

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *Chris*  
Executive Director

ESTIMATED TIME 16 Hours (All D-1 Items)
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DATE: November 25, 2002

SUBJECT: Review alternatives for TAC-setting process (**postponed**)

**ACTION REQUIRED**

TAC-setting process

In October, the Council rescheduled final action on Amendments 48/48 to revise the TAC-setting process until February 2003 to address legal issues raised at that meeting. The executive summary of the analysis is attached as Item D-1(c)(1).

Public testimony at the October 2002 Council meeting suggested two additional alternatives to be included in the analysis of Amendments 48/48 to revise the TAC-setting process: (1) minor adjustments to proposed rulemaking that includes current biological information on groundfish that would best approximate the information that will be available as a result of November Plan Team meetings; and (2) set preliminary specifications for 15-18 months. The Council requested additional consultation with NOAA General Counsel on their determination that the current specification process does not meet the requirements of the Administrative Procedures Act (APA), and a legal review of these proposed alternatives to determine whether either of the proposed alternatives would satisfy the requirements of the APA. NOAA General Counsel staff will provide a report to the Council at this meeting, including the relevance of ongoing litigation.

## EXECUTIVE SUMMARY

Each year, normally in October, proposed groundfish harvest specifications for the Bering Sea and Aleutian Islands area (BSAI) and Gulf of Alaska (GOA) are published in the Federal Register. These proposed specifications are based upon total allowable catch (TAC), acceptable biological catch (ABC) and prohibited species catch (PSC) amounts, and apportionments thereof, which have been recommended by the North Pacific Fishery Management Council (Council) for the current year. Based on public comment on the proposed specifications and information made available at the December Council meeting, final specifications are published in the Federal Register during February or early March. So that fishing may begin January 1, regulations authorize the release of one-fourth of each proposed TAC and apportionment thereof, one-fourth of each PSC and apportionment thereof and the first seasonal allowance of pollock and Atka mackerel. These interim specifications are based upon the proposed specifications and published in the Federal Register in December and are superceded by the final specifications.

The existing harvest specification process is problematic for several reasons. The public is notified and given opportunity to comment on proposed specifications that often are outdated by the time they are published. The publication of proposed specifications each year can confuse the public, because incomplete and outdated information is provided due to the need to adhere to a strict time line in order to comply with all relevant regulations. Because the interim specifications are based on the proposed specifications, they do not take into account the recommendations contained in the Groundfish Plan Teams' final SAFE documents, or the recommendations coming from public testimony, the Science and Statistical Committee, Advisory Panel, and Council at its December meeting. One fourth of the initial TAC and PSC amounts have been found to be an inadequate amount for those fisheries that attract the greatest amount of effort at the beginning of the fishing year. As fisheries are seasonally apportioned to meet other management needs, (i.e., Steller sea lion protection measures) interim TACs based on one fourth of the annual TAC increasingly compromise other management objectives. Under the current process, administrative inefficiency exists in taking the regulatory actions necessary to set interim, proposed and final specifications. For these reasons, NMFS seeks to revise the harvest specification process.

The objectives of modifying the harvest specifications process are to manage fisheries based on best scientific information available, provide for adequate prior public review and comment to the Secretary on Council recommendations, provide for additional opportunity for Secretarial review, minimize unnecessary disruption to fisheries and public confusion, and promote administrative efficiency.

The management alternatives for amending this process are:

- Alternative 1.      Status quo. (Publish proposed specifications, followed by interim and final specifications)
- Alternative 2:      Eliminate publication of interim specifications. Issue proposed and final specifications prior to the start of the fishing year. Option of biennial harvest specification for BSAI and GOA target species on biennial survey schedule.
- Alternative 3:      Issue Proposed and Final Harvest Specifications based on an alternate fishing year schedule (July 1 to June 30).
  - Option 1: Set sablefish TAC on a January through December schedule.
  - Option 2: Reschedule the December Council meeting to January.

Alternative 4: Use Stock Assessment Projections for biennial harvest specifications. For the BSAI and GOA set the annual harvest specifications based on the most recent stock assessment and set harvest specifications for the following year based on projected OFL and ABC values. For setting PSC there are two options:

Option 1: Set PSC limits annually

Option 2: Set PSC limits every two years based on regulations and projected values

Option A: Abolish TAC Reserves

Option B: Update FMPs to reflect current fishing participants and harvest specifications process.

Section 4.12 gives the environmental summary and conclusions. The environmental components that may be affected by the proposed action are the target groundfish species (including the State groundfish fisheries), prohibited species, and Steller sea lions. Results from simulation model and retrospective analysis indicated that under Alternatives 2, 3 and 4 groundfish harvests would be less and several target species biomasses would be more than under the Status Quo. This was primarily due to uncertainty resulting from projecting harvest amounts further into the future than under Alternative 1. Alternative 3 is likely to provide less biomass variability and more likelihood of setting TAC below the OFL compared to alternatives 2 and 4. Alternatives 1 and 3 have potential effects on the temporal dispersion of harvest of Steller sea lion prey species because of the lag between the biomass information used to set harvest specifications and the commencement of the fisheries.

The harvesting effects on groundfish from Alternatives 2, 3 and 4 are unknown due to a number of factors that are not part of the retrospective analysis and simulation model, including the full Council process which can have a substantial effect on the final TAC and has historically been more conservative than the analysis predicted. Potential overfishing identified in the analysis is likely to be mitigated through the Council process and may also be mitigated by additional regulatory action if new information becomes available during the current fishing year that indicates that the level of fishing is inappropriate. Because the effects on groundfish species are unknown, the effects on availability of prey for Steller sea lions are also unknown.

Alternative 3 may also have temporal effects on the groundfish fisheries and potentially conflict with Steller sea lion protection measures. These measures require the temporal dispersion of harvest and current seasons may need to be adjusted for BSAI pollock and Pacific cod trawl fisheries to meet Steller sea lion protection measures and to coincide with the July 1 through June 30 fishing year. During years of high pollock TAC, the BSAI pollock fishery may be conducted into October as the industry attempts to fully harvest the B season allocations, encountering potentially more salmon bycatch and worse weather. Alternative 3 also has the potential for higher levels of harvest in the A season during times of falling biomass than what would occur under the status quo. Because it is not possible to predict if the fishing behavior may change or to predict actions that may be taken by the Council or the State Board of Fish, and because of Steller sea lion protection measures, it is unknown if Alternative 3 could have an effect on target groundfish or Steller sea lions. Option 1 to Alternative 3 to set the sablefish TAC on a January through December schedule would allow the sablefish IFQ program to be managed concurrently with the halibut IFQ program, eliminating any potential effects on these programs from shifting the fishing year.

The Regulatory Impact Review (RIR) meets the requirements of Presidential Executive Order (E.O.) 12866 for a benefit-cost analysis of the proposed action and its alternatives. A complete benefit-cost analysis was

not possible. The information is not available to estimate dollar values for many of the benefits and costs. Moreover, the proposed action affects the conditions under which the Council and Secretary will make decisions about future TAC specifications. The actual benefits and costs will depend on the decisions made by the Council and Secretary, and those decisions cannot be predicted at this time. The RIR does examine a set of outcomes from this action that may affect the benefits and costs. Three general categories of outcomes are identified: (1) impacts on the TAC setting process itself, (2) changes in the fishing year under Alternative 3, and (3) changes in harvests and biomass size under Alternatives 2, 3, and 4.

Alternatives 2, 3 and 4, by extending the time within which the TAC setting should take place, will provide additional opportunities for scientific analysis, for peer review of scientific work, for public notice and comment on the proposed specifications regulations, and for consideration by the Council and the Secretary of Commerce. Since these alternatives will provide for public notice and comment on the specifications actually anticipated for the coming fishing year, comments received from the public will be more useful. Alternatives 2 and 4 provide the most time for this process; Alternative 3 increases the amount of time available, but not to the same extent. It may be difficult, moreover, to complete the entire rulemaking process in the time allotted under Alternative 3, especially with Option 2. Option 2 to Alternative 3 would provide additional time for stock assessment scientists to complete analysis but it may be administratively difficult to reschedule the December Council meeting to January.

Alternative 3 changes the fishing year to begin on July 1. A comparison of fishing seasons for different species with the proposed July 1 start date suggests that a shift from a January 1 to a July 1 start date would cause little disruption to many fisheries. The sablefish IFQ fishery in the GOA and BSAI is an important exception to this. A change in fishing year, and associated change in TAC, would be extremely disruptive in the middle of this fishing season, which currently runs from March 15 to November 15. It might be possible to delay the season, so that it started on July 1 with the start of the new fishing year. However, the administration of the individual quotas in this fishery requires a long closed period between the end of one fishing season and the start of the next. Currently the fishery is closed from November 15 to March 15. This closed period is best in the winter time since fishing conditions aren't as good, and there is less potential for bycatch conflicts with the related halibut fishery. However, a July 1 start for the year would mandate a closed period from March through June. Option 1 to Alternative 3, setting sablefish TAC on a January through December schedule, would eliminate this potential problem.

Alternatives 2, 3, and 4 lengthen the time between biomass surveys and the year in which specifications based on the surveys (specifications year) become effective. Under Alternative 1, the time between the survey information and implementation of the annual fishery based on that information is approximately 7 months, because the first three months of the year are managed under interim specification (which are based on the previous years TACs). Alternative 3 increases the period by three months, Alternative 2 increases the period by nine months, and Alternative 4 increases it by an average of 15 months per year (nine months for the first year of the biennial specifications, and 21 months for the second year). As the length of time between the biomass surveys and the specifications year increases, there is some evidence that biomass levels may vary more, ABCs and harvests may become smaller since lower harvest rates are triggered more often by the harvest control rule, mean spawning biomass levels become larger, and harvest variability increases. These results are extremely tentative.

If the harvest levels do decline as suggested by some modeling results, revenues to industry may also decline. Moreover, an increase in the year-to-year variability of harvest, also suggested by some model results, may impose increased interest and inventory carrying costs on industry.

The Initial Regulatory Flexibility Analysis (IRFA) identifies the numbers of small entities that may be regulated by the action, describes the adverse impacts that may be imposed on these small entities, and describes alternatives to the preferred alternative that may minimize the adverse impacts on the small entities and the reasons they weren't chosen. In this case a preferred action has not yet been identified. This IRFA addresses the statutory requirements imposed under the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Fairness Enforcement Act (SBREFA) of 1996.

The IRFA used the Small Business Administration (SBA) definitions of small entities. Small fishing entities were those that grossed less than \$3.5 million, small shoreside processing entities were those employing fewer than 500 persons. Non-profit entities were also considered small. The SBA also requires that an entity's affiliations be considered in determining its size. Large numbers of small entities may be regulated by this action. These include an estimated 1,353 small groundfish catcher vessel entities, 33 small groundfish catcher/processors, 36 shoreside groundfish processors, and six CDQ groups. The total numbers of entities regulated by this action include 1,366 groundfish catcher vessels, 79 groundfish catcher/processors, three groundfish motherships, 49 shoreside groundfish processors, and six CDQ groups.

There is some evidence that all alternatives compared to Alternative 1 would lead to somewhat reduced revenues, cash flow, and profits for the small entities, although this result is very uncertain. It was not possible to estimate the size of the impact on the small entities, although it was believed to be greatest for Alternative 4, less for Alternative 2, and least for Alternative 3. Increased year-to-year fluctuations in gross revenues may occur, and these also were expected to be greatest for Alternative 4, less for Alternative 2, and least for Alternative 3. The analysis was unable to determine whether or not there would be a disproportionate impact on small entities (compared to large entities). The analysis did identify additional impacts that were not adverse. Alternatives 2 and 4, and to a lesser extent Alternative 3, provide better opportunities for small business input into decision making about specifications since they provide for more informed public notice and comment.

An important component of an IRFA is a review of the alternatives that have not been chosen, but that minimize the burden of the rule on regulated small entities, and an explanation of why each of these has not been chosen. In this case, a preferred alternative has not yet been chosen. Therefore it has not yet been possible to complete this portion of the IRFA.

Environmental impacts and socioeconomic impacts resulting from changing fishing patterns as a result of the preferred alternative would be assessed annually in the EA/RIR/IRFA that accompanies the final harvest specifications.

At this time, a preferred alternative has not been identified. The Council seeks public comments on these alternatives and on the potential impacts on fishery participants and the environment. Alternative 1 appears to have the least potential for environmental effects but does not meet the objectives of this action. Considering administrative procedural aspects, Alternative 2 is more desirable than Alternatives 1, 3, or 4. More time is provided under Alternative 2 to perform stock assessments, to develop Council recommendations and to allow NMFS to implement proposed and final rule making before the beginning of the fishing year. Alternative 4 for demersal shelf rockfish and option 1 for PSC limits, requires annual rulemaking, reducing the administrative efficiencies that could have been realized with a biennial harvest specifications process. Alternative 3 has the disadvantage of requiring changes to the Sablefish IFQ program to accommodate a new fishing year, potentially affecting the State fisheries, and providing less time for the stock assessment and rulemaking processes compared to Alternatives 2 and 4. Option 1 to Alternative 3 would eliminate the potential problems with the sablefish fisheries.



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service  
P.O. Box 21668  
Juneau, Alaska 99802-1668

AGENDA D-1(c)  
DECEMBER 2002  
SUPPLEMENTAL

November 25, 2002

RECEIVED  
NOV 27 2002

N.P.F.M.C

Mr. David Benton, Chairman  
North Pacific Fishery Management Council  
605 West Fourth Avenue, Suite 306  
Anchorage, Alaska 99501-2252

Re: Amendments 48/48 to Fishery Management Plans (FMPs) for the Groundfish Fisheries of the Bering Sea and Aleutian Islands Management Area and the Gulf of Alaska

Dear Dave,

In October 2002, the Council postponed final action on Amendments 48/48 to allow for additional analysis. These amendments would revise the current process for setting harvest specifications and related management measures for new fishing years. The Marine Conservation Alliance (MCA) presented two additional alternatives in addition to those analyzed in the environmental assessment/regulatory impact review/initial regulatory flexibility analysis (EA/RIR/IRFA) for this action. NMFS recommended and the Council agreed that these new alternatives should receive legal review before further analysis. NOAA General Counsel (GC) is currently reviewing Administrative Procedure Act (APA) and Magnuson-Stevens Fishery Conservation and Management Act (MSA) rulemaking and frameworking as national issues, and was asked to provide an opinion on the MCA alternatives in December 2002.

Notice and comment requirements under the MSA currently are unsettled. On October 31, 2002, the U.S. District Court of Massachusetts issued an Order regarding a challenge to the implementation of a framework action (Conservation Law Foundation v. NMFS, Civil Action No. 01-CV-10927-RGS (D. Mass. 2002)) (CLF v. NMFS). The challenge rested on the claim that the framework was improperly implemented because NMFS failed to provide a public comment period for the framework action, as required by § 304(b)(1)(A) of the MSA. The Court in its Order expressed that § 305(f) of the MSA “. . . clearly recognizes the ‘actions taken by the Secretary’ and ‘regulations promulgated by the Secretary’ are distinct regulatory events.” According to this court, the mandatory notice and comment requirements of the MSA apply to the latter and not the former. This opinion is contrary to an Order issued by the U.S. District Court of the Northern District of California in 2001 (National Resources Defense Council v. Evans, Case No. C 01-0421 JL (N.D. CA. 2001)) (NRDC v. Evans), in which the Court expressed that notwithstanding the terminology used (i.e., rules, regulations, or actions), “. . . legally binding obligations which have the force and effect of law and carry with them the threat of civil penalties, citations an/or vessel forfeitures” (quoting Tutein v. Daley, 43 F.Supp.2d 113, 121 (D. Mass. 1999)), are subject to the mandatory notice and comment requirements of the MSA.

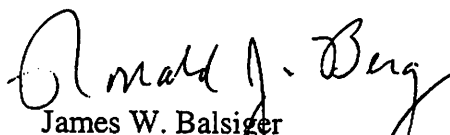



NRDC v. Evans was decided by a U.S. District Court in the 9<sup>th</sup> Circuit, the Circuit in which Alaska is a part. It is being appealed to the 9<sup>th</sup> Circuit Court of Appeals. We currently do not know if CLF v. NMFS will be appealed. Because the 9<sup>th</sup> Circuit Court of Appeals will not make a decision until sometime in 2003, and because opinions from the different U.S. District Courts are conflicting, NOAA GC will not complete its legal review of the MCA alternatives before December 2002. Further, we do not believe that the Council should take final action on Amendment 48/48 until this issue has been resolved. This delay in action will prevent revisions to the harvest specifications process from being effective for the 2004 groundfish fisheries.

The development of proposed harvest specifications was improved this year through the use of projections from the 2001 Stock Assessment and Fishery Evaluation reports. These projections were adjusted for the 2002 projected catch for tier 1 through 3 species. Proposed 2003 specifications for tier 4 and 5 species are based on total allowable catches (TAC), acceptable biological catches, and overfishing levels from the previous year, the approach generally used for past proposed specifications. The 2003 process provides the public with an opportunity to review and provide comment on the proposed harvest specifications that are more likely to be similar to final specifications. Also, the interim specifications for pollock, Pacific cod, and Atka mackerel, which are derived from the proposed specifications, are more likely to be at appropriate harvest levels during the first two months of the year relative to the final specifications and the temporal dispersal of harvest, as required by the Steller sea lion protection measures.

The EA/RIR/IRFA for Amendments 48/48 contains two options that could be recommended by the Council, independent of the harvest specifications process revisions. Option A would revise the harvest specifications process by eliminating certain TAC reserves that are no longer necessary for managing the fisheries. Option B would update language in the groundfish FMPs to accurately reflect the fisheries and the current harvest specifications process. NMFS believes the Council should recommend whether or not to schedule these two options for final Council action in February 2003. NMFS will continue to analyze the harvest specifications process revisions after the legal review is available and will work with the Council to reschedule review and action on potential harvest specifications process revisions.

Sincerely,

  
For  James W. Balsiger  
Administrator, Alaska Region

cc: D. Demaster, AFSC  
L. Lindeman, GCAK