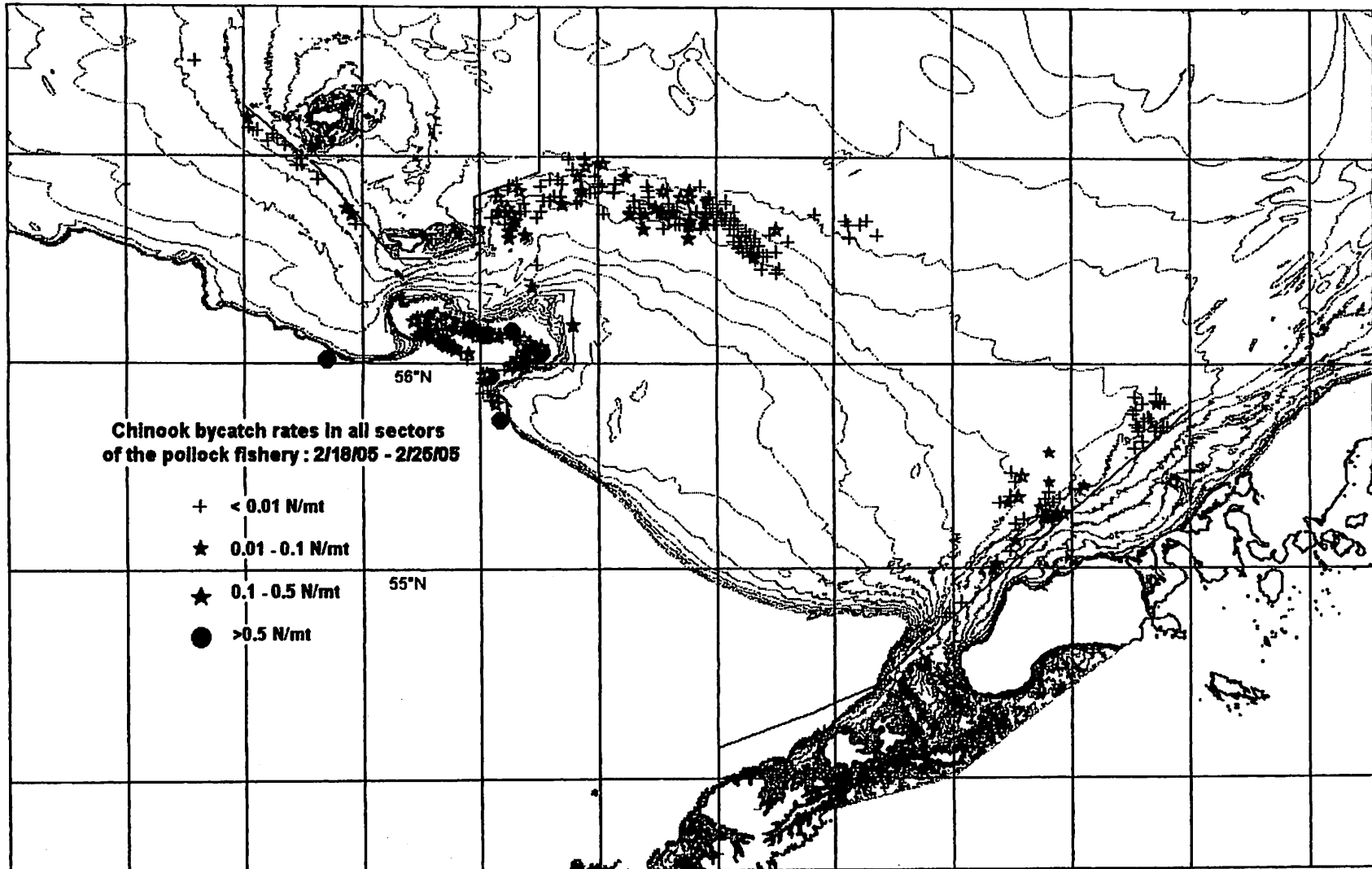
Past two weeks

Vessel	Chinook Rate N/mt
STARBOUND	0.235
EXCALIBUR II	0.145
NORTHWEST EXPLORER	0.141
PROGRESS	0.138
GLADIATOR	0.138
LISA MELINDA	0.136
OCEAN LEADER	0.134
MORNING STAR	0.131
BERING ROSE	0.118
NORTHERN HAWK	0.116
AMERICAN TRIUMPH	0.113
TRAVELER	0.112
ARCTURUS	0.106
NORTHERN EAGLE	0.105
ISLAND ENTERPRISE	0.101
ARCTIC WIND	0.101
PACIFIC VIKING	0.101
PACIFIC CHALLENGER	0.100
ALEUTIAN CHALLENGER	0.099
ALASKAN COMMAND	0.099

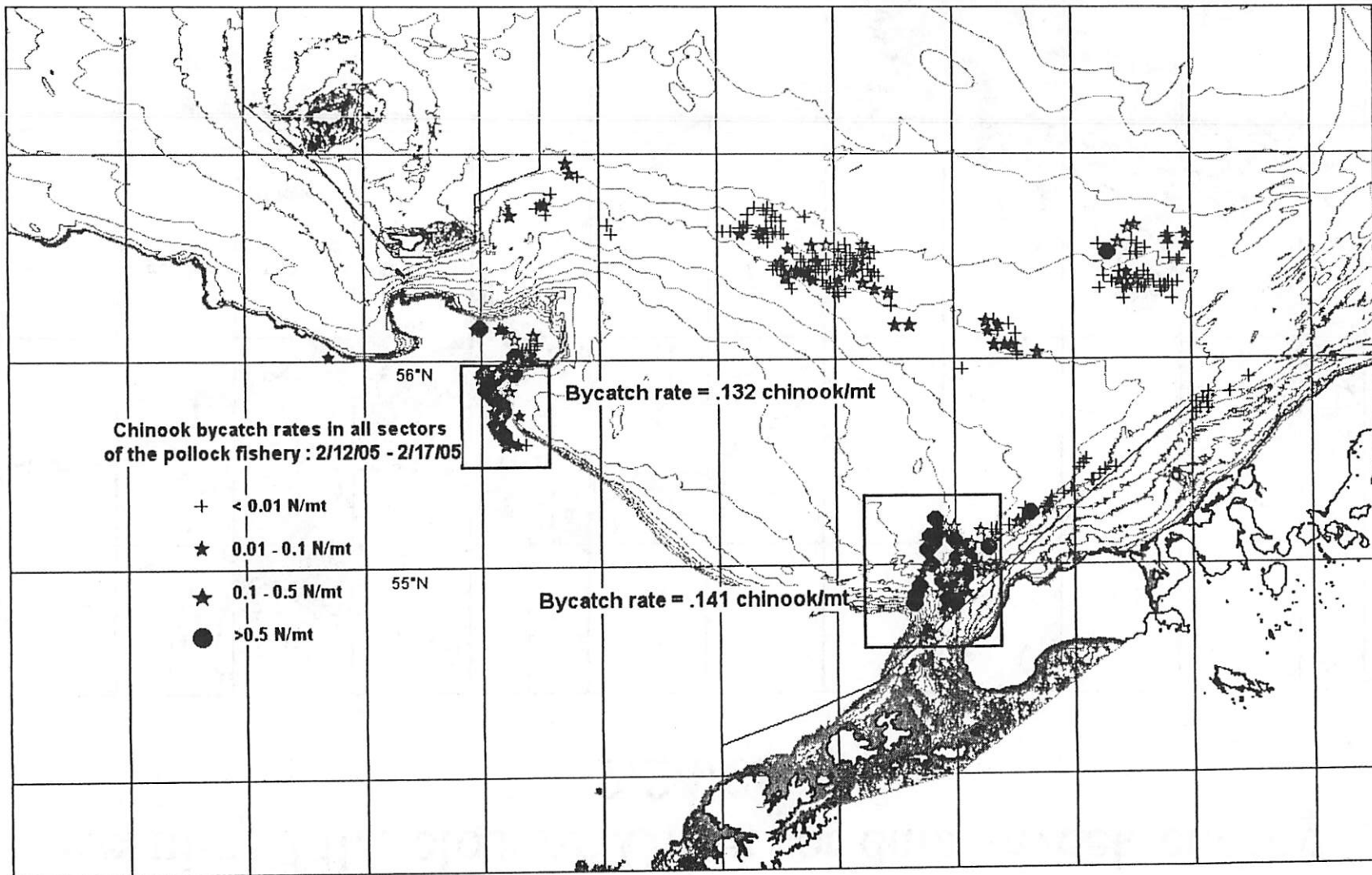
Weekly

Vessel	Chinook Rate N/mt
STARBOUND	0.359
NORTHWEST EXPLORER	0.184
WESTWARD I	0.160
ARCTURUS	0.155
CHELSEA K	0.153
OCEAN LEADER	0.151
OCEAN ROVER	0.150
GLADIATOR	0.146
EXCALIBUR II	0.145
LISA MELINDA	0.143
COMMODORE	0.138
NORTHERN GLACIER	0.136
VIKING EXPLORER	0.136
NORTHERN EAGLE	0.135
NORTHERN HAWK	0.126
BERING ROSE	0.125
AMERICAN TRIUMPH	0.118
MORNING STAR	0.117
STORM PETREL	0.115
GREAT PACIFIC	0.114

# Results of the closure: Observer data - week ending 2/24/05

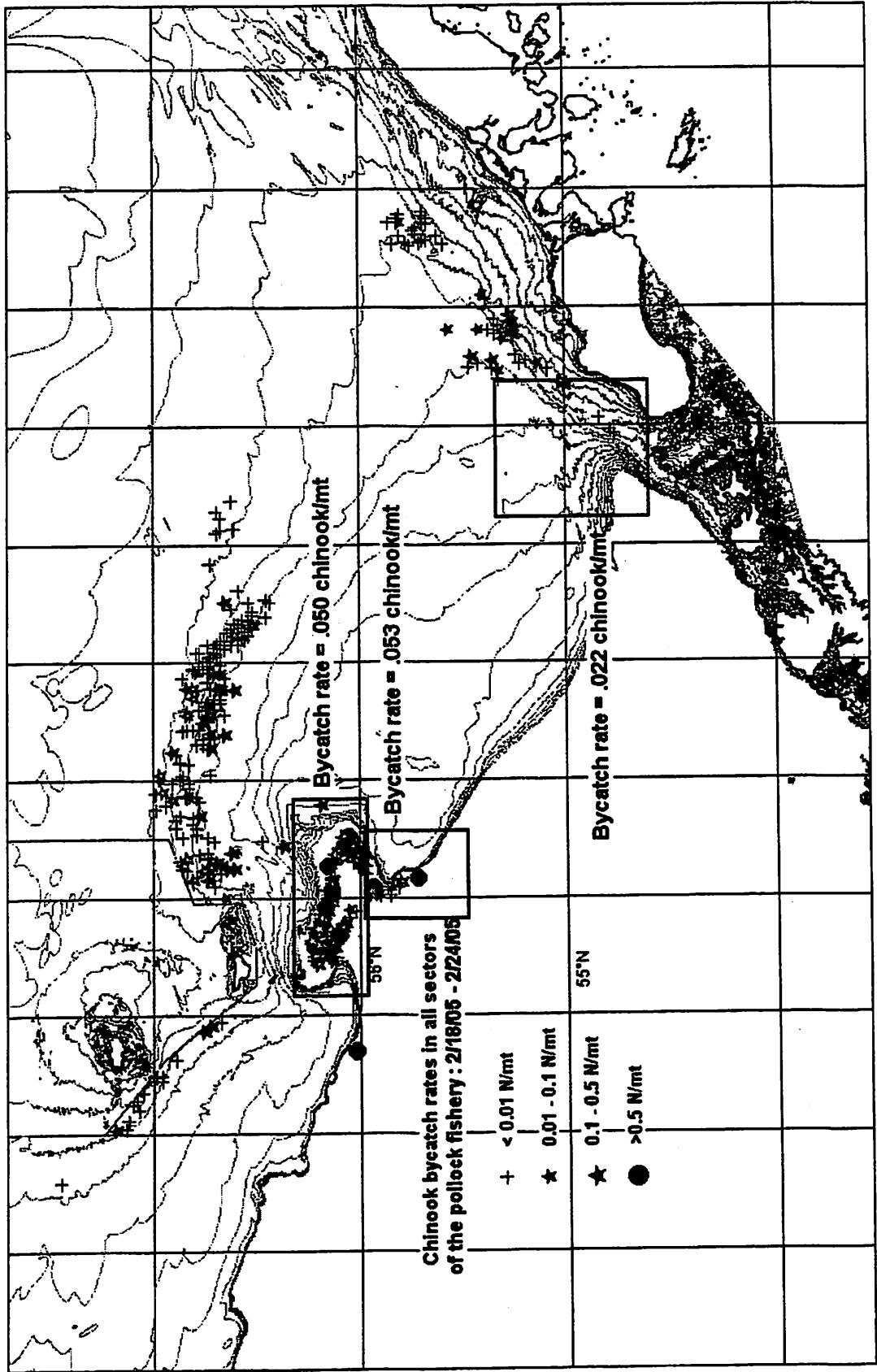


# Bycatch rates before closure

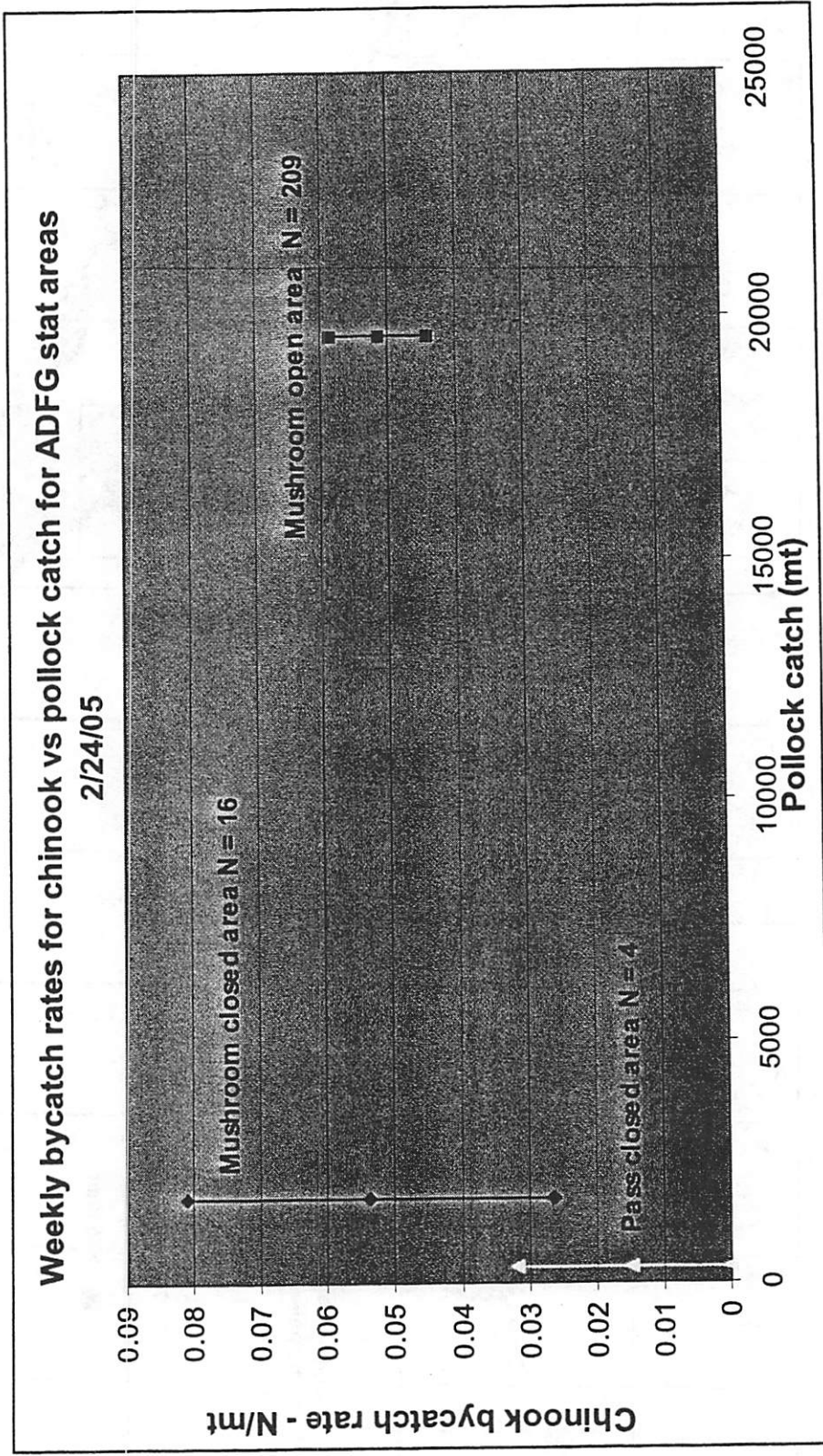




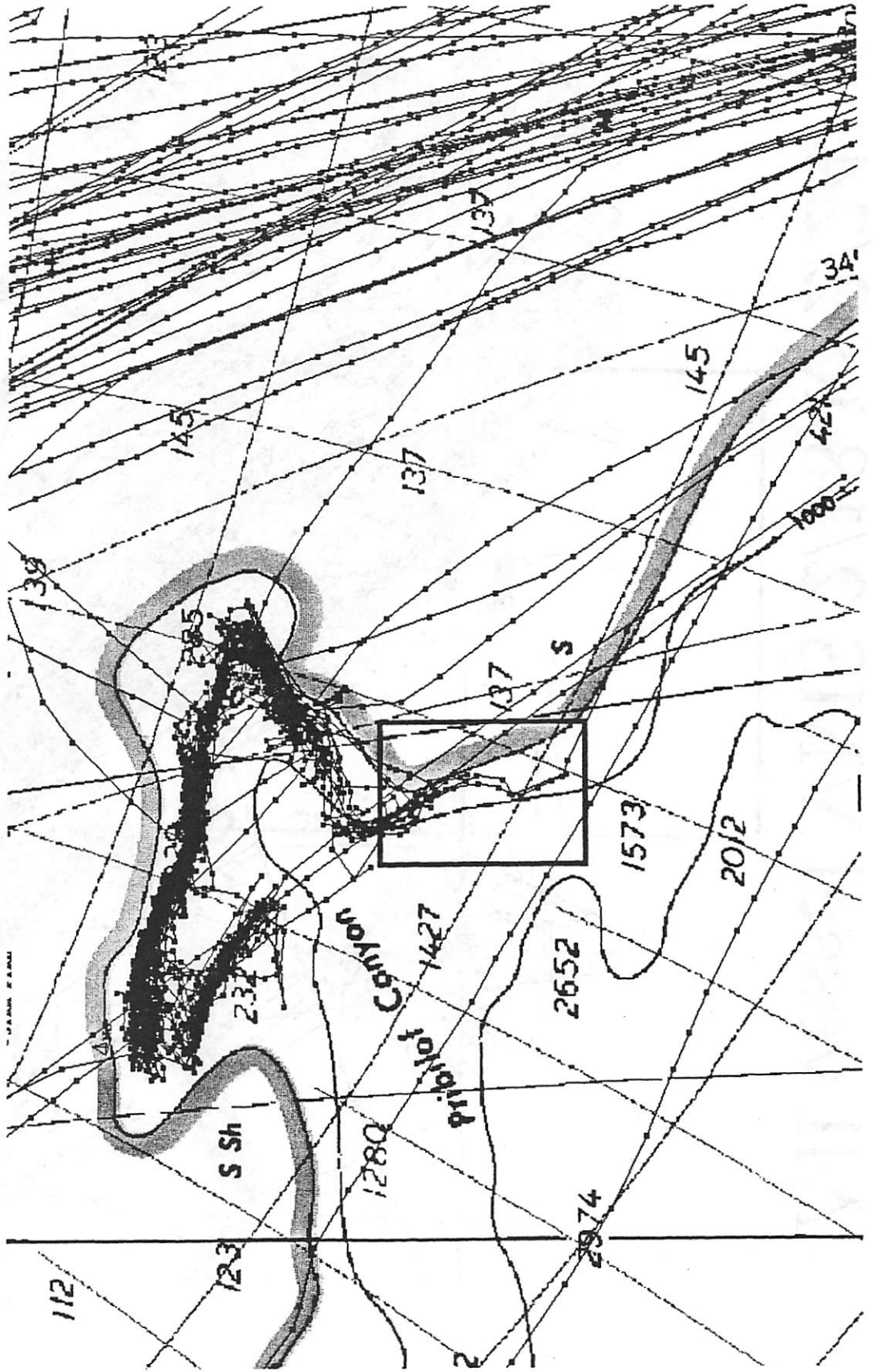
# Bycatch rates after closure



# 2/24/05 rates



# Compliance: All vessels VMS 2/19 - 2/24



# All vessel VMS 2/18 to 2/24

