



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

March 7, 2007

Mr. Chris Oliver, Executive Director
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

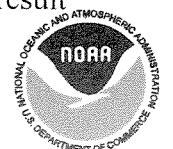
Dear Mr. Oliver:

We have partially approved Amendment 85 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). In April 2006, the Council adopted Amendment 85 to the FMP to revise the current Bering Sea and Aleutian Islands area (BSAI) Pacific cod allocations of total allowable catch (TAC) among various harvest sectors, change incidental catch allowances, and remove the groundfish reserve for Pacific cod. The Council submitted Amendment 85 on November 29, 2006, for review by the Secretary of Commerce.

The approved parts of Amendment 85 to the FMP include the revisions to the current BSAI Pacific cod allocations of total allowable catch (TAC) among various non-CDQ harvest sectors, changes to non-CDQ incidental catch allowances, removal of the groundfish reserve for Pacific cod, and the new appendix. The parts of Amendment 85 that are not approved are those that refer to a 10 percent allocation of Pacific cod TAC as a directed fishing allowance to the CDQ Program, those that specify the creation of an incidental catch allowance of Pacific cod for the CDQ Program, and a reference to the Coast Guard and Maritime Act of 2006, Public Law 109-241 (Coast Guard Act) as being the basis for Pacific cod allocations to the CDQ Program..

Amendment 85 as submitted by the Council includes provisions that allocate 10 percent of the Pacific cod TAC to the CDQ Program as a directed fishing allocation, create an incidental catch allowance of Pacific cod for the CDQ Program, and refer to the Coast Guard Act as the basis for changes to the CDQ Program Pacific cod allocations. These provisions were consistent with requirements set forth in the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended by the Coast Guard Act, at the time Amendment 85 was submitted for Secretarial review.

During Secretarial review of Amendment 85, the CDQ provisions in the Magnuson-Stevens Act were amended once again by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Public Law 109-479 (MS Reauthorization Act), enacted on January 12, 2007. The Magnuson-Stevens Act now requires that allocations to the CDQ Program, including Pacific cod, increase to "a total allocation (directed and nontarget combined) of 10.7 percent effective January 1, 2008," and that the total allocation may not be exceeded. As a result



of the MS Reauthorization Act, the portions of Amendment 85 that address allocations of Pacific cod to the CDQ Program are no longer consistent with the Magnuson-Stevens Act, and must be disapproved.

Shortly after enactment of the MS Reauthorization Act, NMFS determined that the CDQ portions of the proposed rule were inconsistent with the newly amended Magnuson-Stevens Act and returned the rule to the Council for revision pursuant to section 304(b) of the Magnuson-Stevens Act. The Council revised the CDQ portions of the proposed rule for Amendment 85 to incorporate the changes brought about by the MS Reauthorization Act, including a 10.7 percent allocation of Pacific cod to the CDQ program. The Council submitted the revised proposed rule to NMFS, which was subsequently published in the *Federal Register*.

For the reasons stated above, full approval of Amendment 85 would be inconsistent with the Magnuson-Stevens Act. The disapproved FMP language is indicated in red in the attached document.

The public comment period on the proposed rule for Amendment 85 is open until March 26, 2007. A final rule to implement the approved portions of Amendment 85 will follow at a later date.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Mecum". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert D. Mecum
Acting Administrator, Alaska Region

Attachment

Appendix D: Proposed FMP amendment language for BSAI Amendment 85

Deletions are stricken; additions are in bold.

SOC disapprovals are in red and stricken. Approved Council submission is in black.

p. ES-3, Table ES-2:

Apportionment of TAC: Pacific cod: ~~10% of the TAC is allocated to the CDQ Program as a directed fishing allowance.~~ After subtraction of the CDQ ~~directed fishing allowance and the CDQ incidental catch~~ allowance, the remaining TAC shall be allocated 1.42% for vessels using jig gear, ~~47-2.3%~~ for **catcher processors** vessels using trawl gear listed in Section 208(e)(1)-(20) of the AFA, 13.4% for **catcher processors** using trawl gear as defined in Section 219(a)(7) of the Consolidated Appropriations Act, 2005 (P.L. 108-447), 22.1% for **catcher vessels** using trawl gear, 48.7% for **catcher processors** using hook-and-line gear, 0.2% for **catcher vessels** ≥60' LOA using hook-and-line gear, 1.5% for **catcher processors** using pot gear, 8.4% for **catcher vessels** ≥60' LOA using pot gear, and 2.0% for **catcher vessels** <60' LOA that use either hook-and-line gear or pot gear. ~~and 51% to vessels using hook and line or pot gear. The trawl gear allocation is allocated 50% to catcher/processor vessels and 50% to catcher vessels. The allocation to hook and line and pot gear is apportioned 80% to hook and line catcher/processor vessels, 0.3% to hook and line catcher vessels, 3.3% to pot catcher/processor vessels, 15% to pot catcher vessels, and 1.4% to catcher vessels less than 60' LOA.~~ Allocations may be seasonally apportioned.

p. ES-5, Table ES-2, add line to CDQ Multispecies Fishery box:

~~Pacific cod: 10% of the TAC~~

p. 17, 3.2.5.3 Reserves, first paragraph:

The groundfish reserve at the beginning of each fishing year shall equal the sum of 15 percent of each target species and the “other species” category TACs, except for pollock, ~~and~~ fixed-gear sablefish, **and Pacific cod**. When the TACs for the groundfish complex are determined by the Council, 15 percent of the sum of the TACs is set aside as a reserve. This reserve is used for: a) correction of operational problems in the fishing fleets, to promote full and efficient use of groundfish resources, b) adjustments of species TACs according to the condition of stocks during the fishing year, and c) apportionments.

p. 17, 3.2.6 Apportionment of Total Allowable Catch, first paragraph:

When the TAC for each target species and the “other species” category, except for pollock, ~~and~~ fixed-gear sablefish, **and Pacific cod**, is determined, it is reduced by 15 percent to form the reserve, as described in Section 3.2.5.3. The remaining 85 percent of each TAC is then apportioned by the Regional Administrator.

p. 19, Section 3.2.6.3.1, Gear Allocations:

3.2.6.3 Pacific Cod

3.2.6.3.1 Gear Allocations

Among gear groups

The BSAI Pacific cod TAC (**excluding CDQ**) shall be allocated among gear groups as follows: ~~2 percent to vessels using jig gear; 51 percent to vessels using hook and line or pot gear; and 47 percent to vessels using trawl gear. The trawl apportionment will be divided 50 percent to catcher vessels and 50 percent to catcher processors.~~

- a. **48.7 percent to catcher/processors using hook-and-line gear;**
- b. **0.2 percent to catcher vessels equal to or greater than 60 ft length overall using hook-and-line gear;**
- c. **1.5 percent to catcher/processors using pot gear;**
- d. **8.4 percent to catcher vessels equal to or greater than 60 ft length overall using pot gear;**
- e. **2.0 percent to catcher vessels less than 60 ft length overall that use either hook-and-line gear or pot gear;**
- f. **1.4 percent to vessels using jig gear;**
- g. **2.3 percent to catcher processors using trawl gear and listed in Section 208(e)(1) through (20) of the American Fisheries Act;**
- h. **13.4 percent to catcher processors using trawl gear as defined in Section 219(a)(7) of the Consolidated Appropriations Act, 2005 (P.L. 108-447);**
- i. **22.1 percent to catcher vessels using trawl gear.**

Inseason reallocations

Specific provisions for the accounting of these ~~directed fishing allowances~~ **allocations** and the transfer of unharvested amounts of these ~~allowances~~ **allocations** to other vessels using hook-and-line or pot gear, **trawl gear, or jig gear** will be set forth in regulations.

Among vessels using hook and line or pot gear **Incidental catch allowances**

The Regional Administrator annually will estimate the amount of Pacific cod taken as incidental catch in directed fisheries for groundfish other than Pacific cod. ~~For the CDQ fisheries, the incidental catch allowance will be deducted from the Pacific cod TAC before the TAC is allocated among the non-CDQ sectors.~~ **For** by-vessels using hook-and-line or pot gear, **the incidental catch allowance will be and deducted that amount from the aggregate amount portion of Pacific cod TAC annually allocated to hook-and-line or and pot gear sectors combined. The remainder will be further allocated as directed fishing allowances as follows:**

- a. ~~80 percent to catcher/processor vessels using hook and line gear;~~
- b. ~~0.3 percent to catcher vessels using hook and line gear;~~
- c. ~~3.3 percent to catcher/processor vessels using pot gear;~~
- d. ~~15 percent to catcher vessels using pot gear; and~~
- e. ~~1.4 percent to catcher vessels less than 60 ft length overall that uses either hook and line gear or pot gear.~~

p. 46:

3.7.4.3 Pollock Allocation

Ten percent of the pollock TAC in the BSAI management area shall be allocated as a directed fishing allowance to the CDQ program. This quota shall be released to communities on the Bering Sea coast which submit a plan, approved by the Governor of Alaska, for the wise and appropriate use of the quota.

3.7.4.4 Pacific Cod Allocation

~~Ten percent of the Pacific cod TAC in the BSAI management area shall be allocated as a directed fishing allowance to the CDQ Program.~~

3.7.4.4 3.7.4.5 Multispecies Groundfish and Prohibited Species Allocations

In addition to the CDQ allocations authorized in Sections 3.7.4.2, 3.7.4.3 and 3.7.4.4, 7.5 percent of the TAC for all BSAI groundfish species or species groups, except squid, will be issued as a CDQ allocation from the groundfish reserve. A pro-rata share of PSC species also will be issued. PSC will be allocated before the trawl/non-trawl splits. The program is patterned after the pollock CDQ program.

p. 56, Section 4.1.2.2, Pacific Cod:

4.1.2.2 Pacific Cod

The BSAI Pacific cod stock increased to high levels in the mid 1990s, then declined. The 2000 year class was above average, with recruits into the fishery beginning in 2003. Significant uncertainty surrounds the maximum permissible ABC computed in the stock assessment model. Between 1998 and 2002, the ABC was set below the maximum permissible ABC from the model. In 2003 and 2004, the Council, with advice from the Groundfish Plan Team and the SSC, instead selected an ABC through an alternative ‘constant catch’ approach, as the resulting ABC is at least as conservative as under the previous approach.

The BSAI Pacific cod TAC is not apportioned by area, but is currently allocated ~~10% to the CDQ Program as a directed fishing allowance. The remainder of the TAC after subtraction of the CDQ directed fishing allowance and the CDQ incidental catch allowance is allocated~~ 1.4% to vessels using jig gear; 2.3% to catcher processors using trawl gear listed in Section 208(e)(1)-(20) of the AFA; 13.4% to catcher processors using trawl gear as defined in Section 219(a)(7) of the Consolidated Appropriations Act, 2005 (P.L. 108-447); 22.1% to catcher vessels using trawl gear; 48.7% to catcher processors using hook-and-line gear; 0.2% to catcher vessels $\geq 60'$ LOA using hook-and-line gear; 1.5% to catcher processors using pot gear; 8.4% to catcher vessels $\geq 60'$ LOA using pot gear; and 2.0% to catcher vessels $< 60'$ LOA that use either hook-and-line gear or pot gear. ~~2 percent to jig gear, 51 percent to fixed gear, and 47 percent to trawl gear.~~

The ~~hook-and-line, pot, and jig fixed gear allocations are~~ is seasonally apportioned through regulations by ~~trimester, with the exception of catcher vessels $< 60'$ LOA that use either hook-and-line gear or pot gear. The trawl gear allocations are also seasonally apportioned through regulations. Any unused TAC from the jig gear quota becomes available to fixed gear on September 15.~~ 80 percent of the fixed gear apportionment is reserved for longline catcher/processors, 0.3 percent for longline catcher vessels, 15 percent for pot catcher vessels, 3.3 percent for pot catcher/processors, and 1.4 percent for fixed gear catcher vessels less than 60 ft length overall. Beginning in 1998, 100 percent retention was required for Pacific cod under the IR/IU program.

p. 94, Section 4.5.3.2, Akutan (third full paragraph):

As a CDQ community, the community of Akutan enjoys access to the BSAI groundfish resource independently of direct participation in the fishery. The CDQ communities as a group will receive **allocations of groundfish, halibut, and prohibited species under section 3.7.4 of this FMP and allocations of crab under the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs.** ~~CDQs equal to 7.5 percent of each BSAI groundfish TAC, except for the fixed gear sablefish, pollock, and squid TACs. The CDQ communities will receive 20 percent of the fixed gear sablefish and 10 percent of the pollock TACs for the eastern Bering Sea and the Aleutian Islands subareas.~~ Similarly, the economic benefits the community derives from the local 1 percent raw fish tax from landings at the nearby plant are dependent on BSAI groundfish TACs and the resulting ex-vessel value of groundfish landings.

p. 98, Section 4.5.4, Community Development Quota Program Communities (second paragraph):

Although the program was initially proposed for the fixed gear sablefish fishery, it was first implemented for BSAI pollock. The program set aside 7.5 percent of the annual BSAI pollock TAC for allocation to qualifying rural Alaskan communities. The first pollock allocations were proposed for 1992 through 1995, however, the Sustainable Fisheries Act, which amended the Magnuson-Stevens Act, institutionalized the program as part of the BSAI FMP in 1996. CDQ allocations for BSAI sablefish and halibut were added in 1995, and the multi-species groundfish CDQ Program was implemented in late 1998. ~~Ultimately, the program allocates CDQ for pollock, all remaining most groundfish species (7.5 percent, except 20 percent for fixed gear sablefish), crab (7.5 percent), and halibut (20 to 100 percent), as well as a pro-rata share of prohibited species. In 1999, the American Fisheries Act increased the pollock allocation to 10 percent as a directed fishing allowance. In 2006, amendments to the Magnuson-Stevens Act required that the allocation of Pacific cod to the CDQ Program be increased to 10 percent as a directed fishing allowance, as a result of BSAI Amendment 85.~~

Add to the end of Appendix A:

Amendment 85 implemented [insert implementation date], superseded Amendments 46 and 77:

Implemented a gear allocation among all non-CDQ fishery sectors participating in the directed fishery for Pacific cod. After deduction of the CDQ allocation ~~and the CDQ incidental catch allowance,~~ the Pacific cod TAC is apportioned to vessels using jig gear (1.4 percent); catcher processors using trawl gear listed in Section 208(e)(1)-(20) of the AFA (2.3 percent); catcher processors using trawl gear as defined in Section 219(a)(7) of the Consolidated Appropriations Act, 2005 (Public Law 108-447) (13.4 percent); catcher vessels using trawl gear (22.1 percent); catcher processors using hook-and-line gear (48.7 percent); catcher vessels $\geq 60'$ LOA using hook-and-line gear (0.2 percent); catcher processors using pot gear (1.5 percent); catcher vessels $\geq 60'$ LOA using pot gear (8.4 percent); and catcher vessels $< 60'$ LOA that use either hook-and-line gear or pot gear (2.0 percent). ~~Amendment 85 also incorporated provisions of the MSA, added by the Coast Guard and Maritime Transportation Act of 2006 (Public Law 109-241), that require the allocation of 10 percent of the Pacific cod TAC to the CDQ Program as a directed fishing allowance.~~

Add new Appendix J to end of the BSAI FMP:

Appendix J Consolidated Appropriations Act, 2005 (Public Law 108-447): Provisions related to catcher processor participation in the BSAI non-pollock groundfish fisheries

J.1 Summary of the Consolidated Appropriations Act, 2005

On December 8, 2004, the President signed into law the Consolidated Appropriations Act, 2005 (Public Law 108-447). With respect to fisheries off Alaska, the Consolidated Appropriations Act, 2005, establishes catcher processor sector definitions for participation in: 1) the catcher processor subsectors of the BSAI non-pollock groundfish fisheries, and 2) the BSAI Catcher Processor Capacity Reduction Program. The following subsectors are defined in Section 219(a) of the Act: AFA trawl catcher processor; non-AFA trawl catcher processor; longline catcher processor; and pot catcher processor. Section 219(a) also states that ‘non-pollock groundfish fishery’ means target species of Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, or yellowfin sole harvested in the BSAI. Thus, this legislation provides the qualification criteria that each participant in the catcher processor subsectors must meet in order to operate as a catcher processor in the BSAI non-pollock groundfish fisheries and/or participate in the BSAI Catcher Processor Capacity Reduction Program.

The Consolidated Appropriations Act, 2005, includes numerous provisions that are not related to the management of groundfish and crab fisheries off Alaska. Only the portions of the legislation related to eligibility of the catcher processor subsectors are provided for reference. The portions of the legislation authorizing and governing the development of the BSAI Catcher Processor Capacity Reduction Program are not provided here.

J.2 Consolidated Appropriations Act, 2005: Section 219(a) and (g)

SEC. 219. (a) DEFINITIONS.—In this section:

(1) AFA TRAWL CATCHER PROCESSOR SUBSECTOR.—The term “AFA trawl catcher processor subsector” means the owners of each catcher/processor listed in paragraphs (1) through (20) of section 208(e) of the American Fisheries Act (16 U.S.C. 1851 note).

(2) BSAI.—The term “BSAI” has the meaning given the term “Bering Sea and Aleutian Islands Management Area” in section 679.2 of title 50, Code of Federal Regulations (or successor regulation).

(3) CATCHER PROCESSOR SUBSECTOR.—The term “catcher processor subsector” means, as appropriate, one of the following:

(A) The longline catcher processor subsector.

(B) The AFA trawl catcher processor subsector.

(C) The non-AFA trawl catcher processor subsector.

(D) The pot catcher processor subsector.

(4) COUNCIL.—The term “Council” means the North Pacific Fishery Management Council established in section 302(a)(1)(G) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852(a)(1)(G)).

(5) LLP LICENSE.—The term “LLP license” means a Federal License Limitation program groundfish license issued pursuant to section 679.4(k) of title 50, Code of Federal Regulations (or successor regulation).

(6) LONGLINE CATCHER PROCESSOR SUBSECTOR.—The term “longline catcher processor subsector” means the holders of an LLP license that is noninterim and transferable, or that

is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher processor fishing activity, C/P, Pcod, and hook and line gear.

(7) NON-AFA TRAWL CATCHER PROCESSOR SUBSECTOR.—*The term “non-AFA trawl catcher processor subsector” means the owner of each trawl catcher processor—*

(A) that is not an AFA trawl catcher processor;

(B) to whom a valid LLP license that is endorsed for Bering Sea or Aleutian Islands trawl catcher processor fishing activity has been issued; and

(C) that the Secretary determines has harvested with trawl gear and processed not less than a total of 150 metric tons of non-pollock groundfish during the period January 1, 1997 through December 31, 2002.

(8) NON-POLLOCK GROUND FISH FISHERY.—*The term “nonpollock groundfish fishery” means target species of Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, or yellowfin sole harvested in the BSAI.*

(9) POT CATCHER PROCESSOR SUBSECTOR.—*The term “pot catcher processor subsector” means the holders of an LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher processor fishing activity, C/P, Pcod, and pot gear.*

(10) SECRETARY.—*Except as otherwise provided in this Act, the term “Secretary” means the Secretary of Commerce.*

(g) NON-POLLOCK GROUND FISH FISHERY.—

(1) PARTICIPATION IN THE FISHERY.—*Only a member of a catcher processor subsector may participate in—*

(A) the catcher processor sector of the BSAI non-pollock groundfish fishery; or

(B) the fishing capacity reduction program authorized by subsection (b).

(2) PLANS FOR THE FISHERY.—*It is the sense of Congress that—*

(A) the Council should continue on its path toward rationalization of the BSAI non-pollock groundfish fisheries, complete its ongoing work with respect to developing management plans for the BSAI non-pollock groundfish fisheries in a timely manner, and take actions that promote stability of these fisheries consistent with the goals of this section and the purposes and policies of the Magnuson-Stevens Fishery Conservation and Management Act; and

(B) such plans should not penalize members of any catcher processor subsector for achieving capacity reduction under this Act or any other provision of law.