APPENDIX 1. Socioeconomic Profile of Seattle

According to the U.S. Census, the population of Seattle was 3,554,760 in 2000. This represents an increase of nearly 1 million people since the previous census in 1990.

Locational issues are discussed with respect to the Seattle area and Alaska fisheries. The first part of the discussion is divided into three components: the institution of the Port of Seattle, the "traditional" community of Ballard, and the planning area construct of the Ballard Interbay Northend Manufacturing Industrial Center (BINMIC). Each component provides a different perspective on the Seattle social/socioeconomic ties to the fishery.

The Port of Seattle

Martin Associates (2000) provides an overall assessment of the economic impact of fishing activity based at Port of Seattle facilities. They conclude that such activity generates $400 million in wages (direct, indirect, and induced), $315 million in business revenues, $42 million in local purchases, and $48 million in state and local taxes. There is no way to desegregate the Alaskan distant water fleet from this overall impact, so the utility of the information for the present purposes is limited. They do provide estimates for the annual expenditures in Seattle of the various fishing vessels homeported there, and as might be expected, those for the larger vessels, such as participate in the Alaskan groundfish fisheries, are the highest in terms of expenditures per vessel – $250,000 for catcher trawlers, $900,000 for factory trawlers, and $1.7 million for motherships. Crabbers are in the $180,000 range. Most of the vessels in these classes homeported in Seattle probably participate in the Alaskan groundfish fisheries but also participate in other

fisheries. There are also many vessels in the Seattle distant water fleet that do not participate in the Alaskan groundfish fisheries. The Port itself does not have information on moorage fees received, either in total or for segments of the fleet.

The Port of Seattle is separate from the Municipality of Seattle and is an economically self-supporting entity. Besides its direct revenues, it receives 1 percent of the property tax collected in King County, but with a cap on funding not to exceed $33 million a year. In turn, all port revenues are charged a 12.4 percent tax, which is split between the City of Seattle and the State of Washington (in lieu of property tax). The Port's charge is the development of infrastructure that will support local and regional economic activities, especially in cases where the rate of return on investment in that infrastructure may be too low (although still positive) for the private investor. Such development contributes to the overall economy of the region through synergistic and multiplier effects.

Ballard

When looked at on a neighborhood basis, one of more obvious foci of the distant water fishery in the greater Seattle area is the community of Ballard. Today the term "Ballard" represents a loosely defined geographical neighborhood of northwest Seattle. There is no geographically standard area for which various types of comparable information exists. Nonetheless, the area does have a geographical identity in peoples' minds and, together with Magnolia and Queen Anne, has its own yellow pages telephone directory (published by the Ballard and Magnolia Chambers of Commerce). The following brief section is based predominately on information from the Ballard Chamber of Commerce (1998), Reinartz (1988a, 1988b, 1988c, 1988d), Hennig and Tripp (1988), and McRae (1988).

Fishermen's Terminal on Salmon Bay is recognized as the home of the Pacific fishing fleet and has been characterized as the West Coast's "premier home port." Fishermen's Terminal (Salmon Bay Terminal) in turn has often been identified with Ballard, which was formerly a separate city (incorporated 1890) before annexation by Seattle in 1907. Until the construction of the Chittenden Locks and the Lake Washington Ship Canal, opened in 1917, Salmon Bay Terminal was confined to relatively small vessels but was the focus of a developing fishing fleet. Once the area was platted and incorporated, it quickly attracted settlers and industries desiring or dependent upon access to Puget Sound. The timber industry was the first to

develop, due to the need to clear land as well as the value of the timber that was available. By the end of the 1890s, Ballard was a well-established community with the world's largest shingle manufacturing industry, as well as boat building and fishing industries. By 1900 Ballard was the largest area of concentrated employment north of San Francisco.

Ballard effectively blocked the expansion of Seattle to the north, and court decisions had given Seattle control over Ballard's freshwater supply, with the result that Ballard became part of Seattle in 1907. At that time the community had 17 shingle mills, 3 banks, 3 saw mills, 3 iron foundries, 3 shipyards, and approximately 300 wholesale and retail establishments. The Scandinavian identity of Ballard developed at or somewhat before this time. In 1910, first- and second-generation Scandinavian-Americans accounted for 34 percent of Ballard's population, and almost half of Ballard's population was foreign-born. Currently, less than 12 percent of the population is of Scandinavian descent, but the cultural association remains pervasive.

Ballard's economy continued to develop and diversify, but it remained fundamentally dependent on natural resources, and especially timber and fishing. In 1930 the *Seattle Weekly News* reported that 200 of the 300 schooners of the North Pacific halibut fleet were homeported in Ballard, demonstrating not only the centrality of Ballard but the long-term importance of distant water fisheries to Seattle fishermen. In 1936, the Port of Seattle built a new wharf at the Salmon Bay terminal, and in 1937 a large net and gear warehouse was scheduled for construction there. Over the years, Seattle-based vessels were central to the evolution of a number of North Pacific fisheries.

Thus in some ways Ballard is considered a "fishing community within" Seattle. While this has historically been the case, when examined specifically with respect to the BSAI crab fishery, the area cannot cleanly be considered a "village within a city." While there is a concentration of multigenerational fishing families within the area, the "industrialization" of the Alaska fisheries has tended to disperse the ties and relationships. While support service businesses remain localized to a degree (as discussed in another section below), there does not appear to be a continuity of residential location that is applicable to the Alaska crab fishery. This is due to the many changes within the cluster of individual species fisheries that make up the overall Alaska crab fishery, and others in which these fishermen may participate. In summary, this "community within the community" issue is not straightforward due to the complex nature of historical ties, continuity of fishing support sector location through time, changes in the technology and methods of fishing, and industrialization of the fishery. Clearly, Seattle represents a different pattern of colocation of residence and industry with respect to the BSAI crab fishery than that seen in the relevant Alaska communities.

The Ballard Interbay Northend Manufacturing Industrial Center

One of the fundamental purposes for the establishment of the BINMIC Planning Committee was the recognition that this area provided a configuration of goods and services that supported the historical, industrial, and maritime character of the region. At the same time, developmental regional dynamics are promoting changes within the BINMIC area that may threaten the continued vitality of its maritime orientation. Among other objectives, the BINMIC final plan states:

> The fishing and maritime industry depends upon the BINMIC as its primary Seattle home port. To maintain and preserve this vital sector of our economy, scarce waterfront industrial land shall be preserved for water-dependent industrial uses and adequate uplands parcels shall be provided to sufficiently accommodate marine-related services and industries (BINMIC Planning Committee 1998:6).

Previous documents produced for the NPFMC (e.g., NPFMC 2002; IAI 1998) have discussed the BINMIC area, and some of this information is abstracted below. It is now becoming dated, however, as the BINMIC planning document has remained in the form in which it was "finalized" and the City of

Seattle does not collect time series measures for the BINMIC area comparable to those, for example, collected for the Port of Seattle.

As previously noted, Ballard, in northwest Seattle, is commonly identified as the center of Seattle's fishing community. This may be true in a historical residential sense, but commercial fishing-related suppliers and offices are spread along both sides of Salmon Bay-Lake Washington Ship Canal, around Lake Union, along 15th Avenue West through Queen Anne, and then along the shores of Elliot Bay on both sides of Pier 91. Not surprisingly, this is also the rough outline of the formal boundaries of BINMIC, which is bordered by the Ballard, Fremont, Queen Anne, Magnolia, and Interbay neighborhoods. It is defined so as to exclude most residential areas, but to include manufacturing, wholesale trade, and transportation-related businesses. It includes rail transportation, ocean and freshwater freight facilities, fishing and tug terminals, moorage for commercial and recreational boats, warehouses, manufacturing and retail uses, and various port facilities (Terminal 86, Piers 90 and 91).

The BINMIC "Economic Analysis" document (Economic Consulting Services 1997) uses much of the same information as was reviewed above, in combination with an economic characterization of the BINMIC area, to establish that certain economic activities are especially important for that area. One of these activities is commercial fishing, although again the specific extent of connections to the BSAI crab fishery in particular are difficult to establish.

The BINMIC area is relatively small, but contributes disproportionately to the city and regional economy. Again, those characteristics are part of what determined its borders. The BINMIC resident population is only 1,120 (1990 census), but there are 1,048 businesses in the area and 16,093 employees. The great majority of business firms are small, 85 percent have fewer than 26 employees, but accounted for only 30 percent of total BINMIC employment. Self-employed individuals (i.e., fishermen) are probably not included in these numbers.

An important indicator of the importance of commercial fishing and other maritime activities is the availability of commercial moorage. As of 1994, more than 50 percent of all commercial moorage available in Puget Sound was located in Seattle, and of that, more than 50 percent was in the BINMIC area (representing 30 percent of all commercial moorage in the Puget Sound area). Thus, the BINMIC area is clearly important in terms of being an area where vessels (especially larger commercial vessels) are concentrated. The Port of Seattle has concluded that only the ports of Olympia and Tacoma at present provide a significant source of moorage in Puget Sound outside of Seattle. Port Angeles may build additional capacity at some point in the future. Olympia's facility was rebuilt in 1988. Some older moorage constructed of timber piling prior to 1950 is nearing the end of its useful life and will need to be replaced. On the other hand, it is expected that much of the private old timber moorage will not be replaced, so that overall moorage capacity will decline. In the Seattle area, there has also been a dynamic whereby commercial moorage had been converted to recreational moorage. Within the BINMIC area, recreational moorage within the UI Shoreline is prohibited altogether, because of the importance of commercial activity and the danger of interference from recreational moorage. The Port has concluded that it is unlikely that any new private commercial moorage will be developed (because of cost and regulatory regime) and is examining their options (Port of Seattle 1994). As previously mentioned, the Port is pursuing a program of repairing its facilities where economically feasible (when it can be fairly well assured of a steady tenant).

The BINMIC area is fairly well "built out." The BINMIC area contains 971 acres, divided into 806 parcels with an average size of 1.043 acres, but a median size of 0.207 acres. Thus there are many small parcels. Public entities of one sort or another own 574.8 acres (59 percent). The Port of Seattle is the largest landowner with 166 acres, while the city has 109 acres. Private land holders own 396 acres, of which only 19.45 acres were classified as vacant – 19.27 acres in 81 parcels as vacant industrial land and 0.18 acres in 2 parcels as vacant commercial land. An additional 200.76 acres were classified as "underutilized," meaning that it had few buildings or other improvements on it. This classification does

not mean that the land may not be in use in a fruitful way (for instance, storage of gear or other use that is not capital intensive).

Economic Consulting Services (1997, Appendix C) lists 85 companies that have a processing presence in Washington State. Of these, over half (47) are located in Seattle, with many in the surrounding communities (Bellevue, Kirkland, Redmond). Of these 47, at least 18 are located within the BINMIC area, and the rest are located very near the boundaries of the BINMIC. Some examples of fairly large fishing entities that are located within the BINMIC (as well as elsewhere) are Trident Seafoods, Icicle Seafoods, Ocean Beauty Seafoods, Peter Pan, Alaska Fresh Seafood, and NorQuest Seafoods. All demonstrate some degree of integration of various fishing industry enterprises.

The BINMIC area of Seattle displays the following characteristics, which indicate its important economic roles:

- significant component of, and plays a vital role in, the greater Seattle economy;
- integrated into local, regional, national, and multinational markets;
- key port for trade with Alaskan and the West Coast, Pacific, and Alaska fishing industries and the Alaskan fishery is especially significant;
- Salmon Bay, Ship Canal, and Ballard function as a small port of its own but also support fishing and a wide range of other maritime activities - including recreation and tourist vessels and activities; and
- an area of concentration of businesses, corporations, organizations, institutions, and agencies that participate in, regulate, supply, service, administer, and finance the fishing industry.

Importance of Fisheries and Seafood Industry

Chase and Pascall (1996) focus on the importance of Alaska as a market for Seattle region (Puget Sound) produced goods and services. They do so by identifying particular industrial sectors that generate the bulk of these economic impacts, but they do not locate these industrial sectors in terms of particular geographic locations within the region. In their discussion of the fisheries sector, Chase and Pascall indicate that only a fraction of the regional economy is based on fishing and seafood processing industries, but that these industry sectors are concentrated in several communities and rely heavily on North Pacific (Alaskan) resources. The communities that they single out are Bellingham, Anacortes, and the Ballard neighborhood of Seattle. They say that Seattle is the major base for vessels for various fisheries – groundfish (catcher vessels, catcher processors, motherships), halibut, crab, salmon, and others. There are numerous secondary processing plants in the region, and about 60 percent of the seafood harvested and shipped south for processing moves through the Port of Tacoma (Chase and Pascall 1996:23).

The relative value of Alaskan shellfish (crab, shrimp, etc.) for the Seattle fleet varies from year to year, but in 1994 was about 25 percent of the ex-vessel value of the Alaska/North Pacific commercial fishing harvest (Chase and Pascall 1996:26), which represented about 75 percent by harvest value, and 92 percent by weight, of all fish harvested by the Puget Sound fishing fleet (Chase and Pascall 1996:23 – citing ADF&G, NPFMC, NMFS). Since that time, crab harvests have declined considerably, however, so this percentage would now be smaller.

Other relatively recent work (Martin O'Connell Associates 1994) indicates the wide range of activities that the Port of Seattle supports and the web of support services that commercial fishing helps support, but it provides no measure of the contribution of the BSAI crab fishery to this support. Fishing activities are included in this study only to the extent that they are reflected in activities at Fishermen's Terminal. This would generally reflect Bering Sea and Gulf of Alaska catcher vessel activity but would also include a great number of other smaller vessels moored at Fishermen's Terminal. On the other hand, it would also include some Alaskan groundfish activity of similarly sized and somewhat larger vessels, and some factory trawlers. It would not include the activities of larger Alaskan groundfish vessels such as catcher processor, mothership, and secondary processing activities. By their estimation, fishing activity at

Fishermen's Terminal in 1993 generated 4,007 direct jobs (the majority of them crew positions), earning an average of $48,690 per direct job (total $195 million). Also, an additional 2,765 induced and indirect jobs were created. Fishing businesses also expended $145 million on local purchases of goods and services (Martin O'Connell Associates 1994:45-49). Again, this does not indicate the contribution of the BSAI crab fishery so much as it establishes that the local fishing/processing economy is densely developed.

Natural Resource Consultants (NRC) has compiled quite comprehensive accounts of commercial fishing activity by the Seattle and Washington state fleets (NRC 1986, 1999). They provide a brief historical narrative on the development of the various fisheries and then a more detailed summary of the status of fish stocks and historical harvest information. In 1986, the estimated ex-vessel value of the grand total of all seafood taken from local waters by Washington's local fleet was about $93 million (NRC 1986:18,19). Distant water fisheries, primarily in the Gulf of Alaska and the Bering Sea, yielded an estimated grand total of $290 million by 1,371 vessels with an aggregate crew of 6,088 (NRC 1986:28,33). The joint venture fleet accounted for about $80 million (ex-vessel) of this, with about 81 vessels and 405 crew, with an additional 11 catcher processors accounting for another $25 million (ex-vessel) and about 330 jobs. In terms of weight or volume, 92 percent of the seafood harvested by Washington fishermen came from Alaskan waters, and only 7 percent from local waters. In terms of ex-vessel value, the Alaskan harvest was worth $283 million and local harvest $110 million (and other harvest $8 million). None of these general statements had changed to any appreciable degree by 1998/99, and Alaskan distant waters fisheries still provided 95 percent of the harvest for the Washington state fishing fleet (NRC 1999).

Most of the Alaskan catch was processed to some extent in Alaska by processing entities based in Seattle (i.e., either by mobile facilities or onshore facilities owned by Seattle-based entities). NRC states that there were about 130 seafood processing/wholesaling and 33 wholesale/cold storage companies in Washington in 1985, operating 250 primary processing and wholesale plants in Washington and 120 shore based or at sea in Alaska. Washington processing employment was 4,000 seasonally and in Alaska was 8,000, with half coming from Washington (NRC 1986:35-39). A similar NRC study in 1988 found that Washington fishermen harvested about 80 percent (ex-vessel value) of their catch in distant waters, with 98 percent of that coming from Alaskan waters. About 72 Washington state vessels participated in the joint venture trawl fishery, directly employing about 360 people. There were also 43 catcher processors employing about 2,200 people, and 26 shore-based trawlers, employing about 130 people.

Turning to relatively more recent data, Chase and Pascall (1996) focus on the importance of Alaska as a market for Seattle region (Puget Sound) produced goods and services. They do so by identifying particular industrial sectors that generate the bulk of these economic impacts, but they do not locate these industrial sectors in terms of particular geographic locations within the region. In their discussion of the fisheries sector, Chase and Pascall indicate that only a fraction of the regional economy is based on fishing and seafood processing industries, but that these industry sectors are concentrated in several communities and rely heavily on North Pacific (Alaskan) resources. The communities that they single out are Bellingham, Anacortes, and the Ballard neighborhood of Seattle. They say that Seattle is the major base for vessels for various fisheries – groundfish (catcher vessels, catcher processors, motherships), halibut, crab, salmon, and others. There are numerous secondary processing plants in the region, and about 60 percent of the seafood harvested and shipped south for processing moves through the Port of Tacoma (Chase and Pascall 1996:23).

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A summary profile of the Puget Sound maritime industry, which includes commercial fishing, is included in Economic Development Council of Seattle and King County 1995 (Appendix A:39-49). Pertinent information has been abstracted here. The list of included businesses is quite long and is a good indicator of how far indirect benefits can spread:

> . . . cargo shipping, tugs and barges, commercial fishing and supply; ship and boat building; cruise ships; vessel design and repair; fueling; moorage; the fabrication and sale of marine gear such as electronics; refrigeration, hydraulics, and propulsion equipment; the operation of marinas, dry docks and boat yards; services provided by customs and insurance brokers and shipping agents; and maritime professional services including admittedly law, marine surveying and naval architecture (Appendix A:39).

It was estimated that in 1992 there were 30,000 jobs in the maritime sector within the four-county region, including 10,000 in commercial fishing, 7,000 in fish processing, 5,000 in marine recreation, and 3,900 in boat building and repair. Average wages were estimated at $24,000 for fish processors, $32,000 for ship and boat building and repair, and $50,000 to $80,000 for commercial fishing. The sector is one noted for providing entry-level positions for those with limited education and job skills, so that they can learn a high-wage job. Each job in this sector creates or supports one to two other jobs in the regional economy, and each dollar of sector output generates about one additional dollar in output from the rest of the economy.

Seattle offers the maritime sector, and the distant water fleet in particular, a "critical mass" of businesses that allows vessel owners and other buyers a competitive choice of goods and services. The same is true to a lesser extent of other regional ports, such as Tacoma. Efficient land transportation systems are also critical, and Seattle has good rail and truck linkages (and the Port of Seattle is working to improve them).

Although the maritime sector is an important one for the region, some of its components are currently experiencing some difficult times. Other regional communities (Anacortes, Bellingham, Port Townsend) as well as locations in Alaska (closer to the distant fishing waters) are working to develop port facilities to lure vessels so that they may gain the economic benefits of the associated support and supply business. Common sorts of projects are the improvement of shoreside access, building additional moorage, or work and storage capacity.

NRC revised some of their earlier work and added additional analysis focused specifically on the contributions of inshore Washington state (but also Alaska) processing plants to the Washington State economy (NRC 1991/92, 1997). The Washington inshore seafood processing industry purchased $859.5

million of raw material in 1991, $720.1 million from Alaska, and $139.4 million from Washington waters. Salmon accounted for 46 percent of the total value of these purchases, shellfish for 20 percent, groundfish for 19 percent, halibut for 11 percent, and other species for much less. The total finished product from all this raw material was worth $2.1 billion ($1.8 billion from the Alaskan raw material). Salmon accounted for $780 million of the final product's value, shellfish for $563 million, and groundfish for $482 million. "... inshore processors operating in Alaska and Washington account for more than 50 percent of the value of U.S. seafood exports" (NRC nd:4). For 1996, the total purchased was comparable at $877.2 million – 41 percent salmon, 20 percent shellfish, groundfish 15 percent, halibut 9 percent, herring 7 percent, and other species much less. The total finished product totaled $2.17 billion, $1.9 billion from Alaskan material. Salmon accounted for 35 percent, shellfish for 28 percent, and groundfish for 18 percent. Thus Alaskan shellfish is at least as important in terms of value of product as is groundfish for 1991-1996.

Expenditure patterns for Washington (and Washington-owned Alaskan) inshore plants were modeled in these NRC documents. Inshore plants expenditures average 46 percent for their raw materials (fish and shellfish), 16 percent for wages and benefits, 9 percent for processing materials, and 7 percent for tendering and other transportation costs. About 55 percent of these expenditures were made in Washington, 43 percent in Alaska, and 2 percent from other states. This is stated to include fish and shellfish purchased in Alaska from fishermen who homeport in Washington (NRC nd:9), and economic benefits were produced from these expenditures in direct proportion to their magnitude.

The estimated total economic output from primary and secondary processing activities for all seafood to the Washington state economy in 1991 was calculated to be $1.865 billion. This was the result of three main factors (in order of their significance in terms of contributions to economic benefits):

- A substantial portion of expenditures for raw material (fish) in Alaska is made to fishermen whose home ports are in Washington.
- The majority of administrative and sales functions of processing companies are carried out in Washington.
- A major portion of support industries (equipment and packaging manufacturing) is located in Washington.

In 1996 the Washington inshore seafood industry generated 32,837 full-time equivalent jobs (21,308 in Washington and 11,529 in Alaska) and $791 million of earnings impacts ($532 million in Washington and $259 million in Alaska). In terms of economic output, it contributed $1.9 billion to the Washington state economy and $1.2 billion to the Alaska state economy (NRC 1997). As noted earlier, these data underscore the interrelatedness of the economies of Alaska and Washington and, as has been seen through the sector profiles and the ties to particular communities, the ties between Seattle and specific Alaska communities. Companies based in Washington depend on Alaska fisheries for the great bulk of the raw materials processed in Washington, and residents of both states harvest Bering Sea resources. Also, as noted earlier, the corporate offices and sales outlets of the processing companies are located in Washington, as are most of the suppliers and support services for the industry.

APPENDIX 2. Allocation Percentages

Table A2-1 Percent of the Amendment 80 species allocated to the Non-AFA Trawl CP sector

Year	Average Annual Retained Catch of Sector	Average Annual Total Catch of Sector	Option 3.1 (Total/Total)	Option 3.2 (Retain/Retain)	Option 3.3 (Retain/Total)
Atka Mackerel (2005 ITAC was 6,375 mt EAI/BS, 30,175 mt CAI, & 17,000 mt WAI)					
1995-2003	45,236	52,391	84.8%	91.9%	73.2%
1997-2002	39,924	44,608	84.6%	92.5%	75.7%
1998-2002	39,440	43,899	87.6%	96.1%	78.7%
1998-2003	39,159	44,739	88.1%	96.7%	77.1%
1999-2003	39,009	44,965	90.3%	99.6%	78.3%
2000-2003	37,708	44,088	90.3%	99.8%	77.2%
Flathead Sole (2005 ITAC was 16,575 mt)					
1995-2003	10,584	13,701	76.4%	97.1%	59.0%
1997-2002	11,888	15,140	78.6%	97.4%	61.7%
1998-2002	12,245	15,289	80.5%	97.9%	64.5%
1998-2003	11,725	14,630	80.8%	98.1%	64.7%
1999-2003	10,969	13,632	80.9%	98.2%	65.1%
2000-2003	10,804	13,438	80.9%	98.1%	65.0%
AI Pacific Ocean Perch (2005 ITAC was 2,618 mt EAI, 2,580 mt CAI, & 4,322 mt WAI)					
1995-2003	8,444	9,766	90.6%	99.0%	78.3%
1997-2002	8,195	9,283	92.9%	99.9%	82.0%
1998-2002	7,769	8,828	93.3%	100.0%	82.1%
1998-2003	8,112	9,331	91.4%	99.2%	79.5%
1999-2003	8,193	9,492	90.9%	99.1%	78.5%
2000-2003	7,847	9,170	91.0%	98.8%	77.9%
Rock Sole (2005 ITAC was 35,275 mt)					
1995-2003	13,020	29,149	65.8%	94.1%	29.4%
1997-2002	13,133	29,616	67.9%	94.2%	30.1%
1998-2002	11,875	27,132	69.9%	95.9%	30.6%
1998-2003	12,126	27,075	70.8%	96.6%	31.7%
1999-2003	12,684	27,988	71.5%	96.8%	32.4%
2000-2003	13,380	28,463	73.4%	96.9%	34.5%
Yellowfin Sole (2005 ITAC was 77,083 mt)					
1995-2003	51,892	67,536	67.6%	78.1%	52.0%
1997-2002	52,940	67,782	71.3%	82.6%	55.7%
1998-2002	45,501	59,042	75.9%	88.5%	58.5%
1998-2003	46,968	59,864	77.6%	89.6%	60.9%
1999-2003	45,621	57,453	79.4%	91.3%	63.0%
2000-2003	48,099	59,622	80.9%	92.8%	65.3%

[a]Data is not yet available for the 2004 period, so 2003 was the latest year used.

Source: Data summarized from 1995-2003 NOAA Fisheries Weekly Production Reports and 1995-2003 ADFG groundfish fish tickets. Total harvest for all sectors is from NOAA Fisheries blend data (1995-2002) and Catch Accounting System (2003). The 2003 fish ticket data should be considered preliminary.

APPENDIX 3. Draft Cost, Earnings and Employment Survey

This survey is provided to inform the reader of the types of data that are anticipated being collected. Before the survey can be finalized, it will need to undergo additional review by economists working with the effected members of the Non-AFA Trawl CP sector. That review and the development process are intended to be completed in a timely fashion so it will not delay implementation of the overall program.

Cost, Earnings and Employment Survey
for
Non-AFA Trawl Catcher-Processors

Vessel Name: **{provide info we have}**

Owner: **{provide info we have}**

Instructions for Completing Questionnaires

This questionnaire is designed to collect information on individual vessels even if the vessel is part of a larger company. The intent is to evaluate each vessel as a stand-alone entity. If this vessel is part of a larger company with multiple vessels or other operations we request that you report only costs and revenues that are allocated to this vessel.

Person Completing the Survey
Name:_____

Title: _____

Telephone Number:_____FAX _____

E-mail address:_____

Current Company and Vessel Information

1. Please verify or correct the following information about the owner of this vessel.

If all of the information in the table below is correct, please check (✓) this box ☐.

Item	**(1)** **Information On Record**	**(2)** **CORRECTIONS or ADDITIONS**
a. Vessel Name	[provide information we have]	
b. Owner	[provide information we have]	
c. Address 1	[provide information we have]	
d. Address 2	[provide information we have]	
e. City	[provide information we have]	
f. State	[provide information we have]	
g. Zip	[provide information we have]	

2. What was the starting date (mm/dd/yyyy) of this vessel's 2006 fiscal year?

STARTING DATE OF 2006 FISCAL YEAR (___/___/___)
mm dd yyyy

3. Please verify or correct the following information about this vessel.

If all of the information in the table below is correct, please check (✓) this box ☐.

Item	(1) Information on Record	(2) CORRECTIONS or ADDITIONS
a. USCG Vessel ID	[provide info we have]	
b. ADF&G Vessel ID	[provide info we have]	
c. Home Port	[provide info we have]	
d. US Gross Registered Tonnage	[provide info we have]	
e. Net Tonnage	[provide info we have]	
f. Length Overall	[provide info we have]	
g. Beam	[provide info we have]	
h. Shaft Horsepower	[provide info we have]	
i. Fuel Capacity (US gal.)	[provide info we have]	
j.Year Built	[provide info we have]	
k. Year of rebuild		

4. What was the most recent survey value, rounded to the nearest 100 dollars, of the vessel and equipment (fair market value)?

US $ _____ SURVEY VALUE (FAIR MARKET VALUE)

4a. What was the date (mm/dd/yyyy) of this vessel's last value survey?

____/____/_____ DATE OF LAST VALUE SURVEY

mm dd yyyy

4b. Did the survey value given above reflect the value of permits and groundfish licenses associated with the vessel at the time of the value survey?

1 YES (Value of permits/licenses $_____)

2 NO

4c. Did the survey value given above reflect the value of processing equipment on the vessel at the time of the value survey?

1 YES (Value of that equipment $_____)

2 NO

Fiscal Year 2006 Questionnaire

All of the following questions pertain to the vessel's fiscal year.

Section 1: Vessel Characteristics in Fiscal Year 2006

1.1 How much freezer space (measured in pounds of product) did the vessel have at the beginning of fiscal year 2006 (round to the nearest 100 pounds)?

a. Product Freezer Storage _____Lbs.

1.2 Please indicate the number and type of processing equipment this vessel had in place at the beginning of the 2006 fiscal year for each type listed below.

	Manufacturer	Model #	Model Year	Number of Units
Example:	Baader	176	2001	2
1.	_____	_____	_____	_____
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____
7.	_____	_____	_____	_____
8.	_____	_____	_____	_____
9.	_____	_____	_____	_____

1.3 For each of the following activities please give the vessel's average fuel consumption per hour during fiscal year 2006. If not applicable please write "NA".

ACTIVITIES	GALLONS OF FUEL PER HOUR
a. Fishing and processing North Pacific groundfish	
b. Steaming - fully loaded with product	
c. Steaming - empty	

1.4 Fuel Usage and Days Fished during fiscal year 2006. Any portion of a day fished or processing would count as one day.

Total Gallons of Fuel Used in 2006: _____ Gallons

Total Cost of Fuel for Vessel in 2006 $_____

Total Days Fished (groundfish) in 2006 _____Days

Total Days Fished (Other species) in 2006 _____Days

Total Days Spent Processing in 2006 _____Days

Section 2: Fiscal 2006 Revenues

2.1 Please give the total amount of revenue received from each of the following categories for fiscal year 2006 (rounded to the nearest 100 dollars).

REVENUE CATEGORY	(US $)
a. Total fishery product sales revenue (including inventory)	
b. Income derived from lease of fishery permits or catch/processing rights normally associated with this vessel	
c. All other income derived from vessel operations (e.g., tendering, charters, cargo transport, etc.)	

2.2 Please give the number of days in fiscal 2006 that the vessel was laid up or in the shipyard.

_____ DAYS LAID UP OR IN SHIPYARD

Section 3: Fiscal 2006 Expenditures and Materials Usage

Capital Expenditures

3.1 Please give the fiscal year 2006 **capital expenditures** associated with each of the following categories for this vessel. Round all answers to the nearest 100 dollars.

CAPITAL EXPENDITURE CATEGORY	TOTAL CAPITALIZED EXPENDITURE(US $)
a. Purchases of fishery permits and licenses (capitalized)	
b. Fishing gear (nets, net electronics, doors, cables, etc.)	
c. Expenditures on processing equipment	
d. Expenditures on vessel and on-board equipment (other than fishing gear or processing equipment)	
e. Other capital expenditures related to vessel operations	

Expenses

3.2 For each expense category, please provide the total 2006 fiscal year expenditure. Round all answers to the nearest 100 dollars.

EXPENSE CATEGORY	TOTAL EXPENDITURES for 2006 FISCAL YEAR (US $)
a. CDQ royalties	
b. Uncapitalized lease or purchase of fishery permits or catch/processing quota	
c. Fisheries landings taxes	
d. Observer fees	
e. Technicians (on board)	
f. Processing labor expenses (including bonuses and payroll taxes but excluding benefits and insurance)	
g. Labor expenses for all other crew on board the vessel (including bonuses and payroll taxes but excluding benefits and insurance)	
h. Fuel and lube	
i. Food and provisions (not paid by crew)	

j. Product packaging materials	
k. Cooperative costs (including lawyer and accountant costs, association fees, reporting costs, etc.)	
l. Total fish purchases (excluding those accounted for in (a) and (b))	
m. Sales cost for non-FOB sales	
n. Freight and storage cost other than for products (e.g., gear, supplies, etc.)	
o. Lease expenses for this vessel and all on-board equipment	
p. Repair and maintenance expenses for vessel and processing equipment (including shipyard accrual and all purchases of parts and equipment that were expensed in fiscal year 2006)	
q. Fishing gear leases, repairs and purchases fully expensed in fiscal year 2006 (e.g., nets, net electronics, doors, cables, etc.)	
r. Insurance (vessel insurance, P&I, and other insurance associated with the operation of this vessel)	
s. Recruitment, travel, benefits and other employee related costs (excluding food and provisions and other employee costs already provided in question 3.3 e. and 3.3 f.)	
t. General and Administrative (including professional services and management fees, excluding costs under 3.2(k))	
u. Interest payments	
v. Depreciation and Amortization	
w. Capital Construction Fund (CCF) contributions	
x. All other expenses not included in this table (excluding capitalized expenditures)	

Section 4: Fiscal 2006 Labor

4.1 Please provide the average number of processing positions and the average number of all other positions **aboard** this vessel while fishing and processing during the 2006 fiscal year. The sum of the number of positions should equal the total number of employees aboard the vessel (on average).

Average Number of Processing Positions _____

Total Number of Processing Employees that worked on the vessel during 2006 _____

Average Number of all Fishing Positions _____

Total Number of Harvesting Employees that worked on the vessel during 2006 _____

Average Number of Other Vessel Support Positions _____

Total Number of Vessel Support Employees that worked on the vessel during 2006 _____

4.2. On average, how many hours per day did a typical processing line employee work during fiscal year 2006? _____Hours

4.3 Did the vessel use a crew or revenue share system to pay processing or non-processing crew in fiscal year 2006? (C*ircle one number for each*)

	YES	NO
a. To pay <u>some</u> processing crew	1	2
b. To pay <u>all</u> processing crew	1	2
c. To pay <u>some</u> non-processing crew	1	2
d. To pay <u>all</u> non-processing crew	1	2

APPENDIX 4. BSAI Catcher Processor Capacity Reduction Program and Letters to NPFMC from NOAA-GC

One Hundred Eighth Congress
of the
United States of America
AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,
the twentieth day of January, two thousand and four

An Act

Making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2005, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Consolidated Appropriations Act, 2005'.

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

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 GROUNDFISH FISHERY- The term `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.

(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.

(b) AUTHORITY FOR BSAI CATCHER PROCESSOR CAPACITY REDUCTION PROGRAM-

(1) IN GENERAL- A fishing capacity reduction program for the non-pollock groundfish fishery in the BSAI is authorized to be financed through a capacity reduction loan of not more than $75,000,000 under sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f and 1279g).

(2) RELATIONSHIP TO MERCHANT MARINE ACT, 1936- The fishing capacity reduction program authorized by paragraph (1) shall be a program for the purposes of subsection (e) of section 1111 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f), except, notwithstanding subsection (b)(4) of such section, the capacity reduction loan authorized by paragraph (1) may have a maturity not to exceed 30 years.

(c) AVAILABILITY OF CAPACITY REDUCTION FUNDS TO CATCHER PROCESSOR SUBSECTORS-

(1) IN GENERAL- The Secretary shall make available the amounts of the capacity reduction loan authorized by subsection (b)(1) to each catcher processor subsector as described in this subsection.

(2) INITIAL AVAILABILITY OF FUNDS- The Secretary shall make available the amounts of the capacity reduction loan authorized by subsection (b)(1) as follows:

(A) Not more than $36,000,000 for the longline catcher processor subsector.

(B) Not more than $6,000,000 for the AFA trawl catcher processor subsector.

(C) Not more than $31,000,000 for the non-AFA trawl catcher processor subsector.

(D) Not more than $2,000,000 for the pot catcher processor subsector.

(3) OTHER AVAILABILITY OF FUNDS- After January 1, 2009, the Secretary may make available for fishing capacity reduction to one or more of the catcher processor

subsectors any amounts of the capacity reduction loan authorized by subsection (b)(1) that have not been expended by that date.

(d) BINDING REDUCTION CONTRACTS-

(1) REQUIREMENT FOR CONTRACTS- The Secretary may not provide funds to a person under the fishing capacity reduction program authorized by subsection (b) if such person does not enter into a binding reduction contract between the United States and such person, the performance of which may only be subject to the approval of an appropriate capacity reduction plan under subsection (e).

(2) REQUIREMENT TO REVOKE LICENSES- The Secretary shall revoke all Federal fishery licenses, fishery permits, and area and species endorsements issued for a vessel, or any vessel named on an LLP license purchased through the fishing capacity reduction program authorized by subsection (b).

(e) DEVELOPMENT, APPROVAL, AND NOTIFICATION OF CAPACITY REDUCTION PLANS-

(1) DEVELOPMENT- Each catcher processor subsector may, after notice to the Council, submit to the Secretary a capacity reduction plan for the appropriate subsector to promote sustainable fisheries management through the removal of excess harvesting capacity from the non-pollock groundfish fishery.

(2) APPROVAL BY THE SECRETARY- The Secretary is authorized to approve a capacity reduction plan submitted under paragraph (1) if such plan--

(A) is consistent with the requirements of section 312(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(b)) except--

(i) the requirement that a Council or Governor of a State request such a program set out in paragraph (1) of such subsection; and

(ii) the requirements of paragraph (4) of such subsection;

(B) contains provisions for a fee system that provides for full and timely repayment of the capacity reduction loan by a catcher processor subsector and that may provide for the assessment of such fees based on methods other than ex-vessel value of fish harvested;

(C) does not require a bidding or auction process;

(D) will result in the maximum sustained reduction in fishing capacity at the least cost and in the minimum amount of time; and

(E) permits vessels in the catcher processor subsector to be upgraded to achieve efficiencies in fishing operations provided that such upgrades do not result in the vessel exceeding the applicable length, tonnage, or horsepower limitations set out in Federal law or regulation.

(3) APPROVAL BY REFERENDUM-

(A) IN GENERAL- Following approval by the Secretary under paragraph (2), the Secretary shall conduct a referendum for approval of a capacity reduction plan for the appropriate catcher processor subsector. The capacity reduction plan and fee system shall be approved if the referendum votes which are cast in favor of the proposed system by the appropriate catcher processor subsector are--

(i) 100 percent of the members of the AFA trawl catcher processor subsector; or

(ii) not less than 2/3 of the members of--

(I) the longline catcher processor subsector;

(II) the non-AFA trawl catcher processor subsector; or

(III) the pot catcher processor subsector.

(B) NOTIFICATION PRIOR TO REFERENDUM- Prior to conducting a referendum under subparagraph (A) for a capacity reduction plan, the Secretary shall--

(i) identify, to the extent practicable, and notify the catcher processor subsector that will be affected by such plan; and

(ii) make available to such subsector information about any industry fee system contained in such plan, a description of the schedule, procedures, and eligibility requirements for the referendum, the proposed program, the estimated capacity reduction, the amount and duration, and any other terms and conditions of the fee system proposed in such plan.

(4) IMPLEMENTATION-

(A) NOTICE OF IMPLEMENTATION- Not later than 90 days after a capacity reduction plan is approved by a referendum under paragraph (3), the Secretary shall publish a notice in the Federal Register that includes the exact terms and conditions under which the Secretary shall implement the fishing capacity reduction program authorized by subsection (b).

(B) INAPPLICABILITY OF IMPLEMENTATION PROVISION OF MAGNUSON- Section 312(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(e)) shall not apply to a capacity reduction plan approved under this subsection.

(5) AUTHORITY TO COLLECT FEES- The Secretary is authorized to collect fees to fund a fishing capacity reduction program and to repay debt obligations incurred pursuant to a plan approved under paragraph (3)(A).

(f) ACTION BY OTHER ENTITIES- Upon the request of the Secretary, the Secretary of the Department in which the National Vessel Documentation Center operates or the Secretary of the Department in which the Maritime Administration operates, as appropriate, shall, with respect to any vessel or any vessel named on an LLP license purchased through the fishing capacity reduction program authorized by subsection (b)--

(1)(A) permanently revoke any fishery endorsement issued to the vessel under section 12108 of title 46, United States Code;

(B) refuse to grant the approval required under section 9(c)(2) of the Shipping Act, 1916 (46 U.S.C. App. 808(c)(2)) for the placement of the vessel under foreign registry or the operation of the vessel under the authority of a foreign country; and

(C) require that the vessel operate under United States flag and remain under Federal documentation; or

(2) require that the vessel be scrapped as a reduction vessel under section 600.1011(c) of title 50, Code of Federal Regulations.

(g) NON-POLLOCK GROUNDFISH 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.

(h) REPORTS-

(1) REQUIREMENT- The Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Resources of the House of Representatives 5 reports on the fishing capacity reduction program authorized by subsection (b).

(2) CONTENT- Each report shall contain the following:

(A) A description of the fishing capacity reduction program carried out under the authority in subsection (b).

(B) An evaluation of the cost and cost-effectiveness of such program.

(C) An evaluation of the effectiveness of such program in achieving the objective set out in section 312(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(b)).

(3) SCHEDULE-

(A) INITIAL REPORT- The Secretary shall submit the first report under paragraph (1) not later than 90 days after the date that the first referendum referred to in subsection (e)(3) is held.

(B) SUBSEQUENT REPORTS- During each of the 4 years after the year in which the report is submitted under subparagraph (A), the Secretary shall submit to Congress an annual report as described in this subsection.

(i) CONFORMING AMENDMENT- Section 214 of the Department of Commerce and Related Agencies Appropriations Act, 2004 (title II of division B of Public Law 108-199; 118 Stat. 75) is amended by striking `that--' and all that follows, and inserting `under the capacity reduction program authorized in section 219 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005.'.

SEC. 220. None of the funds appropriated in this Act or any other Act may be used to disqualify any community which was a participant in the Bering Sea Community Development Quota program on January 1, 2004, from continuing to receive quota allocations under that program.

SEC. 221. In addition to amounts made available under section 214 of the Department of Commerce and Related Agencies Appropriations Act, 2004 (title II of division B of Public Law 108-199; 118 Stat. 75), of the funding provided in this Act under the heading `NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, OPERATIONS, RESEARCH, AND FACILITIES', $250,000, to remain available until expended, for the Federal Credit Reform Act cost of a reduction loan under sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f and 1279g), not to exceed an additional $25,000,000 in principal, for the capacity reduction program authorized in section 219.

This title may be cited as the `Department of Commerce and Related Agencies Appropriations Act, 2005'.

North Pacific Fishery Management Council

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December 29, 2004

Ms. Lisa Lindeman
NOAA General Counsel
P.O. Box 21109
Juneau, AK 99801

Dear Lisa:

Based on discussions at our recent December Council meeting, there are several issues for which we are seeking legal guidance. Some of these will benefit from such guidance at or before our February 2005 meeting, including the BSAI non-pollock groundfish fisheries (and recent legislation in that regard), and the GOA rockfish pilot program. These issues are summarized below:

BSAI Non-Pollock Groundfish Fisheries

In Section 219 of the FY 2005 Appropriations Act is a BSAI Catcher Processor Capacity Reduction Program. The program authorizes $75 million to reduce the capacity of the catcher processor fleets operating in the BSAI. The program also limits access to the non-pollock groundfish fisheries defined by the Act as the Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, or yellowfin sole fisheries in the BSAI. The Council at the December 2004 meeting, asked NOAA GC to provide clarification at the February 2005 meeting of this new program to help interpret the effects on existing management regulations, and those currently under consideration by the Council. Listed below are some of the specific issues of the program that need further clarification.

1. Section 219 (1) of the Act defines AFA Trawl Catcher Processor subsector as owners of each catcher processor listed in paragraphs (1) through (20) of Section 208(e) of the AFA (16 U.S.C. 1851 note). However, Section 208(e) paragraph (21) of the AFA includes certain vessels in the BSAI pollock fisheries that have harvested more than 2,000 metric tons of the pollock in the 1997 directed pollock fishery. Given that the Capacity Reduction Program definition of AFA includes only paragraphs (1) through (20) of Section 208(e) and not paragraph (21), NOAA GC should clarify

    a. Whether those vessels that qualify for the BSAI pollock fisheries under paragraph (21) of Section 208(e) are precluded from participating in the Capacity Reduction Program and the non-pollock groundfish fishery as AFA vessels.
    b. Whether those vessels that qualify for the BSAI pollock fisheries under paragraph (21) of Section 208(e) would qualify as Non-AFA Trawl Catcher Processor subsector (provided that they meet the harvest requirements defined by the Act for that sector).

2. Section 219 (6) and (9) define the Longline Catcher Processor subsector and the Pot Catcher Processor subsector, respectively, for purposes of the Capacity Reduction Program and participation in the non-pollock groundfish fisheries. In general, to qualify a participant must have an LLP license that is non-interim and transferable (or that is interim and subsequently becomes non-interim and transferable) and that is endorsed for Bering Sea or Aleutian Islands fixed gear catcher processor fishing activity, with a Pacific cod endorsement. NOAA GC should clarify:

    a. Whether only LLPs that carry all of these endorsements (including the Pacific cod endorsement) would be eligible to participate in the Capacity Reduction Program or the non-pollock groundfish fisheries as defined by the Act, in their respective sectors.
    b. Whether LLPs that carry BS and/or AI, catcher processor, fixed gear endorsements are eligible to participate in the non-pollock groundfish fisheries as defined by the Act as catcher vessels (if they are precluded from participating in those fisheries as catcher processors).

3. Section 219 generally defines each sector as being composed of the person who owns a vessel or holds a license or both. Given this wording, the Act is unclear concerning eligibility to participate in the buyback or the non-pollock fisheries.

    a. Does the act authorize entry to the fishery by:
        i. Specific persons ?
        ii. Specific vessels ?
        iii. Holders of specific licenses?

4. Section 219(7) defines the Non-AFA Trawl Catcher Processor subsector as the owner of each trawl catcher processor that is not an AFA trawl catcher processor that holds a valid LLP license with Bering Sea or Aleutian Islands endorsement and 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.

    a. In determining qualification for the sector, should the catch history associated with the vessel or the LLP be considered for meeting the harvest tonnage requirement? G
    b. Given that the Council is currently developing a cooperative program for the non-AFA trawl catcher processors along with allocations for the non-pollock groundfish fisheries in Amendment 80, can the Council adopt a more stringent eligibility requirement for participation in non-AFA trawl catcher processor cooperatives than the eligibility requirement set out in the Act?

5. Section 219 does not include certain species (e.g., arrowtooth flounder) in its definition of the non-pollock groundfish fisheries.

    a. Since some potential target species are not included in the definition of the non-pollock groundfish fisheries, will vessels that hold an LLP, but that do not meet eligibility requirements for participation in the "non-pollock groundfish fisheries" under the statute, be permitted to enter the non-pollock target fisheries not specifically identified in the statute?

6. Relative to further development of Amendment 80 (allocations of flatfish species and cooperative development for the H&G catcher/processor sector), if the Council continues its current course and does not include allocations of those species to AFA sectors, would that in any way compromise those sectors' eligibility for the legislated non-pollock buyback program?

7. An additional, general question concerns the LLP aspects of the legislation; i.e., to the extent that certain aspects of the legislation change the existing LLP eligibility requirements (for purposes of the buyback and/or future fishing privileges), how and when do such changes get implemented? Is an FMP amendment, or regulatory amendment, required to bring our plans in conformance with the legislation? If so, is such an action subject to existing MSA, NEPA, and other requirements, given that the legislation is quite specific in these areas, and does not appear to offer latitude to the Council or NMFS? Should ongoing analyses (such as those associated with Amendment 80 and with Pacific cod allocations in the BSAI) incorporate the assumed license reductions effected by the legislation?

Observer Program Issues

1. Research Plan authority: NOAA GC has made a preliminary determination that the Research Plan authority provided in the MSA (Section 313) to assess a fee for observer coverage cannot be applied to only a subset of vessels in the fisheries for which the Council and NMFS have the authority to establish a fee program. Therefore, according to this determination, any new program for selective fisheries (Alternatives 2 - 6 in the current observer analysis) under the Council's jurisdiction is likely to require statutory authorization unless it is determined that different fees can be assessed against different fisheries/sectors. A need was identified at the December Council meeting to have a formal opinion developed on this issue, in order to have a definitive understanding of whether statutory changes are associated with implementing the alternatives to restructure the funding and deployment mechanism of the NPGOP.

2. Frameworking: While it is expected that the Council and NMFS can set an initial fee percentage that is likely to be sufficient to maintain current coverage levels, some mechanism must be established through which the fee percentage can be adjusted to account for changing management programs and coverage needs, as well as changing coverage costs and ex-vessel prices. The original Research Plan created a framework process under which fee percentages could be adjusted on an annual basis (subject to a 2% cap in statute) in response to changing coverage needs. However, recent (informal) legal guidance on frameworking suggests that an open framework of this sort may no longer be acceptable under the requirements of the Administrative Procedure Act, should the framework mechanism provide NMFS and the Council with the ability to make discretionary changes to the fee percentage. Such discretionary changes may need to undergo the process of notice and comment rulemaking. Additional legal guidance is necessary to determine if any options exist for discretionary fee adjustments that do not involve notice and comment rulemaking.

In addition, the IFQ cost recovery program provides a mechanism by which the IFQ fee is adjusted on an annual basis according to a formula specified in regulation (meaning, no discretionary changes to the fee are possible). Because this formula is explicit and adhered to rigidly each year, NMFS may adjust the IFQ fee percentage on an annual basis through a Federal Register notice without the need for formal notice and comment rulemaking. A general assumption of the current observer analysis is that the Council and NMFS could potentially use the IFQ cost recovery approach to provide annual adjustments to the observer fee

percentage, as long as the formula is explicit and in regulation. While this does not resolve the concern with the inability to make discretionary changes to the fee percentage based on changing management needs, it is necessary to understand the options for adjusting the fee percentage. Legal guidance is requested to confirm this assumption.

Rockfish Pilot Program

Authority to implement the alternatives. The rationalization alternatives under this program are unique, and the ability of the Council to adopt and the Secretary to implement these alternatives could be questioned. The alternatives are:

1) Cooperative alternative with a closed class of processors. Under this alternative, harvesters would be permitted to form cooperatives. Cooperatives would receive an allocation based on the history of their members in the harvester qualifying years. Cooperatives would be required to land their harvests with eligible processors. Processors that processed in excess of a threshold amount of rockfish during the years defined by the statute would be eligible.
2) Cooperative alternative with processor associations. Under this alternative, each harvester would be eligible to join a cooperative in association with the processor to which it delivered the most pounds in the processor qualifying years defined by the statute. Cooperatives would receive an allocation based on the history of their members in the harvester qualifying years defined in the statute. The specific terms of the cooperative agreement would be subject to negotiation and must be approved by the processor. Although not specified in the description of the alternative, the agreement is likely to create an obligation for the cooperative to deliver a specific portion of landings to the associated processor. Harvester that do not join a cooperative would be permitted to fish in a limited access fishery that would receive an allocation based on the collective histories of non-members of cooperatives.

Membership of processor affiliates in cooperatives. Under all of the alternatives, some processor affiliates are likely to receive harvest shares (or could acquire harvest shares after implementation). The Council is likely to ask for guidance on whether processor affiliates would be permitted to join cooperatives. If so, the scope of cooperative activities that processor affiliates can engage in should be specifically defined.

Penalties for non-members of cooperatives. As defined some of the provisions in the alternatives would reduce allocations to the limited access fishery that are fished by non-members of cooperatives. Some industry members have questioned whether such a reduction is legal (with or without Congressional authority). It is possible that the allocation to the limited access fishery may not be large enough to support a directed fishery. Whether the reduction in the allocation would be the cause of not opening the limited access fishery is uncertain.

Qualifying years for determining allocations. The legislation directing the Secretary to develop the pilot program specifies years of history to recognize for harvesters and for processors. To what extent may the Council recognize different years under its program. The Council could choose either to recognize additional years not specified in the legislation or not recognize some of the years that are specified in the legislation. Does the Council have different latitude with respect to harvesters than for processors?

BSAI Pacific cod allocation

A question that has once again arisen is that of the disposition of the catch history of the 'AFA 9'; i.e., those nine specific vessels which were explicitly addressed in the American Fisheries Act, and whether the non-pollock catch history of those vessels can be counted in determining catch history for the overall AFA catcher/processor sector. Could you please reaffirm or clarify any previous legal opinions in this regard, as it will potentially be a consideration in the Council's development of the BSAI Pacific cod sector allocations?

In summary Lisa, I realize there are a number of significant legal issues raised in this letter. The Council would appreciate your office's response in as timely a manner as is practicable.

Sincerely,

Chris Oliver
Executive Director

CC: Dr. James Balsiger
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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

February 9, 2005

MEMORANDUM FOR: Chris Oliver, Executive Director
North Pacific Fishery Management Council

THROUGH: Lisa L. Lindeman
Alaska Regional Counsel

FROM: Lauren M. Smoker
Attorney-Advisor

SUBJECT: Responses to Council Questions 4.b and 6 concerning the BSAI non-pollock groundfish fisheries

This memorandum responds to your letter of December 29, 2004, requesting legal guidance on several issues concerning the statutory provisions for the BSAI non-pollock groundfish fishery and the BSAI Catcher Processor Capacity Reduction Program (hereinafter referred to as the "Capacity Reduction Program") that are included in the Department of Commerce and Related Agencies Appropriations Act, 2005, which is included in Public Law No. 108-447 (hereinafter referred to as the "Act").[1] For convenience, a copy of the Act is attached to this memorandum. We are providing responses to Questions 4.b and 6. We have not fully developed responses to the remaining questions. We will provide those to you as soon as possible and before the April 2005 Council meeting.

The questions the Council has posed involve issues of statutory interpretation. Therefore, the following brief overview of two main tenets or rules of statutory construction is provided as a starting point for our responses. First, under the rules of statutory construction, the language of a statute is controlling and takes precedence over the language of a regulation if the regulation is not consistent with the statutory language.[2] A statute is the charter for the administrative agency charged with implementing it.[3] A regulation issued by an agency under the authority of a

[1]Your letter also contained questions for NOAA General Counsel in other topic areas, such as Gulf of Alaska rockfish and observers. Our office has responded or will respond to those questions separately.

[2]Singer, Norman J., Sutherland Statutory Construction §31:02 (5th ed. 1992).

[3]*Id.*

particular statute therefore must be authorized by and consistent with the statute, and administrative action cannot be in excess of the authority conferred by the statute.[4] Because Congress is the source of a federal administrative agency's powers, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation implementing that statute.[5]

Second, when the language of a statute is clear and unambiguous and not unreasonable or illogical in its operation, a court may not go outside the language of the statute for its meaning.[6] This is known as the plain meaning rule. Only statutes that are ambiguous are subject to the process of statutory interpretation.[7] Ambiguity exists when a statute is capable of being understood by reasonably well informed persons in two or more different senses.[8] Even if a specific provision is clearly worded, ambiguity can exist if some other section of the statutory program expands or constricts the provision's meaning, if the plain meaning of the provision is repugnant to the general purview of the act, or if the provision when considered in conjunction with other provisions of the statutory program import a different meaning.[9]

The Council's questions 4.b and 6 and NOAA GC's responses are provided below.

Council Question 4.b: Section 219(a)(7) defines the Non-AFA Trawl Catcher Processor subsector as the owner of each trawl catcher processor that is not an AFA trawl catcher processor, that holds a valid LLP license with Bering Sea or Aleutian Islands endorsement, and 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:

b. Given that the Council is currently developing a cooperative program for the non-AFA trawl catcher processors along with allocations for the non-pollock groundfish fisheries in Amendment 80, can the Council adopt a more stringent eligibility requirement for participation in non-AFA trawl catcher processor cooperatives than the eligibility requirement set out in the Act?

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[4] *Id.*

[5] *Id.*

[6] *Id.*, at §46:01 (6th ed. 2000).

[7] *Id.*

[8] *Id.*, at §46:04.

[9] *Id.*, at §46:01.

NOAA GC response: Section 219(a)(7) reads as follows:

> (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.

Section 219(a)(7) of the Act sets forth the criteria for eligibility to the non-AFA trawl catcher processor subsector. Although there are some questions that have been raised by the Council as to how to interpret the individual criteria contained within the Act's definition of non-AFA trawl catcher processor subsector,[10] it is quite clear from the language used in the definition that there are three criteria for eligibility in the subsector. Additionally, it is clear from the language used that all the criteria must be met by the owner of a trawl catcher processor in order to be eligible for the non-AFA trawl catcher processor subsector given Congress' use of the word "and" at the end of subsection 219(a)(7)(B).

The Council's current options for eligibility criteria for both the non-AFA trawl catcher processor sector and harvesting cooperatives formed within the sector are contained in Component 9 of the Council's December 2004 motion on Amendment 80. Component 9 currently reads as follows:

> **Component 9** Identifies the license holders that are in the Non-AFA Trawl Catcher Processor sector which would receive Sector Eligibility Endorsements. Non-AFA qualified license holders with a trawl and catcher processor endorsement would be issued a Sector Eligibility Endorsement that will be attached to that holder's LLP identifying it as a member of the Non-AFA Trawl Catcher Processor sector. Only vessels that qualify for a sector eligibility endorsement may participate in cooperative under this program.
>
> Option 9.1 Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1998-2002.
> Option 9.2 Qualified license holders must have caught 1,000 mt. of groundfish with trawl gear and processed that fish between 1998-2002.
> Option 9.3 Qualified license holders must have caught 500 mt. of groundfish with trawl gear and processed that fish between 1997-2002.
> Option 9.4 Qualified license holders must have caught 1,000 mt. of groundfish with trawl gear and processed that fish between 1997-2002.
> Option 9.5 Qualified license holders must have caught 150 mt. of groundfish with trawl

[10] See Council Questions, 1, 3, and 4.a.

gear and processed that fish between 1997-2002.

Under this component of Amendment 80, if a person meets the criteria within the options under consideration, then that person would be a member of the non-AFA trawl catcher processor sector and would be eligible to join a harvesting cooperative within that sector. With the exception of Option 9.5,[11] all of the options currently under consideration by the Council differ from the Act's sector eligibility criterion in section 219(a)(7)(C) either in qualifying harvest tonnage amounts or qualifying years, or both.

The statutory language used in section 219(a)(7) or in other sections of the Act does not include words that permit the Council or NOAA Fisheries to amend Congress' enumerated subsector qualification criteria. Additionally, there is no statutory language in section 219(a)(7) or elsewhere in the Act that would permit the application of more restrictive, or more lenient, subsector qualification criteria by the Council or NOAA Fisheries. Because the language of the Act is clear and unambiguous and is not unreasonable or illogical in its operation, there is no need to go outside of the language of the Act for its meaning. Congress did not provide the Council or NOAA Fisheries with any ability to make adjustments to the specific statutory criteria addressing eligibility in any of the subsectors. As explained earlier, under statutory rules of construction, the language of the Act is controlling and would take precedence over the language of a regulation if the regulation were not consistent with the statutory language. While the Council and NOAA Fisheries may continue to examine alternative eligibility options for the non-AFA trawl catcher processor subsector in the analysis for Amendment 80, the criteria as to who is eligible to be a member of the non-AFA trawl catcher processor subsector has been decided by Congress, and the Council and NOAA Fisheries cannot select or impose different, including more stringent, eligibility requirements for entrance to the non-AFA trawl catcher processor subsector.

Although the Act defines who is eligible for the non-AFA trawl catcher processor subsector, the Act does not address the issue of eligibility in a harvesting cooperative *within* the non-AFA trawl catcher processor subsector. The imposition of more restrictive eligibility criteria for the formation of harvesting cooperatives does not appear to be prohibited by the Act. If the Council chooses, the Council could examine eligibility requirements for harvesting cooperative formation within the non-AFA trawl catcher processor subsector that would be more stringent than the subsector's eligibility requirements, and adopt such measures if the measures are consistent with the requirements of the Magnuson-Stevens Act and other applicable law, including the Act. It is important to note, however, that the Council could not use harvesting cooperative eligibility requirements as a means to effect changes to the Act's eligibility criteria for the non-AFA trawl catcher processor subsector. For example, if the Council would make an allocation of BSAI non-pollock groundfish to the non-AFA trawl catcher processor subsector, the Council could not allocate all the subsector's allocation to harvesting cooperatives within that subsector if the

[11]The Council added Option 9.5 at their December meeting because of the Act's criterion at section 219(a)(7)(C).

eligibility criteria for harvesting cooperatives are more restrictive than the criteria for subsector eligibility. Under this example, only those persons that would meet the more stringent harvesting cooperative eligibility criteria would be eligible to participate in the non-AFA trawl catcher processor subsector, impermissibly amending the statutory criteria for participation in that subsector.

Council Question 6: Relative to further development of Amendment 80 (allocations of flatfish species and cooperative development for the H&G catcher/processor sector), if the Council continues its current course and does not include allocations of those species to AFA sectors, would that in any way compromise those sectors' eligibility for the legislated non-pollock buyback program?

NOAA GC response: For the following reasons, NOAA General Counsel has determined that the ability of the four catcher processor subsectors, as defined in the Act, to participate in the Act's Capacity Reduction Program is not dependent on the receipt of an allocation of non-pollock groundfish. Therefore, the catcher processor subsectors as defined in the Act, including the AFA trawl catcher processor subsector, are not precluded from participation in the Capacity Reduction Program if the Council continues its current course and does not include allocations of non-pollock groundfish to those catcher processor subsectors in Amendment 80.

The Act, in sections 219(b) through (f), establishes the voluntary Capacity Reduction Program.[12] Under section 219(e)(1), participation in the Capacity Reduction Program begins with the development of a capacity reduction plan by the members of a catcher processor subsector, and submission of that capacity reduction plan to the Secretary of Commerce (Secretary) after notice to the Council. None of the statutory provisions in the Act concerning the Capacity Reduction Program tie Amendment 80 to participation in the Capacity Reduction Program or make a subsector's inclusion in Amendment 80 a prerequisite for that subsector's participation in the Capacity Reduction Program. In fact, the statutory language of the Act makes no specific reference to Amendment 80 at all.

More importantly, the ability of a catcher processor subsector to participate in the Capacity Reduction Program is not dependent on first receiving an allocation of BSAI non-pollock groundfish. There is no statutory provision within sections 219(b) through (f) of the Act that makes an allocation of non-pollock groundfish to a catcher processor subsector a criterion for participation in the Capacity Reduction Program or a criterion for the development and submission of a capacity reduction plan to the Secretary. Because a subsector's participation in

[12]Section 219(b) establishes the authority for the Capacity Reduction Program; section 219(c) addresses the availability of Capacity Reduction Program funds to the four defined catcher processor subsectors; section 219(d) contains requirements for binding reduction contracts; section 219(e) contains the provisions concerning the development, approval and notification of catcher processor subsector capacity reduction plans; and section 219(f) addresses the actions that are to be undertaken by other federal agencies upon the request of the Secretary of Commerce.

the Capacity Reduction Program is not dependent on first receiving an allocation of non-pollock groundfish, each subsector defined in the Act is capable of participating in the Capacity Reduction Program regardless of whether it is included in Amendment 80.

Attachment

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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April 25, 2005

MEMORANDUM FOR: Chris Oliver, Executive Director
North Pacific Fishery Management Council

THROUGH: Lisa L. Lindeman
Alaska Regional Counsel

FROM: Lauren M. Smoker
Attorney-Advisor

SUBJECT: Responses to Council Question 1 Concerning the BSAI Non-Pollock Groundfish Fisheries

This memorandum responds to Question 1 in your letter of December 29, 2004, requesting legal guidance on several issues concerning the statutory provisions for the BSAI non-pollock groundfish fishery and the BSAI Catcher Processor Capacity Reduction Program (hereinafter referred to as the "Capacity Reduction Program") that are included in the Department of Commerce and Related Agencies Appropriations Act, 2005, which is included in Public Law No. 108-447 (hereinafter referred to as the "Act"). We have previously provided responses to Questions 4.b and 6. We have not fully developed responses to the remaining questions. We will provide those to you as soon as possible.

Council Question 1: Section 219(a)(1) of the Act defines the AFA Trawl Catcher Processor subsector as "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)." However, section 208(e) paragraph (21) of the American Fisheries Act (AFA) includes "any catcher/processor not listed in this subsection and determined by the Secretary to have harvested more than 2,000 metric tons of the pollock in the 1997 directed pollock fishery and determined to be eligible to harvest pollock in the directed pollock fishery under the license limitation program recommended by the North Pacific Council and approved by the Secretary, . . ." Given that the Act's definition of the AFA Trawl Catcher Processor subsector includes only paragraphs (1) through (20) of section 208(e) of the AFA and not paragraph (21), please clarify:

a. Whether those vessels that qualify for the BSAI pollock fisheries under paragraph (21) of section 208(e) are precluded from participating in the Capacity Reduction Program and the non-pollock groundfish fishery as AFA vessels.

NOAA GC response: Section 219(g)(1) of the Act states that "Only a member of a catcher processor subsector may participate in — (A) the catcher processor sector of the BSAI non-pollock groundfish fishery;[1] or (B) the fishing capacity reduction program authorized by subsection (b)." The Act does not define the phrase "catcher processor sector" in section 219(g)(1)(A), but section 219(a)(3) of the Act defines the phrase "catcher processor subsector" as:

(1) the AFA trawl catcher processor subsector;
(2) the non-AFA trawl catcher processor subsector;
(3) the longline catcher processor subsector; and
(4) the pot catcher processor subsector.

The Act defines the AFA trawl catcher processor subsector as "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)." The statutory language used to define the AFA trawl catcher processor subsector is quite clear and unambiguous and does not appear to be unreasonable or illogical in its operation. Given the clear language of the Act, the AFA trawl catcher processor subsector includes only the owners of the vessels listed in section 208(e)(1) through (20) of the AFA and excludes all others. The owner of any trawl catcher processor vessel that qualifies for participation in the BSAI pollock fishery under section 208(e)(21) of the AFA is not within the AFA trawl catcher processor subsector as defined by the Act. Therefore, the owners of AFA section 208(e)(21) vessels are not members of the AFA trawl catcher processor subsector and are precluded from participating in the Capacity Reduction Program and the catcher processor sector of the BSAI groundfish fishery as members of the AFA trawl catcher processor subsector.

b. Whether those vessels that qualify for the BSAI pollock fishery under paragraph (21) of section 208(e) of the AFA would qualify for the non-AFA trawl catcher processor subsector (provided that they meet the harvest requirements defined by the Act for that sector).

NOAA GC response: For purposes of participation in the Capacity Reduction Program as well as the catcher processor sector of the BSAI non-pollock groundfish fishery, section 219(a)(7) of

[1]The Act at section 219(a)(8) defines "non-pollock groundfish fishery" as "target species of Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, or yellowfin sole harvested in the BSAI." By way of comparison, component 1 of Amendment 80 currently identifies the target species to be included in the non-AFA trawl catcher processor sector allocation as Atka mackerel, flathead sole, Aleutian Islands Pacific Ocean perch, rock sole, and yellowfin sole.

the Act defines the non-AFA trawl catcher processor subsector as "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." Council Question 1.b focuses on the interpretation of the first criterion in section 219(a)(7)(A) and whether the owners of those vessels that qualify for the directed pollock fishery under section 208(e)(21) of the AFA are ***not*** AFA trawl catcher processors for purposes of the Act.

In responding to this Council question, the first step in statutory interpretation is to discern the "plain meaning" of the statutory language.[2] Rules of statutory interpretation provide that words, not defined by the statute, are to be interpreted as taking their ordinary, contemporary, common meaning[3] unless the ordinary meaning fails to fit the statutory text.[4] Additionally, "[t]he plain meaning of a particular statutory provision is not determined by considering language of that provision in isolation; rather, determining the plain meaning of a statutory provision requires considering the provision at issue in the context of the statute as a whole."[5]

If the meaning of the statute is plain, i.e. the language is clear and unambiguous on its face,[6] "admits of no more than one meaning,"[7] and "is not unreasonable or illogical in its operation,"[8]

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[2] *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) ("the meaning of the statute must, in the first instance, be sought in the language in which the act is framed"). *See also*, Sutherland Stat. Construction § 46:01 (6th Ed).

[3] *A-Z Intern. v. Phillips*, 323 F3d 1141, 1146 (9th Cir. 2003).

[4] *Johnson v. U.S.*, 120 S.Ct. 1795, 1804 n. 9 (2000) (rule of construction prefers the ordinary meaning of statutory terms, but uncommon sense of term may be relied on when the ordinary meaning fails to fit the text and when the realization of clear congressional policy is in tension with the result that customary interpretive rules would deliver).

[5] *Patenaude v. Equitable Life Assurance Society of the U.S.*, 290 F3d 1020, 1025 (9th Cir. 2002). *See also U.S. v. Maria-Gonzalez*, 268 F.3d 664, 668 (9th Cir. 2001) (to determine whether the language of a statute is plain and unambiguous, court considers that language as well as the "context and design of the statute as a whole"); *Alabama Power Co. v. U.S. EPA*, 40 F.3d 450, 454 (D.C. Cir. 1994) (to determine whether Congress has unambiguously expressed its intent, court applies traditional tools of statutory interpretation to text at issue as well as to the language and design of statute as whole).

[6] Sutherland Stat. Construction § 45:02 (6th Ed).

[7] *McCord v. Bailey*, 636 F.2d 606, 614-15 (D.C. Cir. 1980).

[8] Sutherland Stat. Construction § 46:01 (6th Ed).

then the statute "need not and cannot be interpreted by a court"[9] and "the sole function of the courts is to enforce it according to its terms."[10] The result is that a "clear and unambiguous" statutory provision generally is one having a meaning that is not contradicted by other language in the same act.[11]

"Only statutes that are of doubtful meaning are subject to the process of statutory interpretation."[12] Ambiguity exists "when a statute is capable of being understood by reasonably

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[9]Sutherland Stat. Construction § 45:02 (6th Ed); *Barnhart v. Sigmon Coal Co.*, 122 S.Ct. 941, 950, 956 (2002) (the inquiry ceases in a statutory construction case if the statutory language is unambiguous and the statutory scheme is coherent and consistent; Courts must presume that a legislature says in a statute what it means and means in a statute what it says there; when the words of a statute are unambiguous then this first canon is also the last: judicial inquiry is complete).

[10]*Caminetti v. U.S.*, 242 U.S. 470, 485 (1917); *see also*, Sutherland Stat. Construction § 46:01(6th Ed); *Atlantic Mutual Ins. Co. v. Comm. of Internal Revenue*, 118 S.Ct. 1413, 1417 (1998) (in construing statute, court and administrative agency must give effect to unambiguously expressed intent of Congress); *Freytag v. Comm. of Internal Revenue*, 111 S Ct. 2631, 2636 (1991) (When Supreme Court finds terms of statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances).

[11]Sutherland Stat. Construction § 46:05 (6th Ed).

[12]Sutherland Stat. Construction § 45:02 (6th Ed). *See also, Villegas-Valenzuela v. I.N.S.*, 103 F.3d 805, 809 (9th Cir. 1996) (language of statute controls where it is not ambiguous or unconstitutional); *Idaho First Natl Bank v. Comm. of Internal Revenue*, 997 F.2d 1285, 1289 (9th Cir. 1993) (task of resolving meaning of statute begins with language of statute itself and if language is unambiguous and literal application does not conflict with intentions of drafters, plain meaning should prevail); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2002) (if the language used in a statute has a plain and unambiguous meaning, court's inquiry must cease); *County of L.A. v. Shalala*, 192 F.3d 1005, 1012-13 (D.C. Cir. 1999) (court initiates statutory analysis by first asking whether Congress has directly spoken to the precise question at issue. If, after exhausting the traditional tools of statutory construction, the court of appeals ascertains that Congress' intent is clear, that is the end of the matter; but if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the administrative agency's answer is based on a permissible construction of the statute.); *Harper v. U.S. Seafoods L.P.*, 278 F.3d 971, 975 (9th Cir. 2002) (if the language of a statute is clear, a court looks no further than that language in determning the statute's meaning; the only exception to this rule would be for absurd or impracticable consequences).

well-informed persons in two or more different senses."[13] In these situations, agencies are permitted to develop a reasonable interpretation of a term or phrase.[14]

Congress used the phrase "AFA trawl catcher processor" in section 219(a)(7)(A) but did not define this phrase in the Act.[15] However, the lack of a statutory definition does not necessarily mean that the phrase is therefore ambiguous and subject to agency interpretation.[16] In such instances, as explained above, the ordinary or common meaning of an undefined word or phrase is to be applied in the context of the statute as a whole unless the ordinary meaning fails to fit within the statutory text as a whole.

There is sufficient support within the AFA and NOAA Fisheries regulations implementing the AFA to conclude that, prior to passage of the Act, the common meaning of the phrase "AFA trawl catcher processor" was any vessel that is authorized by section 208(e) of the AFA to participate in the directed pollock fishery, including those vessels that qualify under section 208(e)(21) of the AFA. Section 208 of the AFA is entitled "Eligible Vessels and Processors" and subsection 208(e) is entitled "Catcher/Processors." Additionally, NOAA Fisheries regulations implementing the AFA define the phrase "AFA catcher processor" as "a catcher processor permitted to harvest BSAI pollock under 679.4(l)(2)."[17] Under section 679.4(l)(2), NOAA Fisheries issues AFA catcher processor permits to all of the vessels that qualify under section

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[13]Sutherland Stat. Construction § 45:02 (6th Ed). *See also, DeGeorge v. U.S. Dist. Court for Cent. Dist. of California*, 219 F.3d 930, 939 (9th Cir. 2000) (a statute is ambiguous if it gives rise to more than one reasonable interpretation); *Local Joint Exec. Board of Culinary/Barenders Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1157 (9th Cir. 2001) (if alternative readings of a federal statute are possible, court determines whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress); *Brown v. Gardner*, 115 S.Ct. 552, 555 (1994) (ambiguity is a creature not of definitional possibilities but of statutory context); *U.S. ex rel Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir. 1997) (if ambiguity persists, court must construe ambiguous term in statute to contain that permissible meaning which fits most logically into the body of both previously and subsequently enacted law).

[14]*See Chevron U.S.A., Inc. V. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (holding that if statute is silent or ambiguous with respect to specific issue, agency's interpretation of statute must be upheld if agency's construction of statute is permissible and not arbitrary, capricious, or "manifestly contrary to the statute").

[15]Section 219(a)(7)(A) is the only place in the Act where the phrase "AFA trawl catcher processor" appears.

[16]*AFL-CIO v. Glickman*, 215 F.3d 7, 10 (D.C. Cir. 2000) (lack of statutory definition does not render a term ambiguous, but, instead, it simply leads a court to give the term its ordinary, common meaning. *See also, Engine Manufacturers Association v. U.S. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (if statute clearly requires particular outcome then mere fact that statute does so implicitly rather than expressly does not mean that it is silent for purposes of *Chevron* analysis).

[17]50 CFR 679.2.

208(e), including vessels that qualify under AFA section 208(e)(21). These regulatory provisions were in effect during the development of the Act and its passage.[18]

While this pre-Act common meaning of the phrase "AFA trawl catcher processor" still applies in the context of the AFA and the directed pollock fishery, the pre-Act common meaning should not be applied to the phrase used in section 219(a)(7)(A) because it fails to fit the statutory text of the Act. As explained in NOAA GC's response to Council Question 1.a., the AFA trawl catcher processor subsector is defined by the Act to be only those vessels listed in paragraphs (1) through (20) of section 208(e) of the AFA. The Act's definition of the "AFA trawl catcher processor subsector" clearly and unambiguously excluded any AFA catcher processor that qualified under section 208(e)(21) from the subsector, although it is clear that those vessels remain eligible AFA catcher processors for purposes of the AFA. Congress was aware that there are vessels that qualify for the directed pollock fishery under section 208(e)(21) of the AFA and could have included all of the catcher processor vessels that are eligible under section 208(e) of the AFA in the Act's definition of "AFA trawl catcher processor subsector." Including all of the vessels that are eligible in paragraphs (1) through (21) of section 208(e) of the AFA would have applied the pre-Act ordinary meaning of "AFA trawl catcher processor" into the Act. Instead, Congress chose to exclude AFA section 208(e)(21) vessels from the Act's definition of AFA trawl catcher processor subsector and more narrowly defined which AFA trawl catcher processors would continue to be considered AFA trawl catcher processors in the non-pollock groundfish fishery. Congress could have used its prior definition of AFA trawl catcher processor in the Act and chose not to do so. It is evident from the exclusion of section 208(e)(21) vessels in the Act's definition of the AFA trawl catcher processor subsector that Congress did not intend to incorporate wholesale all of the vessels that are considered AFA trawl catcher processors for purposes of the directed pollock fishery as AFA trawl catcher processors for purposes of the non-pollock groundfish fishery. The language in the Act suggests that Congress purposely decided to have a slightly different group of vessels as AFA trawl catcher processors in the catcher processor sector of the non-pollock groundfish fishery than the group of vessels that are AFA trawl catcher processors in the directed pollock fishery. Therefore, to apply the pollock fishery's common meaning of AFA trawl catcher processor to section 219(a)(7)(A) for purposes of the non-pollock groundfish fishery would not be consistent with the full statutory language of the Act.

If the pre-Act common meaning is not applied, the meaning of the phrase "AFA trawl catcher processor" in section 219(a)(7)(A) still must be discerned. For the reasons explained below, the plain meaning of the phrase "AFA trawl catcher processor" as used in section 219(a)(7)(A) of the Act likely means those trawl catcher processors that are identified in paragraphs (1) through (20) of section 208(e) of the AFA.

[18]The final rule implementing section 679.4(l) was published in the Federal Register on December 30, 2002 (67 FR 79692).

First, as explained above, it is clear from the statutory language used in the Act that the Act redefined what vessels are to be considered AFA trawl catcher processors for purposes of the Act and the non-pollock groundfish fishery through its explicit definition of the AFA trawl catcher processor subsector. Congress implicitly identified the universe of AFA trawl catcher processors for purposes of the Act and the non-pollock groundfish fishery when it explicitly and exclusively identified the vessels that comprise the AFA trawl catcher processor subsector. Because the Act specifically identifies only those vessels listed in AFA section 208(e)(1) through (20) as being within the AFA trawl catcher processor subsector, the Act implicitly defines the phrase "AFA trawl catcher processor" as those 20 vessels. No other meaning for the phrase "AFA trawl catcher processor" is apparent from the statutory language of the Act.

Second, such an interpretation applies a plain meaning that appears to be consistent with and not contrary to the intentions of Congress, and does not appear to result in unreasonable, absurd, illogical, or impracticable consequences. The legislative history for section 208(e)(21) of the AFA states that the section was intended to "allow a small number of catcher/processors (perhaps as few as one) to continue to harvest the relatively small amount of pollock they harvested in the past **while relying primarily on other fisheries**." (Emphasis added.)[19] Section 208(e)(21) of the AFA acknowledges the participation of vessels in the directed pollock fishery while at the same time recognizing that those vessels primarily participate in non-pollock fisheries. Furthermore, different definitions of AFA trawl catcher processor can co-exist harmoniously because they apply to separate and distinct fisheries. Whereas the AFA is applicable to participation in the directed pollock fishery, the Act is applicable to participation in the catcher processor sector of a completely different fishery, the non-pollock groundfish fishery. A vessel that is an AFA trawl catcher processor for purposes of the directed pollock fishery, and not an AFA trawl catcher processor for purposes of the catcher processor sector of the non-pollock groundfish fishery does not appear to create a conflict with Congressional intent or produce an unreasonable, absurd, illogical, or impracticable consequence.

Third, the legislative history is silent in regards to the interpretation of the phrase in section 219(a)(7)(A). While it is evident from the statutory language that the phrase certainly includes vessels listed in paragraphs (1) through (20) of section 208(e) of the AFA, there is nothing in the legislative history that indicates Congress' intent to exclude vessels that qualify for the directed pollock fishery under section 208(e)(21) of the AFA from participation in the catcher processor sector of the BSAI non-pollock groundfish fishery or the Capacity Reduction Program. Instead, the floor statements made in support of section 219 reflect Congress' intent to include active and latent participants[20] and to provide each subsector, rather than Congress, with the ability to make the initial determinations as to what capacity will be removed from the non-pollock groundfish fishery.[21]

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[19] 144 CONG REC. S12,779 (daily ed. Oct. 21, 1998).

[20] 151 CONG. REC. S11,747-48 (daily ed. Nov. 20, 2004) (statement of Sen. Murray).

[21] *Id.*, at S11,748.

Given the above, the plain meaning of the phrase "AFA trawl catcher processor" as used in section 219(a)(7)(A) of the Act means those vessels identified in paragraphs (1) through (20) of section 208(e) the AFA. Consequently, vessels that qualify for the directed pollock fishery under section 208(e)(21) of the AFA are not AFA trawl catcher processors for purposes of the Act and therefore satisfy the first criterion in section 219(a)(7)(A) for qualification in the non-AFA trawl catcher processor subsector.

cc: NOAA GC
GCF

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

September 8, 2005

MEMORANDUM FOR: Chris Oliver, Executive Director
North Pacific Fishery Management Council

THROUGH: Lisa L. Lindeman
Alaska Regional Counsel

FROM: Lauren M. Smoker
Attorney-Advisor

SUBJECT: Responses to Council Questions Concerning the BSAI Non-Pollock Groundfish Fisheries

This memorandum responds to the remaining questions[1] in your letter of December 29, 2004, requesting legal guidance on several issues concerning the statutory provisions for the BSAI non-pollock groundfish fishery and the BSAI Catcher Processor Capacity Reduction Program (hereinafter referred to as the "Capacity Reduction Program") that are included in the Department of Commerce and Related Agencies Appropriations Act, 2005, which is included in Public Law No. 108-447 (hereinafter referred to as the "Act").[2] This memorandum also responds to the Council's request for NOAA GC to consider the viability and legal implications of Component 8 for Amendment 80 in light of the Act's sector eligibility requirements. We have previously provided responses to Questions 1, 4.b, and 6.

Council Question 2: Sections 219(a)(6) and (a)(9) define the Longline Catcher Processor subsector and the Pot Catcher Processor subsector, respectively, for purposes of the Capacity Reduction Program and participation in the BSAI non-pollock groundfish fisheries. In general, to qualify a participant must have an LLP license that is non-interim and transferable (or that is interim and subsequently becomes non-interim and transferable) and that is endorsed for Bering Sea or Aleutian Islands fixed gear catcher processor fishing activity, with a Pacific cod endorsement. Please clarify:

[1]These questions are 2, 3, 4.a, 5, and 7.

[2]The Council's letter (Attachment 1) and the Act (Attachment 2) are provided with this memorandum.

a. Whether only holders of LLPs that carry all of these endorsements (including the Pacific cod endorsement) would be eligible to participate in the Capacity Reduction Program or the non-pollock groundfish fishery as defined by the Act, in their respective sectors.

NOAA GC response: Sections 219(a)(6) and (a)(9) of the Act set forth the qualification criteria for the longline and pot catcher processor subsectors, respectively. Section 219(a)(6) defines the longline catcher processor subsector as "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." Section 219(a)(9) defines the pot catcher processor subsector as "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."

Many of the terms used in the Act's definitions for the longline and pot catcher processor subsectors are not defined by Act. However, these terms have technical meanings found in NOAA Fisheries Service regulations. Under the rules of statutory interpretation, when a statutory term is undefined, that term is given its ordinary and popularly understood meaning unless the term has acquired technical meaning or unless a definite meaning is apparent or indicated by the context of the words.[3] In such a case, and "in the absence of legislative intent to the contrary, or other overriding evidence of a different meaning, technical terms or terms of art used in a statute are presumed to have their technical meaning."[4]

With several specified exceptions, current regulations[5] require that each vessel within the BSAI must have an LLP license on board at all times it is engaged in directed fishing activities for license limitation groundfish. 50 CFR 679.4(k)(1)(I). LLP licenses can have two types of vessel designations, either a catcher processor vessel designation or a catcher vessel designation (50 CFR 679.4(k)(3)(ii)) and there are three types of gear designations for LLP licenses: (1) trawl, (2) non-trawl, and (3) trawl/non-trawl (50 CFR 679.4(k)(3)(iv)). LLP licenses for the BSAI can have a Bering Sea and/or an Aleutian Islands area endorsements (50 CFR 679.4(k)(4)). Finally, regulations at 679.4(k)(9) address Pacific cod endorsements for LLP licenses and require an LLP license holder to have a Pacific cod endorsement on his or her LLP license in order to conduct

[3]Sutherland Stat. Construction § 47:27 (6th Ed. 2000).

[4]Sutherland Stat. Construction § 47:29 (6th Ed. 2000). "Technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in the law, shall be construed according to their peculiar and appropriate meanings." *Id. See also, McDermott Intern., Inc. v. Wilander*, 111 S.Ct. 807, 810-11 (1991) (In absence of contrary indication, court assumes that when statute uses terms of art, Congress intended it to have its established meaning at the time of statute's passage); *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1476 (10th Cir. 1990) (technical terms or terms of art used in statute are presumed to have their technical meaning).

[5]These regulations were also the regulations in existence when the Act was signed into law.

directed fishing for Pacific cod with hook and line or pot gear in the BSAI. Pacific cod endorsements include designations for either catcher vessels or catcher processor vessels, and for hook and line gear or pot gear (50 CFR 679.4(k)(9)(ii)). Regulations at 679.4(k)(6) address the issuance of LLP licenses that are transferrable as well as the issuance of LLP licenses that are non-transferrable and that expire with final agency action on an application for an LLP license (*i.e.* interim LLP licenses). These regulations set forth the technical meanings of these terms that were in existence at the time of passage of the Act.

The statutory language used in the Act's longline and pot catcher processor subsector definitions closely follows the language used in various regulatory requirements for LLP licenses. The Act's definitions for both subsectors include provisions concerning the status of LLP licenses (interim versus noninterim), LLP area endorsements ("endorsed for Bering Sea or Aleutian Islands") and LLP vessel designations ("catcher processor fishing activity"). The statutory definitions also include a Pacific cod endorsement requirement with certain vessel and gear designations ("C/P, Pcod, and hook and line gear" or "C/P, Pcod, and pot gear"). Neither subsector definition includes a reference to general LLP gear designations (trawl, non-trawl, or trawl/non-trawl). However, this omission does not appear to create an inconsistency or ambiguity because hook and line gear and pot gear are both gear types included in the regulatory definition of "non-trawl" gear at 50 CFR 679.4(k)(3)(iv)(F)(*1*), which states that non-trawl gear means "any legal gear, other than trawl, used to harvest license limitation groundfish." Hook and line gear and pot gear are authorized, legal gear types in the BSAI groundfish fisheries.

Given the nearly identical usage of the LLP regulatory requirements in the Act's definitions of the longline and pot catcher processor subsectors, the lack of other provisions within the Act that contradict or override the application of the technical meaning, and the absence of legislative intent to the contrary within the legislative history, it is reasonable to apply the technical meaning found in NOAA Fisheries Service regulations to the terms used in the Act's definitions for these subsectors.

It is also clear from the statutory language used in sections 219(a)(6) and (a)(9) that an LLP license must meet <u>all</u> of the specified criteria, including the specific provisions for a catcher processor Pacific cod endorsement, in order for the holder of that LLP license to be a member of either the longline or pot catcher processor subsectors. Congress' use of the word "and" in the definitions ties the qualification criteria within each definition together and requires that all of the criteria must be satisfied in order to be eligible.[6]

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[6]Sutherland Stat. Construction § 21:14 (6th Ed. 2000). *See also, Ortiz v. Secretary of Defense*, 41 F.3d 738, 742 (D.C. Cir. 1994) (requiring that two types of remedies joined by conjunction "and" must both be exhausted before consideration of an application); *Laubach v. Arrow Service Bureau, Inc.*, 987 F.Supp. 625, 630 (N.D. Ill. 1997) (use of conjunction "and" linking words together signifies that all three elements of offense are required to be met).

Additionally, there is no statutory language in sections 219(a)(6) or (a)(9), or elsewhere in the Act, that would authorize the Council or NOAA Fisheries Service to amend the subsector qualification criteria established by Congress. Congress did not provide the Council or NOAA Fisheries Service with any ability to make adjustments to the specific statutory criteria addressing eligibility in any of the subsectors. As explained earlier,[7] under the rules of statutory construction, the language of the Act is controlling and would take precedence over the language of a regulation if the regulation were not consistent with the statutory language.

Given the above discussion, only those holders of LLP licenses that meet all of the criteria for the longline catcher processor subsector as defined by the Act, including the specific provisions for a catcher processor Pacific cod endorsement, are members of the longline catcher processor subsector. Additionally, only those holders of LLP licenses that meet all of the criteria for the pot catcher processor subsector as defined by the Act, including the specific provisions for a catcher processor Pacific cod endorsement, are members of the pot catcher processor subsector. Under section 219(g)(1), members of the longline and pot catcher processor subsectors are eligible to participate in the Capacity Reduction Program or the catcher processor sector of the BSAI non-pollock groundfish fishery. Conversely, holders of LLP licenses that do not meet all of the criteria for either the longline or the pot catcher processor subsectors are not members of these subsectors, and are therefore precluded from participating in the Capacity Reduction Program or the catcher processor sector of the BSAI non-pollock groundfish fishery as members of the longline or pot catcher processor subsectors.

b. Whether holders of LLPs that carry BS and/or AI, catcher processor, fixed gear endorsements are eligible to participate in the non-pollock groundfish fisheries as defined by the Act as catcher vessels (if they are precluded from participating in those fisheries as catcher processors).

NOAA GC response: It is evident from the language used in the Act that it is solely focused on catcher processors and the catcher processor sector for purposes of participation in the Capacity Reduction Program and the BSAI non-pollock groundfish fishery. In the case of the non-pollock groundfish fishery, the Act only addresses who can participate in the *catcher processor sector* of that fishery.[8] Section 219(g)(1)(A) provides that only members of one of the four defined catcher processor subsectors may participate in the catcher processor sector of the BSAI non-pollock groundfish fishery. Stated in the negative, any person that does not qualify for one of the four

[7] *See* Memorandum dated February 9, 2005, to Chris Oliver, Executive Director, North Pacific Fishery Management Council, from Lisa Lindeman, Alaska Regional Counsel, and Lauren Smoker, GCAK, and NOAA GC's response to Question 4.b.

[8] It is important to distinguish the phrase "participation in the catcher processor sector of the BSAI non-pollock groundfish fishery," as used in the Act at section 219(g)(1)(A), versus the broader phrase "participation in the BSAI groundfish fishery," which is used in many of the Council's questions to NOAA GC.

catcher processor subsectors is prohibited from participating in the catcher processor sector of the BSAI non-pollock groundfish fishery.

The language in section 219(g)(1)(A) leaves at least two situations unaddressed. First, the Act does not address, and therefore does not prohibit, persons that do not meet the qualification criteria for one of the catcher processor subsectors from continuing to participate in the catcher processor sector for fisheries not included in the Act's definition of the "non-pollock groundfish fishery," such as arrowtooth flounder.[9] Second, the Act does not address, and therefore does not prohibit, persons that do not meet the qualification criteria for one of the catcher processor subsectors from participating in the non-pollock groundfish fishery through a sector other than the catcher processor sector, such as the catcher vessel sector. Although the Act does not prohibit the holders of LLP licenses that do not qualify for either the longline catcher processor subsector or the pot catcher processor subsector from participating as catcher vessels in the catcher vessel sector of the BSAI non-pollock groundfish fishery, the factual circumstances for each LLP would have to be examined under the current regulatory structure in order to determine whether the holder of an LLP could participate in the non-pollock groundfish fishery as a catcher vessel in the catcher vessel sector.

Council Question 3: Section 219 generally defines each sector as being composed of the person who owns a vessel or holds a license or both. Given this wording, the Act is unclear concerning eligibility to participate in the buyback or the non-pollock fisheries.

a. Does the act authorize entry to the fishery by:
I. Specific persons?
ii. Specific vessels?
iii. Holders of specific licenses?

NOAA GC response: Council staff provided NOAA GC with additional information concerning this question. According to Council staff, Question 3 relates to who is authorized to enter what vessel into each of the four catcher processor subsectors defined by the Act and how LLP requirements factor into this interpretation. The statutory language used in the Act to describe the eligibility criteria for the four catcher processor subsectors varies depending on the specific subsector and each subsector must be examined individually. However, before examining the specific provisions of each catcher processor subsector, three statements of general applicability can be made about all of the catcher processor subsectors.

First, the Act authorizes persons that meet the subsector criteria to participate in the Capacity Reduction Program or the catcher processor sector of the BSAI non-pollock groundfish fishery.

[9]As explained in more detail in NOAA GC responses to Questions 5 and 7.a, the Act only applies to the following BSAI fisheries: Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, and yellowfin sole.

This interpretation is supported by several provisions of the Act. The statutory language for each catcher processor subsector definition applies to the owners of vessels and/or the holders of LLP licenses, who, by virtue of their ownership or possession of a particular vessel or LLP license, are qualified for membership in one of the catcher processor subsectors. Additionally, several sections of the Act regarding the Capacity Reduction Program, such as entering into binding reduction contracts at section 219(d)(1), the development of capacity reduction plans at section 219(e)(1), and the casting of votes in a referendum for approval at section 219(e)(3)(A), clearly apply to activities that are undertaken by persons and not vessels or licenses.

Second, each catcher processor subsector definition has two qualification components, one component that establishes whether the owner of a vessel and/or the holder of an LLP license is the person that will qualify for membership in a catcher processor subsector, and one component that establishes the vessel and/or the LLP license criteria that must be satisfied in order to qualify the person for membership in a catcher processor subsector.

Third, given the plain language of section 219, both qualification components within each subsector definition must be met for a person to become a member of a catcher processor subsector and both qualification components must continue to be met for that person to remain a member of that catcher processor subsector. Beginning on December 8, 2004, the date the Act was signed into law, the Act requires that any person participating in the catcher processor sector of the BSAI non-pollock groundfish fishery or the Capacity Reduction Program be a member of the AFA trawl, the non-AFA trawl, the longline, or the pot catcher processor subsector. This means that all participants must satisfy all of the statutory criteria specified for a catcher processor subsector at the time of participation in either the catcher processor sector of the BSAI non-pollock groundfish fishery or the Capacity Reduction Program. Merely having satisfied the subsector criteria on December 8, 2004, is not sufficient to qualify a participant, if that person no longer meets the qualifying criteria, because the qualification criteria must continue to be met for a person to remain a member of the catcher processor subsector.

The intent of the Act is to provide a vessel buyback program for the BSAI non-pollock fishery that is to be financed through a capacity reduction loan. 150 CONG. REC. S11744 (daily ed. November 20, 2004) (statement of Sen. Murray). Sections 219(e)(1) and (e)(2)(D) provide for the development of capacity reduction plans by members of the catcher processor subsectors subsequent to passage of the Act. According to section 219(e)(2)(D), capacity reduction plans are to be designed to "result in the maximum sustained reduction in fishing capacity at the least cost and in the minimum amount of time." If participation in the Capacity Reduction Program was governed by ownership on a specific past date, the capacity reduction intent of the Act could be undermined because, at the time a capacity reduction plan may be developed, the eligible participants may no longer be the owners of the capacity the Act seeks to reduce. The intent of the Act is preserved if participants in the catcher processor sector of the BSAI non-pollock groundfish fishery or the Capacity Reduction Program are those persons who currently own or hold the capacity and therefore have the ability to remove that capacity from the fishery.

The following paragraphs examine the Council's questions in light of the specific provisions of each catcher processor subsector.

AFA trawl catcher processor subsector: Persons who are eligible to participate in the Capacity Reduction Program or the catcher processor sector of the BSAI non-pollock fishery through this catcher processor subsector are those persons who own one or more of the twenty vessels specifically named in section 208(e)(1) through (20) of the AFA (16 U.S.C. 1851 note) at the time of participation in the sector or the Capacity Reduction Program. The qualification criteria for this subsector does not include any requirements concerning LLP licenses, so LLP licenses and the various LLP license endorsements and designations do not factor into eligibility determinations for this catcher processor subsector.

Non-AFA trawl catcher processor subsector: Persons who are eligible to participate in the Capacity Reduction Program or the catcher processor sector of the BSAI non-pollock fishery through this catcher processor subsector are those persons who, at the time of participation in the sector or the Capacity Reduction Program, own a trawl catcher processor that meets the statutory criteria at sections 219(a)(7)(A) and (C), and who has been issued a valid LLP license is endorsed for Bering Sea or Aleutian Islands trawl catcher processor fishing activity for the trawl catcher processor that meets the criteria in sections 219(a)(7)(A) and (C). The criteria for trawl catcher processors at sections 219(a)(7)(A) and (C) will qualify a finite number of vessels for this catcher processor subsector. As with the other subsectors, it is not imperative that all of the criteria for membership in the non-AFA trawl catcher processor subsector were met on December 8, 2004, only that all of the criteria are satisfied at the time of participation in either the Capacity Reduction Program or the catcher processor sector of the BSAI non-pollock groundfish fishery.

Longline catcher processor subsector: Persons who are eligible to participate in the Capacity Reduction Program or the catcher processor sector of the BSAI non-pollock fishery through this catcher processor subsector are those persons who, at the time of participation in the sector or the Capacity Reduction Program, hold LLP licenses that possess the required status, endorsements, and designations set forth in section 219(a)(6). The qualification criteria for this subsector do not include any criteria concerning the eligibility of specific vessels, or criteria requiring that minimum amounts of non-pollock groundfish be harvested and processed during a specified time period by either a vessel or an LLP holder. Therefore, these kinds of criteria do not factor into eligibility determinations for this catcher processor subsector.

Pot catcher processor subsector: Persons who are eligible to participate in the Capacity Reduction Program or the catcher processor sector of the BSAI non-pollock fishery through this catcher processor subsector are those persons who, at the time of participation in the sector or the Capacity Reduction Program, hold LLP licenses that possess the required status, endorsements, and designations set forth in section 219(a)(9). The qualification criteria for this subsector do not include any criteria concerning the eligibility of specific vessels, or criteria requiring that minimum amounts of non-pollock groundfish be harvested and processed during a specified time

period by either a vessel or an LLP holder. Therefore, these kinds of criteria do not factor into eligibility determinations for this catcher processor subsector.

Council Question 4: Section 219(a)(7) defines the Non-AFA Trawl Catcher Processor subsector as the owner of each trawl catcher processor that is not an AFA trawl catcher processor that holds a valid LLP license with Bering Sea or Aleutian Islands endorsement and 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:

a. In determining qualification for the sector, which should be considered for meeting the harvest tonnage requirement – the catch history associated with the vessel or the catch history associated with the LLP?

NOAA GC response: For purposes of participation in the Capacity Reduction Program and the catcher processor sector of the BSAI non-pollock groundfish fishery, section 219(a)(7) of the Act states:

> (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.

In responding to this question, one rule of statutory construction that serves as an aid for interpreting conventional language usage is the doctrine of the last antecedent:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision or clause immediately preceding it.[10]

[10]Sutherland Stat. Construction § 47:33 (6th Ed. 2000). *See also*, *Wilshire Westwood Asso. v. Atlantic Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989) (doctrine of last antecedent states that qualifying words, phrases, and clauses must be applied to the words or phrases immediately preceding them and are not to be construed as extending to and including others more remote); *Huffman v. Commissioner of Internal Revenue*, 978 F.2d 1139, 1145 (9th Cir. 1992) (doctrine of last antecedent teaches that where one phrase of a statue modifies another, the modifying phrase applies only to the phrase immediately preceding it).

However, the rules of statutory construction also provide that when the application of the doctrine of the last antecedent would create an absurd result, the doctrine must yield to the most logical meaning of a statute that emerges from its plain language.[11]

Given the language of section 219(a)(7), the phrase "trawl catcher processor" emerges as the last antecedent preceding the qualifying phrases in subsections (A) through (C). Subsections (A) through (C) are provisos or qualifying phrases that are distinct requirements for eligibility. Each requirement in (A) through (C) qualifies the introductory language in section 219(a)(7). The phrase immediately preceding the provisos in subsections (A) through (C) is "trawl catcher processor," thereby making the phrase "trawl catcher processor" the last antecedent.

Application of the doctrine of the last antecedent to subsection (A) is logical given the plain language of the statute. Subsection (A) is a vessel-oriented requirement, qualifying the kinds of trawl catcher processor vessels that are eligible for the non-AFA trawl catcher processor subsector by requiring that they not be a particular kind of trawl catcher processor vessel. Both the last antecedent and subsection (A) are vessel oriented phrases, creating a comparable match between the last antecedent and subsection (A).

Application of the doctrine of the last antecedent to subsection (C) also appears logical given the plain language of the statute. It is reasonable to apply the catch requirements of subsection (C) to the trawl catcher processor vessel because the Secretary of Commerce is capable of determining which trawl catcher processors have harvested and processed the requisite amount of non-pollock groundfish during the qualifying period. A consistency exists between subsection (C) and a vessel-oriented last antecedent. Additionally, although reference to an LLP license is made in subsection (B), subsection (C) is not a dependent clause of subsection (B) and the introductory language of section 219(a)(7) does not contain any reference to LLP license. Applying the criterion of subsection (C) to an LLP license would not be consistent with the plain language of section 219(a)(7). Here, both the plain language of the statute and the doctrine of the last antecedent support the interpretation that subsection 219(a)(7)(C) modifies the phrase "trawl catcher processor" and therefore it is the trawl catcher processor vessel that must have been used to harvest with trawl gear and process at least 150 metric tons of non-pollock groundfish between 1997 and 2002.

It is not appropriate to apply the doctrine of the last antecedent for subsection (B) because the plain language of subsection (B) clearly applies to persons. Congress' use of the word "whom" in subsection (B) indicates reference to a person, such as a vessel owner, and not a thing, such as

[11] *Demko v. U.S.*, 216 F.3d 1049, 1052-53 (Fed. Cir. 2000) (last antecedent doctrine should not apply in this case because its application would create absurd result); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 833 (9th Cir. 1996) (doctrine of the last antecedent is not rigid and must yield to most logical meaning of a statute that emerges from its plain language).

a vessel.[12] Additionally, qualified persons are issued LLP licenses under the LLP.[13] Therefore, it is logical to interpret subsection (B) as modifying the phrase "owner of a trawl catcher processor."

Council Question 5: Section 219(a)(8) does not include certain species (e.g., arrowtooth flounder) in the definition of the non-pollock groundfish fisheries.

a. Since some potential target species are not included in the definition of the non-pollock groundfish fisheries, will vessels that hold an LLP, but that do not meet the eligibility requirements for participation in the "non-pollock groundfish fisheries" as defined by the Act, be permitted to participate in those non-pollock target fisheries not specifically within the non-pollock groundfish fishery as defined in the Act?

NOAA GC response: Section 219(a)(8) of the Act defines "non-pollock groundfish fishery" as "target species of Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, or yellowfin sole harvested in the BSAI." As Council staff note, the Act's definition of "non-pollock groundfish fishery" does not include all of the BSAI non-pollock groundfish species for which a total allowable catch is established by the Council and the Secretary.[14] Section 219(g)(1)(A) of the Act restricts participation in the "non-pollock groundfish fishery" as follows: "Only a member of a catcher processor subsector may participate in — (A) the catcher processor sector of the BSAI non-pollock groundfish fishery."

As explained in NOAA GC response to Question 2.b, the Act is solely focused on catcher processors and the catcher processor sector for purposes of participation in the Capacity Reduction Program and the BSAI non-pollock groundfish fishery. In the case of the non-pollock groundfish fishery, the Act specifically addresses who can participate in the *catcher processor sector* of that fishery (only members of one of the four defined catcher processor subsectors may participate in the catcher processor sector of the BSAI non-pollock groundfish fishery), but does

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[12]The relative pronouns who, which, and that introduce clauses (adjectival clauses) that modify the nouns that are the antecedents of these pronouns. MARTHA KOLLN, LANGUAGE AND COMPOSITION: A HANDBOOK AND RHETORIC 189 (Macmillian Publishing Co. 1984). "Whom" is the objective case of "who and "who" is defined by Webster's as "what or which person or persons." Webster's II New Riverside University Dictionary.

[13]While each vessel within the BSAI must have an LLP groundfish license on board at all times it is engaged in fishing activities defined at 50 CFR 679.2 as directed fishing for license limitation groundfish, the LLP is issued by NOAA Fisheries Service to a qualified ***person*** and authorizes the license holder to deploy a vessel to conduct directed fishing for license limitation groundfish only in accordance with the specific area and species endorsements, the vessel and gear designations, and the MLOA specified on the license. 50 CFR 679.4(k)(1)(i).

[14]Specifically, the Act's definition of "non-pollock groundfish fishery" excludes: pollock, sablefish, arrowtooth flounder, other flatfish, Alaska plaice, northern rockfish, shortraker rockfish, rougheye rockfish, other rockfish, squid, and "other species."

not include participation criteria for any other sector of that fishery. Therefore, the Act's restrictions on participation in the catcher processor sector of the "non-pollock groundfish fishery" do not extend to BSAI groundfish species that are not included in the Act's definition of "non-pollock groundfish fishery" and do not extend to other sectors of the BSAI non-pollock groundfish fishery. Therefore, persons that do not meet the qualification criteria for one of the Act's catcher processor subsectors may be able to participate in the catcher processor sector for those BSAI groundfish fisheries not included within the Act's definition of "non-pollock groundfish fishery," such as the arrowtooth flounder fishery. Additionally, entities that do not meet the qualification criteria for one of the Act's catcher processor subsectors may be able to participate in the BSAI non-pollock groundfish fishery through their qualification into a sector other than the catcher processor sector, such as the catcher vessel sector. Participation by persons in sectors other than the catcher processor sector for the "non-pollock groundfish fishery" or in any sector for target fisheries that are not specifically part of the "non-pollock groundfish fishery" is governed by other applicable statutory and regulatory provisions.

Council Question 7: General questions concern the LLP aspects of the legislation. To the extent that certain aspects of the legislation change the existing LLP eligibility requirements (for purposes of the buyback and/or future fishing privileges), how and when do such changes get implemented? Is an FMP amendment, or regulatory amendment, required to bring our plans into conformance with the legislation? If so, is such an action subject to existing MSA, NEPA, and other requirements, given that the legislation is quite specific in these areas, and does not appear to offer latitude to the Council or NOAA Fisheries Service? Should ongoing analyses (such as those associated with Amendment 80 and with the Pacific cod allocations in the BSAI) incorporate the assumed license reductions effected by the legislation? Since the issuance of the Council's December 29, 2004 letter, Council staff provided further elaboration on this last question, asking whether the status quo alternative in our analyses consider only those boats or people or licenses that meet the criteria since the Act defined each sector as boats or people or licenses that meet certain criteria?

Council Question 7.a: To the extent that certain aspects of the legislation change the existing LLP eligibility requirements (for purposes of the buyback and/or future fishing privileges), how and when do such changes get implemented?

NOAA GC response: If changes to the endorsements or designations on existing LLP licenses are necessary as a result of the Act, notice and comment rulemaking likely will be required and the holders of amended LLP licenses must be afforded due process before those changes are effective.

As discussed in NOAA GC's response to Question 5, the Act only applies to the BSAI non-pollock groundfish fishery, defined by the Act as Atka mackerel, flathead sole, Pacific cod, Pacific Ocean perch, rock sole, turbot, and yellowfin sole. The Council is currently developing

BSAI FMP Amendment 80, which incorporates the Act's requirements for membership in the non-AFA trawl catcher processor subsector for the Atka mackerel, flathead sole, Aleutian Islands Pacific Ocean perch, rock sole, and yellowfin sole fisheries. Additionally, the Council is currently developing an amendment that would make allocations of BSAI Pacific cod to 10 sectors, including the four catcher processor subsectors defined in the Act. This amendment also incorporates the Act's catcher processor subsector definitions.

Between these two Council actions, qualification for membership in the four catcher processor subsectors defined by the Act will be addressed for the Pacific cod fishery and qualification in the non-AFA trawl catcher processor subsector will be addressed for those BSAI non-pollock groundfish fisheries included in Amendment 80. However, these two actions do not completely cover all aspects of the Act. For example, both the longline and pot catcher processor subsector definitions require Pacific cod catcher processor endorsements. Accordingly, only those persons who hold an LLP license with a Pacific cod catcher processor endorsement are able to participate in the longline or pot catcher processor subsector for all of the non-pollock groundfish fisheries. Conversely, the holder of a non-trawl LLP license that has a general catcher processor vessel designation endorsement but not a Pacific cod catcher processor endorsement does not qualify for either the longline or pot catcher processor subsector for any of the BSAI non-pollock groundfish fisheries. Additionally, neither of the Council actions include the turbot or the Bering Sea Pacific Ocean perch fisheries.

Given the above, NOAA Fisheries Service and/or Council staff should examine those aspects of the Act that are not covered by either Amendment 80 or the Pacific cod sector allocation amendment and determine whether an additional amendment is needed.

Council Question 7.b: Is an FMP amendment, or regulatory amendment, required to bring our plans in conformance with the legislation?

NOAA GC response: As explained in the NOAA GC response to Question 7.a, the Council is already developing amendments that will address many of the provisions of the Act. An amendment may be necessary for those aspects of the Act that are not addressed by these Council actions.

Council Question 7.c: If an FMP or regulatory amendment is required, is such an action subject to existing MSA, NEPA, and other requirements, given that the legislation is quite specific in these areas, and does not appear to offer latitude to the Council or NOAA Fisheries Service?

NOAA GC response: Congress explicitly defined membership criteria for the four identified catcher processor subsectors and limited participation in the Capacity Reduction Program and the catcher processor sector of the BSAI non-pollock groundfish fishery to members of those

subsectors. Congress did not provide the Council or NOAA Fisheries Service with any latitude to modify that criteria. If an amendment is necessary for those aspects of the Act that are not addressed by Amendment 80 or the Pacific cod sector allocation amendment, certain analytical requirements that typically apply to Council and NOAA Fisheries Service actions would not apply because the Council and NOAA Fisheries Service would be performing a ministerial act in implementing the sector eligibility criteria and would not be free to exercise any discretion in implementing those criteria. Should the Council or NOAA Fisheries Service include any discretionary provisions in an action to implement the non-discretionary provisions of the Act, then the requirements of the MSA, NEPA, and other applicable law would apply for those non-discretionary provisions.

Council Question 7.d: Should ongoing analyses (such as those associated with Amendment 80 and with the Pacific cod allocations in the BSAI) incorporate the assumed license reductions effected by the legislation? In other words, should the status quo alternative in our analyses consider only those boats or people or licenses that meet the criteria since the Act defined each sector as boats or people or licenses that meet certain criteria?

NOAA GC response: The status quo alternative in Council and NOAA Fisheries Service analyses should not incorporate the Act's eligibility requirements for the catcher processor subsectors. If the analyses for Amendment 80 and the Pacific cod sector allocations incorporated the catcher processor subsector qualification requirements of the Act into the no action/status quo alternative, important information regarding the impacts of the Act on current participants would not be included. It is possible that the Act's membership requirements for the catcher processor sector of the BSAI non-pollock groundfish fisheries will have no practical effect on current participants and that all those currently participating in the catcher processor sector of these fisheries are identical to those persons who are eligible to participate under the provisions of the Act. However, if this is not the case, then the impacts on current participants who are no longer eligible for participation in the catcher processor sector of the BSAI non-pollock groundfish fisheries would not be available. Defining the no action/status quo alternative as those persons currently participating and including an alternative that incorporates the Act's participation requirements would present all necessary information for the decisionmakers and the public.

NOAA GC response to questions raised by the Council at the June 2005 meeting concerning Component 8a and whether it is a viable component given the non-AFA trawl catcher processor sector eligibility provisions of the Act.

The Council's June 2005 motion explains that the license authorization part of Component 8 (Component 8a) establishes the LLP licenses that will be authorized for participation in a cooperative and that will receive a cooperative endorsement. Based on discussions with Council staff, the intent of options 8a.1, 8a.2, and 8a.3 appears to be that for each owner that is eligible for the non-AFA trawl catcher processor subsector under Component 7, that owner will receive a

cooperative endorsement on each LLP license associated with the vessel if that LLP license was associated with the vessel when the vessel was used to catch not less than 150 mt of non-pollock groundfish with trawl gear and process that fish between three different sets of qualifying years, one set of years for each option. The intent of option 8a.1 appears to be that cooperative endorsements would be issued to those LLP licenses that were associated with a vessel when that vessel qualified for subsector participation under Component 7. The intent of options 8a.2 and 8a.3 appears to be to expand the number of LLP licenses that could receive a cooperative endorsement beyond those LLP licenses that were associated with a vessel when that vessel qualified for subsector participation under Component 7. The Council has asked whether options 8a.2 and 8a.3 impermissibly expand the statutory eligibility criteria for the non-AFA trawl catcher processor subsector.

As explained in NOAA GC's response to Question 3, the statutory criteria for the non-AFA trawl catcher processor subsector limit the number of vessels that qualify for the subsector due to the non-pollock groundfish harvesting and processing requirement in section 219(a)(7)(C). As a result, only those vessels that were used to harvest and process the requisite amount of non-pollock groundfish during the qualifying years will be eligible for the non-AFA trawl catcher processor subsector regardless of the number of LLP licenses currently used on the vessel. Additionally, the Act does not limit eligible members of the non-AFA trawl catcher processor subsector to only one LLP license. The statutory language at section 219(a)(7)(B) refers to the owner of a trawl catcher processor "to whom ***a*** valid LLP license" (emphasis added) with the proper endorsements has been issued. The language of the Act clearly requires that an eligible owner hold at least one LLP license for the qualifying vessel. However, the Act does not include any language that requires that LLP license to have been generated by the history of the vessel that satisfies the criterion at section 219(a)(7)(C). Finally, the Act does not include any language that addresses the formation of cooperatives within the non-AFA trawl catcher processor subsector. The provisions of the Act go solely to subsector eligibility and are silent with regards to the formation of cooperatives within any of the subsectors.

Given the above, there appears to be room under the Act for the Council to consider options concerning eligibility for cooperative endorsements that would qualify more than one LLP license held by persons eligible for the non-AFA trawl catcher processor subsector. However, any option ultimately adopted by the Council must ensure that no person eligible for the non-AFA trawl catcher processor subsector under the Act is excluded from the sector by the Council's choices for cooperative membership criteria. Additionally, the Act states at section 219(g)(2)(A) that the Council should take actions that "promote stability of [the BSAI non-pollock groundfish] fisheries consistent with the goals of this section and the purposes and policies of the Magnuson-Stevens Fishery Conservation and Management Act." According to the floor statements of Senator Murray, the goals of section 219 appear to be to provide a vessel buyback program for the BSAI non-pollock fishery that is to be financed through a capacity reduction loan[15] and to reduce excess harvesting capacity in the catcher processor sector of the

[15] 150 CONG. REC. S11744 (daily ed. November 20, 2004) (statement of Sen. Murray).

BSAI non-pollock groundfish fisheries which will contribute to the future rationalization and long term stability of these fisheries.[16]

The language of section 219(g)(2)(A) is permissive ("should") rather than mandatory ("must") and even Senator Murray in her floor statement says that section 219 should not be interpreted as requiring the Council to rationalize the BSAI non-pollock groundfish fisheries. 150 CONG. REC. S11744 (daily ed. November 20, 2004) (statement of Sen. Murray). Nonetheless, the Council should consider whether the options under consideration for Component 8a promote stability in the non-AFA trawl catcher processor subsector. If the Council ultimately adopts an option that does not promote stability in the non-AFA trawl catcher processor subsector, the Council should provide a rationale as to why the option is reasonable under the Act, the Magnuson-Stevens Act, and other applicable law.

cc: Jane Chalmers
Sam Rauch
Adam Issenberg

Attachments

[16] 150 CONG. REC. S11747 (daily ed. November 20, 2004) (statement of Sen. Murray).

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

March 28, 2006

Ms. Stephanie Madsen, Chair
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

Dear Stephanie,

The Office of Management and Budget (OMB) has issued new guidance on the collection of survey and census data. This guidance pertains to the cost and earnings information that the Council would like to collect from the non-American Fisheries Act (non-AFA) trawl catcher processors under Amendment 80 to the Fishery Management Plan for Groundfish of Bering Sea and Aleutian Islands Groundfish Management Area (FMP).[1] The OMB guidance (Guidance on Agency Survey and Statistical Information Collections: January 20, 2006) requires the completion of an extensive questionnaire by the agency seeking OMB approval for an information collection (see http://www.whitehouse.gov/omb/inforeg/pmc_survey_guidance_2006.pdf). If the Council moves forward with the proposed Cost, Earnings and Employment Survey under Amendment 80, we will need substantial assistance to comply with this guidance.

Based on the content of the Council's proposed survey of the non-AFA trawl catcher processors, the NOAA clearance officer at OMB advises that we will need to comply with both Parts A and B of the supporting statement (attached) required for all information collections subject to the Paperwork Reduction Act. OMB has advised agencies that supporting statements for new information collections of the nature being proposed by the Council may take several weeks or months to pass through the OMB approval process.

In developing the documentation for the Council's proposed survey, either the Council or NMFS must address the following purpose, intent, and technical questions. NMFS staff were required to provide this and other information during OMB review of the economic data collection adopted by the Council as part of its Crab Rationalization Program.

1. Why is this data collection necessary? What questions is it designed to address, and how will the information be used?
2. Is the collection intended for economic research, regulatory enforcement, program monitoring, or some other purpose?

[1] See Appendix 3 to the EA/RIR/IRFA for Amendment 80 which shows the proposed Cost, Earnings and Employment Survey.

3. How often would data be collected?
4. How would data be stratified?
5. Show how the collection of each variable is the optimum method for collection, in comparison with other data sources.
6. Precisely what economic models and regressions will be used?
7. If a cost function is to be constructed, what specific data elements will be used for which analyses?
8. How will each variable be used in economic models or regressions?
9. How will data be verified?
10. How is confidentiality to be assured?

Additionally, NOAA General Counsel has raised questions concerning the level of legal process that may be necessary for the data verification protocol described in the Amendment 80 analysis starting on page 209 of the March 16, 2006, EA/RIR/IRFA. The agency's use of an independent auditor, as described in the analysis, may require the development of an administrative process governing when and how the agency may conduct such an audit and a description and analysis of which party would be responsible for the costs of the audit. NOAA General Counsel also has concerns about the verification protocol's description of whether and when NOAA Fisheries Enforcement may become involved.

In summary, addressing OMB guidelines on information necessary to support approval of the proposed economic information collection and legal concerns about the proposed data verification protocol will require additional assessment. As with the economic data collection under the Crab Rationalization Program, a data committee appointed by the Council would provide helpful assessment and selection of variables and information collection instruments. The input from such a committee and further Council guidance is essential in securing OMB approval for this data collection program in a timely manner.

Sincerely,

for Robert D. Mecum
Acting Regional Administrator

Attachment

Attachment

Supporting Statement for Paperwork Reduction Act Submissions

General Instructions

A Supporting Statement, including the text of the notice to the public required by 5 CFR 1320.5(a)(i)(iv) and its actual or estimated date of publication in the Federal Register, must accompany each request for approval of a collection of information. The Supporting Statement must be prepared in the format described below, and must contain the information specified in Section A below. If an item is not applicable, provide a brief explanation. When Item 17 of the OMB Form 83-I is checked "Yes", Section B of the Supporting Statement must be completed. OMB reserves the right to require the submission of additional information with respect to any request for approval.

Specific Instructions

A. Justification

1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.

2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

5. If the collection of information impacts small businesses or other small entities (Item 5 of OMB Form 83-I), describe any methods used to minimize burden.

6. Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

7. Explain any special circumstances that would cause an information collection to be conducted in a manner:
* requiring respondents to report information to the agency more often than quarterly;
* requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;
* requiring respondents to submit more than an original and two copies of any document;
* requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;
* in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;
* requiring the use of a statistical data classification that has not been reviewed and approved by OMB;
* that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or
* requiring respondents to submit proprietary trade secrets, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.

8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.
Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.
Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years - even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

9. Explain any decision to provide any payment or gift to respondents, other than reenumeration of contractors or grantees.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

12. Provide estimates of the hour burden of the collection of information. The statement should:
* Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.
* If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13 of OMB Form 83-I.
* Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.

13. Provide an estimate for the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 and 14).
* The cost estimate should be split into two components: (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and record storage facilities.
* If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collections services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use

existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.
* Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.

14. Provide estimates of annualized costs to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 in a single table.

15. Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB Form 83-I.

16. For collections of information whose results will be published, outline plans for tabulation and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

18. Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submissions," of OMB Form 83-I.

B. Collections of Information Employing Statistical Methods

The agency should be prepared to justify its decision not to use statistical methods in any case where such methods might reduce burden or improve accuracy of results. When Item 17 on the Form OMB 83-I is checked, "Yes," the following documentation should be included in the Supporting Statement to the extend that it applies to the methods proposed:

1. Describe (including a numerical estimate) the potential respondent universe and any sampling or other respondent selection methods to be used. Data on the number of entities (e.g., establishments, State and local government units, households, or persons) in the universe covered by the collection and in the corresponding sample are to be provided in tabular form for the universe as a whole and for each of the strata in the proposed sample. Indicate expected response rates for the collection as a whole. If the collection had been conducted previously, include the actual response rate achieved during the last collection.

2. Describe the procedures for the collection of information including:
* Statistical methodology for stratification and sample selection,
* Estimation procedure,
* Degree of accuracy needed for the purpose described in the justification,
* Unusual problems requiring specialized sampling procedures, and
* Any use of periodic (less frequent than annual) data collection cycles to reduce burden.

3. Describe methods to maximize response rates and to deal with issues of non-response. The accuracy and reliability of information collected must be shown to be adequate for intended uses. For collections based on sampling, a special justification must be provided for any collection that will not yield "reliable" data that can be generalized to the universe studied.

4. Describe any tests of procedures or methods to be undertaken. Testing is encouraged as an effective means of refining collections of information to minimize burden and improve utility. Tests must be approved if they call for answers to identical questions from 10 or more respondents. A proposed test or set of test may be submitted for approval separately or in combination with the main collection of information.

5. Provide the name and telephone number of individuals consulted on statistical aspects of the design and the name of the agency unit, contractor(s), grantee(s), or other person(s) who will actually collect and/or analyze the information for the agency.