

**Discussion Paper on Amendment 80 Vessel Replacement Provisions
NMFS Alaska Region
NPFMC Meeting, October 2008**

Summary of Court Decision in *Arctic Sole Seafoods v. Gutierrez*

On September 14, 2007, the National Marine Fisheries Service (NMFS) published a final rule implementing Amendment 80 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands (BSAI) Management Area. One aspect of the final rule identified and limited the vessels that could be used to fish for certain species of BSAI groundfish in a particular sector of the groundfish fishery. The final rule included this vessel restriction based on NMFS's interpretation of the Capacity Reduction Program (CRP), a statutory program enacted in December 2004 as part of the Consolidated Appropriations Act of 2005 (Pub. L. No. 108-447, 118 Stat. 2809 (2004)). The final regulations reflected the agency's interpretation that the CRP provided not only eligibility criteria for vessel owners' participation in the sector, but also criteria regarding which vessels could be used when fishing for the species covered by Amendment 80 (hereinafter referred to as "qualifying vessels").

Arctic Sole Seafoods is the owner of the ARCTIC ROSE, a vessel that meets the eligibility criteria in the CRP and the Amendment 80 final rule. The ARCTIC ROSE sank in 2001 and has not been recovered. Subsequent to the sinking of the ARCTIC ROSE, Arctic Sole Seafoods purchased the OCEAN CAPE, a vessel that does not meet the eligibility criteria of the CRP or the Amendment 80 final rule. Arctic Sole Seafoods asserted that the CRP did not restrict participation in the sector to qualifying vessels but instead permitted owners of qualifying vessels to use non-qualifying vessels in the sector, thus allowing replacement of a lost qualifying vessel. Because the final rule implementing Amendment 80 prohibited Arctic Sole Seafoods from using the non-qualifying OCEAN CAPE, Arctic Sole Seafoods challenged the Amendment 80 final rule, claiming that the final rule was arbitrary and capricious under the Administrative Procedure Act.

On May 19, 2008, the U.S. District Court for the Western District of Washington issued a decision invalidating those regulatory provisions that limit the vessels used in the Amendment 80 Program. In *Arctic Sole Seafoods, Inc. v. Gutierrez*, Case No. 07-1676MJP (W.D. Wash. May 19, 2008), the district court found the statutory language of the CRP ambiguous as to whether replacement of qualifying vessels with non-qualifying vessels was permissible, and found the agency's interpretation of the statute to be arbitrary and capricious. The court concluded that the inability to replace qualifying vessels with non-qualifying vessels would ultimately result in the elimination of the sector through vessel attrition, and that Congress had not intended such an outcome in the CRP. The district court ordered that "[t]o the extent that [regulations] restrict[] access to the BSAI non-pollock groundfish fishery to qualifying vessels without allowing a qualified owner to replace a lost qualifying vessel with a single substitute vessel, the regulations must be set aside...."

Compliance with the Order for 2009

The following paragraphs describe how NMFS will comply with the court's ruling in *Arctic Sole Seafoods v. Gutierrez* for 2009. The attached FAQs provide additional information.

NMFS will permit the owner of an Amendment 80 vessel listed in Table 31 to 50 C.F.R. Part 679 to replace that Amendment 80 vessel. An Amendment 80 vessel may not be replaced unless that vessel is no longer able to be used in the Amendment 80 Program due to actual total loss, constructive total loss, or permanent ineligibility of that vessel to receive a fishery endorsement under 46 U.S.C. 12108.

If a replacement vessel suffers an actual total loss, constructive total loss, or permanent ineligibility to receive a fishery endorsement under 46 U.S.C. 12108, that replacement vessel may be replaced by another subsequent replacement vessel. No more than one vessel may be used to replace any other vessel at the same time.

Consistent with existing regulations, the owner of an Amendment 80 vessel must provide clear and unambiguous written documentation that can be verified by NMFS that any lost vessel is no longer able to be used in the Amendment 80 Program due to the actual total loss, constructive total loss, or permanent ineligibility of that vessel to receive a fishery endorsement under 46 U.S.C. 12108. The owner of any replacement vessel must clearly identify the replacement vessel to NMFS in any Amendment 80 QS application, and annual application to participate in either an Amendment 80 cooperative or the Amendment 80 limited access fishery, as applicable.

Any vessel that replaces an Amendment 80 vessel listed in Table 31 to 50 C.F.R. Part 679, or any subsequent vessel that replaces a replacement vessel, shall be considered an Amendment 80 vessel for purposes of the Amendment 80 Program. Any replacement vessel must comply with all regulations applicable to the Amendment 80 vessel that it is replacing, except that; (1) any vessel other than an Amendment 80 vessel listed in Table 31 to 50 CFR 679 shall not have any Amendment 80 legal landings, and no Amendment 80 QS may be issued for any catch made by a vessel not listed in Table 31 to 50 CFR 679; (2) specific GOA sideboard provisions applicable to an Amendment 80 vessel listed in Table 39 to 50 CFR 679 and the F?V GOLDEN FLEECE do not apply to a vessel replacing those vessels (see FAQs for more information).

NMFS will not reissue quota share (QS) that has already been assigned to the License Limitation Program (LLP) license that was originally issued for an Amendment 80 vessel under the provisions of 50 CFR 679.91(h) to the owner of a replacement Amendment 80 vessel.

However, if the owner of an Amendment 80 vessel listed in Table 31 to 50 CFR 679 replaces that Amendment 80 vessel, NMFS has not issued QS based on the catch history of that Amendment 80 vessel, and the owner or that Amendment 80 vessel applies to, and does, receive QS for that Amendment 80 vessel under the provisions at 50 CFR 679.90, NMFS will assign that Amendment 80 QS to the vessel that is used to replace that Amendment 80 vessel.

Frequently Asked Questions on Amendment 80 Vessel Replacement

1. What is a “lost vessel”?

NMFS will permit the replacement of an original qualifying vessel listed in Table 31 to part 679 that has suffered an actual total loss, constructive total loss, or permanent ineligibility of that vessel to receive a fishery endorsement under 46 U.S.C. 12108.

The court’s decision uses both the terms “sunk” and “lost” when referring to qualifying vessels. In NMFS’ opinion, the court’s decision refers to the broader category of qualifying vessels that are “lost” rather than only those that sank.

2. Who may replace a lost vessel?

Only a “qualified owner” may replace a “lost qualifying vessel.” NMFS will not permit persons who do not currently own title to an original qualifying Amendment 80 vessel, either because title has been transferred to another person or because the vessel has been lost and no title exists for that vessel, to replace the vessel.

3. How would I establish that a vessel has been lost and designate a new vessel?

Any vessel owner who wishes to replace a vessel must provide NMFS with clear and unambiguous documentation in written form of the actual total loss, constructive total loss, or permanent ineligibility of that Amendment 80 vessel to receive a fishery endorsement under 46 U.S.C. 12108 and must provide NMFS with the necessary identifying information for the replacement vessel including the vessel name, USCG Documentation number, and length overall of the vessel. If NMFS is not notified that a specific Amendment 80 vessel has been replaced, then NMFS will assume that Amendment 80 vessel has not been replaced.

Note that existing regulations require a person to list the specific vessels, which would include any replacement vessels, that are participating in an Amendment 80 cooperative or limited access fishery during the annual cooperative/limited access fishery application process (see 50 CFR 679.91).

4. Is a replacement vessel considered to be an “Amendment 80 vessel”?

Yes, NMFS will consider any replacement vessel to be an Amendment 80 vessel subject to all prohibitions, limitations, and requirements applicable to the Amendment 80 vessel that it is replacing. These include, but are not limited to, requirements to comply with permitting, recordkeeping and reporting, groundfish retention standards, monitoring and enforcement, regulations applicable to participation in an Amendment 80 cooperative or Amendment 80 limited access fishery, and Gulf of Alaska sideboard restrictions. See the final rule for the Amendment 80 Program (September 14, 2007; 72 FR 52668) and 50 CFR 679 for all regulations applicable to Amendment 80 vessels and participation in the Amendment 80 Program.

The exceptions to this rule are: (1) NMFS will not consider the catch history of any replacement vessel that is not listed in column A of Table 31 to part 679 as eligible for generating Amendment 80 QS; and (2) GOA sideboard restrictions applicable to specific listed Amendment 80 vessels would not apply (see following Q&A).

5. How would GOA sideboard restrictions applicable to a specific Amendment 80 vessel be applied to any vessel used to replace that Amendment 80 vessel?

NMFS will apply GOA sideboard regulations at 50 CFR 679.92(b) to any replacement vessel. Currently, all Amendment 80 vessels are subject to this provision. However, NMFS will not permit any vessel that replaces an Amendment 80 vessel that is listed in Table 39 to part 679 to directed fish for flatfish in the GOA. Similarly, NMFS will not apply GOA sideboard regulations specifically applicable to the F/V GOLDEN FLEECE to any vessel that replaces the F/V GOLDEN FLEECE.

The Court addressed the interpretation of the CRP and whether NMFS could limit fishing for non-pollock groundfish in the BSAI to a specific list of non-AFA trawl catcher/processors. The Order indicates that any vessel replacing an original qualifying Amendment 80 listed in Table 31 to part 679 would be subject to the provisions applicable to Amendment 80 vessels generally. The Court did not indicate that specific provisions applicable to specific vessels in the GOA would be extended to the vessel replacing an original qualifying Amendment 80 vessel. For example, the Court did not specify that a vessel replacing a lost Amendment 80 vessel that is eligible to direct fish for flatfish (i.e., listed in Table 39 to part 679) would also be eligible to directed fish in the flatfish fishery in the GOA, or that a vessel replacing the F/V GOLDEN FLEECE would be subject to the sideboard restrictions applicable to the F/V GOLDEN FLEECE. Because the Court is silent on this issue, and the Council developed specific GOA sideboard criteria for specific vessels, NMFS does not intend to modify its regulations. NMFS notes that the Council may wish to address this issue in a future FMP amendment.

6. Can a lost Amendment 80 vessel be replaced with more than one vessel?

No, NMFS will allow only one vessel to replace an Amendment 80 vessel at a time. The Order stated that “a regulation that allowed an otherwise qualified owner to replace his or her Amendment 80 vessel with multiple vessels would also be impermissible (footnote 4, p. 15).”

7. What happens if a replacement vessel is lost?

NMFS would allow only one vessel to replace another replacement vessel at a time, consistent with the Court’s desire not to allow multiple replacement vessels at the same time.

The Order did not specifically address the potential to replace a replacement vessel. However, based on the text of the Order, it appears that the term “single replacement vessel” is intended to allow a person to replace a lost Amendment 80 vessel with another vessel, regardless of the number of times that vessel may be replaced. The Order supports this interpretation. Specifically, the Court noted that “an interpretation of the Capacity Reduction Program [sec. 219; Pub. L. 108-447] that limits eligibility to certain vessels but does not include a vessel replacement provision leads to absurd results – the inevitable elimination of the fishery. (p. 14).” The only way to avoid the elimination of the fishery that concerned the Court would be to allow a lost replacement vessel to be replaced if it is lost.

8. Are there any limitations on the characteristics of a replacement vessel?

No, the Court did not address the size or capacity of a replacement vessel relative to the qualifying vessel being replaced. However, existing regulations remain in place that may provide some practical limits on the size and capacity of a replacement vessel. Specifically, in order to be eligible to participate in the Amendment 80 fishery, a replacement vessel would still need to be designated on an Amendment 80 LLP in order to be eligible to fish in the Amendment 80 fishery (see 50 CFR 679.7(o)(2)(ii)). An Amendment 80 LLP license is defined under 50 CFR 679.2 as

- (1) Any LLP license that is endorsed for groundfish in the Bering Sea subarea or Aleutian Islands subarea with a catcher/processor designation and that designates an Amendment 80 vessel in an approved application for Amendment 80 QS;
- (2) Any LLP license that designates an Amendment 80 vessel at any time after the effective date of the Amendment 80 Program; and
- (3) Any Amendment 80 LLP/QS license.

NMFS notes that once an LLP license is assigned to an Amendment 80 vessel, that LLP license may not be used on any vessel other than an Amendment 80 vessel (see 50 CFR 679.7(o)(2)(i)). In addition, a person cannot hold an Amendment 80 QS permit assigned to an Amendment 80 vessel unless an Amendment 80 LLP license is assigned to that vessel (see 50 CFR 679.7(o)(3)(i)). Furthermore, the number of LLP licenses that may be used in the Amendment 80 Program is limited by the fact that LLP licenses with the applicable endorsements for trawl catcher/processor activity in the BSAI assigned to AFA catcher/processors may not be used on a non-AFA catcher/processors (see 50 CFR 679.4(k)(10)).

9. What happens to QS that has been assigned to the holder of an LLP license originally issued for an Amendment 80 vessel if that vessel is subsequently replaced?

NMFS will not reassign QS that was already issued to the holder of an LLP license listed in Column C of Table 31 to part 679 if the Amendment 80 vessel corresponding to that LLP license in Column A of Table 31 to part 679 is subsequently replaced.

For example, NMFS would not reissue the QS already assigned to the LLP license originally assigned to the lost Amendment 80 vessel the F/V PROSPERITY (LLG 1802) to the owner of the F/V PROSPERITY if the owner of the F/V PROSPERITY decided to replace that vessel.

10. What happens if I have established that I am the owner of a lost Amendment 80 vessel, I have replaced that vessel, and I apply for QS?

Consistent with regulations at 50 CFR 679.90(a)(2)(i) and (d)(2)(i), if the owner of a lost Amendment 80 vessel replaces that vessel, NMFS has not previously issued QS for that lost vessel, and the owner of the replacement vessel subsequently applies for QS and is eligible to receive QS, NMFS will issue an Amendment 80 QS that must be assigned to the replacement vessel.

For example, because NMFS has not yet issued QS based on the catch history of the F/V ARCTIC ROSE, a lost Amendment 80 vessel, if the owner of the F/V ARCTIC ROSE replaces that the F/V ARCTIC ROSE, NMFS will issue QS and assign that QS to the vessel that replaces the F/V ARCTIC ROSE.

11. What happens if I hold the LLP license originally issued to a lost Amendment 80 vessel and the rights and privileges to receive QS, but I have not replaced the vessel and I wish to receive QS?

If you apply to receive QS consistent with regulations in 50 CFR 679.90, NMFS would issue the QS derived from the lost Amendment 80 vessel to the LLP license originally issued to the Amendment 80 vessel that you hold. You are not required to replace an Amendment 80 vessel before you receive QS.

For example, the person holding the LLP license originally issued to the F/V BERING ENTERPRISE, a lost Amendment 80 vessel, is not required to replace the F/V BERING ENTERPRISE before applying to receive QS based on the catch history of that vessel. NMFS would issue any QS to the holder of the LLP license of the F/V BERING ENTERPRISE, provided all other requirements were met.

12. What happens if I hold the LLP license originally issued to a lost Amendment 80 vessel and the rights and privileges to receive QS, I have not yet applied for QS, and the owner of the lost Amendment 80 vessel replaces that vessel and applies to receive QS before I do?

NMFS has not yet thoroughly reviewed this situation. A brief review of the regulations suggests that the owner of an original qualifying Amendment 80 vessel has the first priority to apply for and receive QS. There is no conclusive answer at this time.

Council Actions Necessary to Address the Order

The BSAI groundfish FMP text and NMFS regulations must be amended in light of the court's ruling. Although NMFS has not conducted an extensive review of the FMP and regulations, NMFS proposes the following draft FMP and regulatory language to bring the existing regulatory text into conformance with the court's decision. This language is subject to revision upon further review. First, NMFS proposes that a new section 3.7.5.10 be added to the BSAI groundfish FMP to state:

3.7.5.10 Vessel Replacement

If a vessel in the non-AFA trawl catcher/processor sector as defined in Section 219(a)(7) of the Consolidated Appropriations Act, 2005 (P.L. 108-447) suffers an actual total loss constructive total loss, or permanent inability to be used in the Program, that vessel can be replaced. Any replacement vessel may also be replaced. No more than one vessel can replace a vessel at a given time.

Second, NMFS proposes that the definition of "Amendment 80 legal landing" at 50 C.F.R. 679.2 be modified to read as follows:

Amendment 80 legal landing means the total catch of Amendment 80 species in a management area in the BSAI by an Amendment 80 vessel, other than an Amendment 80 vessel described in paragraph (2)(iii) of the definition of an Amendment 80 vessel, that:

- (1) Was made in compliance with state and Federal regulations in effect at that time; and
- (2) Is recorded on a Weekly Production Report from January 20, 1998, through December 31, 2004; and
- (3) Amendment 80 species caught while test fishing, fishing under an experimental, exploratory, or scientific activity permit, or fishing under the Western Alaska CDQ Program are not considered Amendment 80 legal landings.

Third, NMFS proposes that the definition of "Amendment 80 vessel" at 50 C.F.R. 679.2 be modified to read as follows:

Amendment 80 vessel means:

- (1) The vessels listed in Column A of Table 31 to this part with the corresponding USCG Documentation Number listed in Column B of Table 31 to this part; or
- (2) Any vessel that:
 - (i) Is not listed as an AFA trawl catcher/processor under sections 208(e)(1) through (20) of the American Fisheries Act;
 - (ii) Has been used to harvest with trawl gear and process not less than 150 mt of Atka mackerel, flathead sole, Pacific cod, Pacific ocean perch, rock sole, turbot, or yellowfin sole in the aggregate in the BSAI during the period from January 1, 1997, through December 31, 2002.; or
 - (iii) (A) Any vessel that is replaced by an owner of a vessel described in paragraph (1) of this definition provided that the vessel described in paragraph (1) of this definition is no longer able to be used in the Amendment 80 Program due to the actual total loss, constructive total loss, or permanent ineligibility of that vessel to receive a fishery endorsement under 46 U.S.C. 12108;
 - (B) Any vessel that is replaced by the owner of a vessel described in paragraph (2)(iii)(A) of this definition provided that the vessel described in paragraph (2)(iii)(A) of this definition is no longer able to be used in the Amendment 80 Program due to the

actual total loss, constructive total loss, or permanent ineligibility of that vessel to receive a fishery endorsement under 46 U.S.C. 12108.

Fourth, NMFS proposes a new regulation at 50 C.F.R. 679.7(o)(9) as follows:

(9) For a vessel owner to replace an Amendment 80 vessel with more than one Amendment 80 vessel at a time.

Other Considerations for Potential Council Action

The Court did not address several specific requirements for vessel replacement language that the Council may wish to consider. Because the FMP must be amended to be consistent with the Order, the Council may wish to address these issues at the same time that the FMP is being amended.

First, the Court's interpretation of the CRP suggests that the Council may have the discretion to allow an Amendment 80 vessel to be replaced for reasons other than actual total loss, constructive total loss, or permanent ineligibility of that vessel to receive a fishery endorsement under 46 U.S.C. 12108. The Council may wish to explore options that would define vessel replacement provisions to allow replacement to improve vessel efficiency, address safety concerns, improve compliance with the groundfish retention standards, or for other reasons.

Second, the Court did not establish a specific vessel size, capacity, or other limit on replacement vessels. This raises the possibility that a smaller vessel could be replaced with a larger vessel with additional harvesting and processing capacity (see FAQ #8 for additional detail). If the Council wishes to establish limits on the size of a replacement vessel, this would require amendment to the FMP. For example, the Council could explore alternative to limit a replacement to: (1) the size of the original qualifying Amendment 80 vessel as of a specific date; (2) the length specified as the maximum length overall on the LLP license originally derived from an original qualifying Amendment 80 vessel (shown in Column C of Table 31 to part 679); or (3) some other criteria.

Third, the Council may wish to consider defining the types of vessels that could replace an Amendment 80 vessel. As an example, under the provisions of the Order, it is possible that an Amendment 80 vessel could be replaced with an AFA catcher/processor. As with any complex program, mixing vessels from one limited access privilege program with another could create complications for both enforcement and catch accounting. As an example, if a replacement vessel is both an AFA catcher/processor and an Amendment 80 vessel, then it would appear that the regulations at 679.7(o)(1)(ii) would require that any Pacific cod caught by such a vessel while it is directed fishing for pollock would need to be attributed to an Amendment 80 cooperative, or the Amendment 80 limited access fishery allocation, and not to the allocation of Pacific cod to the AFA catcher/processor subsector as established under Amendment 85. The Council may want to clarify what type of vessels, and under what conditions replacement vessels could participate in the Amendment 80 sector.

Fourth, as noted in the response to FAQ # 5, the Court did not address the applicability of specific GOA sideboard provisions for listed Amendment 80 vessels to any replacement vessels. The Council may want to clarify if replacement vessels would be able to be used in the GOA in the same manner as the original vessels.

Finally, the Council may wish to consider incorporating FMP amendments to allow replacement vessels with the analysis of Amendment 80 cooperative standards currently scheduled for initial review in December, 2008. Proponents for modifying cooperative formation standards have indicated that one rationale for modifying the standards was to provide greater flexibility for vessel owners in the case of a vessel sinking. If vessel replacement provisions affect cooperative formation standards then integrating these two actions could improve the analysis and reduce redundant analyses. The cooperative formation standard would need to be delayed to incorporate the vessel replacement provisions.