

Table 2-34 A and B season caps for Alternative 4 under PPA1 and PPA2

	PPA1				PPA2 cap	
	High Cap		Backstop cap			
Overall cap	68,392		32,482		47,591	
A season allocation (70%):	47,874		22,737		33,314	
CDQ	9.3%	4,452	7.5%	1,705	9.3%	3,098
Inshore CV	49.8%	23,841			49.8%	16,590
Mothership	8%	3,830			8%	2,665
Offshore CP	32.9%	15,751	92.5%	21,032	32.9%	10,960
B season allocation (30%):	20,518		9,745		14,277	
CDQ	5.5%	1,128	7.5%	731	5.5%	785
Inshore CV	69.3%	14,219			69.3%	9,894
Mothership	7.3%	1,498			7.3%	1,042
Offshore CP	17.9%	3,673	92.5%	9,014	17.9%	2,556

Note: under both PPA1 high cap and PPA2, the inshore sector allocation and CDQ Program allocations would be further allocated among the inshore cooperatives, inshore limited access fishery, and six CDQ groups.

2.4.3 Options for changes to the PPA

During the process of writing this EIS/RIR/IRFA and describing and analyzing the PPA, three issues arose that require either clarification by the Council or modification to the PPA. This section describes these issues and suggests possible options for resolving them. These are issues associated with the PPA that have a bearing on how, and whether, the PPA could be implemented as intended by the Council. They are:

- Two issues related to the formation and composition of the ICA.
- The potential for the 68,392 Chinook salmon hard cap to be exceeded because, under the PPA, Chinook salmon bycatch accrues to both the high cap and the backstop cap.

2.4.3.1 Formation and Composition of the ICA

The PPA specifies some elements of the ICA, but not all. This section addresses two issues related to the ICA: (1) the possibility of more than one ICA being submitted to NMFS for review, and (2) the possibility that some participants could be involuntarily excluded from the ICA.

More than one ICA is submitted: The Council stated at its June 2008 meeting that it intended that only one Chinook salmon bycatch ICA would be approved by NMFS. However, it is possible that more than one proposed ICA could be submitted to NMFS for review. Therefore, NMFS recommends that the regulations clearly allow the submission of only one ICA. If more than one ICA is submitted by the deadline, NMFS would disapprove all proposed ICAs and provide the industry an opportunity to resubmit a single ICA.

Participation in the ICA: The PPA does not require 100 percent participation in the ICA by all eligible AFA vessels, inshore cooperatives, sectors, or CDQ groups. This is evident because the PPA refers to “those operations that opt out of such an ICA” and provides the backstop cap for those operations opting out of the PPA. Analysts assume that reference to “operations” in the PPA means that entire sectors, inshore cooperatives, or CDQ groups could opt to not participate in the ICA, as could any number of

Furthermore, as with Alternative 2, sector transfers would require an increase to the catch monitoring requirements for the inshore CV sector. This includes increased observer coverage for those vessels that currently are subject to 30 percent observer coverage, as well as revisions to shoreside processor monitoring requirements.

The method used to close an area to directed pollock fishing would depend on whether Component 4, transfers among sector entities, is selected. If Component 4 is not selected, then NMFS would close savings areas through closure notices because an allocation of salmon is made to a sector, rather than an entity. Selection of Component 4 would require sectors to form an entity that would be authorized to make transfers. The entity would be allocated a specific amount of salmon that could be adjusted through transfers from other entities. Vessels in a given sector would be prohibited from directed fishing in a closed area once they had reached their salmon bycatch allocation.

2.5.4 Managing and Monitoring Alternative 4

The general management of transferable sector, cooperative, and CDQ group allocations would be similar to those discussed under Alternative 2. The Chinook bycatch allocations would increase the complexity of NMFS's salmon bycatch monitoring efforts due to the increased effort associated with establishing, monitoring, and enforcing additional Chinook salmon caps. As under Alternative 2, transferable salmon bycatch allocations must be issued to a legal entity that represents all members of the group eligible to receive the transferable allocation (see section 2.5.2.5). The legal entity could be created by a contract among the group of eligible AFA participants in that sector who are receiving the transferable salmon bycatch allocation.

2.5.4.1 Salmon Bycatch Intercooperative Agreement (ICA)

The ICA concept includes two components to implement the incentive program to reduce salmon bycatch:

- the ICA contract that contains the elements of the incentive program that all vessel owners and CDQ groups agree to follow in the future, and
- the annual report to the Council on performance under the ICA in the previous year.

The ICA would be required to be submitted to and approved by NMFS prior to fishing under the ICA. Representatives of the ICA would prepare the annual report after the fishing season is over to provide an evaluation of how the measures implemented through the ICA actually worked.

Under Alternative 4, allocations under the high cap of 68,392 Chinook salmon would only be available to sectors, cooperatives, or CDQ groups participating in a salmon bycatch ICA that meets the following requirements:

- An ICA must provide incentive(s) for each vessel to avoid salmon bycatch under any condition of pollock and salmon abundance in all years.
- Incentive measures must include rewards for salmon bycatch avoidance and/or penalties for failure to avoid salmon bycatch at the vessel level.
- The ICA must specify how those incentives are expected to promote reductions in actual individual vessel bycatch rates relative to what would have occurred in absence of the incentive program. Incentive measures must promote salmon savings in any condition of pollock and salmon abundance, such that they are expected to influence operational decisions at bycatch levels below the hard cap.

The Council expressed its intent at its June 2008 meeting that the PPA requires the creation of a single ICA. However, nothing in the PPA would prevent a single ICA from having multiple sections each

describing a different type of incentive program for different sectors, cooperatives, CDQ groups, or vessel regulations. An ICA with multiple sections would take longer for NMFS to review, and would be subject to all relevant regulations.

The PPA does not include any specific requirements for the type of incentives that must be included in the ICA other than the general language above. One of the specific components the Council discussed that could be included in an ICA is some type of fee per salmon caught. A fee would impose costs on fishermen for every salmon caught while pollock fishing and would provide cost savings, or benefits, to those fishermen who avoided Chinook salmon bycatch. These costs and benefits would start occurring with the first salmon caught as bycatch. However, the Magnuson-Stevens Act does not provide authority to the Council and NMFS to require a fee per salmon either directly in regulations or indirectly through a regulation that requires a fee to be a component of an ICA. In addition, there may be other, more effective incentives that could be developed by the industry. Therefore, the ICA requirements only specify the end result of what the Council wants the industry to achieve and does not specify how the industry must reach these goals.

Participation in the ICA is voluntary and any vessel, sector, inshore cooperative, or CDQ group could decide to not participate in the ICA, or to "opt out" of the ICA. The PPA uses the term "operations" when it refers to those who can opt out of the ICA, however, the term is not defined. Analysts assume that the term refers to individual AFA eligible vessels (catcher/processors, motherships, catcher vessels) and to inshore cooperatives and CDQ groups. Furthermore, analysts assume that the term "operations" was not limited to AFA cooperatives or the PPA would have specified the option for cooperatives to opt out rather than for "operations" to opt out.

The PPA does not specify participation or composition requirements for the ICA, nor does it require 100 percent participation in the ICA because of inclusion of the backstop cap and language referring to "those operations that opt out of such an ICA." Therefore, analysts assume that entire sectors, inshore cooperatives, or CDQ groups could opt to not participate in the ICA, or any number of individual vessels within the catcher/processor or mothership sectors or the inshore cooperatives could opt out of the ICA. Vessels fishing on behalf of a CDQ group could not opt out on their own because they are not authorized to make decisions about whether a CDQ group participates in the ICA or opts out. They fish under whatever cap and whatever ICA conditions the CDQ group agrees to and these conditions are part of the contract between the CDQ group and the vessel harvesting pollock on its behalf. In this respect, only a CDQ group could decide whether to participate in an ICA or not, rather than the owners of vessels fishing on behalf of the CDQ group. A CDQ group could not have some vessels fishing under the 68,392 cap and others fishing under the backstop cap. (Note NMFS's concerns in Section 2.4.3.1 about the PPA's description of the formation and composition of the ICA)

NMFS would implement the requirements for the ICA in regulation. These regulations would include requirements for the information that must be included in the ICA and a deadline for submission of the ICA. In addition, the regulations would describe the process NMFS would use to review and approve or disapprove the ICA. If NMFS approved the ICA, those participating in the ICA would receive transferable allocations of the 68,392 Chinook salmon cap.

The Chinook salmon bycatch ICA would be required to be submitted to NMFS prior to the start of the fishing year and in enough time for NMFS to review the proposed ICA and provide some time to address any minor issues identified in this review. Because the requirements for the ICA are performance based, i.e., they address what the ICA should accomplish, any number of different incentive programs could meet these objectives. As long as a proposed ICA contains all of the information required in NMFS regulations and it generally describes an incentive program that is designed to accomplish the goals

specified in regulation, NMFS would have to approve the ICA. The annual report and evaluation by the Council and the public of how the incentive program is working will be the primary tool to determine whether the ICA is meeting the Council's goal to reduce Chinook salmon bycatch below the cap level.

Approval or disapproval of the ICA by NMFS would be an administrative determination. NMFS would review a proposed ICA by comparing the actual content of a proposed ICA with the information requirements in regulations and decide whether the proposed ICA provides the required information. The information requirements in regulation would be based on the ICA requirements in the PPA, using the exact same words as the PPA unless minor wording changes were necessary for clarity (e.g. NMFS recommends not using the term "and/or" in regulation). NMFS would not develop additional requirements for the ICA beyond those recommended by the Council.

The ICA would be required to explain the incentive program and how it would create the incentives desired by the Council. For example, the ICA would be required to explain how the incentive program provided incentive(s) for each vessel to avoid salmon bycatch under any condition of pollock and salmon abundance in all years; how the incentive program provided rewards for salmon bycatch avoidance and/or penalties for failure to avoid salmon bycatch at the vessel level; how the incentives would promote reductions in actual individual vessel bycatch rates relative to what would have occurred in absence of the incentive program; and how the incentive measures in the ICA promote salmon savings in any condition of pollock and salmon abundance so that these measures influence operational decisions at levels of bycatch below the hard cap. NMFS would approve the proposed ICA if it included this information. NMFS would look for key words and key sections of descriptive text in the ICA that addressed the requirements of the PPA. However, NMFS would not judge the adequacy of the incentives described or whether these incentive measures would, in fact, successfully provide the incentives intended by the Council. Judgments about the efficacy or outcomes of the proposed incentive program would be subjective and the regulations would not provide a legal basis for NMFS to disapprove the proposed ICA because it did not believe that the proposed measures would work as intended. Minor errors or omissions in the ICA likely would be resolved by NMFS contacting the ICA representative and requesting revisions to the ICA. The approved ICA would be made available for Council and public review.

Once submitted and approved, the ICA would not have to be re-submitted each year. If approved, the ICA it would remain in effect unless it had an expiration date specified by the ICA participants or until the participants notified NMFS that the ICA was revoked. Amendments or revisions to the ICA could be submitted to NMFS by the parties to the ICA at any time. NMFS would review whether the amendments would create an ICA that still complied with all of the appropriate regulations. The original, approved ICA would be effective until NMFS approved amendments or revisions. If amendments were disapproved, then the existing, approved ICA would remain in effect. Once party to an ICA, a vessel, sector, cooperative, or CDQ group could not withdraw from the ICA mid-way through the year.

If the regulatory requirements for the ICA were not met, NMFS would issue an initial administrative determination (IAD) explaining the reasons that the proposed ICA did not comply with NMFS regulations. Possible reasons for disapproval would be a complete lack of information that responds in any way to one or more of the ICA requirements or information that did not make sense in such an obvious way as to be clearly not responsive to the requirements. Information that seemed to be somewhat responsive, but did not include sufficient detail or information that was responsive by using the right words but was difficult to understand would not be sufficient reasons for disapproval. If NMFS issued an IAD disapproving a proposed ICA, the ICA representative could then (1) resubmit a revised ICA that addressed the issues identified in the IAD or (2) file an administrative appeal. An administrative appeal likely would not be resolved prior to the fishing year in which the ICA was supposed to be effective.

The Chinook salmon bycatch cap that would be in effect if an ICA is not submitted or approved by NMFS by the start of the fishing year would depend on whether the Council selected PPA1 or PPA1 and PPA2 combined.

If the Council selected only PPA1 and no ICA was submitted or approved, all vessels would be fishing under the backstop cap of 32,482 salmon.

If the Council selected implementing both PPA1 and PPA2 together, NMFS would recommend the following regulatory structure. The 47,591 Chinook salmon cap would be the initial cap specified in regulation. It would be allocated as transferable seasonal Chinook salmon bycatch allocations among the catcher/processor sector, mothership sector, inshore cooperatives, and CDQ groups. This cap would be in effect if no approved ICA existed for any of the following reasons:

- No ICA was submitted for NMFS review,
- An ICA was submitted, but NMFS issued an initial administrative determination to disapprove the ICA because it was inconsistent with regulations, and the appeal was not yet resolved by the time the fishing year started,
- NMFS issued a final agency action to disapprove the ICA (either no appeal was filed or the appeal was resolved in NMFS's favor).

The regulations also would specify that if NMFS approved an ICA, then the 68,392 cap and the 32,482 backstop cap would be in effect and would be implemented as described in this chapter. This regulatory structure would ensure that an initial fixed cap was in place regardless of the outcome of the submission of and approval of an ICA.

An alternative interpretation would be to require implementation of the high cap while an IAD to disapprove the proposed ICA was under appeal. However, this interpretation could create an incentive to submit an ICA that would be disapproved just to have the high cap in place without any ICA in effect that implements the bycatch reduction incentive program. However, such an ICA is an integral component of the Council's recommendations for reducing Chinook salmon bycatch.

Annual reporting requirements: A second component of the ICA provisions is the requirement for an annual report about performance under the ICA. This report would be required to include:

- a comprehensive explanation of incentive measures in effect in the previous year,
- how incentive measures affected individual vessels, and
- evaluation of whether incentive measures were effective in achieving salmon savings beyond levels that would have been achieved in absence of the measures.

The Council would review an annual report about performance under the ICA. It could initiate FMP or regulatory amendments to revise or remove the ICA requirements if it found that the ICA concept needed improvement or was not performing as intended.

The Council would have no role in NMFS's review and approval/disapproval of the ICA. That administrative process would be conducted by NMFS based on the regulations implemented for Alternative 4. The Council intends to review industry proposals for the ICA prior to final action on Amendment 91. However, nothing in NMFS's potential regulations would require the industry to submit exactly the same ICA that was presented to the Council prior to its final action.

2.5.4.2 Catch accounting

Catch accounting would be more complex under Alternative 4 than under the other alternatives because of the potential for two separate caps under PPA1. Under PPA1, all Chinook salmon bycatch by vessels