
**INITIAL REVIEW DRAFT ONLY
NPFMC REVIEW
JUNE 2008**

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

**Of Measures to Reduce Chinook Salmon Bycatch in the Bering Sea and
Aleutian Islands Pollock Trawl Fishery**

Initial Review Draft
May 15, 2008
Scott A. Miller

NOTE: This document will be revised to form the Draft Environmental Impact Statement

INTRODUCTION

This Initial Regulatory Flexibility Analysis (IRFA) evaluates the impacts on small entities, of alternatives designed to reduce Chinook salmon bycatch in the pollock trawl fisheries in the Bering Sea and Aleutian Islands management areas of the EEZ off Alaska.

This IRFA addresses the statutory requirements of the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 601-612).

1 THE PURPOSE OF AN IRFA

The Regulatory Flexibility Act (RFA), first enacted in 1980, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business, (2) to require that agencies communicate and explain their findings to the public, and (3) to encourage agencies to use flexibility and to provide regulatory relief to small entities. The RFA emphasizes predicting impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts while still achieving the stated objective of the action.

On March 29, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act. Among other things, the new law amended the RFA to allow judicial review of an agency's compliance with the RFA. The 1996 amendments also updated the requirements for a final regulatory flexibility analysis, including a description of the steps an agency must take to minimize the significant economic impact on small entities. Finally, the 1996 amendments expanded the authority of the Chief Counsel for Advocacy of the Small Business Administration (SBA) to file *amicus* briefs in court proceedings involving an agency's violation of the RFA.

In determining the scope, or 'universe', of the entities to be considered in an IRFA, NMFS generally includes only those entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment, or portion thereof, of the industry (e.g., user group, gear type, geographic area), that segment would be considered the universe for the purpose of this analysis. NMFS interprets the intent of the RFA to address negative economic impacts, not beneficial impacts, and thus such a focus exists in analyses that are designed to address RFA compliance.

Data on cost structure, affiliation, and operational procedures and strategies in the fishing sectors subject to the proposed regulatory action are insufficient, at present, to permit preparation of a "factual basis" upon which to certify that the preferred alternative does not have the potential to result in "significant adverse impacts on a substantial number of small entities" (as those terms are defined under RFA).

Because, based on all available information, it is not possible to 'certify' this outcome, should the proposed action be adopted, a formal IRFA has been prepared and is included in this package for Secretarial review.

2 WHAT IS REQUIRED IN AN IRFA?

Under 5 U.S.C., Section 603(b) of the RFA, each IRFA is required to contain:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and the legal basis for, the proposed rule;
- A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
- A description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule;
- A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the proposed action, consistent with applicable statutes, and that would minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
 1. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
 2. The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
 3. The use of performance rather than design standards;
 4. An exemption from coverage of the rule, or any part thereof, for such small entities.

3 WHAT IS A SMALL ENTITY?

The RFA recognizes and defines three kinds of small entities: (1) small businesses, (2) small non-profit organizations, and (3) small government jurisdictions.

Small business. Section 601(3) of the RFA defines a ‘small business’ as having the same meaning as ‘small business concern’, which is defined under Section 3 of the Small Business Act. ‘Small business’ or ‘small business concern’ includes any firm that is independently owned and operated and not dominant in its field of operation. The SBA has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor... A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the firm is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the United States, including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. Finally, a wholesale business servicing the fishing industry is a small business if it employs

100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

Affiliation may be based on stock ownership when, (1) a person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) if two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners, controls the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations. The RFA defines “small organizations” as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

Small governmental jurisdictions. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000.

4 REASON FOR CONSIDERING THE ACTION

The purpose of Chinook salmon bycatch management in the Bering Sea pollock fishery is to minimize Chinook salmon bycatch to the extent practicable while achieving optimum yield from the pollock fishery. Minimizing Chinook salmon bycatch while achieving optimum yield is necessary to maintain a healthy marine ecosystem, ensure long-term conservation and abundance of Chinook salmon, provide maximum benefit to fishermen and communities that depend on Chinook salmon and pollock resources, and comply with the Magnuson-Stevens Act and other applicable federal law. National Standard 9 of the Magnuson-Stevens Act requires that conservation and management measures shall, to the extent

practicable, minimize bycatch. National Standard 1 of the Magnuson-Stevens Act requires that conservation and management measures prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

Several management measures are being used to reduce Chinook salmon bycatch in the Bering Sea pollock fishery. Chinook salmon taken incidentally in groundfish fisheries are classified as prohibited species and, as such, must be either discarded or donated through the Pacific Salmon Donation Program. In the mid-1990s, NMFS implemented regulations recommended by the Council to control the bycatch of Chinook salmon taken in the Bering Sea pollock fishery. These regulations established the Chinook Salmon Savings Areas and mandated year-round accounting of Chinook salmon bycatch in the pollock fishery. Once Chinook salmon bycatch levels reached a specified amount in a Chinook Salmon Savings Area, the area would be closed to pollock fishing. These areas were adopted based on historic observed salmon bycatch rates and were designed to avoid high spatial and temporal levels of salmon bycatch.

The Council started considering revisions to salmon bycatch management in 2004 when information from the fishing fleet indicated that it was experiencing increases in salmon bycatch following the regulatory closure of the Chinook Salmon Savings Area. While the non-CDQ fleet could no longer fish inside the Chinook Salmon Savings Area, vessels fishing on behalf of the CDQ groups were still able to fish inside the area because the CDQ groups had not yet reached their Chinook salmon prohibited species catch limit. Much higher salmon bycatch rates were reportedly encountered outside of the closure areas by the non-CDQ fleet than experienced by the CDQ vessels fishing inside. Further, the closure areas increased costs to the pollock fleet and processors.

To address this problem, the Council examined other means to minimize salmon bycatch that were more flexible and adaptive. Since 2006, the pollock fleet has used a salmon bycatch reduction inter-cooperative agreement to establish a voluntary rolling hotspot system (VRHS). The VRHS is intended to increase the ability of pollock fishery participants to minimize salmon bycatch by giving them more flexibility to move fishing operations to avoid areas where they experience high rates of salmon bycatch. The VRHS was first implemented through an exempted fishing permit and subsequently, in 2007, through Amendment 84 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands (FMP).

In light of the high amount of Chinook salmon bycatch in recent years, the Council and NMFS are considering measures to effectively reduce bycatch to the extent practicable while achieving optimum yield from the pollock fishery. While the inter-cooperative reports on Chinook salmon bycatch indicate that the VRHS has reduced Chinook salmon bycatch rates compared with what they would have been without the measures, concerns remain because of escalating amounts of Chinook salmon bycatch through 2007. From 1990 through 2001, the Bering Sea Chinook salmon bycatch average was 37,819 salmon annually. Since 2002, Chinook salmon bycatch numbers have increased substantially. The averages from 2002 to 2007 were 82,311 Chinook salmon, with a bycatch peak of 122,000 Chinook salmon in 2007.

The Council and NMFS decided to limit the scope of this action to Chinook salmon, leaving in place the existing non-Chinook salmon bycatch reduction measures, because of the need for immediate action to reduce Chinook salmon bycatch. Chinook salmon is separated from non-Chinook salmon because Chinook salmon is a highly valued species and a species of concern that warrants specific protection measures. Additionally, the Council and NMFS expect the Chinook salmon bycatch reduction measures under consideration to also reduce non-Chinook salmon bycatch. The Council will address non-Chinook salmon bycatch in the Bering Sea pollock trawl fishery with a subsequent action.

5 OBJECTIVES OF, AND LEGAL BASIS FOR, THE PROPOSED ACTION

Under the Magnuson-Stevens Act, the United States has exclusive management authority over all living marine resources found within its exclusive economic zone (EEZ). The management of marine fishery resources is vested in the Secretary of Commerce (Secretary), with advice from the Regional Fishery Management Councils. The groundfish fisheries in the EEZ off Alaska are managed under the Fishery Management Plan (FMP) for Groundfish of the BSAI.

Statutory authority for measures designed to reduce bycatch is specifically addressed in Sec. 600.350 of the Magnuson-Stevens Act. That section establishes National Standard 9—Bycatch, which directs the Councils to minimize bycatch and to minimize mortality of bycatch when it cannot be avoided.

The dual objectives of the proposed action are to reduce salmon bycatch, to the extent practicable, in the BSAI trawl fisheries in compliance with National Standard 9 of the Magnuson-Stevens Act and, further, to comply with National Standard 1 of the Magnuson-Stevens Act which requires that conservation and management measures prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

6 NUMBER AND DESCRIPTION OF SMALL ENTITIES REGULATED BY THE PROPOSED ACTION

The proposed action(s) being considered by the Council apply only to those entities that participate in the directed pollock trawl fishery in the BSAI. These entities include the American Fisheries Act (AFA) affiliated pollock fleet and the six Western Alaska Community Development Quota (CDQ) organizations that presently receive CDQ allocations of BSAI pollock.

As described in Section A2.4, the RFA requires a consideration of affiliations between entities for the purpose of assessing if an entity is small. The AFA pollock cooperatives in the BSAI are an important type of affiliation. All of the entities directly affected by the proposed action are members of AFA co-ops in 2008, and therefore, are “affiliated” and are considered to be large entities for RFA purposes. The six CDQ organizations potentially affected by the proposed action are considered to be small entities and, as discussed in section A2.4 above, their affiliations with other large entities does not define them as large entities. Thus, the only small entities that are directly regulated by this action are the six Western Alaska CDQ organizations.

7 RECORDKEEPING AND REPORTING REQUIREMENTS

Depending on the alternative chosen, the subsequent proposed regulation may impose new record keeping or reporting requirements on directly regulated small entities. This would be true for components of both Alternative 2 and Alternative 3, which eliminates existing salmon bycatch prevention measures, and replaces them with an hard caps and/or triggered closure areas. The present alternative set contains a great number of options and suboptions including provisions for transfers, rollovers, cooperative management, and possibly a continuation of a modified voluntary rolling hotspot system under an intercooperative agreement. Extensive treatment of the management and enforcement issues surrounding the myriad possible combinations of alternatives, components, and options, is provided in the preceding appendix containing the Regulatory Impact Review. As this draft is being prepared for an Initial review by the Council, and a preliminary preferred alternative has not yet been chosen, this section incorporated the discussion of the RIR by reference until a more defined and tractable preferred alternative has been chosen and can be analyzed for its specific potential recordkeeping and reporting requirements on the six CDQ entities that comprise the small entities directly regulated by the proposed action.

8 FEDERAL RULES THAT MAY DUPLICATE, OVERLAP, OR CONFLICT WITH PROPOSED ACTION

Section 7 consultation under the Endangered Species act could pose the risk of future restrictions on the Bering Sea pollock trawl fishery if genetic information identifies threatened or endangered salmon stocks in the salmon bycatch of the BSAI pollock trawl fishery. A consultation will occur in support of the proposed actions.

9 DESCRIPTION OF SIGNIFICANT ALTERNATIVES

Alternatives which have been considered by the Council for salmon bycatch management measures include hard caps on salmon bycatch, sector allocations of hard caps, transferability or rollover provisions, cooperative management, triggered closures, and exemption to triggered closures for vessels participating in an inter-cooperative rolling hotspot management system. In April 2008, the Council moved to bifurcate the analytical package, which originally contained an action for Chinook salmon and a second action for non-Chinook salmon, into two separate analyses. The amendment package considered in this analysis focuses on Chinook salmon bycatch reduction measures and will be considered by the Council prior to a following analysis of non-Chinook salmon bycatch. This has been done in order to move forward with the Chinook action on a faster track, given the record high Chinook salmon bycatch in recent years and the low returns of Chinook salmon to some river systems in Western Alaska.

The alternative set being considered by the Council includes specific identification of the CDQ groups as a sector receiving pollock allocations and prohibited species quota for bycaught Chinook salmon. Presently, CDQ groups have the ability to negotiate PSQ transfers and that flexibility is carried forward in the alternative set. In addition, the Council has the ability to consider salmon bycatch minimization alternatives that specifically address the salmon bycatch history of the CDQ groups. Thus, the alternative set does offer flexibility for the Council to minimize the impacts on regulated small entities.