


MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke   
Executive Director

DATE: November 28, 1994

SUBJECT: Full Retention/Full Utilization and Harvest Priority

ESTIMATED TIME  
4 HOURS

**ACTION REQUIRED**

- (a) Receive committee report on Full Retention/Full Utilization and Harvest Priority.
- (b) Consider next steps to address bycatch and discard.

**BACKGROUND**

Full Retention / Full Utilization and Harvest Priority

In September, the Council reviewed two discussion papers on Full Retention/Full Utilization (FR/FU) and Harvest Priority (HP), which are two proposals that may have some potential to address the bycatch and discarding issue. The Council recommended further evaluation of these proposals, and a committee was established to further flesh out the alternatives and details of each program, focussing on four specific fisheries as case examples. These fisheries were Bering Sea/Aleutian Island (BSAI) pollock mid-water trawl, BSAI rock sole trawl, Gulf of Alaska (GOA) flatfish trawl, and BSAI Pacific cod longline fisheries.

The committee met in Seattle November 17-18 to discuss the issues and provide information for the Council to assist them in determining how to proceed. Chairman Bob Alverson will present the committee's report (attached as Item C-5(a)).

**Harvest Priority and Full Retention/Full Utilization Committee**  
Report to the North Pacific Fishery Management Council  
December 1994

**Background**

Addressing the problems of bycatch, discards, and underutilization of North Pacific fishery resources are among the goals of the Comprehensive Rationalization Plan. Full Retention/Full Utilization (FR/FU) and Harvest Priority (HP) are two proposals that may have some potential to address these problems. In September 1994, the Council recommended further evaluation of these proposals. A committee was established to further flesh out the alternatives and details of each program, focussing on four specific fisheries as case examples. These fisheries were Bering Sea/Aleutian Island (BSAI) pollock mid-water trawl, BSAI rock sole trawl, Gulf of Alaska (GOA) flatfish trawl, and BSAI Pacific cod longline fisheries.

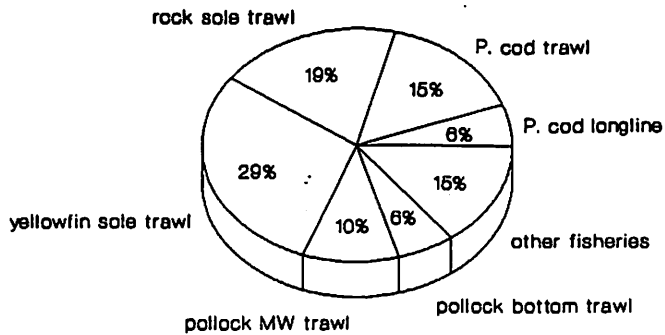
The committee met in Seattle November 17-18 to discuss the issues and provide information for the Council to assist them in determining how to proceed. The meeting agenda included reports from the Alaska Marine Conservation Council (AMCC), the Alaska Department of Fish and Game (ADF&G), the National Marine Fisheries Service (NMFS), and National Oceanic and Atmospheric Administration (NOAA) General Council. Two sets of data tables, summarizing catch and discards in the focus fisheries, were distributed by NMFS staff and are available from the Council office. In addition to the four focus fisheries, several other fisheries were examined to encompass a wider range of bycatch and discarding issues. Public attendance was relatively high (about 25 people), and the public had an opportunity to participate on an informal basis. This report was written to summarize the committee's discussions of the harvest priority and full retention/full utilization alternatives.

**Nature of Bycatch and Discards**

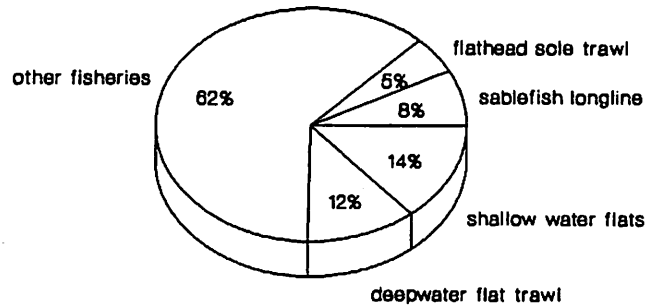
The meeting began with an examination of the magnitude of bycatch and discard in the focus fisheries. Bycatch may include catch of PSC species as well as retained catch of non-target species; whereas discards were defined as fish and invertebrates not retained. There was considerable discussion as to whether or not whole fish turned into meal products should be considered as discards. Under the current NMFS accounting system, meal produced in meal plants on a processing vessel or in a shoreside processing plant is considered retained groundfish. However, whole fish sent from Kodiak shoreside processing plants to the Kodiak reduction plant is counted as discards regardless of whether it is processed into meal or discarded from the reduction plant. The reduction plant is not required to report meal production to NMFS. In 1994, approximately 1,925 tons of groundfish were reported as whole fish sent to the Kodiak plant. Within the retained category, distinction of fish processed into meal from other products is not possible with existing data. Target fisheries are identified as the dominant species in the retained catch, with the exception of the mid-water pollock fishery that is defined as a catch of greater than 95% pollock.

Discarding was highly variable among the focus fisheries. Data indicate that in 1994, for example, the three BSAI focus fisheries (pelagic trawl pollock, longline cod, and trawl rock sole) accounted for 34.8% of groundfish discards in all BSAI groundfish fisheries. The focus fishery in the GOA (shallow water flatfish trawl) accounted for 13.8% of discards in the combined GOA groundfish fisheries. The figures below show the contribution of various fisheries examined to the 1994 total groundfish discards within each management unit (preliminary data through October 29).

**Contribution of Fisheries to Total Groundfish Discards in the Bering Sea & Aleutian Islands**



**Contribution of Fisheries to Total Groundfish Discards in the Gulf of Alaska**



**BSAI mid-water trawl pollock** - Discards in the 1994 pelagic pollock trawl fishery totalled 28,558 mt, and consisted primarily of pollock (72.7%) and Pacific cod (17.2%). Pollock are discarded due to capture of small fish, net bleeding, topping off, geographical areas, and product forms (fillet processing uses larger pollock than surimi processing). Cod are discarded due to small fish, product quality problems such as worms in flesh, and processing facilities not being set up to fillet cod.

Discard rates of pollock in this fishery have been declining since 1991, with only 1.8% of the pollock discarded in 1994, which would indicate a 98% retention rate. Committee members attributed increased retention to the pelagic trawl definition, a higher production of fish meal, growth of a pollock year-class, or larger mesh sizes being used. The mid-water trawl pollock fishery accounted for 61.6 % of all groundfish catch and 10% of all discards from the 1994 BSAI groundfish fisheries.

Relative to other groundfish fisheries, bycatch of chinook, other salmon, and herring in the mid-water trawl fishery is high due to the size of the fishery (the bycatch rates are relatively low). In 1994, this fishery accounted for 44.7% of the herring bycatch, 35.3% of the chinook salmon bycatch, and 45.2% of the other salmon bycatch. Lower bycatch of red king crab (0.1%), bairdi Tanner crab (4.3%) and halibut mortality (5.5%) was accounted for by the mid-water trawl pollock fishery.

**BSAI trawl rock sole** - In 1994, 54,377 mt of groundfish were discarded in the rock sole trawl fishery (at-sea processing), and consisted primarily of rock sole (43.5%) and pollock (27.8%), and to a lesser extent, Pacific cod (7.1%), yellowfin sole (6.5%), and other flatfish (5.7%). The rock sole fishery targets on females during the roe season, with roe-bearing fish worth about five times more than males. Small female and male rock sole and other species are discarded in the race for fish and PSC. Rock sole are processed mainly by heading and gutting (H&G) operations. Participating vessels are generally not set up for fillet processing, processing capacity (including meal) is limited, and the quality of H&G cod in the rock sole fishery may be relatively low. As a result, pollock, cod, and other target species are discarded at relatively high rates.

Discard rates of rock sole in this fishery have remained stable at about 58% of the rock sole being discarded. High discard rates are observed for most species, including pollock (94.2% discarded), Pacific cod (61.9% discarded) and yellowfin sole (73.7% discarded). The rock sole fishery accounted for 4% of groundfish catch and 19% of all discards from the 1994 BSAI groundfish fisheries.

Bycatch of red king crab, other king crab, and bairdi Tanner crab in the rock sole fishery is high relative to other groundfish fisheries. In 1994, this fishery accounted for 77.4% of the red king crab bycatch, 31.8% of the other king crab bycatch, and 25.2% of the bairdi Tanner crab bycatch. Lower bycatch of other Tanner crab (3.9%), herring (0.7%) and halibut mortality (12.9%) was accounted for by the rock sole fishery.

GOA trawl shallow water flatfish - A total of 2,583 mt of groundfish were discarded in the 1994 on-shore processing trawl fishery for shallow water flatfish (rock sole, butter sole, yellowfin sole, Alaska plaice). Discards consisted primarily of arrowtooth flounder (31.6%) Pacific cod (19.6%), shallow water flatfish (13.2%), and "other species"(16.0%). All arrowtooth is discarded because there is little market for this species. Other species of flatfish are discarded if they are small fish. Also recall that in Kodiak, fish turned into meal by the community meal plant is considered as discard. Nearly all cod are discarded, as cod was generally on bycatch status by the time the shallow water flatfish fishery is conducted. The shallow water flatfish fishery accounted for 2.1% of groundfish catch and 5.6% of all discards from the 1994 GOA groundfish fisheries.

Relative to other GOA groundfish fisheries, bycatch of red king crab and bairdi Tanner crab is high, but overall crab bycatch in the GOA is relatively insignificant. In 1994, the GOA shallow water flatfish fishery accounted for 56.7% of the red king crab bycatch (38 crab) and 13.4% of the bairdi Tanner crab bycatch (7,001 crab). Bycatch of halibut in this fishery accounted for 6.3% of the halibut mortality from all GOA groundfish fisheries.

BSAI longline Pacific cod - The BSAI Pacific cod longline fishery discarded 16,627 mt of groundfish in 1994. Discards consisted primarily of "other species" (55.5%), Pacific cod (18.3%), and pollock (14.9%). Generally, only Pacific cod, sablefish, turbot, and rockfish are retained in this fishery. Other fish such as pollock may sometimes be retained for bait purposes. Discard rates of Pacific cod in this fishery are low, with only 3.5% discarded in 1994. Discarded cod are generally small in size. Some fish, such as turbot, may be discarded because they become regulatory discards during the season. As with other fisheries, fish that are returned alive to the water are still considered as discards. Overall, the longline Pacific cod fishery accounted for 5.3% of groundfish catch and 5.8% of all discards from the 1994 BSAI groundfish fisheries.

Relative to other groundfish fisheries PSC bycatch, only the bycatch of halibut is high. In 1994, this fishery had a bycatch rate of 65 kg of halibut per metric ton of retained groundfish. Bycatch in this fishery accounted for 24.9% of the halibut taken as bycatch in all BSAI groundfish fisheries, and equates to 11.0% of the total halibut bycatch mortality. The Pacific cod longline fishery accounted for a very low percentage of bairdi Tanner crab (0.5%) and other Tanner crab (0.5%) taken as bycatch in all BSAI groundfish fisheries.

## Harvest Priority

Paul Seaton (AMCC) provided an overview of a generalized harvest priority (HP) program as proposed. The objective of a HP program is to change fishermen's pre-harvest behavior and fishing practices to avoid the catch of unwanted fish. Simply put, HP would encourage fishermen to reduce the catch of unwanted fish by allowing those that met bycatch standards to participate in a reserve fishery. Bycatch standards would be set for the fishery based on four types of discards: PSC species, economic discards of target species, regulatory discards, and non-commercial species. Bycatch standards could be set for each PSC and target species separately. Whole fish turned into meal may be considered discarded, whether or not the meal was intended for human consumption; another option would be to use a human consumption standard in the calculation of discards.

Because bycatch standards would be applied to individual vessels, observers may be required to sample all hauls or sets on vessels that chose to compete for the reserve quota. This could require two or more observers per vessel to qualify some vessels that run 24 hours per day. Another option as stated in the original HP proposal would be that all unsampled or unobserved hauls could be calculated at the fleet average of the previous year. Provisions could be made to exempt small vessels from the HP program and allow them to fish on the reserve quota without meeting HP observer requirements or performance standards. The Research Plan would have to be amended to allow vessel operators to pay for additional observer coverage required by the HP program. Only vessels that had all hauls or sets sampled by an observer and did not exceed any of the

bycatch standards during the open fishery would be allowed to participate in the reserve fishery, which would occur later in the following year. Bycatch rates from the reserve season would be averaged into the subsequent "prove-up" open season to provide incentive for vessels fishing in the reserve season to maintain low bycatch rates.

To allow for a reserve fishery, various allocations may be necessary. Quotas for target species may need to be allocated among different gear types, processing mode, product forms, and seasons. Within an HP fishery, which may be specific to gear type, processing mode, product form (e.g. surimi or fillet), the target species quota would need to be allocated into the open fishery TAC and the reserve fishery TAC. Available PSC may also need to be apportioned among the open and reserve fisheries, so that one does not inhibit the prosecution of the fisheries in the other. Overall utilization of the TAC for some species could potentially increase because fisheries will fish with lower bycatch rates, causing the season to last longer before being shut down due to PSC closures. The reward season could occur in the weeks just prior to the next "prove-up" open season.

As envisioned, a harvest priority program would be set up as an allowable management measure in the FMP, to be implemented by regulations for specific fisheries following Council approval. A HP program could be proposed for a fishery by fishermen participating in that fishery or possibly the Council or others. It was mentioned that crab fisheries, as well as groundfish fisheries, could be considered for an HP program. At this time, however, HP has not been proposed for any specific fishery. Once an HP program is allowed as a management measure, fishermen may come forward with proposals for their fishery. The Council may need to establish a review board to prioritize HP proposals similar to the now defunct joint venture review board.

### **Full Retention/Full Utilization**

Seth Macinko (ADF&G) briefed the committee on ADF&G's full retention/full utilization (FR/FU) alternative. This alternative would be expected to lower bycatch and increase utilization of the catch by altering pre- and post-harvest behavior of fishermen. This would occur at the pre-harvest level through increased retention (thus providing incentive not to catch unwanted fish), and at the post-harvest level through increased utilization (another incentive). Under this alternative, retention of all captured groundfish target species specified under the Council's License Limitation analysis would be mandatory. Target species identified for the BSAI are pollock, Pacific cod, Atka mackerel, yellowfin sole, other flatfish, rockfish, squid (fixed gear), rock sole, and turbot. Target species in the Gulf are pollock, Pacific cod, deepwater flatfish, shallow water flatfish, flathead sole, Atka mackerel, and rockfish. Retention of PSC species (crab, halibut, etc.), "other species" (sharks, skates, etc.), non-allocated species (rattails, eelpouts, etc.), and arrowtooth flounder would not be required. Full utilization means that some percentage (say 50%, 70%, or 90%) of retained catch in round weight must be processed for human consumption. Meal products processed for human consumption would be considered utilized, whereas meal processed for other uses would be considered not utilized. The FR/FU alternative would apply to catcher vessels, catcher-processors, motherships, and shore-based primary processors. At this time, no increases in observer coverage are proposed to implement this alternative, although it was discussed as a key element for full retention.

### **Evaluation of the HP and FR/FU Alternatives**

The committee developed some general pros and cons for the HP and FR/FU alternatives, and discussed how the HP and FR/FU alternative would apply to specified fisheries. Pros and cons suggested by committee members were the following:

## Harvest Priority

### PRO:

- may reduce discards of target species
- may reduce bycatch of PSC and unwanted fish
- allows some vessels access to additional quota
- may improve estimates of catch, bycatch, and discard
- may increase length of fishing season
- may lead to cleaner fishing practices
- may address public perception of discards as wasteful
- may be incentive to improve processing technology

### CON:

- may provide a financial advantage to larger vessels
- will increase management costs
- will increase observer cost
- may not work for small vessels
- will be complex to implement
- will increase number of allocative decisions
- may require 2 year appeals process
- may increase enforcement role of observers

## Full Retention/Full Utilization

### PRO:

- may eliminate discards of target species from vessels
- may reduce bycatch
- may lead to cleaner fishing practices
- may address public perception of discards as wasteful
- may be incentive to improve processing technology
- may increase management costs
- may improve estimates of total catch and bycatch
- may increase fish available for human consumption
- may slow fisheries down
- may result in new product forms

### CON:

- may result in added mortality of fish not discarded
- may have allocative effects by gear types
- may need to increase observer coverage
- may increase the cost of processing fish
- doesn't address discards of non-target species
- may not reduce mortality of regulatory discards
- may reduce U.S. market share of fish products
- may not be able to apply to shoreside processors
- may add mortality to fish currently discarded
- may be disadvantage to smaller vessels without a meal plant
- may increase enforcement role of observers

## **Application of HP and FR/FU to Focus Fisheries**

**BSAI midwater trawl pollock** - Some on the committee felt that although a HP program could be applied to this fishery (particularly to reduce bycatch of salmon and the unwanted catch of small pollock), a FR/FU alternative would be more comprehensive. Two committee members suggested that the FR/FU program may not be necessary with the mesh size regulation recently adopted for this fishery. One potential problem with applying a FR/FU program for only this fishery may be the ability for fishermen to easily change target fisheries mid-week (by catching less than 95% pollock) and avoid FR/FU requirements. Unless full utilization applies on a species by species basis, rather than on the basis of total catch, it was pointed out that the pelagic pollock fishery, on average, would already meet even the most stringent criteria proposed for processing for human consumption (proposed standards are 50%, 70%, or 90%). Other alternatives suggested to reduce discarding in the fishery include: mesh regulations, publishing vessel names with bycatch and discard rates, time/area closures, pelagic trawl definition, prohibiting bottom trawling for pollock, VIP based on retained fish, and ITQs or IBQs.

**BSAI rock sole trawl** - Data on individual vessel discard and bycatch rates were available for examination. Data indicate that rates among vessels are highly variable within each discard and bycatch category. No trends in discard rate of groundfish or rock sole with total catch were apparent. Vessels showed different bycatch rates for PSC species. Although the data appeared to indicate that reductions could occur in all categories of bycatch, the reliability of the discard data for this type of analysis is questionable according to NMFS staff. The observer program indicated that the estimates of bycatch by vessel were not adequate to support discard rate comparison among vessels.

Some committee members felt that a HP program could be applied to this fishery to reduce bycatch of crabs, and to some extent discards if fishermen can use more selective gear or change fishing behavior. Such a system could be quite complex, however, with different bycatch standards for each PSC species. There was some concern that with a matrix of bycatch standards, vessels with low bycatch in most categories (but higher in one) would not be allowed access into the reward fishery, and fishermen may not be able to simultaneously avoid bycatch of crab, halibut, and non-target fish in this fishery. An alternative to bycatch standards for this fishery would be to allow only a percentage of vessels to participate in the reward fishery; say, for example only one-half of the fleet (those vessels with the lowest overall discard and bycatch rates). One committee member was concerned that recent Council action on time/area closures for red king crab may reduce potential benefits of a HP program for this fishery. Because only 36 vessels (all catcher/processors) participated in the rock sole fishery in 1993, analysis and implementation may be easier than for other fisheries. Allocation of TAC and PSC between the open and reward season and between HP and non-HP fisheries would be required. Due to the multi-species nature of this fishery, it was felt that monitoring and enforcement of a HP program would be difficult.

Regarding the FR/FU alternative, it was noted that full retention in the rock sole target fishery would take care of up to 19% of all groundfish discards (minus others species and arrowtooth) in the BSAI. A FR/FU program would likely encourage gear development to reduce bycatch and discard, and find markets for those fish not currently retained. Although the fishing season may be extended with lower PSC bycatch rates, a reduction in the value of the fishery may occur if more of the fishery occurs outside the roe-season. One committee member noted that there are other alternatives available to address bycatch and discarding in the rock sole fishery. Many of these are underway for the 1995 season, including a 6" minimum codend mesh size, daily reporting of crab bycatch rates, an emergency closure to trawling in the eastern Bering Sea, and an industry voluntary program to increase retention of groundfish taken in the rock sole fishery by 30%.

GOA shallow water flatfish trawl - Although a HP program could be applied to reduce halibut bycatch, some committee members felt that a HP program would not be appropriate for the shallow water flatfish trawl fishery. One committee member suggested that this was a marginal fishery that occurs after other GOA fisheries are over, and that the additional observer costs would exceed any value derived from this fishery. Most vessels participating in this fishery fall into the 30% coverage category, and switch back and forth among the shallow water flatfish and deepwater flatfish fisheries. One committee member related that the GOA flatfish fisheries are multi-species in nature, and that catch of "targeted bycatch" (e.g. rockfish, sablefish) is necessary to make the fishery profitable, and topping off with these species is common.

Regarding a FR/FU alternative, there was concern that onshore processing could not be regulated under the Magnuson Act. Most shallow water flatfish are currently processed shoreside.

BSAI Pacific cod longline - Some on the committee felt that a HP program could be applied to this fishery to reduce bycatch of halibut. With regards to discards, some committee members felt that the cost of implementation of a HP program would be high relative to potential benefits, as discarding of target species in this fishery is relatively low. On the positive side, implementation costs of a HP program would be somewhat lessened as Pacific cod TAC is already allocated between trawl and fixed gear types, and the longline fishery has some vessels with 100% observer coverage (34 of 60 c/p in 1993). TAC would still need to be allocated between longline and pot gear, however. As with many other fisheries under a HP program, PSC may also need to be apportioned among the open and reserve season to keep one from shutting down the other.

A FR/FU alternative would make vessels retain and process their pollock, rockfish, and flatfish. Other reductions in discarding would be slight however, because a large proportion of discards consist of "other species" and non-allocated species.

## Legal Considerations

Robert Babson (NOAA GC) and others discussed the legal problems and aspects of the HP and FR/FU alternatives. NOAA GC concluded that under HP, a reward fishery is not a "benefit", as persons precluded from the reward fishery are penalized (sanctioned). This determination raises issues of due process and rights under the Administrative Procedures Act. Under existing regulations, a hearing for someone is required before that person can be excluded from the reward fishery. There are four sanctions that can apply to someone for violating the Magnuson Act or regulations promulgated under the Act. These are: civil penalties, permit sanctions, civil seizure, and criminal prosecution. Under a harvest priority, non-qualifying fishermen would face a permit sanction. The 15CFR 904 regulations, which lay out procedures for enforcement action, clearly set out what happens when you have a permit sanction, including when you can make the permit sanction effective. A permit sanction cannot be effective until a person has their day in court. The regulations also provide for an appeal if one does not agree with the administrative law judge's decision, and a second appeal to the administration. Fishermen cannot be prevented from continuing to fish (even in the reserve fishery) during the appeals process, which could take one to two years to resolve. Additionally, provisions on licenses under Administrative Procedures Act independently require prior notice and a right to a hearing before sanctions become effective. The bottom line is that fishermen will be able to participate in all reward fisheries until the department position is upheld, up to two years later.

There remains an unresolved question as to whether aspects of a HP or FR/FU program could be applied to shoreside processors. Although Magnuson Act regulations can be enforced at the dock, no federal regulations exist that tell shoreside processors how to utilize their catch, which products to make, mandatory retention, etc. The possibility was raised that FR/FU could be mandated as a condition of a groundfish processing permit in the same way Research Plan contributions will be collected from shoreside processors. NOAA GC will review its previous roe-stripping opinion to determine how Magnuson act can be used to regulate shoreside processors and utilization of their products.

Justification would be necessary to exclude small vessels or those that could not afford the observer coverage from participating in the HP reserve fishery. Otherwise such exclusion would be considered arbitrary and capricious, and in fact may turn the reward fishery into the domain of larger boats. Justification would also be necessary to exclude some vessels from the observer requirement and automatically include them in the reward fishery. Additionally, there are restrictions on what you can do with information generated from voluntary observers, such as information for enforcement purposes. On a related issue, NOAA GC noted that none of the current challenges to the vessel incentive program is based on observer sampling methodology.

## Summary

If the Council is looking for specific fisheries to serve as candidates for further examination of the two alternatives, then the committee suggests the rock sole fishery be examined for HP and pelagic trawl pollock fishery be examined for FR/FU. The committee noted however, that FR/FU may not work if applied to a single fishery and not to others because fishermen have some ability to switch target fisheries, thereby potentially avoiding FR/FU requirements. The issue that NOAA GC raises regarding due process appears to make the HP a difficult proposition.



Table 1. Members of the Harvest Priority and Full Retention/Full Utilization Committee and staff assisting the committee.

Committee

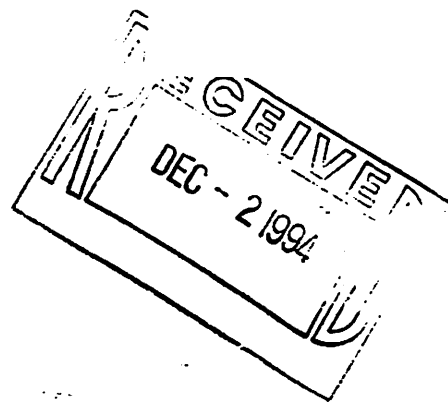
Bob Alverson (Chairman)	Fishing Vessel Owners' Assn.
Dave Benson	Arctic Alaska Fisheries Corp.
John Iani	Unisea, Inc.
Spike Jones	Crab/groundfish fisherman
Mandy Merklein	Fishery observer/biologist
Hazel Nelson	Bristol Bay Economic Development Corp.
Paul Seaton	Alaska Marine Conservation Council

Staff

Joe Terry	National Marine Fisheries Service
Sally Bibb	National Marine Fisheries Service
Lew Queirolo	National Marine Fisheries Service
Janet Wall	National Marine Fisheries Service
Sue Salvesson	National Marine Fisheries Service
Ron Berg	National Marine Fisheries Service
Seth Macinko	Alaska Department of Fish and Game
Dave Witherell	North Pacific Fishery Management Council
Bob Babson	National Oceanic and Atmospheric Administration
Jon Pollard	National Oceanic and Atmospheric Administration
Lisa Lindeman	National Oceanic and Atmospheric Administration
Susan Auer	National Oceanic and Atmospheric Administration

Sue Entsminger  
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Tok, AK 99780  
Dec 29 '94

AGENDA C-5  
DECEMBER 1994  
SUPPLEMENTAL



N.P. Fishery Management Council  
P.O. Box 103136  
Anchorage, AK 99510

ATT: to the Council

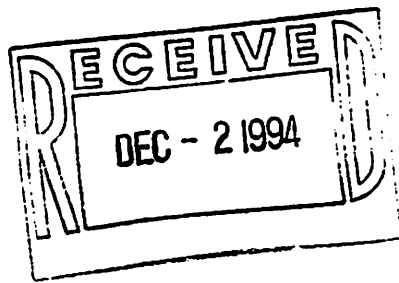
Enclosed is a letter given to me about the commercial trawlers. Since I'm on the Alaska Game Board, people bring to me fisheries problems, also, + ask me for their help.

Henry Hope is very upset about the friends he knows who have boats + follow these commercial vessels that throw their by-catch over board. ~~Fishers~~ Local boat owner + personal use fishermen, he knows, are appalled at the volume of fish they see thrown over board. This is Henry's idea as a solution. I'm passing it on to you for your information.

P.S. He wanted me to type it but I don't have the time. My apologies!

Thank-you

Sue Entsminger



HENRY M HOPE  
PO BOX 109  
TOK, AK. 99780-0109

TO WHOM IT MAY CONCERN:

I FOR ONE WOULD LIKE TO SEE THE COMMERCIAL FISHING LAWS CHANGED FROM THE WAY IT IS NOW AS IT IS NOW WHEN A COMMERCIAL FISHERMAN GO OUT ON A HALIBUT SEASON HE WOULD ALSO CATCH BLACK COD, BROWN COD, REEF SWAPPER, AND HE HAS THROW THEM BACK IN THE OCEAN. HE CAN NOT KEEP THE MISC FISHES CAUGHT ON BOARD OF HIS BOAT. IF HE IS CAUGHT WITH ANY FISH ON BOARD, HE IS FINED BIG DUCKS.

SO WHY NOT CHANGE THE LAWS TO KEEP ANY INCIDENTAL FISH CAUGHT SEND THEM TO THE PROCESSOR THE FISHERMAN KEEP 50% AND THE STATE OF ALASKA GET 50% AT THE LOCAL MARKET PLACE FOR THESE INCIDENTAL FISHES CAUGHT WHILE FISHING FOR A SPECIFIC FISH.

Henry Hope

# ALASKA MARINE CONSERVATION COUNCIL

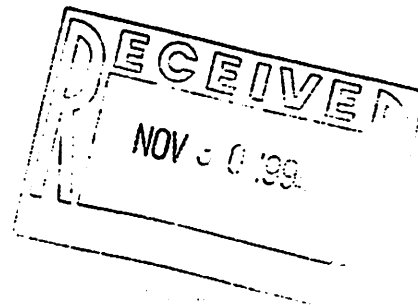
Box 101145 Anchorage, Alaska 99510  
(907) 277-5357; 277-5975 (fax); amcc@igc.apc.org

AGENDA C-5  
DECEMBER 1994  
SUPPLEMENTAL

**BY FAX AND FIRST CLASS MAIL: 5 PAGES**

November 30, 1994

Lisa Lindeman  
Bob Babson  
Susan Auer  
Jonathon Pollard  
NOAA General Counsel  
P.O. Box 21109  
Juneau, AK 99801



Dear Lisa, Bob, Susan, and Jonathon:

I listened with interest to your conference call with the Harvest Priority - Full Retention/Full Utilization Committee meeting in Seattle on November 18. One of the questions from the committee was about the appeal regulations that could be used with Harvest Priority ("HP"). Mr. Babson argued that fishermen could only be excluded from the HP reward fishery by sanction of the federal fishing permit required of all vessels operating in the North Pacific. However, the procedure for sanctioning this kind of permit is cumbersome, taking one to two years to resolve. Furthermore, Mr. Babson noted that such a permit may not be sanctioned before the termination of the appeal process. Thus, he argued that NOAA would not be able to exclude a fisherman from the HP reward fishery until resolution of an appeal that could run one to two years. Without timely resolution of appeals, HP could run into the same difficulties as the Vessel Incentive Program ("VIP") which are widely recognized as greatly weakening this program.

This problem can be solved by requiring a separate permit for participation in an HP reward fishery. In order to qualify for the HP permit, an applicant would have to show he or she met the bycatch standards in the qualifying fishery. A streamlined appeal procedure could be devised to permit resolution of appeals in time for the HP reward fishery to take place the following season that would still meet all due process requirements. In the rare case that an appeal was not resolved before the HP reward fishery took place, a fisher would not automatically have the right to fish in the HP fishery.

This is the exact system which has been approved by the Secretary for the halibut/sablefish ITQ program in Alaska. In the ITQ program, a person who wishes to fish for halibut or sablefish must have a Quota Share permit in addition to the generalized federal fishing permit required of all fishermen in the North Pacific. Ample authority exists under the current Magnuson Act for this same procedure, or a similar procedure, to be used for HP.

The purpose of this letter is to lay out this argument in greater detail. I look forward to continue talking to all of you about Harvest Priority. The Alaska Marine Conservation

Council ("AMCC") would certainly appreciate NOAA GC's aid in devising a workable appeal procedure in order to implement HP's important conservation goal of minimizing bycatch, waste, and discards in the North Pacific fisheries under your jurisdiction.<sup>1</sup>

The Harvest Priority Proposal. Harvest Priority, as proposed by AMCC, is designed to significantly reduce waste in North Pacific fisheries by giving fishermen an incentive to not catch unwanted fish in the first place. HP would provide the Council a conservation and management tool to reward fishermen who prove they have met a previously agreed-upon bycatch rate for four categories of bycatch: economic discards, regulatory discards, prohibited species, and non-commercial discards. For a fishery operating under HP, the Council would establish two separate TACs. The initial TAC would be open to all fishermen who meet the normal qualifications. However, any participants who wished to qualify for the second TAC would need to meet the HP bycatch standard as verified by full observer coverage of all fishing activity. The second HP reward TAC would be open to all fishermen who participated in the first season and met the qualification standards. In order to provide an opportunity to verify observer data and process appeals, if any, the second HP reward TAC would probably need to be scheduled in the following year.

Under HP, the Council would adopt a framework amendment to the Fishery Management Plan ("FMP") establishing the rules under which HP would operate. The Council would open windows on selected fisheries for which HP could apply. It would then solicit HP proposals from fishermen in that fishery. Such proposals would include all factors required in the framework FMP such as portion of the TAC to be devoted to the HP reward fishery, timing of the HP reward fishery, and bycatch qualification rate. An industry panel would screen the proposals. The Council would ultimately approve the parameters through a regulatory amendment.

The Need for an Appeals Procedure Under Harvest Priority. Under HP, some vessels will qualify for the HP reward fishery, some will attempt to qualify but fail, and some will choose not to attempt to qualify. AMCC fully recognizes the need for an appeals procedure for vessels that try but fail to qualify for the HP reward fishery. Such an appeals procedure must meet the requirements of due process under the U.S. Constitution, and the procedural requirements of the Magnuson Act, 16 U.S.C. § 1801 *et seq.*, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.* It must also be streamlined enough to process the majority of the appeals in time for the HP reward fishery the following year. Finally, although not essential, in the worst case scenario where an appeal is not processed in time for the HP reward fishery it would be helpful for the appeals process to not permit the appellant to participate in the HP reward fishery pending resolution of the appeal.

An Appeal Procedure Similar or Identical to the Halibut/Sablefish ITQ Program Could Be Used for HP. The appeals procedure for the Halibut/Sablefish ITQ program, 50 C.F.R. Part 676, appears to meet all of these criteria and, thus, could be useful for appeals under HP.

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<sup>1</sup> From previous discussions with Susan Auer of your office and Maggie Hayes in your Washington, D.C. office. I understand that NOAA GC has written no opinions on AMCC's Harvest Priority proposal. By this letter, I am requesting a copy of any such written opinion or communication prepared by your office on Harvest Priority in the future.

The appeals procedure is streamlined. A fisher applies for a quota share ("QS") permit. NMFS makes an initial determination on the application. An applicant who is found not to qualify then has 90 days to appeal by filing a full written statement in support of the appeal. Id. § 676.25(d). If requested, a written or oral hearing may be held at the discretion of NMFS to resolve genuine issue of fact. Id. § 676.25(g). If a hearing is granted, NMFS provides a statement of issues. Id. §§ 676.25(m) & (n). The appellant then has 30 days to file a written response including affidavits. Id. At the conclusion of the hearing, the hearing officer closes the record and issues a decision. Id. Within 45 days, the appellant may appeal this decision to the Regional Director who will resolve the appeal based solely on the record. Id. § 676.25(o). The Regional Director may deny the appeal, or modify, reverse, or remand the appeals decision. Id. Unless remanded, the Regional Director's decision is final agency action subject to judicial review. Id.

Harvest Priority could require a similar permit and resolve any controversy over issuance of the HP permit with a similar appeals procedure. The framework FMP amendment establishing the guidelines for HP could specify that in order to fish in a HP reward fishery, all participants would need a HP permit. In applying for a HP permit, the applicant would be required to demonstrate through observer data a bycatch rate in the previous, qualifying fishery at or below the qualifying rate. NMFS would make an initial determination. An applicant who was turned down could appeal the initial determination within a specified time and could request an oral or written hearing. At the conclusion of the hearing, the hearing officer would issue a decision which, if adverse, could be appealed to the Regional Director.<sup>2</sup>

The Magnuson Act provides ample authority for issuance of separate HP fishing permits if they are required to make HP work. Under the Act, any FMP may require a fishing vessel, its operator, or a fish processor receiving fish regulated under a FMP to obtain a permit. 16 U.S.C. § 1853(b)(1). In addition, a FMP may prescribe other measures, requirement, conditions, or restrictions necessary for the conservation and management of a fishery.<sup>3</sup> Id. § 1853(b)(10). Likewise, the Act gives the Council and NMFS the authority to devise an appeals procedure to make HP work. See id. § 1853(c) (authorizing Council to propose regulations necessary to carry out an FMP or amendment); id. § 1855(a) (Secretary directed to promulgate such necessary regulations).<sup>4</sup>

In order to be efficient, moreover, the Council might simply decide to use the existing halibut/sablefish appeals procedure for HP. See national standard 7, 16 U.S.C. § 1851(a)(7)

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<sup>2</sup> The appeals procedure for HP could be streamlined even more and still meet the due process requirements of the U.S. Constitution. See Davis, Administrative Law § 9.2 (1994) (basic notice and opportunity for informal hearing sufficient under Constitution and APA).

<sup>3</sup> NMFS relied upon this regulation as authority for issuing ITQ permits to vessel owners rather than only to vessel operators or vessels as authorized in 16 U.S.C. § 1853(b)(1). See 58 Fed. Reg. 59389 (Nov. 9, 1993) (response to comment 32).

<sup>4</sup> NMFS relied upon these provisions for issuance of the halibut/sablefish ITQ program which required a separate permit and devised a separate appeal procedure. See 59 Fed. Reg. 59400 (Nov. 9, 1993) and 59 Fed. Reg. 28281 (June 1, 1994).

(conservation and management measures should avoid unnecessary duplication); see also Aug. 5, 1994 letter from Pennoyer to Lauber at 3 (rejecting moratorium in part because duplicative appeals procedure unnecessary).

Permit Sanctions Would Not Apply to Consideration of a HP Permit Application. If such a separate permit system were designed for HP, a vessel could be excluded from the HP reward fishery without recourse to permit sanctions. Such permit sanctions are an enforcement tool. See 16 U.S.C. § 1858(g) (permit sanctions apply where prohibited act or violation has occurred). Permit sanctions are not necessary in order to turn down an application for a permit under HP. See 15 C.F.R. § 904.300(a) ("Nothing in this subpart precludes...denial of a permit for reasons not relating to enforcement."); see also Key Bank of Washington v. Concepcion, 847 F.Supp. 844, 848 (W.D.Wa. 1994) (permit sanction must be based on criminal fine or civil penalty).<sup>5</sup> In the same way that denial of an application for quota share in the halibut/sablefish program is not an enforcement action, denial of access to the HP reward fishery would not be an enforcement action requiring the procedures of permit sanction. Failing to qualify for the HP reward fishery, like failing to qualify for a halibut quota share, is not a violation of the law.<sup>6</sup>

Under such streamlined regulations, NMFS should be able to process most if not all appeals before the HP reward fishery would be held. In the worst case scenario in which the agency has not processed the appeal before the HP reward fishery began, however, the appellant would not automatically be entitled to fish in the HP reward fishery. Mr. Babson correctly cites the APA for the proposition that once a license is issued the government may not withdraw or suspend it before notice and an opportunity to be heard. See 5 U.S.C. § 558(c). However, nothing in this section requires the government to allow someone to enjoy the benefits of a license *before* the government grants it. In fact, this section of the APA merely directs the government to process the application under applicable law. Id. In this case, the applicable law would be satisfied by appeal regulations designed for HP as described above.<sup>7</sup> As with the halibut/sablefish ITQ program, NMFS could therefore decide not to let

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<sup>5</sup> The Magnuson Act does allow permit sanctions to be applied against an owner or operator of a vessel who has applied for a permit. 16 U.S.C. § 1858(g). However, this is to allow NMFS to deny a permit application of an operator who already has an outstanding sanction or penalty for a different permit. See 15 C.F.R. § 904.301(b)(1). The authority cited above is clear that permit sanctions are not the mechanism that must be employed in denying a permit for non-enforcement reasons.

<sup>6</sup> A vessel might ignore the HP provisions and attempt to fish in the HP reward fishery without a permit. In that case, the full range of sanctions including issuance of a Notice of Violation, civil penalties, criminal penalties, and civil forfeiture would be available. Such enforcement tools would be equally sufficient deterrent under HP as they are for any other willful violation of existing FMP provisions such as fishing after a closure, in a prohibited manner, in a closed area, or without the proper QS permit.

<sup>7</sup> APA § 558(c) does not independently require formal agency adjudication under the APA. Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1260 n.25 (9th Cir. 1977). The Magnuson Act also does not appear to require a formal APA adjudication of permit applications. See 16 U.S.C. § 1853(b)(1). Therefore, the applicable law would be the due process requirements of the Constitution which would easily be met by the appeal procedure described above.

Letter to Lisa Lindeman, et al.  
November 30, 1994

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the mere filing of an appeal to automatically allow participation in a fishery for which an applicant does not hold a valid permit. See NMFS, The IFO Program: Insights and Updates (Feb. 1994) at 12 (no interim quota share to be issued pending resolution of appeal).

Thank you for your attention to this matter. I look forward to seeing you at the Council meeting in Anchorage. Please don't hesitate to contact me to discuss this or any other facet of the Harvest Priority proposal.

Sincerely,

  
Scott Highleyman  
Executive Director

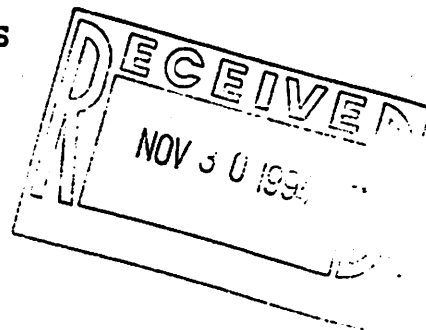
cc: Rick Lauber, Chair, NPFMC  
Maggie Hayes, NOAA GC  
HP-FU/FR Committee  
Senator Ted Stevens  
Senator Frank Murkowski  
Congressman Don Young



ALASKA FEDERATION OF NATIVES

1994 ANNUAL CONVENTION

RESOLUTION 94-92



TITLE: REDUCE WANTON WASTE

WHEREAS: more fish were discarded dead in federally managed fisheries in the North Pacific and the Bering Sea than were landed in the U.S. North Atlantic in 1993; and

WHEREAS: over 740,000,000 pounds of marine life were dumped overboard in the Bering Sea and the Gulf of Alaska, including over 16,000,000 pounds of halibut and over 16,000,000 crab; and

WHEREAS: in 1993 over 370,000 salmon were intercepted by the trawl fishery; and

WHEREAS: these discarded crab, salmon, intercepted in Federal offshore waters are managed resources of the State of Alaska; and

WHEREAS: these resources are the economic and cultural lifeblood for many Alaskans who depend on the sea for their livelihoods and subsistence; and

WHEREAS: this continued wanton waste undermines any long term management strategy of sustained commercial, subsistence, and recreational fisheries, and places rural communities at risk; and

WHEREAS: Alaska marine waters face declining wildlife populations and potential endangered species listings of several marine species that depend on fish for food; and

WHEREAS: minimizing the catch of undersized species and reducing wanton waste will conserve fisheries resources for the present and future generations of subsistence users, commercial and recreational fishers, seafood industries, coastal communities, consumers, and the Nation; and

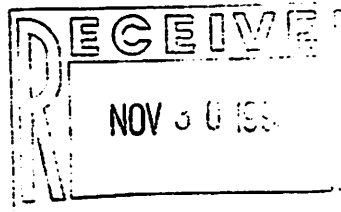
WHEREAS: wanton waste now occurring in Federal fisheries of the Bering Sea and the Gulf of Alaska is of utmost importance culturally, economically, and ecologically;

NOW THEREFORE BE IT RESOLVED by the delegates to the 1994 Annual Convention of the Alaska Federation of Natives that AFN urge Congress to amend the Magnuson Act to enact a broad range of measures to reduce wanton waste in the North Pacific and Bering Sea fisheries, including harvest priority incentives for Clean Fishing Practices and other management tools.

SUBMITTED BY: Qawalangin Tribe of Unalaska

CONVENTION ACTION: PASSED





Finding #: 94-05-FB

# ALASKA BOARD OF FISHERIES

**Resolution Title: Reducing Bycatch and Waste in the North Pacific and Bering Sea Fisheries.**

**WHEREAS**, in 1992 and 1993, the North Pacific fishermen discarded as dead or dying more fish than U.S. Atlantic coast fishermen harvested in those years; and

**WHEREAS**, of the total groundfish catch of the Bering Sea/Aleutian Islands and Gulf of Alaska in 1993 which amounted to at least 4.6 billion pounds, discards amounted to at least 740 million pounds, or 16% of the total catch; and

**WHEREAS**, this bycatch in 1993 included over 370,000 salmon bound for river systems in the State of Alaska, over 16 and a half MILLION crab, 16 MILLION pounds of halibut, and over 750,000 pounds of herring; and

**WHEREAS**, the rippling effects of this appalling waste of our natural resources threatens the economic and cultural well-being of many Alaskan rural communities, and

**WHEREAS**, the minimization of bycatch waste in the fisheries of the Bering Sea and Gulf of Alaska is a prudent measure to provide the conservation of marine resources for future generations of subsistence, commercial, and sport fishers and hunters of marine life; and

**WHEREAS**, a system of economic incentives can be a viable solution to reduce the wanton bycatch and waste in the North Pacific; now

**BE IT RESOLVED**, that the Alaska Board of Fisheries has as a primary goal to greatly reduce this bycatch and waste; and

**BE IT FURTHER RESOLVED**, that minimizing bycatch must be first and foremost in any waste reduction plan. The Board of Fisheries strongly urges the North Pacific Fishery Management Council and Congress to promote measures to minimize bycatch and waste through harvest priority incentives for clean fishing practices.

Adopted: November 14, 1994

Vote: (7/0) (Yes/No)

Location: Anchorage, AK

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Larry Engel, Chair  
Alaska Board of Fisheries