

Discussion Paper:
Aleutian Islands Pacific Cod Management
December 2, 2019¹

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1 Introduction

In October 2019, the Council asked staff to update the June 2019 discussion paper on management options available to promote conservation of Aleutian Islands (AI) Pacific cod and the sustained participation of AI fishing communities. The Council requested the updated discussion paper include changes to the Bering Sea and Aleutian Islands (BSAI) Groundfish Fishery Management Plan Amendment 113 modifications approved by the Council in December 2018 (Section 2.1), an update on the status of the Amendment 113 litigation (Section 1, below), a discussion of how Amendment 113 addresses the national standards (Section 3.1), and a thorough examination of options available under Magnuson-Stevens Fishery Conservation and Management Act (MSA) Section 303A for Limited Access Privilege Programs and outside of Section 303A to meet these objectives (Section 3).

The Council’s discussion paper request stems from the March 21, 2019, U.S. District Court (Court) opinion that the National Marine Fishery Service (NMFS) failed to demonstrate that the rule implementing Amendment 113 satisfied the requisite standards for such regulatory measures set forth by the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Specifically, the Court found NMFS had not demonstrated the rule implementing Amendment 113 was reasonably calculated to promote conservation consistent with National Standard 4, and that NMFS could not show consistency with National Standard 8 because in the Court’s view the rule allocates fishery resources to two particular communities. The Court vacated the rule implementing Amendment 113 and remanded the rule to NFMS for reconsideration consistent with the Court’s opinion. Because the Court vacated the rule, the NMFS must take some affirmative action, such as beginning a new rulemaking consistent with the Court’s opinion or removing the vacated rule from regulations. Vacatur forecloses the possibility that the Amendment 113 program could be reinstated by merely supplementing the record without a new rulemaking. On May 17, 2019, the Defendant-Intervenors, including the City of Adak, filed a notice of appeal. On May 20, 2019, the U.S. Department of Justice (DOJ) filed a protective notice of appeal to preserve the government’s right to join the appeal, but DOJ has not yet reached a final decision as to whether it will proceed with an appeal. Appeal briefings for DOJ and Intervenors were scheduled for November 21, 2019, but on October 31, 2019 a motion requesting a 60-day extension of time for appellants’ opening briefs was granted. Appellants brief(s) are now scheduled for January 21, 2020.

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Additionally, on August 23, 2019, NOAA requested an extension of currently approved information collection associated with Amendment 113 in the event of a successful appeal (FR 44286). In 2016, NMFS implemented this collection of information under Amendment 113, which contains the annual notification of intent that the City of Adak or the City of Atka submits to NMFS of its intent to process AI Pacific cod in the upcoming fishing year in order for the BS trawl CV A-season sector limitation and the AI CV harvest set-aside to go into effect in the upcoming year. As the annual notification of intent is based on the vacated regulations that implemented Amendment 113, this information will not be collected unless the regulations are reinstated on appeal.

The Council recognized that the Court's order vacating Amendment 113 has left insufficient protections for AI communities from the risks associated with excess offshore harvesting and processing capacity created by previously rationalized programs being used in the AI Pacific cod fishery. Offshore harvesting and processing activities continue to have the potential to threaten the long-term stability of shorebased processors in the region, so the Council requested the initial discussion paper be prepared for the June 2019 meeting and then requested staff update that discussion paper for the December 2019 meeting.

2 Background

2.1 Amendment 113 and the modification to the amendment

In October 2015, the Council recommended a management measure to provide stability to AI shoreplant operations and the communities dependent on shoreside processing activity by prioritizing a portion of the AI Pacific cod total allowable catch (TAC) for access by CVs delivering their AI Pacific cod catch to shoreplants in the AI. The Secretary of Commerce (Secretary) approved the Council's recommendation (Amendment 113) which had an effective date of November 23, 2016. The amendment modified the management of the BSAI Pacific cod fishery to set aside a portion of the AI Pacific cod TAC for harvest by CVs directed fishing for AI Pacific cod and delivering their catch for processing to a shoreside processor located on land west of 170° W. longitude in the AI. The harvest set-aside applies only if specific notification and performance requirements are met, and only during the first few months of the fishing year. This harvest set-aside provides the opportunity for vessels, AI shoreplants, and the communities where AI shoreplants are located to receive benefits from a portion of the AI Pacific cod fishery. The notification and performance requirements preserve an opportunity for the complete harvest of the BSAI Pacific cod resource if the set-aside is not fully harvested.

In February 2018, the Council identified a regulatory issue that ran counter to the intent of providing community protections in the AI. Since the AI Unrestricted Fishery and the AI CV Harvest Set-Aside are administered simultaneously, the AI Pacific cod catch that is delivered to offshore or non-AI shoreplants by trawl CVs is deducted from both the AI Unrestricted Fishery and the BSAI Trawl CV A season allocation. The deduction of AI Pacific cod delivered to offshore processors or non-AI shoreplants from the total BSAI Trawl CV A season allocation could result in a situation in which the total A season allocation could be landed between the AI unrestricted fishery and the BS "remainder."² This result runs counter to the intent of the Council to provide stability to AI shoreplant operations and the communities that are dependent on that processing activity by ensuring that a portion of the A season allocation is available for use by trawl CVs that intend to harvest AI Pacific cod from the AI CV Harvest Set-Aside and deliver to AI shoreplants.

In April 2018, the Council developed a purpose and need statement and requested that staff develop an analysis of three action alternatives to adjust Amendment 113 regulations implementing the AI Pacific cod set-aside for trawl CVs delivering to shoreplants in the AI to prioritize the AI Pacific cod CV harvest

² The BS remainder equals the total BSAI trawl CV A season allocation minus a BS Trawl CV Limitation, which is an amount equivalent to the AI CV Harvest Set-Aside.

set-aside fishery before the AI unrestricted fishery for the trawl CV sector. In December 2018, the Council recommended to the Secretary to modify Amendment 113 so that harvest by trawl CVs from the AI Unrestricted Fishery will also be deducted from the BS Trawl CV Remainder when determining the closure of the BS subarea. Since the Council's recommendation in December 2018, the analysis has been updated to include those recommendations, but no further work on the amendment package has been completed given the Court's order vacating Amendment 113.

Provided below is the problem statement and the alternatives identified when considering modifications to BSAI Amendment 113.

The Council adopted the following purpose and need statement during its April 2018 meeting.

Amendment 113 to the Bering Sea and Aleutian Islands Fishery Management Plan (BSAI) was intended to address the Council's concern of the continued risk of increased processing participation by rationalized sectors in the non-rationalized Aleutian Island cod fishery. In the first year Amendment 113 was in effect, changes in fishery participation patterns and total allowable catches in the BSAI resulted in the fishery progressing in a manner that may have been counter to the intent of providing community protections in the Aleutian Islands. The Council intends to modify Amendment 113 such that the prosecution of the BSAI Pacific cod fishery aligns with the Council's original objective of addressing the risk that participants in the BSAI rationalized fisheries may diminish the historical share of the BSAI Pacific cod of other industry participants and communities that depend on shoreplant processing in the region.

Alternative 1. No Action

Alternative 2. Amend CFR 679.20(a)(7)(viii)(E) as follows:

- (1) Language is unchanged
- (2) Language is unchanged
- (3) Aleutian Islands Unrestricted Fishery. Prior to March 15, vessels otherwise authorized to directed fish for Pacific cod in the Aleutian Islands may directed fish for that portion of the Aleutian Islands Pacific cod non-CDQ directed fishing allowance that is specified as the Aleutian Islands Unrestricted Fishery as determined in paragraph (a)(7)(viii)(B) of this section and may deliver their catch to any eligible processor, provided directed fishing for Pacific cod by the catcher vessel trawl sector is allowed in the BS Subarea.
- (4) Management of Trawl Catcher Vessels in the Aleutian Islands Unrestricted Fishery. If the trawl catcher vessel sector is closed in the BS Subarea prior to March 15, only trawl catcher vessels that deliver their catch of Aleutian Islands Pacific cod to an Aleutian Islands shoreplant for processing may directed fish for that portion of the Aleutian Islands Pacific cod non-CDQ directed fishing allowance that is specified as the Aleutian Islands Unrestricted Fishery as determined in paragraph (a)(7)(viii)(B) of this section.
- (5) Minimum Aleutian Islands shoreplant landing requirement. If less than 1,000 mt of the Aleutian Islands Catcher Vessel Harvest Set-Aside is landed at Aleutian Islands shoreplants on or before February 28, then paragraphs (a)(7)(viii)(E)(1) thru (4) of this section will not apply for the remainder of the fishing year.
- (6) Language is unchanged

Alternative 3. If the Aleutian Islands Catcher Vessel Harvest Set-Aside is in effect, the trawl CV sector may not engage in directed fishing for cod from the Aleutian Islands Unrestricted Fishery until the earlier of March 15 or until the entire Set-Aside is landed.

This prohibition will be removed if less than 1,000 mt of the Aleutian Islands Catcher Vessel Harvest Set-Aside has not been landed by February 28.

Alternative 4 (Preferred Alternative).

1) Prior to March 21, the A-season trawl CV Pacific cod harvests in the Bering Sea and trawl CV Pacific cod harvests in the Aleutian Islands except harvests delivered shoreside west of 170° longitude in the AI shall be limited to an amount equal to the BSAI aggregate CV trawl sector A-season allocation minus the lesser of the AI directed Pacific cod non CDQ DFA or 5,000 mt.

Upon the closure under the above provision, directed trawl CV fishing for non CDQ BSAI Pacific cod is prohibited for all trawl CVs vessels except trawl CVs delivering shoreside west of 170° longitude in the AI prior to March 21, unless restrictions are removed earlier under 3 or 4 below.

2) Prior to March 15 AI directed Pacific cod non CDQ harvests of any sector other than the CV sector delivering shoreside west of 170° longitude in the AI as defined in 1) are limited to the amount of the AI directed Pacific cod non CDQ DFA above minus the amount set-aside from the trawl CV BSAI allocation under 1). Catches of those other sectors under this provision are not subject to the regional delivery requirement.

3) If less than 1,000 mt of the AI Pacific cod non CDQ TAC has been landed shoreside west of 170 longitude in the AI by February 28 the restrictions under 1) and 2) shall be suspended for the remainder of the year.

4) If prior to November 1, neither the City of Adak nor the City of Atka have notified NMFS of the intent to process non CDQ directed AI Pacific cod in the upcoming year, the Aleutian Islands shoreside delivery requirement and restriction on the trawl CV sector allocation is suspended for the upcoming year. Cities can voluntarily provide notice prior to the selected date.

Options that apply to Alternative 4:

Option 1: Under Alternative 4, change the date for requiring shoreside deliveries to March 15.

Option 2 (**Preferred Alternative**): Keep the dates the same but allow Pacific cod harvested in the AI to be delivered either shoreside or at-sea after March 15, the BS limitation would not apply after March 21st or sooner if the AI Pacific cod TAC is achieved.

Shoreside deliveries are defined as deliveries made to a facility physically located on land.

2.2 Update on the AI Pacific cod set-aside fishery

The first full year the AI Pacific cod set-aside could have applied was 2017, but neither the City of Adak nor the City of Atka notified NMFS of the intent to process AI Pacific cod in late 2016, which advance notice is required in regulation. As a result, the AI Pacific cod set-aside did not apply for 2017. In late 2017, the City of Adak notified NMFS of the intent to process AI Pacific cod for the 2018 fishing year, so in 2018, 5,000 mt of the AI Pacific cod was set aside for harvest by CVs delivering their catch to AI shoreplants.

The AI Pacific cod set-aside was utilized for the 2018 and 2019 fishing years. For the 2018 fishing year, 27 percent of the 21,500 mt AI Pacific cod ABC was assigned to the State AI GHF fishery and the

remaining 73 percent of the ABC was assigned to the federal fishery as the AI TAC. The GHL and federal hook-and-line (HAL), pot, and jig gear fisheries opened on January 1, 2018. Several less than 60' pot CVs participated in the State AI GHL fishery and delivered to an AI shoreplant. Some greater than or equal to 60' pot CVs arrived about a week after the start date (January 4th and January 8th) and participated in the federal Pacific cod fishery. On January 19, 2018, BSAI Pacific cod directed fishing closed for pot CVs greater than or equal to 60'. On January 23, 2018, BSAI Pacific cod directed fishing closed for CV less than 60' using HAL/pot gear. The AI shoreplant did not take deliveries of any Pacific cod deducted from the federal TAC by the CVs less than 60' HAL/pot sector³.

On January 20, 2018, the federal BSAI non-CDQ Pacific cod trawl CV fishery opened to directed fishing. Some trawl CVs arrived in the AI after participating in the BS fisheries as well as some of the smaller CVs from the Western GOA. The trawl CVs began fishing for the AI shoreplant in early February. Directed fishing closed on February 11, 2018 for the BS non-CDQ Pacific cod trawl CV sector to prevent exceeding the 2018 BS trawl CV A-season sector limitation. The limited deliveries by pot CVs from the federal Pacific cod fisheries and the late arrival of the trawl CVs created some concern that the 1,000 mt AI minimum requirement would not be reached by February 28th. However, the shoreplant was able to reach the required amount and the 5,000 mt set-aside remained in effect.

Since there was 6,516 mt of AI Pacific cod that was available in the unrestricted fishery, two companies made plans to harvest a portion of that allowance and deliver the catch to processors other than AI shoreplants. One company was using its CV to deliver to one of its catcher/processors (C/Ps) acting as a mothership. However, this occurred during the February 2018 Council meeting, and when the Council was made aware of the issue with Amendment 113, the Council asked this company to not participate in the unrestricted fishery, due to the impacts to the AI shoreplant. This company had already taken a small amount of AI Pacific cod, but they agreed to stand-down from the fishery at the request of the Council. After the 2018 A-season was underway, a second company requested that their trawl CVs be allowed to deliver to the AI shoreplant. In part due to capacity constraints and the timing of the request, the AI shoreplant did not offer a market to those trawl CVs. The company instead decided to have some of its trawl CVs deliver AI Pacific cod to Dutch Harbor.

CVs that were delivering to the AI shoreplant are reported to have self-imposed trip limits and a one-day stand-down after a delivery to help reduce wait times for processing at the plant and improve product quality. Trawl CVs set the trip limit at 400,000 lbs. for the larger CVs and 100,000 lbs. for smaller CVs. These trip limits were abandoned when NMFS announced the BSAI A season trawl CV closure for March 4, 2018, which resulted in a larger volume of Pacific cod being delivered during a short period of time.

Once trawl CVs harvest an amount that is projected to be equal to the BSAI trawl CV sector A-season allowance, they are closed to directed fishing. In 2018, this occurred on March 11. Catch in the AI set-aside and unrestricted fishery resulted in the trawl CV sector A season being closed in the BSAI prior to the entire 5,000 mt AI set-aside being delivered. That meant the only CV sector that remained open⁴ to directed fishing until March 15 was the BSAI jig gear sector. The BSAI allocation to the jig sector was insufficient to allow the AI shoreplant to take deliveries of the remaining 5,000 mt AI set-aside before March 15.

³ NMFS did reapportion 1,400 mt from the jig sector to the <60' HAL/pot sector on February 6th, but the <60' HAL/pot sector in federal waters may not reopen until September 1st.

⁴ The <60' HAL/pot Pacific cod fishery was closed to directed fishing in the BSAI on January 23. On February 6, NMFS reallocated 1,400 mt of the jig A-season allocation to the < 60' HAL/pot sector. That reduced the total A-season jig allowance to 129 mt. The 510 mt B-season jig allowance became available on April 30th.

NMFS announced that the 5,000 mt AI set-aside had not been landed at the AI shoreplant by March 15th. Because the 5,000 mt AI set-aside was not reached by that date the BS non-CDQ trawl CV A-season sector limitation remained in effect until March 21 and the AI set-aside did not apply for the remainder of the year. The amount of the 5,000 mt AI set-aside that was delivered to the AI shoreplant in 2018 cannot be reported using Federal or State data due to confidentiality restrictions⁵.

The BSAI Pacific cod non-CDQ trawl CV B-season opened to directed fishing on April 1. The 2018 B-season allowance was set at 4,425 mt at the start of the fishing year. Directed fishing was closed on April 3 as a result of the B-season allowance being reached. The AI shoreplant took Pacific cod deliveries during the B-season. However, as was the case for the A-season, confidentiality restrictions prohibit reporting the amount of catch delivered to the AI shoreplant relative to other BSAI processors.

For the 2019 fishing year, one AI shoreplant notified the NMFS that they would be participating in the 2019 Pacific cod season. For 2019, the AI Pacific cod directed fishing allowance (DFA) was set at 10,193 mt. The DFA was specified as 5,193 mt for the AI unrestricted fishery and 5,000 mt for the AI CV harvest set-aside for delivery to AI shoreplants. Vessels participated in both the BS and AI areas for the federal Pacific cod CV greater than or equal to 60' pot fishery and the CV less than 60' pot/hook-and-line fishery beginning on January 1, and deliveries were made in both the BS and AI. The CV less than 60' pot/hook-and-line sector closed on January 12, and the CV greater than or equal to 60' pot gear sector closed on January 15. The closures for both sectors applied to both the BS and the AI.

The BSAI trawl CV sector for Pacific cod opened on January 20 with an overall A season sector allocation of 26,388 mt. Vessels participated in both the BS and the AI beginning in January. The BS subarea closed on February 1 after achieving the BS trawl remainder (BSAI trawl CV A season allocation minus 5,000 mt to be harvested from the AI). Although the new modified regulation for Amendment 113 was still not in place for 2019, industry agreed not to participate in the AI unrestricted fishery if it cut into the 5,000 mt set-aside established for AI shoreplants. However, there was some fish remaining in the CV trawl fishery over the 5,000 mt needed for AI shoreplants to achieve the full set-aside. As a result, some unrestricted fishing did occur in the AI after the closure of the BS, but it did not affect the AI shoreplant's ability to achieve the full set-aside amount.

On February 21, 2019, the NMFS announced that AI shoreplants had landed the 1,000 mt necessary to keep the set-aside regulations in place after February 28. As a result, the set-aside regulations remained in effect until March 15 and the BS CV trawl limitation remained in effect until the set-aside was achieved or until March 21, whichever came first. On March 15, NMFS announced that AI shoreplants had not landed the full 5,000 mt set-aside. As a result, the BS CV trawl limitation remained in effect until March 21. Although shoreplants did not land the full set-aside amount by March 15, the CV trawl Pacific cod fishery in the AI remained open until March 16. The CV trawl Pacific cod B season opened on April 1 and closed on April 2 for a 24-hour fishery. Vessels participated in both the BS and AI and harvest was landed in both areas. Pacific cod harvest landed at the AI shoreplant is confidential.

3 Council Next Steps

To be clear, the Council is not obligated to take any action to address the absence of protections for AI communities as a result of the Court's order to vacate Amendment 113. If the Council decides to take no action, NMFS would remove the vacated rule from regulations, and, at that point, the Council should remove the Amendment 113 language from the Fishery Management Plan for Groundfish of the BSAI

⁵ Golden Harvest Alaska Seafood, LLC in a public comment letter to the NPFMC in April 2018 noted that "landings from the Federal fishery were 4,010 mt; or about 80% of the AI CV Harvest Set Aside."
<http://comments.npfmc.org/CommentReview/DownloadFile?p=48236946-a5e9-42fa-977a-b723217e1a66.pdf&fileName=GHAS%20to%20NPFMC%20033018.pdf>

Management Area through a housekeeping amendment. However, if the Council decides to address the absence of protections for AI communities via a new rulemaking, NMFS and Council could include in the proposed action an alternative to remove or replace Amendment 113 regulations and FMP language.

During the April and October 2019 meetings, the Council tasked staff to identify potential regulatory approaches that could be used to provide opportunities for trawl CVs harvesting Pacific cod in the AI and delivering to AI shoreplants. Four potential regulatory approaches are presented below.

3.1 Revise Amendment 113 to address the Court's concerns and incorporate the December 2018 modification

The first regulatory approach would involve a new rulemaking to implement a revised Amendment 113, including the modifications approved by the Council in December 2018 and an expanded description of how the revised Amendment 113 is consistent with National Standards 4 and 8. This approach would require updating the analysis for the original Amendment 113 and combining it with the analysis for the December 2018 modification. Such an analysis would provide the Council with a single document that would serve as the record for a revised Amendment 113, including the modifications. Because the December 2018 modifications built upon the original Amendment 113, the existing analysis for that action is no longer functional as a standalone document, as it contemplates amending regulations that currently have no legal effect.

The record for a revised Amendment 113 would have to explain how the action is consistent with National Standard 8. In doing so, the Council should consider the Court's ruling that National Standard 8 cannot serve as a justification for allocating Pacific cod to AI communities. Although the Council designed Amendment 113 as an allocation among harvesters and Amendment 113 directly distributed fishery resources only to catcher vessels intending to deliver to AI shoreplants, the Court determined that based on the record for Amendment 113, it appeared the intent of the program was to allocate resources to two specific fishing communities. In the Court's view, NMFS "converted National Standard 8's mandate that [NMFS] take into account impacts on affected fishing communities when pursuing the MSA's conservation objectives into a tool to affirmatively reallocate fishing privileges to benefit specific fishing communities." Despite what the Council or NMFS may add to the record to explain consistency with National Standard 8, the same Court may find a revised Amendment 113 inconsistent with National Standard 8 because it would still allocate resources in a way that provides benefits to two particular fishing communities. In a revised Amendment 113 analysis, the Council could acknowledge that National Standard 8 does not constitute a basis for allocating AI Pacific cod to specific fishing communities and explicitly state the program does not allocate anything to AI communities but instead directly allocates fishery resources only to a class of harvest vessels. The Council should reaffirm that the action effectively makes a portion of the AI Pacific cod fishery a CV fishery for a specified period of time in the A-season. The Council could also better explain that the action is designed to provide benefits and/or stability to *both* harvesters and fishery-dependent communities and is responsive to changes in management regimes like rationalization programs that necessitate putting protections in place for non-rationalized fisheries, like requiring participating CVs to deliver their catch to AI shoreplants.

The analysis for a revised Amendment 113 would also need to include an explanation of how the action promotes conservation consistent with National Standard 4. The Court stressed that National Standard 4 requires an allocation of fishing privileges "shall be...reasonably calculated to promote conservation." The opinion goes on to state that the action must actually promote a conservation purpose—that is, advance or further it—rather than just avoid jeopardizing one. Therefore, according to this Court, National Standard 4 requires something more than stating Amendment 113 is reasonably calculated to promote conservation because the action makes no changes to the total TACs for Pacific cod in the BS or AI and does not modify any existing measures protecting fishery resources. Regulations at § 600.325 states numerous methods of allocating fishing privileges are considered "conservation and management"

measures under Section 303 of the MSA. An allocation alternative may promote conservation by encouraging a rational, more easily managed use of the resource. Or, it may promote conservation (in the sense of wise use) by optimizing the yield in terms of size, value, market mix, price, or economic or social benefit of the product. The Court expressed skepticism that an allocation could promote conservation “in the sense of wise use” as suggested by the National Standard 4 guidelines. However, the Court did not ultimately rule on the issue of whether Amendment 113 promoted conservation in the sense of wise use, as it determined the agency did not rely on that guidance in adopting Amendment 113. In addition, the Council during the October 2019 meeting had a brief discussion of National Standard 4 with regards to the term “conservation and management.” It was noted in that discussion that conservation and management of National Standard 4 is broader than just providing for abundance but includes maintaining stability and growth of the fishery, avoiding conflict amongst user groups, and ensuring some degree of certainty for the fishermen which may result in better sustainability of the fishery resource as a whole. In summary, the record for a revised Amendment 113 should explain why the action is reasonably calculated to promote conservation consistent with National Standard 4 and the National Standard 4 guidelines beyond noting that it makes no changes to existing measures protecting fishery resources.

3.2 October 2019 Proposed Trawl CV LAPP

In October 2019, the Council adopted alternatives, elements, and options for a proposed BSAI Pacific cod trawl CV cooperative style LAPP. As currently envisioned, the BSAI trawl CV cooperative program would address conservation and management issues associated with the BSAI trawl CV sector including AI shoreplant deliveries of BSAI Pacific cod. Specifically, Element 6 includes provisions to promote sustained participation of AI processors and communities. Option 1 requires the cooperative(s) to reserve a set-aside ranging from 10 percent to 25 percent of the BSAI trawl CV A season harvest quota for delivery to a shoreplant in the AI management region. Option 2 would issue annual harvest quota, the lesser of 5,000 mt or 5.5 percent of the total BSAI trawl CV Pacific cod quota, to the plant operator if the community of Adak or Atka files a notice of intent to process. The benefit of this approach is it would provide a more holistic integration of the AI trawl CV Pacific cod fishery into the overall management of the BSAI trawl CV Pacific cod fishery, particularly since many vessels fish in both the BS and AI

One obvious drawback to this approach is the time required to develop and implement the trawl CV cooperative program that addresses the broad range of concerns for participants. Addressing these issues will likely take more than one review of the analytical documents before they are fully developed and ready for final action by the Council, which would likely not happen before the end of 2020.

Regarding the issue specific to AI shoreside processors, the Council could develop alternatives and options that include a regional or port-specific landing requirement. MSA Section 303A(c)(5)(B)(i) states that when developing a LAPP program, policy makers should consider the basic cultural and social framework of the fishery through “the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on the fisheries, including regional or port-specific landing or delivery requirements”. Including a regional landing requirement would ensure that a predetermined percentage of the sector allocation would be delivered to defined AI shoreplants as allowed under the MSA. Port specific landings requirements are currently a component of the Central Gulf of Alaska Rockfish Program.

Based on the authority granted the Council in Section 303A(c)(5)(B)(i) of the MSA, the Council is within its authority to require cooperatives to reserve a set-aside for delivery to a shoreplant in the AI management region (Element 6, Option 1). In the October 2019 BSAI LAPP Scoping Paper for the Trawl CV and Pot CV ≥ 60 feet (Scoping Paper), there is a brief discussion concerning Council authority under Section 303A of the MSA when developing a regional delivery requirement or port delivery requirement that results in a group of harvesters having to deliver their Pacific cod to one processor. For example, if Adak had the only operational shoreside processor in the AI region, then harvesters would be required to

deliver their Pacific cod to that one shoreside processor. Though requiring regional or port-specific deliveries is clearly authorized by Section 303A, the record for such a LAPP would still have to explain how the program is consistent with the national standards, particularly in light of the *Groundfish Forum v. Ross* decision discussed in Section 3.1 above. A LAPP would be authorized by a different statutory provision and have a different record than Amendment 113, so it is difficult to draw too many parallels. The record for any LAPP should include a robust discussion of the conservation and management objectives and benefits of a trawl CV LAPP, including considerations beyond providing for the sustained participation of fishing communities.

3.3 Narrowly defined AI Pacific Cod LAPP

Another approach would be to implement a scaled-down AI only LAPP to promote sustained participation for AI shoreside processors and communities. As an example, the scaled-down LAPP could allocate a set percentage of the non-CDQ BSAI Pacific cod trawl CV sector allocation to the AI shoreplants as quota share (QS). The Council would need to determine the appropriate percentage of the sector allocation to allocate to the shoreplant(s). It would also need to consider how to address potential annual variation in the number of shoreplants that will participate. Some general rules that could be considered are:

- QS would only be allocated during years when the AI shoreplant(s) notify NMFS, in a timely fashion, that they will be operating.
- Catch shares resulting from the QS could only be delivered to AI shoreplants that are issued QS, unless the AI shoreplants agree to CVs delivering the fish elsewhere.
- The shoreplants would lease the catch shares resulting from their QS holdings to trawl CVs to harvest the catch shares.
- The percentage of the trawl CV sector that is not allocated under the LAPP would continue to be managed as it is currently.

An issue that would need to be addressed under this structure is how the QS would be allocated among shoreplants if more than one shoreplant notifies NMFS of its intent to process AI Pacific cod the following year. In that case, the Council will need to develop an allocation formula that is not based on history, since the new shoreplants will not have had history in the fishery. This issue will likely be contentious and if more shoreplants enter the fishery it could lead to requests for ever increasing percentages of the BSAI trawl CV sector allocation being assigned to the LAPP. The maximum limit could be an amount equal to the AI Pacific cod directed fishing allowance, but the allocation could be less than that amount to allow opportunities for small fixed gear vessels or longline C/Ps to fish in the AI.

As described above in more detail, the Council has full authority under Section 303A(c)(5)(B)(i) of the MSA to include a regional delivery requirement or port delivery requirement. The analysis of the proposed action should explain how such an action is consistent with the national standards, particularly in light of the Court's ruling in *Groundfish Forum v. Ross*.

3.4 LAPP with a Regional Fishing Association

A third method would be to develop a LAPP that includes a regional fishing association whose board of directors includes all communities in the AI west of 170° longitude that have a processor that notifies NMFS they intend to process Pacific cod the following year. The MSA defines a regional fishing association and the requirements for one to form in Section 303A(c)(4). To be eligible to participate in a LAPP to harvest fish, a regional fishery association must:

- be located within the management area of the relevant Council;

- meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;
- be a voluntary association with established by-laws and operating procedures;
- consist of participants in the fishery who hold QS that are designated for use in the specific area covered by the regional fishery association, including... processing or fishing communities;
- **not be eligible to receive an initial allocation of a limited access privilege** but may acquire such privileges after the initial allocation, and may hold the annual fishing privileges of any limited access privileges it holds or the annual fishing privileges that members contribute; and
- develop and submit a regional fishery association plan to the Council and the Secretary for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

If members fail to comply with the plan the Secretary “shall” deny or revoke limited access privileges granted. This provides NMFS and the Council a continued oversight role in the process.

A problem that the Council would need to address is who is authorized to be initially allocated the QS and assign the IFQ to the harvesters. A regional fishing association is not eligible to be initially allocated QS and the two primary communities in the region, Adak and Atka, are in a census area and not an organized borough (Aleutians West Census Area). However, all communities in the region are members of the Aleut Corporation, which was used as the QS holder for the AI pollock allocation. One option would be to issue the QS to the Aleut Corporation and structure the regional fishing association board of directors to be comprised of a subset of community leaders from the directly involved communities, processors, and harvesters. The Aleut Corporation (or some other defined entity) would hold the QS and the regional fishing association would determine the distribution of IFQ annually. In years when there is only one active processor, the allocation would be less controversial in terms of which processor can process the Pacific cod, but the distribution of harvester privileges could still be contentious within the regional fishing association.

One benefit of the allocating the QS to an entity that leases the IFQ to harvesters through the regional fishing association is that they would determine on an annual basis how the Pacific cod IFQ would be allocated among the fleet and to the processors taking deliveries from the vessels. Such an entity would have more flexibility to adjust allocations as the number of participants change relative to the traditional regulatory process used by the Council and NMFS. The Council/NMFS would still maintain oversight of the program and could adjust the overall allocation amount as appropriate through the normal regulatory process. However, the annual division of IFQ would be determined by the holder of the QS based on changes in the number of shoreplants that apply to process Pacific cod in the AI West of 170° longitude and the harvesters that want to catch the available AI Pacific cod.

4 References

- NPFMC. (2018). AI Pacific Cod Harvest Set-Aside Adjustment, Initial Review, Regulatory Impact Review to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Regulatory Areas. Anchorage: NPFMC.
- U.S. District Court for the District of Columbia. (2019). THE GROUND FISH FORUM et al., Plaintiffs, v. WILBUR L. ROSS et al., Defendants. Civil Action No. 16-2495 (TJK).