

Discussion Paper

**Community Fishing Association
and
Adaptive Management Quota
for
Gulf of Alaska Trawl Bycatch Management**

North Pacific Fishery Management Council
October 2014

1 Introduction

In addition to a motion describing a proposed framework for the Gulf of Alaska (GOA) Trawl Bycatch Management program, the Council made two additional motions at its April 2014 meeting that address stated goals and objectives. The first motion discussed in this paper asked staff to assess a proposal for a Community Fishing Association (CFA). The proposal describes the CFA as a non-profit entity that would be established in order to sustain local participation in GOA trawl fisheries, to assist small and entry level owner-operators, captains and crew, and to incentivize additional bycatch (PSC) savings. The second motion requested an examination of the “adaptive management” (AM) quota set-aside in the west coast groundfish trawl ITQ fishery. The Pacific Council included the AM element as a means to address similar concerns about how that catch share program might impact fishery dependent communities, but deployment of adaptive management quota is not strictly limited to that purpose.

These motions are covered in a single discussion paper because there is *some* overlap in the envisioned purpose of AM quota and a CFA. However, the analysts do *not* mean to imply that the North Pacific Fishery Management Council (Council) must choose to pursue one direction at the exclusion of the other.

2 Community Fishing Associations

The Council requested an assessment of its April 2014 Community Fishing Association (CFA) proposal. The purpose of the assessment is to provide information regarding how the proposed CFA structure could be used to address the Council’s problem statement and its goals and objectives for the GOA Trawl Bycatch Management program (GOA TBM), beyond what could be achieved under the main motion.

2.1 Background

CFAs have been proposed as a means to achieve various objectives that have been raised by stakeholders during the development of the GOA TBM. The Council initiated the main GOA TBM proposal to provide

the fishing industry with “tools” to fish effectively under PSC limit reductions that have been implemented or are in the process of being implemented. Implementation of the proposed tools should allow the fleet to avoid PSC, to the extent practicable, and to reduce or better utilize groundfish bycatch that cannot be avoided. These issues are discussed in detail in the October discussion paper of the Council’s main motion. In total, the elements of the Council’s April motion appear to achieve this objective. However, persons supporting the CFA construct are concerned that implementing the proposed voluntary cooperative structure could change the fishery in a way that negatively impacts fishing communities and their residents, fishermen trying to enter the trawl fishery, and employment. CFA proponents suggest that their proposed management structure could include elements that create additional incentives for individuals to further improve conservation and social outcomes, beyond those expected to be achieved in the Council’s main motion for GOA TBM.

2.2 Program Goals and Objectives

The CFA motion includes a section that addresses Goals and Objectives that the Council could establish for the CFA program, Goals and Objectives that the Council has included in its GOA TBM proposal that the CFA may assist in addressing, and a list of specific Goals and Objectives that the CFA Board of Directors could consider implementing.

The Goals and Objectives that the Council could consider establishing for the CFA program included:

- *Provide for the sustained (current and historical) participation of fishing communities (MSA National Standard 8).*
- *Minimize adverse economic impacts on fishing communities (MSA National Standard 8).*
- *Promote community stability and minimize adverse economic impacts by limiting consolidation, providing employment and entry opportunities, and increasing the economic viability of the groundfish harvesters, processors, and support industries.*

The first two Goals and Objectives taken from the Council’s April 2014 GOA TBM motion focus on minimizing negative impacts on fishing communities and sustaining the participation of those communities in GOA fisheries. The CFA motion uses the MSA definition of a fishing community: “*a community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew and United States fish processors that are based in such community.*”

Section 303A(c)(3)(A)(i) states the requirements to allocate a fishing privilege to a fishing community. Those requirements include that the community must be “*located within the management area of the relevant Council,*” meet criteria developed by the Council and established by the Secretary, and “*consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the Council’s management area.*” The CFA motion then states that under these definitions a community need only be engaged in fishing or processing within the management area; there

is no requirement that they engage in the target species fisheries that are allocated under the final GOA TBM program.

The Council's GOA TBM motion addresses several issues relative to community participation and impacts on those communities. The motion includes an option that would establish a port of landing requirement that applies to Kodiak. Implementing that provision would help ensure that historical percentages of target species allocated under the program would continue to be delivered to Kodiak. For Central GOA TACs, this means that over 80 percent of these TACs would be required to be delivered to Kodiak processors. These deliveries would ensure that the economic activity associated with those deliveries remains in Kodiak. That economic activity includes harvesting vessels making deliveries, processors buying and processing that catch, and support industries providing services to keep the harvesters and processors operating. For example, harvesters would likely continue to purchase certain supplies, fuel, and other support industry services within the community to which they deliver their catch. Processors as a whole would be active at historical groundfish levels, but competition would still exist between processors. The fish taxes derived from those landings would still flow into Kodiak. To the extent that the GOA TBM program allows harvesters to increase groundfish catch, the amount of activity could increase relative to historical levels (assuming that TACs remain fairly stable).

Communities like Kodiak would not be protected from persons emigrating after they are issued quota. People may leave relatively small communities to pursue educational, cultural, and financial opportunities elsewhere.¹ Under LAPP programs implemented in Alaska and elsewhere, some individuals have leveraged the opportunities granted under the program to relocate. The rural communities that they leave often feel they have lost valuable assets when this occurs. Whether these individuals choose to stay in the community after being issued quota involves a variety of factors. These factors include their overall contentment in the community, the opportunities they see for themselves and their families, and their historic attachment to an area. Persons who seek change or perceive that increased opportunities are available in other areas may choose to leave a community regardless of whether they are allocated quota. However, the allocation of quota could facilitate or accelerate when they leave a community.

The Council is not able to require a person to remain in the community where they resided when the quota was allocated. The Council could contemplate whether a CFA lease could be revoked if a recipient no longer resides in a community for which residence is a criterion for holding community quota. If an individual has signed a multi-year lease contract with the CFA, then revocation upon leaving the community may well be a term of the contract that would not require Council or agency involvement. The prospect of CFA quota recipients leaving their home community might be a reason to limit the duration of the CFA's allocations to lessees. If an individual is free to emigrate, the negative impact of that act on the CFA's goals would be smaller if the individual held only a one-year lease.

Implementing a Kodiak port of landing requirement would leave only small amounts of quota for processors in other Central GOA communities. Because the CFA proposal states that it would implement the same quota requirements as the overall program (CFA proposal Section VI), the quota that it allocates would be subject to the same set of rules as the overall program. The motion specifically states that CFA

¹ See: <http://chronicle.com/article/The-Rural-Brain-Drain/48425/>, and <http://aese.psu.edu/nercrd/community/rural-brain-drain>.

quota would be subject to regionalization, but does not specifically mention port of landing requirements. Maintaining the port of landing requirement would provide few opportunities for new Central GOA communities to take deliveries of trawl cooperative quota. These communities and their processors would need to attract deliveries of quota that is not subject to the port of landing requirement, or else focus on lower valued directed fisheries that may not be allocated under the GOA TBM program. In either case, creating a viable business under those conditions would be difficult. Processors taking deliveries of groundfish from a trawl vessel would require substantial infrastructure investments. For example, to process pollock (a directed fishery that does not require access to halibut PSC but does require Chinook salmon PSC) a new processor would need to make substantial investments in pollock processing equipment; it is unlikely they would be able to invest in meal production to limit waste, given that the overall groundfish processing would be on a relatively small scale. Accessing capital to construct and maintain these operations could be difficult. In addition, the mandatory PSC reductions that could be imposed by the CFA might make it difficult to harvest other groundfish species (flatfish) in economically viable amounts.

If the intent of the CFA proposal is not to include all of the regionalization, port of landing, and LLP linkages requirements for CFA quota, that should be stated clearly in any future motion. The port of landing requirement will limit opportunities for Central GOA processors outside of Kodiak from entering the fishery. Entry by new processors would dilute the amount of fish that can flow to historical processors. Also, if LLPs are linked to a processor for the first two years of the program, allowing new communities to participate would either conflict with the current cooperative structure, or new processing entrants would need to wait two years and then compete with existing processors.

If a port of landing requirement is implemented for Kodiak, regionalization would have the greatest impact on the Western GOA, since the vast majority of most allocated Central GOA species would be required to be delivered to Kodiak. Regionalization in the Western GOA would ensure that allocated target species are delivered to processors located in ports located in the defined Western GOA region. That region could include all ports that historically took deliveries of Western GOA fish, or only those fish that were delivered to King Cove, Sand Point, and any other shorebased processor operating in the geographical boundaries defined in regulation for the Western GOA.

Regionalization only ensures that fish will be delivered to a processor in a given area (or community, depending on how regionalization/port landing requirement is defined). Competition for deliveries could still exist between Western GOA communities (after the first two years of the program, depending on the contractual commitments that were agreed to during cooperative formation). Western GOA license holders that have longstanding involvement or residence in a community will likely deliver to their community whether quota is regionalized or not. Also, in the Western GOA, long distances to other processors substantially restrict opportunities for vessels to deliver rapidly degrading species to other regions.

The CFA's legal authority to establish delivery requirements that are more restrictive than the Council and Secretary's action will require additional examination. However, to expand opportunities for new processors/communities to enter the GOA groundfish fishery in the short term, CFAs would need to establish their own cooperatives with LLP holders associated with the new processor. This could be

accomplished by attaching CFA quota to GOA trawl licenses that do not already have catch history assigned to them. Alternatively, the CFA could use its quota to entice persons that receive an allocation to leave their cooperative after the first two years of the GOA TBM program and deliver to a newly formed cooperative. This would need to be done through public meetings on CFA quota allocations, and the social engineering aspects of those allocations are likely to be controversial.

Ownership and use caps relative to maintaining jobs

Consolidation under a LAPP is driven by overcapitalization in the fishery and by participants' opportunity cost of actively fishing their initial quota allocation. It is likely that some consolidation will occur regardless of the use/ownership limitations that might be implemented. Most programs set ownership/use caps at a level that would, at a minimum, allow persons with small allocations that cannot be efficiently harvested under their historic business model to consolidate that quota, allowing for efficient deployment by the remaining quota holders. This could occur within the proposed cooperative structure through intra-cooperative leasing. Allowing some consolidation is not necessarily a negative outcome, especially when quota programs allocate to more licenses, vessels, and/or companies than traditionally harvested groundfish in a year. However, consolidation limits should be designed to balance tradeoffs between economic efficiency and job loss, decreased opportunities for young fishermen to enter the fishery, and decreased opportunity for captains and crew to become owner-operators. These outcomes should also be monitored to ensure that the Council's program goals and objectives are being achieved.

- *Assist entry-level and small vessel owner-operators, captains and crew and fishing communities (MSA §303A(c)(5)(C)).*

Limiting the number of licenses that a person may hold and allowing primary species (and the associated secondary and PSC species) to be separated from the license to which they were initially assigned can assist persons entering the fishery. Limiting the consolidation of licenses may prevent larger entities with access to more financial resources from outcompeting small vessel owners or new entrants in the market for licenses. Larger entities might not only have greater financial resources, but they might also have more fully developed social or business connections with the seller that could influence the sale. In some cases, licenses may be transferred without ever entering a truly open market. However, enforcing license limits may be difficult due to corporate structures that can be designed to circumvent ownership and control limits. The CFA board could take an active role in using "dock" knowledge to distribute quota or to purchase licenses that could benefit new entrants. This type of information is often presented to the Council during public testimony and in other discussions with stakeholders by individual Council members. Both the Council and CFA could respond to concerns that are raised, but the CFA may be able to react more quickly than the Council. Because the Council and the CFA board would be comprised of different members, it is likely that they would reach different solutions to address problems of consolidation and limited opportunity.

The goal of bring new persons into the fishery may have consequences regarding PSC avoidance and groundfish bycatch reductions – at least in the short term. Persons that enter the trawl fishery face a learning curve in when, where, and how to fish while avoiding unwanted catch. An influx of new operators could result in a temporary increase in PSC rates. However, given that turnover in the fishery

will occur with or without this action, the relevant question is whether a CFA would increase the number of new entrants relative to the amount of new entry that would occur naturally. Mentoring of new operators could reduce the learning curve, and could be facilitated either through the CFA or under the Council's proposed cooperative structure.

- *Minimize adverse impacts on sectors and areas not included in the program.*

The discussion paper for the main motion provides a description of the need to protect other fisheries and areas that are not included in the program. The general conclusion of that discussion was that most existing protections for other GOA fisheries would not be necessary under the Council's proposed program. Groundfish license endorsements limit the number of vessels that may be used to harvest groundfish with trawl gear in the GOA. A fixed gear license endorsement is required in order to fish in non-trawl fisheries. Many of the trawl-endorsed licenses either do not have fixed gear endorsements, or those endorsements are specific to pot gear in the Pacific cod fishery.

Pollock is almost exclusively harvested in directed trawl fisheries, and would be allocated under the proposed program. Additional protections for other pollock fishermen in Federal fisheries are not needed. Pacific cod TAC is divided by gear type and area in the GOA. The main discussion paper treats this issue in detail and concludes that additional protections are not needed at this time. Impacts on other fishermen in the Western GOA should continue to be monitored. Central GOA trawl operators have limited opportunity to expand into fixed gear Pacific cod fisheries without purchasing additional licenses. Rockfish are proposed to be allocated in the Western GOA and West Yakutat district; those species are already allocated in the Central GOA. Additional protections for rockfish fisheries are not recommended at this time. Flatfish are harvested almost exclusively by the trawl fleet, and most flatfish fisheries do not have a substantial impact on other stakeholders' directed groundfish fisheries. Skates would likely continue to be managed under ICA and MRA limits (based on NMFS recommendation). Greenland turbot is managed as part of the deep-water flatfish species group in the GOA. The Council and NMFS propose allocating that group. An ICA that accounts for the needs of the fixed gear fleet would be set by NMFS. Impacts to the directed halibut fishery are the result of PSC mortality. The proposed cooperative program is intended to promote PSC avoidance to the extent possible and is discussed in the next section.

PSC and Bycatch Savings

- *Incentivize additional bycatch [staff note: and PSC] savings beyond standard requirements by rewarding those willing to adopt additional measures to reduce bycatch [and PSC] with access to additional CFA quota.*

The Council's main GOA TBM motion creates a reward system, in effect, by establishing a structure that allows vessel operators to share information that could result in PSC avoidance and reductions in bycatch of species with little or no commercial value. Timely and accurate information shared between harvesters and processors could allow harvesters to avoid incidents of high unwanted catch. Harvesters would be given the opportunity to learn from others' experience. They would also have reduced pressure to harvest target species quickly, and could better assess the presence of unwanted species with shorter test tows. These methods of sharing data and fishing slower have been reported to be successful in other trawl

fisheries. The February 2014 discussion paper noted that these methods appear to have reduced PSC mortality and groundfish bycatch in the Central GOA Rockfish Program, the West Coast Trawl program, and the British Columbia Trawl program.

The CFA could adopt measures that only allocate CFA quota to vessels that use excluder devices, or that agree to fish times and areas known to produce lower PSC rates. The Council considered collecting data on excluder usage as part of its proposed EDR. However, ensuring that these devices are being used effectively, versus simply being deployed, proved problematic. Ultimately, the Council did not recommend monitoring excluder use. For the CFA to allocate based on at-sea behavior, it would need to reliably track whether and how certain activities are taking place on specific vessels.

- *Authorize fair and equitable access privileges that take into consideration the value of assets and investments in the fishery, and dependency on the fishery for harvesters, processors, and communities.*

The Council's main motion takes into account asset value and investments in the GOA trawl fisheries by allocating quota to those license holders that took financial risks to participate in those fisheries prior to development of the GOA TBM program. Processors' investment is considered through cooperative linkages with harvesters that are granted quota. During the first two years of the program, that linkage could require harvesters to deliver their quota to the processor that took a majority of their deliveries during the program's qualifying years. Community investments are protected through port of landing requirements, regionalization, and processor linkages. These program requirements would ensure that a specific amount of fish is landed in a community or region. Whether the protections defined in the Council motion satisfy all stakeholders is open to debate and will receive additional stakeholder input.

The CFA proposal does not clearly define how it would protect asset values and investments of participants in the inshore sector. It does indicate that CFA quota would be subject to the same rules and conditions of quota in the main program. This would provide some protections to processors and communities, but harvesters only receive benefits if they are allocated more quota under the CFA than they would receive without a CFA set-aside. These operators would be subject to additional lease fees to make up the loss of some of their initial allocation. The harvesters that could benefit are those without substantial historic participation during the qualifying years. Those individuals would not receive an allocation of quota (or it would be small), though they may have made some form of investment in the fishery prior to the program being developed. Discrepancies in the size of initial allocations beg the question of how to weigh the timing of fishery investment in the consideration of what makes initial and annual allocations fair and equitable. In other words, the Council should consider whether investment prior to GOA TBM program implementation provides a full picture of fishery dependency, or if post-implementation investments need to be continually considered and weighted in an ongoing determination of fairness.

- *Promote active participation by owners of harvest vessels and fishing privileges.*

The term "active participation" has not yet been clearly defined for the proposed GOA trawl LAPP, but has been considered by the Council as part of other programs. The Council noted in April that active

participation criteria are important to members of the public, but stakeholders have yet to provide input on how active participation should be defined in the context of this action. To aid that discussion, staff provided a review of the treatment of active participation in other North Pacific LAPPs. That discussion considered both potential requirements for persons who hold quota, and requirements for those who may wish to enter the fishery through quota acquisition. Until the Council defines its position on active participation it is difficult to compare and contrast the effects of the Council's main motion and its CFA motion.

The CFA board could use its (yet to be developed) definition of active participation as a weighting factor in determining allocations. However, it is difficult to determine how current participation is weighted against other factors like protecting investment, community protections, PSC/bycatch avoidance, limiting consolidation of shares to protect employment, or rewarding persons that compensate their crew at CFA-approved levels. Because of the variety of goals that could be achieved by the CFA structure, it may be appropriate to have the CFA proponents clearly define how various objectives could be weighted – or prioritized – in their allocation philosophy. This would likely be very difficult to develop because the board has yet to be defined and appointed.

The CFA motion also identified potential Goals and Objectives that the CFA board could adopt, and that fall within the objectives already stated by Council. The example Goals and Objectives tend to be more specific than those stated by the Council, and could provide measureable target goals. The specific goals listed for the CFA are:

1. Maintain the historical number of active trawl vessels home-ported in CFA communities
2. Maintain the historical number of active trawl skippers that are resident in CFA communities
3. Maintain the historical number of GOA trawl vessel crew persons that are resident in CFA communities
4. Maintain the amount of quota owned and/or operated by CFA community residents
5. Maintain crew compensation at levels established prior to the rationalization program
6. Enable fishermen to transition into the GOA trawl fishery under the new management program
7. Facilitate gear conversion within provisions of the main program

Many of these goals may be outside the authority of the Council to implement in regulation. Section 2.5 describes some of the Council's limitations under existing law. The CFA proponents could provide the Council information on how they could leverage any trawl quota that they might be allocated in order to achieve these goals.

2.3 How the CFA Construct Might Fit Within the Council's Proposed Program

The CFA motion states that CFA quota must be used within the cooperative structure established by the Council, and that CFA quota will be subject to the same set of rules as other quota in the program. These rules included PSC and groundfish bycatch management, observer coverage, sector allocation, cooperative structure, regionalization, consolidation limits, and gear conversion. Maintaining these rules may reduce the CFA's flexibility in meeting its specific goals and objectives. On the other hand, applying

these rules will help to ensure that the Council's management structure is not eroded by CFA quota being used in ways not approved by the Council.

2.3.1 Council's Role

If the Council proposes establishing a CFA program, it will need to determine the programs general structure and how much flexibility is built into the program. The Council may establish requirements that the CFA must meet in order to be approved. The CFA proposal states that these could mirror the requirements that were established for the Community Quota Entities (CQEs). Section 679.2 in regulations defines a CQE under the Halibut and Sablefish IFQ program as a non-profit organization that:

- (1) Did not exist prior to April 10, 2002;
- (2) Represents at least one eligible community;
- (3) Has been approved by the Regional Administrator to obtain by transfer and hold QS, and to lease IFQ resulting from the QS on behalf of an eligible community.

CQEs are required to provide an annual report to the Council (§ 679.5(t)). General reporting requirements mandate that the annual report identify the communities represented by the CQE. For the proposed program, this could include the list of fishing communities that are represented by the CFA Board of Directors and any changes that occurred on the Board during the year. Any changes to the CFA's bylaws and any other changes in key management personnel could also be required in the annual report. Copies of minutes and other relevant decision making documents from all CFA board meetings (or appointed decision making committees) held during the prior calendar year could also be included. The Council could require the CFA to report business operations and fishing activity for the CFA quota held by the CFA. The CFA annual report could require information on the total pounds of each primary species quota, secondary species quota (if any), and PSC limits issued during the previous calendar year. A complete description of the process used by the CFA to solicit applications from persons to use CFA quota could also be required. The report could include the total number of persons who applied for CFA quota, and the number of persons to whom CFA quota was ultimately issued. If CFA quota is attached to a license, those license numbers could be included. NMFS would need to receive all of this information in order to make allocations to cooperatives; at the least, NMFS would need to be notified of how much CFA quota should be allocated to each cooperative. A detailed description of the criteria used by the CFA to distribute CFA quota among selected applicants would provide the Council and other stakeholders a clearer understanding of the CFA's allocation process. Information on whether different lease fees are being charged to different applicants could be gathered through collection of fee schedules and the amount of each primary species that was allocated to each license.

The Council and NMFS must define how the CFA allocations will be reported to RAM in a timely manner that allows the agency to monitor annual quota harvests. Eventually, the Council and NMFS will need to define the exact date by which CFA allocation recommendations must be submitted to the agency. The Council and NMFS will need to develop an application form that the CFA must submit to distribute quota to licenses or cooperatives. This process would need to precede or correspond with any cooperative application process for the main program, so that NMFS can determine the amount of quota that should be assigned to each cooperative. Additional discussion may also be needed regarding whether CFA quota

has any specific designations or requirements that must be tracked once it is allocated to a cooperative. Such a requirement would likely complicate NMFS's catch accounting system.

The Council may wish to define additional requirements for the CFA's allocation (lease) structure. The CFA will need some flexibility to achieve its goals and objectives, but NMFS/Council must also be confident that the CFA's decisions quota deployment are meeting the Council's goal of serving *all* community members.

An appeal/redress mechanism will need to be established for community members to express disagreement with how the quota is being leased. This appeals process must include NMFS since the agency is charged with providing due process and fair, impartial hearings.

Allowing the Council to establish Goals and Objectives for a CFA is not required by MSA. However, the CFA is required to submit a plan to the Council that would likely include the CFAs Goals and Objectives. Because that plan would require Council approval, the CFA would need to address issues of concern to the Council, even if the Council does not directly submit its own list of Goals and Objectives.

2.3.2 Cooperative and CFA Linkages

The Council's proposed cooperative structure would allow license holders to join a cooperative with the processor to which they had delivered the majority of their catch in recent years (two recent years defined by the Council). Because the Council's main motion does not include any CFA provisions, adding alternatives that implement a CFA will require some discussion on the CFAs role in a cooperative. This discussion paper does not suggest how that linkage would be treated. However, the Council could consider a range from "no linkage" to "the CFA is a part of any cooperative that uses CFA quota" to "the CFA is a signatory to the cooperative contract". If the CFA is not part of the cooperative, it would simply impose its quota use requirements on the person that receives CFA quota. That person would then need to ensure that any clauses in the cooperative contract allow them to meet those standards. That person would then be subject to operational standards imposed by the cooperative *and* the CFA. For example, the CFA quota holder could be required to harvest at least as much quota as they took into the cooperative, based on the April CFA motion. This requirement would supersede other inter-cooperative transfer rules developed by the cooperative members. If this rule does not contain a hardship provision from the CFA, mechanical breakdowns or other unforeseen hardships could result in other cooperative members not being able to harvest that quota, even if the other cooperative members followed all other CFA requirements. If the CFA is a signatory to the cooperative agreement, it may be able to impose additional requirements on the cooperative. On the other hand, the cooperative may also be in a position to negotiate concessions from the CFA on a cooperative-by-cooperative basis. If that were to occur, the CFA could have different quota use requirements, depending on the cooperative to which the CFA quota is assigned.

The main motion contains an option for processors to control a portion a cooperative's PSC. The Council will need to address whether CFA quota would be subject to that provisions. The cooperatives and the CFA would also need to make sure that any provisions their contracts establish do not conflict.

The CFA motion is clear that CFA quota may not be fished outside of the cooperatives. LLP holders that apply for CFA quota would likely need to identify the cooperative they intend to join that year, before the annual cooperative formation paperwork is submitted to NMFS. This would be less of an issue during the first two years of the program, as licenses will be linked to certain cooperatives through their delivery history, but in later years there could be more movement between cooperatives.

2.3.3 CFA Allocation Issues

The Council and CFA allocation processes are not yet fully defined. Following the proposal, the CFA quota allocation process can be divided into two steps. First, NMFS would transfer (set-aside) fishing privileges for the CFA. Second, the CFA would transfer those fishing privileges to the harvesting sector.

The CFA motion proposes that a set-aside of 10% to 20% of allocated primary and PSC species would be made available to the CFA. NMFS could issue quota shares (QS) to the CFA, like QS is issued in the Halibut and Sablefish IFQ program. This would mean that the CFA would hold the underlying basis for the harvest privilege. Because the CFA proposal would prohibit the CFA from selling (transferring) these privileges, there is little benefit for the CFA in holding QS. It is also assumed that because the QS may not be transferred, those shares could not be used as collateral to access short-term funding for the CFA. Alternatively, the underlying QS could be held by NMFS and the CFA would recommend to NMFS how RAM should allocate the resulting CQ to cooperatives. The latter structure would more closely mirror the adaptive management quota developed for the West Coast trawl program.

A structure for assigning CFA quota to cooperatives must then be defined. The Council's proposed program would allocate catch history and quota to GOA groundfish trawl licenses. The quota assigned to each license, based on catch history, would be assigned to the cooperative that the license holder joins. The CFA quota would be assigned to a cooperative either by attaching that quota to a GOA groundfish trawl license on an annual basis, or by allowing CFA quota to be assigned directly to a cooperative, bypassing the step of assigning it to a license. If CFA quota is assigned to a license, the CFA would negotiate the use of that quota with the license holder². The license could be owned by the CFA, if they decide to purchase existing licenses, or it could be held by license holders that received an initial allocation. If the CFA held the license and the quota, it could lease both to entry level fishermen to provide access to a cooperative. Purchasing licenses would require greater CFA expenditures. Those expenses could be covered by lease fees or by accessing outside funding from groups that support the CFA concept. The dependence of the vessel owner on the CFA would be greater in this case than simply leasing quota. That greater level of dependence may result in a longer time frame before that new entrant is able to operate independently of the CFA program.

The underlying assumption in the above discussion is that CFA quota would need to be leased to a person with a license. If the CFA was allowed to lease quota to a cooperative directly, it would change the requirement of CFA quota being assigned to license. Additional discussion of this concept would be needed, but it does not seem to comply with the requirements defined in the CFA motion that only the person in the cooperative who leased the CFA quota can harvest those fish. Leasing directly to a

² The GOA trawl groundfish license holder may or may not have received an initial allocation of quota on that license.

cooperative could also complicate the cooperative structure for collecting funds to pay for the leased CFA quota. Additional discussion with NMFS would be required to determine whether direct allocations to cooperatives would create any benefits over requiring the intervening step of allocating quota to a license and then to the cooperative.

It is assumed that the Council would indirectly define who may lease quota from the CFA. For example, if CFA quota can only be leased to a groundfish CV license holder with a GOA trawl endorsement it limits the universe of persons that may lease CFA quota to a maximum 125 individuals³. Persons may and do hold more than one license, so the actual maximum number of unique individuals would likely be less than 125. This number will change as licenses are transferred in the future. Also, because ownership and control limits apply to CFA quota, any person that is at or grandfathered above the limit would be precluded from leasing CFA quota. Aside from those types of limitations, the CFA board could determine who would be allowed to lease quota. The Council could also consider whether to loosen or tighten the restrictions above, and could possibly choose to tailor the way that restrictions are applied when a CFA is involved. It is assumed that giving the CFA greater flexibility would make it easier for the board to identify lessees that share its fishing and business philosophies.

2.3.4 CFA Program Costs and Measuring Benefits

Costs

The direct cost to some of the CV license holders would be the 10% to 20% reduction in their annual allocation of GOA groundfish and PSC limits. Because license holders who do not lease from a CFA would have fewer pounds of quota over which to spread their fixed costs, it is possible that their reductions in profit could be even greater than 10% to 20%, relative to no deduction being set-aside for CFA quota.

Cost of lease fees could be fixed per unit leased, or could vary for each person leasing the quota. If lease fees are the same for all license holders, the burden would be the same for all persons utilizing the program. If the CFA board charges different lease fees to different classes of license holders, the cost burden would differ. For example, the CFA has indicated they could use the CFA quota to promote the use of pot gear to harvest Pacific cod. One way to promote the use of pot gear could be to offer a lower lease rate to persons that commit to harvesting that allocation with pot gear.

Attending CFA meetings where allocations are determined would pose an additional cost for license holders. License holders would also have to prepare bid materials that the CFA would likely require in order to determine the distribution of annual (or every three years) allocations. License holders would also incur costs associated with any appeals to the CFA board or the agency.

Harvesters will face increased annual (or every three years) uncertainty, because they will not know their final allocation until the CFA board determines its allocations. That uncertainty would impact short and medium term business planning, and might affect an individual's ability to get a capital loan. Uncertainty could be reduced if allocations are granted sufficiently early in the year and over a sufficient time period

³ Assuming the CFA does not purchase licenses and lease them to vessel owners without a license.

to allow harvesters and processors to adjust business plans before variable costs associated with harvesting that quota are incurred.

Depending on how the CFA allocates quota and imposes restrictions on its use, it is possible that the fleet could realize reductions in the total amount of PSC available. For example, if the CFA limited inter-cooperative PSC transfers by its members (lessees), then it would limit the ability of cooperatives to expand harvests of non-allocated species or species where the entire TAC is not allocated. This would be a cost to members of the cooperative, but could also indirectly result in PSC savings.

Cost to some communities could occur if the CFA encourages expansion of deliveries to ports that have not been consistent historic participants in the fishery. Unless the overall amount of groundfish harvested increases under the proposed program, any quota processed by a “new” entrant would result in a loss to existing processors and communities. Likewise, if quota is allocated to a “new” harvester, the ex-vessel value of that quota would be lost by the existing harvesters and their crew.

Reductions in cooperation within the fleet could be realized if license holders are allocated CFA quota based on PSC and bycatch rates. One of the values of the proposed cooperative structure is that everyone can benefit from sharing information. The incentive to share information is that additional quota or PSC limits could be leased within a cooperative or across cooperatives as a result of individual PSC avoidance. Persons who guard information to increase their chance to access CFA quota could reduce the overall benefits that would be generated by sharing information.

Longstanding distrust and animosity could reduce the effectiveness of the CFA program and GOA TBM if some CFA board members attempt to use the program to harm participants in the trawl sector, or participants that do not live in GOA fishing communities year-round. During the development of regulatory amendments that reduced PSC limits, different views of the objectives often pitted stakeholders against each other. If individual grievances are carried into the CFA structure, it could have negative impacts on the CFA process and the trawl sector overall.

Finally, the apportionment of CFA quota could increase strife between communities and stakeholders within the communities. The CFA quota allocation process is expected to be contentious. GOA communities and fishermen within those communities will compete to receive an allocation that they feel is appropriate. The limited amount of quota available and the decision on who should be allocated that quota will be difficult and, no matter how well the CFA board does its job, all applicants will never be completely satisfied. Persons that are unhappy with the CFA Board’s decisions will likely raise those concerns through the NMFS appeals process or bring them to the Council when the CFA annual reports are discussed.

Benefits

Implementing a CFA program would likely result in greater involvement in the groundfish fisheries by GOA communities and GOA community members. The CFA board will have members from many affected communities. Those local board members should represent all stakeholders in the community. If

they represent all stakeholders, a broad and diverse group of individuals would shape the vision for the CFA program.

The ability to reallocate quota relatively quickly should allow the CFA board to respond to operators in the CFA program that have poor PSC and bycatch performance, treat their crew poorly, or fail to meet some other CFA objective. The board would have the ability to support additional allocations (through leasing) to specific persons who had small catch histories or are trying to enter the fishery. The board could, in a sense, use its knowledge of the community to identify individuals who are a “good investment”, and whose success would benefit others in turn.

While the underlying quota shares would be held by either NMFS or the CFA, the annual CQ that results from that quota could be allocated to harvesters that are residents of the local communities. If the persons that hold the quota live in the community and homeport their vessel in the community, it is likely that a greater percentage of their income will be spent locally.

CFA quota could be used to promote active participation by license holders. The CFA board would, perhaps with Council input, need to define what constitutes active participation in the GOA trawl fishery. If it means owner-on-board, the CFA board could weight its allocation decisions to increase the quota available to that type of license holder. If it means something else, the distribution of quota could be tailored to meet that objective.

CFA quota could be allocated to persons that minimize impacts on other sectors that are not included in overall GOA TBM program. For example, the CFA board could reward license holders who are able to harvest their primary species allocation without using their entire halibut PSC limit.

CFAs could provide business planning training and support to local operators. Support programs could utilize seasoned captains to mentor new entrants. To the extent the CFA can build a cooperative working structure of local participants who are willing to share knowledge of how to operate a successful business and how to fish efficiently, at a minimal cost, it would provide a valuable service.

CFAs could allocate quota to vessel operators that maintain local crew. This will be dependent on residents of the community being an adequate source of talented, safe, and dependable crew members. Communities that do not have sufficient local crew to meet all needed positions could be supplemented by outside workers without penalty to the vessel operator. Determining whether there are adequate crew members to meet demand could be complicated for a board of directors, and socially challenging. It should also be noted that there may be legal issues in putting the Council or NMFS in a position of directly influencing hiring decisions for a private business.

The CFA board could monitor crew compensation and allocate quota to vessel operators that pay a “fair” crew share. The board would need to develop a mechanism to monitor crew payments by vessel (license). Members of the CFA board would also need to weight or prioritize crew compensation against other objectives like PSC avoidance when determining quota allocations.

The CFA could allocate Pacific cod quota to license holders that have both a trawl and pot endorsement. This objective would need to be crafted so that participants in the pot sector are not harmed. However, increasing pot gear harvests of Pacific cod is expected to reduce the amount of halibut PSC and Chinook salmon PSC necessary to harvest the Pacific cod quota.

2.4 Issues Identified

Only target and PSC species that will be allocated to the Inshore sector are proposed to be assigned to the CFA. The primary species that NMFS recommended allocating under this program are listed in Table 2-1. This table is taken from the main discussion paper and the reader is referred to Section 4 of that paper for additional discussion of primary species that are proposed to be allocated under the GOA TBM program.

Table 2-1 NMFS recommendations for primary species allocation in the GOA Trawl Bycatch Management Program (in reference to Part 5 of the Council’s April motion)

Target Species	NMFS Recommends Allocating:
Pollock (610/620/630/640)	Yes
Pacific cod (WGOA, CGOA)	Yes
CGOA flatfish: rex sole, arrowtooth flounder, flathead sole* , and/or deep water flatfish	Yes
WGOA Pacific ocean perch, dusky rockfish, and northern rockfish	Yes
WY Pacific ocean perch	Yes
WY dusky rockfish	Yes – if WY POP is allocated
WGOA flatfish: rex sole, arrowtooth flounder, flathead sole, and/or deep water flatfish	Yes

* NMFS recommends allocating flathead sole in the GOA TBM program. Based on experience with previous catch share programs, not allocating flathead sole could result in a race for fish in that fishery. This would also make the allocation of flatfish species the same in the CGOA and WGOA.

Note: Species in **bold** are allocation recommendations that were not included in the Council’s April motion.

Secondary species are not included in the CFA motion. For the CV sector, these include sablefish, thornyhead rockfish, and other rockfish. Without those species, persons bringing CFA quota into a cooperative may need to lease secondary species from other quota holders in the cooperative. This would not be necessary if the license holder was allocated sufficient secondary species under the main program to cover their secondary species needs for any CFA target allocations.

The Council may wish to consider allocating the same species that are allocated under the main program to the CFA program. Doing so would reduce the need for CFA quota holders to obtain secondary species quota. Due to the relatively high ex-vessel value of these secondary species, the required lease fees may be relatively expensive. Having to lease secondary species from the CFA could make the program less attractive to some potential participants.

The Council and the CFA proponents should also comment on whether target species, secondary species, and PSC limits must be allocated to a license/cooperative in the same proportions as the main program. For example, it should be determined whether a license holder could lease Pacific cod CFA quota without also receiving pro rata halibut PSC if they commit to fishing that allocation with pot gear. Allocations would be more straightforward if the same formula is used in both programs, but that approach might reduce the flexibility of the CFA board in using its pool of quota.

It has been proposed that the CFA will submit an operations plan for Council approval. The Council will need to define a structure for what happens to the CFA's quota if the plan is not approved, or is only partially approved. Additional stakeholder input will be required to address this issue. If the quota set-aside is not allocated through the CFA, it would impact the lease fees generated by the CFA and limit its ability to cover administrative and other expenses that were incurred while developing the proposed allocations. This also raises the questions of how the CFA will operate until the first year that lease revenues are generated. Either the CFA would need to raise its own funding for the first year, or it would need to borrow funds that could be repaid after the first year. To break this cycle, the CFA would need to charge extra fees the first year to cover both the first and second years of operation. As a result lease fees would be greatest during the first years when uncertainty is also greatest.

2.5 Legal and Management Considerations With the Proposal

The following discussion identifies several legal and management considerations with the CFA proposal as currently drafted. It is important to note that additional legal considerations with the current proposal may be identified in the future, and that new issues may develop if the Council modifies the current proposal.

The first legal consideration for the Council is whether the limited access privileges allocated to the CFA under the CFA proposal are to be granted under MSA section 303a(c)(3) addressing fishing communities or under more general authority at MSA section 303a(c). The proposal contains numerous references and citations to section 303a(c)(3), but does not explicitly state whether the quota shares allocated to the CFA are to be granted under section 303a(c)(3). The lack of a specific statement that the privileges allocated to the CFA are to be developed under section 303a(c) may indicate that the allocations to the CFA are to be under the more general authority in section 303a(c)(5), but that the CFA would be designed to include some aspects of fishing communities, such as the eligibility and participation criteria set forth in section 303a(c)(3). An explicit statement as to the Council's intent will clarify the legal framework that applies to the CFA proposal.

If privileges allocated to the CFA under the CFA proposal would not be granted under section 303a(c)(3), the second legal consideration for the Council is whether the CFA proposal is a community development quota program. MSA section 305(i) addresses the Alaska and western Pacific community development programs. Section 305(i)(4) states: "After the date of enactment of the Sustainable Fisheries Act, the North Pacific Council and the Western Pacific Council may not submit to the Secretary a community development quota program that is not in compliance with this subsection." Given this language, if a quota program is a community development quota program but is not in compliance with section 305(i), the Council cannot submit such a program to the Secretary. However, if a quota program is not a community development quota program, then the prohibition in section 305(i)(4) does not apply.

If the limited access privileges allocated to the CFA under the CFA proposal are to be granted under MSA section 303a(c)(3), then the CFA would be a fishing community and not a community development quota program and the prohibition at 305(i)(4) would not apply. However, if the limited access privileges allocated to the CFA are to be granted under the more general authority at MSA section 303a(c), then a determination would have to be made as to whether section 305(i)(4) applies. The CFA proposal is not in compliance with the provisions of section 305(i); therefore, the question would be whether the CFA proposal is a community development quota program. The MSA does not define the term “community development quota program” but the MSA recognizes the western Alaska CDQ program as a CDQ program. In order to determine whether the prohibition at section 305(i)(4) applies, the record should include a discussion of what characteristics make a quota program a community development quota program, compare the CFA to those characteristics, and determine whether the CFA is a community development quota program.

The CFA proposal also presents legal considerations with regard to delegations of authority. These considerations are dependent on whether the CFA is allocated quota share under section 303a(c)(3) authority or under 303a(c) in general. To summarize generally, an agency cannot delegate authority and functions which are to be exercised by that agency under the law. An agency may delegate merely ministerial functions, but cannot delegate discretionary or quasi-judicial powers and functions unless a statute permits such a delegation.

The authority provided in section 303a(c)(3) for fishing communities to receive initial allocations of limited access privileges may alleviate concerns with delegation of authority because the MSA includes a specific statutory provision permitting allocations to fishing communities. Additional analysis to determine if this is an appropriate interpretation given the law on delegations of authority would be required. If the limited access privileges allocated to the CFA are not to be granted under section 303a(c)(3), then the CFA proposal would need to be reviewed to determine whether it would delegate discretionary or quasi-judicial functions that are the agency’s responsibility. If that review concludes that discretionary or quasi-judicial functions of the agency would be delegated to the CFA, then the proposal would need to be reviewed to determine whether it provides for adequate agency review and control over the exercise of those functions and modified to include such measures if absent. It is important to note that the Council and NMFS can adopt a CFA proposal that delegates discretionary or quasi-judicial functions as long as the proposal contains mechanisms that provide NMFS with appropriate review and control over the CFA’s exercise of its delegated authority. Staff will continue to analyze the CFA proposal for delegation of authority considerations as additional detail on the allocations to the CFA and leasing to participants is developed.

The Council’s consideration of the Community Incentive Fisheries Trust (CIFT) proposal provides some context for the delegation of authority issue. In 2003, the Council was considering the CIFT proposal, which would:

allocate quota shares to a non-profit entity that would hold QS in trust to issue IFQ annually to QS holders that meet the requirements established by a governing body. The CIFT would be comprised of a group of stakeholders, including processors, community representatives, crew

members as well as other persons or entities selected by the stakeholders. The non-profit entity would be authorized to allocate IFQ to QS holders who sign a contract to meet the objectives of the CIFT to enable those QS holders to increase the amount of IFQs they can fish annually. The CIFT system is intended to provide the community, industry, and stakeholders the ability to influence the practices of fishermen to protect their interests and investments. The CIFT would collect fees to cover administration, establish allocation procedures to distribute IFQ, and provide for dispute resolution mechanism. The National Marine Fisheries Service would distribute the IFQ to the contracted recipient pursuant to authorization from the CIFT.⁴

In a legal memorandum provided to the Council later that year, NOAA General Counsel concluded that, “While the Council could authorize allocations of QS to organizations representing communities and authorize such organizations to re-allocate IFQ annually, the authority thus delegated cannot be unlimited. Such sub-allocations of IFQ must be made subject to final approval by the Secretary. Any party aggrieved by such annual adjudications also would have a constitutional right to an agency appeal ... before the agency can take final action on the recommendation.”⁵

Finally, a question exists as to whether the Council and NMFS have authority under the MSA for the provision concerning lease fees and the possible CFA goal of maintaining crew compensation at levels established prior to the implementation of a GOA TBM program. The provision at paragraph V provides that “[l]ease fees will be used only to directly support the CFA’s operational and administrative costs” and “will be publically disclosed in the CFA annual report.” This wording seems to imply that regulations would be needed that describe the permissible expenditures for which lease fees may be used and may require regulatory definitions of what constitutes administrative and operational costs. NMFS’ ability to assess fees is strictly controlled by Congress and additional legal research will be needed to determine whether the Council and NMFS have the authority under the MSA to impose such a provision. A similar question exists as to the Council’s and NMFS’s authority under the MSA to impose criteria that would maintain crew compensation at pre-rationalization levels. Additional legal research on the authority for this provision will be required if the Council adopts this as a criterion for CFAs.

2.6 Summary

It appears the CFA program is not being proposed strictly to provide the trawl fleet with additional management tools to meet the Council’s PSC and bycatch avoidance goals, which was the primary Council objective that initiated the main GOA TBM action. Instead, CFAs are proposed to ensure that other fishery stakeholders are not negatively impacted by the proposed program. Still other persons may view this action as opportunity to increase their access to fish traditionally allocated to the trawl fishery or increase their influence over how the GOA trawl fisheries are harvested and processed. These objectives are not inherently good or bad, but will require the Council to closely monitor how power in the various

⁴ Memorandum for the North Pacific Fishery Management Council, from Lisa L. Lindeman, Alaska Regional Counsel, regarding Gulf of Alaska Rationalization Program Community Protection Measures, dated January 28, 2003.

⁵ Memorandum for Chris Oliver, Executive Director, North Pacific Fishery Management Council, from Robert Babson, Attorney, NOAA General Counsel Alaska Region, regarding Delegation of Authority and the Community Incentive Fisheries Trust Proposal, dated October 3, 2003.

stakeholder groups is shifted by the structure and objectives of the CFA, and to ensure that the Council's Goals and Objectives are being met by the CFA program if it is implemented.

3 West Coast Groundfish Adaptive Management Set-Aside

The Council is interested in the adaptive management model because it could be used to address a variety of foreseen and unforeseen consequences that might stem from implementation of the GOA Trawl Bycatch Management Program. Staff was specifically directed to examine the Pacific Fishery Management Council's (PFMC) rationale for including adaptive management (AM) quota in its groundfish trawl ITQ program, the continuing public process of determining how that quota is best deployed, and "lessons learned" during the period since implementation.

3.1 Rationale for an Adaptive Management Quota Set-Aside

In general, adaptive management programs establish an iterative approach to program design. AM is a tool to address risk and uncertainty about the impacts of resource management programs that are difficult or impossible to predict. The initial program design might accomplish one objective, but have an unintended adverse impact on the achievement of another. Adaptive management can be particularly useful in a program that has a diverse set of goals. Once implemented, major management programs are difficult to disassemble. As a result, monitoring impacts, developing revised goals, and adjusting the management plan might be the most effective strategy to make necessary changes (Stankey et al, 2005).

PFMC included an AM quota set-aside whereby groundfish and bycatch allowances could be distributed annually in order to address five stated objectives: (1) community stability, (2) processor stability, (3) conservation, (4) unintended/unforeseen consequences of ITQ management, and (5) facilitating new entry⁶. A more detailed description of how the AM program is intended to function is provided in Section 3.2. PFMC initially considered an AM program after Environmental Defense Fund (EDF) presented the notion to their groundfish advisory committee, and after examining the 10% "Code of Conduct" quota set-aside established for the British Columbia groundfish trawl fishery. PFMC did not develop specific examples of situations that might merit an annual allocation of AM quota pounds (QP) as part of its final preferred alternative. However, the Final EIS for their Groundfish FMP Amendment 20 did broadly discuss the strengths and limitations of using AM QP to further the Council's objectives. Parts of that analysis are captured below.

Community Stability

PFMC considered making initial quota allocations to communities up until the final stages of their deliberations on a trawl rationalization program, in March 2007. Their scoping included a discussion of community development quota, as applied in the North Pacific region (PFMC 2010, pp. 49 & 505). The FEIS states that "communities expressed no interest in receiving an initial allocation of QSs" (*Ibid*, p. 58). Given that, PFMC developed other mechanisms to address concerns about adverse community impacts. The AM QS set-aside was among those, in addition to accumulation limits, a two year post-implementation moratorium on QS transfers, making communities eligible to purchase trawl permits with

⁶ 50 CFR 660, Subpart D §660.140(d)(8)(iii)(D)(l)(i – v)

attached QS, and the inclusion of a community advisory committee in the 5-year program review. The AM program was envisioned as serving a variety of purposes; among those, AM QP could be used to facilitate the formation of CFAs (*Ibid.*, p. 505).

Processor Stability

In addressing potential shore plant consolidation, the AM QP set-aside gave the PFMC a tool that was an alternative to allocating non-whiting harvest shares to processors. Allocating harvest shares to processors raised some concern about providing a market power advantage to processors that also own trawl licenses. Fishery dependent communities could be supported through AM QP allocations to small processing facilities as long as the related harvest is delivered locally.

New entry

The FEIS for Amendment 20 acknowledged that entities that did not receive initial QS allocations would be at a disadvantage in the quota market relative to those entities that did receive QS. Initial allocation recipients would not only be able to use quota as collateral to gain financing for additional quota purchases, but would also be able to viably operate at a smaller margin of return on that additional purchased quota. New entrants, on the other hand, would have to cover fixed costs in addition to other costs through the prosecution of whatever quota they are able to acquire on the open market. Following that logic, the FEIS states that directing AM QP to new entrants could help “bridge a profitability gap” and allow those entities to eventually purchase their own QS (*Ibid.*, p. 321).

AM QP could also be used to aid new entry in the shoreside processing sector. Small or “impacted” processors – however they might be defined – could provide AM QP to vessels that would make deliveries to that plant. Those deliveries could help small plants cover operating costs, or could be used to develop specially processed product forms that serve higher-value niche markets. Distributing AM QP to processors could also help align the incentives of harvest vessels and shore plants, creating goal-oriented arrangements that could promote local deliveries, higher value product forms, or incentives for better bycatch management.

PFMC considered making initial allocations to crew members. However, implementation of such a measure proved problematic due to limited historical information on the identity of individual active crew members. PFMC envisioned AM quota as an alternative means to help crew stakeholders, contingent upon further Council action.

3.1.1 Citation of the Adaptive Management Program in a Federal Court Decision

In *Pacific Coast Federation of Fishermen’s Associations v. Blank*, 693 F.3d 1084 (9th Cir. 2012), various fishermen’s groups challenged the PFMC’s groundfish trawl ITQ program, arguing that the MSA required the PFMC and NMFS to develop criteria for ensuring that quota shares are distributed to fishing communities and to adopt measures and policies to ensure the sustained participation of fishing communities. Requiring a Council to consider a certain set of entities when developing a LAPP is not the same as requiring that allocations to be made to those entities. After examining the statutory language at section 303a(c) of the MSA, the court held that the MSA requires councils and NMFS to consider fishing communities when developing a limited access privilege program, but does not require the councils or

NMFS to guarantee fishing communities any particular role in a LAPP. The court then determined that the PFMC and NMFS met their obligations to consider fishing communities. The court found that not only did PFMC and NMFS examine fishing communities and the effects of quota programs on those communities, but also that PFMC and NMFS adopted various flexible measures to mitigate any impacts of the ITQ program on fishing communities. Specifically, the court identified the AM quota program as an example of having adequately considered and addressed a new management program's potential impacts on communities. In addition to the AM program, the court also relied on the fact that PFMC had recommended additional measures to mitigate community impacts. Those measures included a two year moratorium on quota share transfers following implementation, the inclusion of a community advisory committee in the 5-year review process, and limits on the accumulation of quota shares by individual entities.

3.2 Design of the Program Element

This section describes the initial design of the AM program, as defined in FEIS for the PFMC's Groundfish FMP Amendment 20 (PFMC, 2010). This section also summarizes some of the analytical conclusions about how allocation and distribution of a quota set-aside might impact certain stakeholders. Those conclusions reflect some of the PFMC's thought process in deciding to include the AM program in its final preferred alternative.

Allocations must meet the requirements of National Standard 4. In other words, allocations must be fair and equitable, must promote conservation, and must not allow an entity to hold excessive shares. Because the west coast program is a LAPP, allocations must also follow the requirements in MSA Section 303A. That section of the MSA states that privileges do not confer a property right, that allocations are revocable, that allocation promotes social and economic benefits, and that the program will be well monitored and undergo periodic reviews.

The west coast groundfish trawl ITQ program allocated non-whiting species and halibut bycatch to individual holders of harvest licenses. Allocations were not made to processors. Ninety percent of the non-whiting QS and halibut individual bycatch quota was attached to licenses based on a historical landings formula. The remaining 10 percent of each allocated species, and of halibut bycatch quota, was set aside for adaptive management. Until such a time as PFMC and NMFS develop criteria and a formula for the distribution of the 10 percent quota set-aside, those groundfish and bycatch quota pounds would be annually allocated to license holders in accordance with the formula used to distribute the other 90 percent. This interim distribution of the 10 percent set-aside is known as the "pass-through", and is defined in regulation at 50 CFR 660, Subpart D §660.140(d)(8)(iii)(D)(1)(2).

PFMC selected 10 percent as the size of AM quota pool because it matched the size of the harvest share allocation to shore-based processors that was on the table prior to final action (PFMC 2010, p. 58). The Council felt that allocations to processors could adversely impact ex-vessel price negotiations, and the likelihood of such an outcome would increase with the size of the processor allocation. Knowing that AM quota *could* be distributed to processors, the Council did not want to create an AM quota set-aside that was larger than the highest considered processor allocation, which might result in market power or negotiating asymmetries if the AM set-aside was, at least in part, distributed to processors.

Passing through the 10 percent AM quota set-aside to initial allocation recipients was envisioned as an interim measure. Development of alternative distribution criteria was originally schedule to take place during the first three years of program implementation, which would have caused the pass-through to expire at the end of 2013. In 2011, the Council extended that deadline to the end of 2014 since PFMC was devoting time to other high-priority trailing actions. Without taking action at the recent June 2014 meeting, the pass-through would have expired at the end of this calendar year and 10 percent of the non-whiting and halibut bycatch quota pools would not have been allocated for use by anyone in 2015. PFMC's ongoing consideration of whether to continue the pass-through, and for how long, is described in the following section (3.3).

Once the pass-through is replaced by a set of criteria and a formula for quota pound distribution, those distributions could be made on an annual basis or could be made as part of the biennial harvest specifications process (as the pass-through currently is). Because distribution criteria have not yet been developed, the program is not clear on whether or not QP could be committed to a multi-year "project". The Council and NMFS have not yet determined the timing and frequency of AM quota distributions. When they do, the management bodies will likely have to consider what amount of public due process is required at each stage, and whether or not that process can be completed on an annual timeline. In addition to Council action, changes to any distribution formula might also require public notice, a waiting period, a comment period, and possibly additional analysis.

PFMC has not developed eligibility criteria to determine which entities or individuals could receive AM quota. For example, the Council has not expressed any direction about whether or not an entity that received an initial allocation could also receive AM QP, or if there might be a maximum threshold of initial quota issuance above which the license holder is ineligible for AM QP.

The FEIS for Amendment 20 discussed CFAs. While CFAs are not strictly defined, PFMC and NMFS treat non-fishing entities (non-profits, community organizations) like any other potential license holder. PFMC does not currently envision any special treatment for non-profit groups that seek to acquire fishing privileges, and thus they do not have to be regulated differently (i.e. the same limits on license and quota ownership would apply).

The following bullets highlight analytical conclusions about the potential impacts of setting aside 10 percent of non-whiting quota and distributing it to different user groups for adaptive management, as presented in the FEIS (PFMC, 2010):

- Allocating AM QP to selected individuals might affect fleet-wide profitability, since redistribution would likely run counter to purely market-driven outcomes where quota flows to the license holders who can operate most profitably (p.321). AM QP could affect ex-vessel prices depending on whether or not the additional quota gives recipients a negotiating advantage in regards to the shore-based market to which they deliver.
- Allocating AM QP to catcher/processors is less likely to have a community protection effect, but there might be applications of AM QP in the C/P fleet that further bycatch management goals through quota incentives.

- Allocating AM QP to certain (adversely affected) processors can have a direct geographic distributional effect, and an indirect effect on the harvesters that might be contracted to catch and deliver groundfish using that quota. In other words, some processors and harvesters would benefit from the 10 percent set-aside more than others.
- If AM QP is allocated to a processor who then entices harvesters to fish that quota (conditional on delivery to the plant that received the AM quota), those harvesters might be locked into a market where they receive a non-competitive ex-vessel payment. That asymmetry in negotiating power would be reduced if the contracting harvester already had some of its own annual QP attached to its license.
- New entrants, or license holders who did not receive an initial allocation, will find it difficult to become independent owner-operators, since recipients of initial allocations will trade QS among themselves at relatively high prices. Quota transfer prices can remain high because initial allocation recipients are already generating profit from quota that they received at no cost, and thus can afford to generate small margins on any additional quota that they purchase. By comparison, those who buy in from zero initial allocation will have to cover all of their fixed costs and any operating costs (including debt financing) with the purchased harvest privilege. The FEIS frames AM QP as a way for new entrants to “bridge a profitability gap” and build towards future QS ownership (p.321).
- If potential for conservation benefits is a criterion for distribution of AM QP, the quota set-aside might naturally flow to participants who are *already* more likely to switch to low-bycatch fixed gear. Those could be individuals who already own that kind of gear, who have the license endorsements that allow for fixed gear fishing, who rely on target species that can be economically prosecuted with fixed gear, or who fish in areas where target species with low bycatch rates are more available.

3.3 Pacific Council’s Ongoing Consideration of Adaptive Management Quota Use

PFMC’s final preferred alternative for the west coast groundfish trawl ITQ program left a number of issues to be resolved through trailing actions. In addition to expediting implementation of the main program to address bycatch, the Council felt that some decisions would be better informed after observing the new program in effect for several years. Appendix E to the FEIS for Amendment 20 (PFMC, 2010) listed the following adaptive management program elements that would best be determined within the three years following implementation (that timeline was later extended to four years):

- Decision-making and organizational structure to be used in distributing the AM QP set-aside;
- Formula for determining community and processor eligibility to receive AM QP;
- Allocation methods that are consistent with PFMC’s overall program goals;
- Whether and how AM QP might be divided among states within the Pacific region;
- Whether multi-year commitments of AM QP could be made to a stakeholder or community project proposal.

Written public comment during the implementation process for Amendment 20 requested quantitative analysis of adverse impacts that could result from the delayed implementation of the AM program. The Agency’s response noted that quantitative analysis of that nature was not possible until the Council decides how the AM set-aside will be distributed. The response also stated that the purpose of the AM

program element was to *react* to unanticipated and unintended consequences, so predictive analysis would not be appropriate.

As noted in Section 3.2, the AM quota pass-through was set to expire at the end of 2014 unless the PFMC took action to either continue it or to replace it with a set of quota distribution criteria and an implementation formula. At its June 2014 meeting, PFMC considered two action alternatives on the continuation of the pass-through (in addition to a no action alternative which would have let the pass-through expire at the end of the year, effectively making 10 percent of the quota pool inaccessible until AM QP distribution criteria were developed). One alternative would continue the pass-through indefinitely, or until further Council action established AM criteria. A second option would continue the pass-through for a pre-determined amount of time. Two suboptions were considered: (1) continue the pass-through until the end of 2017, or (2) continue the pass-through until the implementation of any actions resulting from PFMC's five-year program review.⁷

The Council chose to continue the pass-through until the implementation of actions resulting from the program review. It is assumed that continuing the pass-through would still be an alternative that the Council could consider at that time, but maintaining the pass through would not occur under the "no action" alternative. The Council noted that it was important to provide a measure of certainty as to how long the pass-through will continue, so that quota share transfer prices can incorporate the expected value of the 10 percent pass-through over the appropriate duration. The Council noted that some stakeholders have testified to being adversely impacted by the program's initial allocations, and reiterated its interest in utilizing the AM tool in the future. Participants who received little or no initial allocation want to use AM quota to leverage QS purchases on the open market. Many of those fishermen are currently engaged in the fishery, but lease from (or skipper/crew for) QS holders. Those requesting AM QP also suggested that they could be delivering to small processing facilities that have had difficulty filling their line capacity since implementation of the ITQ program. In its rationale for temporarily continuing the pass-through, the Council noted that the program is still in its early years, that several trailing actions are yet to be implemented, and that the managing bodies must balance the administrative burden of replacing the pass-through against other priorities. The authors of this paper have received anecdotal reports that participants who support the continuation of the pass-through view the AM program as a solution in search of a problem. The PFMC's rationale for its June action suggests that it is valuable to have a potential solution on hand, should that problem emerge.

When and if the PFMC does establish a structure that furthers management objectives by allocating AM QP, the goal is to set it up so that NMFS can manage the process as part of its routine functions. The alternative would be a proposal-driven process that puts an annual (or biennial) demand on Council time to review proposals and make allocative decisions. Depending on how the Council might define eligibility and allocation formulas, AM QP distribution might be incorporated into the region's biennial groundfish harvest specification schedule.

Since implementation of the trawl ITQ program, PFMC has already gained some additional insight as to how the objectives of the AM program might best be refined. At final action, furthering groundfish and halibut conservation was defined as one of the potential uses for AM QP. The first three years of the

⁷ The five-year review is expected to occur in 2016.

program have produced positive results in terms of halibut bycatch and reduced pressure on overfished stocks. PFMC will continue to monitor bycatch performance in the fishery, but is now looking to focus the future application of AM QP on the other defined objectives (community stability, processor stability, new entry, and unforeseen impacts). Nevertheless, the Council may identify other environmental objectives that would warrant quota allocation in the future. For example, if the Council determined that the program was causing localized depletion or damage to physical habitat, it could use AM QP to incentivize fishing in different areas or with different gear types.

Finally, the analysts' communication with knowledgeable PFMC, NMFS WCRO, and NW Fisheries Science Center staff included discussion of an alternative use for the AM quota set-aside referred to as a "deemed value system". The remainder of this subsection describes that tool and discusses its strengths and challenges. *It is important to underscore that the PFMC has not stated that the deemed value system is a preferred approach, or even one that the Council will explicitly consider in the foreseeable future.* Nonetheless, the following description of a potential use for a quota set-aside could be of interest to the NPFMC, depending on its final program objectives for the GOA TBM program.

The deemed value system would pool the quota set-aside, and allow a fisherman to access an amount of that allowable catch, bycatch, or PSC in the event that he or she needs it to cover an unexpected overage. The individual would have to pay a per-unit price to access the quota pool, but that payment would be recoverable so long as the individual was able to acquire the necessary quota from the open market by the end of the applicable time period (season or year) to replace what was used. If the quota is not replaced in the pool, then the payment functions similarly to a fine.

This approach could be beneficial if it turns out that GOA quota holders are hoarding allocations instead of making them available on the short-term transfer market (i.e. leasing). An individual may be reticent to transfer groundfish or PSC to a fisherman who recorded an overage if that individual is worried about having an overage himself later in the year. Establishing an emergency quota pool would assure those individuals with available quota that the pool would also be available to them if they were to eventually need it themselves. If quota is not flowing through the market to meet emergency needs, some fishermen might be closed out of the fishery early while others end the year with unused quota. Assuming that the allowable limit of PSC is meant to be used to fully harvest groundfish TACs, an illiquid PSC transfer market could reduce overall production and downstream benefits to communities. NPFMC is not likely to be able to directly influence the temporary transfer of quota within cooperatives once the GOA TMB program is implemented, so setting up this type of program on the front-end might be the Council's best opportunity to promote a smooth in-season quota market.

If the price (deemed value) paid to access the set-aside pool is set too low, fishermen might be willing to simply pay the "fine" and would not worry about replacing the quota in the set-aside pool. This might have the unintended effect of making fishermen less concerned about overages, which could lead to wasteful fishing practices or higher PSC rates. Even if the price is high, some fishermen could still choose not to recover their payment. In any case, the Council would need to define where the unrecovered money goes. A deemed value system has been used in New Zealand, and some critics have stated that charging too low a price increases the chance that fines are simply accepted (quota is not replaced), thus constituting a transfer of money from industry to the government that receives and holds the payments.

Existing applications of this approach have set the price as a function of species' ex-vessel values. If the Council were to pursue this as a program element, further analysis of how to set the price would be required. The set price (deemed value) to access the set-aside pool would likely affect market lease rates within the fishery, over which the Council might otherwise have little or no control. Setting a high price – perhaps greater than ex-vessel value – would make accessing the set-aside pool unattractive, which would ensure that use of the pool remains a last resort for covering overages – as it is intended. Setting a price lower than ex-vessel value could mean that fishermen view the pool as a source of profitable fishing opportunities (albeit at a narrow margin), which is not the intended purpose. The downside to setting a high price for last-resort quota is that it might drag up the going lease rate on the open transfer market. This would be particularly harmful to new entrants and small-scale quota holders, who may rely on leased fishing opportunities to cover fixed costs and turn a profit. The effect of the deemed value pool price on the market lease rate might be weakened if there was a small limit on the total amount that any one individual could take from the set-aside pool in a given year or season – say, 2 percent of the pool. The small limit could still be enough for someone to cover an unintended overage, and it would also make the pool less of an alternative (or a competitor) to the regular lease market for those looking to acquire more harvestable quota. In general, structuring the set-aside pool as a relatively unattractive source of last resort should add liquidity to the short-term transfer market without creating a perverse “race” to fish into the set-aside.

Since ex-vessel prices vary throughout the year, it might be necessary for the deemed value of the quota in the set-aside pool to vary as well. For instance, it would be undesirable for ex-vessel prices to swing higher than the deemed value quota price, for reasons mentioned above. Because NMFS would not likely have the time or resources to manage a quota market as part of its in-season responsibilities, it might be necessary to contract a third-party to track and adjust the price. If the cost of the third-party service can be placed on users of the set-aside pool, it would only impact those who are exceeding their quotas. Alternatively, further analysis might lead to agreement on a ratio between deemed value and ex-vessel price (for example, quota from the set-aside pool could cost 110% of the current ex-vessel price in the relevant market). In that case, the price of set-aside quota could be pegged to something that is measurable and could potentially be tracked, albeit at an additional management cost.

If the set-aside pool is funded by quota shares that come off the top of annual allocations, and if all users of the pool replace the quota that they used, then that amount of quota would be left unharvested at the end of the year. That outcome would be undesirable for groundfish quota, so it might make sense to apply the deemed value approach only to PSC quota. However, PSC species do not have an ex-vessel value, so pricing the PSC quota would have to be based on its implicit value as a means to target additional groundfish.

3.4 Applicable Lessons for NPFMC to Consider

The most consistent message shared by stakeholders and managers in the west coast groundfish trawl fishery was that the decision timeline for how to use AM QP should be established clearly and prior to implementation of the main trawl program. If determining eligibility for and distribution of AM quota is slated as a trailing action, the Council should consider the likelihood that recipients of the interim pass-

through could become invested in maintaining their access to that additional quota. If the Council wants to increase the ease with which the set-aside could be redistributed for adaptive management goals, it could frame the continuation of the pass-through as something that would be considered only if initial allocation recipients demonstrate an adverse impact from the implementation of the main GOA trawl LAPP. Uncertainty about the duration of a pass-through is likely to affect QS transfer prices, as potential buyers would not know if some percentage of what they are purchasing might be reallocated to other stakeholders.

While it is reasonable for the Council to wait and see when and where adverse impacts of the GOA trawl LAPP might occur, defining a list of potential impacts that would warrant AM QP distribution is advised. Classifying eligible impacts would still allow the Council to be appropriately responsive in its quota distribution, but would also reduce the administrative burden of reviewing a broad array of petitions stating that “X harm requires Y quota pounds in order to make a stakeholder (or set of stakeholders) whole.” Responding to specific petitions would not only be time consuming, but would also be difficult to do correctly, understanding that conditions in the fishery are dynamic, that aid to one stakeholder could harm another, and that it could be problematic to change a quantitative allocation structure based on potentially unverifiable qualitative (or confidential) information. The list of “harms” that require additional quota for redress could be expanded, revised, or reprioritized, as the PFMC has done in reducing the priority placed on stock conservation impacts after observing their program in action for several years.

If a pass-through is framed as the *de facto* status quo, then the Council could use it as an incentive. For example, if community stability is identified as an adaptive management priority, the Council could set observable criteria in order to continue receiving pass-through quota. Perhaps license holders who deliver to the same port to which they delivered in the previous year would continue to receive the pass-through, but those who delivered elsewhere would not. In that case, the Council would need to define how the quota that is not passed through as it was before would be redistributed, and when those license holders who changed ports could once again receive pass-through quota. If fleet consolidation is a concern, the observable criteria could pertain to how much a license holder’s share of the quota pool (for a species, or in aggregate) has deviated from their initial allocation. Those whose share holdings have increased by more than a pre-determined threshold percentage might lose access to the pass-through. In general, it is preferable for criteria to be objective and measurable, thus allowing NMFS to adjust allocations without requiring Council actions and the attendant analyses at every iteration.

Finally, those with AM program experience noted the importance of defining criteria for eligibility to receive AM QP. For example, if the Council wants to make AM QP available only to “small” processors then it would have to define a metric that determines size and a cut-off. The Council would not necessarily have to use the same criteria as the SBA. Criteria that do not relate to size or location could also be considered. For example, AM QP might only be made available to processors that do not own any LLPs with attached groundfish catch history. License holder eligibility could be determined as a function of how much catch history was attached to an individual’s license (or licenses) at initial allocation. While defining a class of eligible stakeholders at the outset of the program might simplify the roll-out of the AM program, it would also marginally reduce the Council’s flexibility to respond to unanticipated adverse impacts of the overall trawl program.

Preparers

Darrell Brannan	NPFMC Contractor
Sam Cunningham	NPFMC Staff

Contributors

Lauren Smoker	NOAA GC Alaska Section
---------------	------------------------

Persons Consulted

Jamie Goen	NMFS West Coast Regional Office
Frank Lockhart	
Sarah Williams	
Jim Seger	PFMC Staff
Mariam McCall	NOAA GC Northwest Section
Daniel Holland	Northwest Fisheries Science Center
Leesa Cobb	Port Orford Ocean Resource Team
Brent Paine	United Catcher Boats
Becca Robbins-Gisclair	Alaska Marine Conservation Council

References

Lian, C., Singh, R., and Weninger, Q. 2008. Economic impacts of individual fishing quota management in the Pacific coast groundfish fishery. Unpublished Report (Cited in PFMC Amendment 20 Final EIS [“PFMC 2010”]).

NMFS, 2013. National Marine Fisheries Service Report on the Adaptive Management Program for the Trawl Rationalization Program. Agenda Item G.9.b, September 2013. http://www.pcouncil.org/wp-content/uploads/G9b_NMFS2_SEPT2013BB.pdf.

Pacific Coast Federation of Fishermen's Associations v. Blank, 693 F.3d 1084 (9th Cir. 2012).

PFMC (Pacific Fishery Management Council) and NMFS (National Marine Fisheries Service). 2010. Rationalization of the Pacific Coast Groundfish Limited Entry Trawl Fishery; Final Environmental Impact Statement Including Regulatory Impact Review and Initial Regulatory Flexibility Analysis. Pacific Fishery Management Council, Portland, OR. June 2010.

Pacific Fishery Management Council, 2014. Trawl Rationalization – Issue: Adaptive Management Program QP Pass-Through – Council Decision Document. Agenda Item F.3.a, June 2014. http://www.pcouncil.org/wp-content/uploads/F3a_Att1_AMPDiscsn_JUNE2014BB.pdf.

Stankey, G. H., Clark, R. N., and Bormann, B. T. 2005. Adaptive management of natural resources; theory, concepts, and management institutions. Gen. Tech. Rep. PNW-GTR-654. Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station. 73 p.