April 2009
Agenda C-1 (Supplemental)

Vessel Capacity Limits in the Gulf of Alaska (GOA) Fixed Gear Recency Action
NMFS Alaska Region & NOAA Office of Law Enforcement
March 24, 2009

Summary

The alternatives the Council is considering under Component 6 for vessel capacity limits do not appear to meet the Council's purpose and need statement and are not practical for NMFS to implement or enforce. Alternative approaches to control effort (i.e., trip limits, gear restrictions, or quota-based management) by a class of vessels (i.e., the "super 8 fleet") have not been addressed or analyzed by the Council and should be considered before final action. This is not practical given the timing of final action. Based on these policy, implementation, and enforcement concerns, NMFS recommends that Component 6 not be implemented as part of the Council's final action. The Council may wish to reconsider a revised approach as a separate subsequent action. A broad range of policy and implementation issues would need to be addressed before any future Council action. The Council could recommend the remaining aspects of the fixed gear License Limitation Program (LLP) recency action without recommending Component 6.

Council's Purpose and Need Statement and Component 6

GOA Fixed Gear Recency Purpose and Need Statement

Western GOA and Central GOA Pacific cod fisheries are subject to intense competition, particularly during the A season, when fish are aggregated and of highest value. Competition among fixed gear participants in the Western GOA and Central GOA Pacific cod fisheries has increased for a variety of reasons, including increased market value of Pacific cod products, a declining ABC/TAC, increased participation by harvesters displaced from other fisheries and introduction of capital that has been accrued from participation in rationalized fisheries. Additionally, fishery policies have created incentives that encourage non-traditional efficiency improvements for the less than 60 ft LOA vessel class. The possible future entry of latent effort and disproportionate vessel efficiency would have detrimental effects on LLP holders that have exhibited participation in, and dependence on, the fixed gear Pacific cod fisheries. Many fixed gear vessel owners have made significant investments, have long catch histories, and are dependent on the Western GOA and Central GOA Pacific cod resources. These long-term participants need protection from those who have little or no recent history and who have the ability to increase their participation in the Pacific cod fisheries. At the same time, retaining Federal waters opportunities for small community quota eligible (CQE) communities dependent on access to a range of fishery resources and expanding opportunities in Federal waters for small capacity jig operations is valued to promote community protections at a level that imposes minimal impact on historic catch shares of recent participants.

The intent of the proposed amendment is to prevent the future entry or re-entry of latent fixed gear groundfish fishing capacity that has not been utilized in recent years into the Pacific cod fisheries, and to preserve the traditional vessel operational efficiencies within the fisheries. This requires

prompt action to promote stability in the fixed gear sectors of the GOA Pacific cod fisheries, and is expected to be implemented concurrently with the division of GOA Pacific cod among sectors which is currently under consideration. However, this action cannot address continued growth in the waters managed by the State of Alaska.

Component 6 – Capacity/efficiency limits to CV and CP fixed gear LLPs

Add a width restriction (efficiency restriction) to each CV and CP fixed gear LLP license that is eligible to access Pacific cod under this action. The width restriction would be 1 ft of width for each 3 ft of length, and is based on the LOA of the vessel assigned to the license on December 8, 2008. The licenses that are assigned to vessels on December 8, 2008 that exceed the width restriction will be grandfathered at their present LOA. For vessels under construction on December 8, 2008, the width restriction for the license shall be equal to the vessel width upon completion. Vessels would be required to report width measurements to RAM.

Option: Add a simple gross tonnage maximum to licenses.

Policy and Legal Considerations

The proposed actions to limit the width or Simple Gross Tonnage (SGT) of a vessel do not appear to specifically address the Council's purpose and need statement to limit "[t]he possible future entry of latent effort and disproportionate vessel efficiency." As an example, under the alternatives being considered by the Council nothing would prevent a vessel owner from purchasing or building a vessel less than 60 feet length overall (LOA) with the desired depth and width and purchasing or leasing an LLP license with an endorsement from a larger vessel that meets the requisite width or SGT requirements necessary to use that vessel in the under 60 foot LOA vessel size class. (e.g., a vessel owner could build a 58 foot LOA vessel with a width of 22 feet and purchase or lease an LLP license with a 70 foot LOA and a corresponding 23.3 foot width endorsement and continue to fish in the under 60 foot LOA vessel size class). The alternatives being considered by the Council would increase the operational costs for those vessel operators who did not hold an LLP license with the appropriate capacity endorsement, but it would not necessarily constrain vessel capacity within that vessel size class.

Increasing costs for operating a specific size of vessels, presumably vessels that are more efficient than smaller vessels within that size class, without necessarily reducing the ability to increase capacity within that vessel size class, presumably the goal of the action, raises concerns that these measures may not meet the requirements of National Standards 5 (consider efficiency) and National Standard 7 (minimize costs).[1] Similarly, the alternatives under consideration may not meet the requirements of the Regulatory Flexibility Act (RFA) which requires consideration of alternatives that would minimize costs on small entities, or the Administrative Procedure Act

[1] MSA, Section 301:
National Standard 5: "Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no measure shall have economic allocation as its sole purpose.
National Standard 7: "Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication."

(APA) which prohibits the adoption of arbitrary and capricious regulation. It is likely that the alternatives considered by the Council could result in additional costs to vessel operators building larger, and possibly more efficient vessels (i.e., the costs of purchasing a new LLP license with an adequate width endorsement), that smaller, and possibly less efficient, vessel operators would not bear.

In addition, establishing regulations that discourage specific vessel configurations may conflict with the requirements of National Standard 10 (promote safety).[2] It could be argued that wider or deeper vessels with greater hold capacity, newer construction, improved engines, or better navigation may be safer than smaller and older vessels. Measures that discourage the development of these vessels (e.g., by increasing operational costs by requiring the purchase of a properly endorsed LLP license) could fail to promote safety to the extent practicable. The Council would need to analyze the potential effect of this action on safety and would likely need to review additional alternative approaches. Such an analysis has not yet been conducted.

Section 3.3.2.12 of the Council analysis notes that the intent behind the provision is to limit "high capacity 58 ft LOA vessels from entering the GOA groundfish fisheries," but the wording of the Council's motion in Component 6 is applicable to vessels of all vessel size classes, which significantly expands the enforcement burden and costs on the affected industry. At a minimum, the Council's proposed action and the intent described in the analysis would need to be aligned should the Council choose to consider future action with a capacity endorsement on the LLP licenses. If these provisions applied only to vessels under 60 feet LOA, or even a specific subclass of vessels under 60 feet LOA (i.e., only vessels with a 58 foot or 59 foot LOA) the Council would need to provide specific justification why such an action was not arbitrary and why capacity should not be constrained in other vessel length classes.[3] Presumably, other vessel owners in other vessel size classes could have similar incentives to expand their vessel's capacity. [4]

Although the Council's purpose and need statement indicates that there is a need to address "non-traditional efficiency improvements for the less than 60 ft LOA vessel class," and that "[t]he possible future entry of latent effort and disproportionate vessel efficiency would have

[2] MSA, Section 301:
National Standard 10: "Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea."

[3] As an example, if the Council sought to constrain capacity only for vessels with a 58 or 59 foot LOA, the Council would need to provide compelling rationale for recommending a restriction on such a specific class of vessels and demonstrate that other alternative methods had been considered.

[4] Section 3.3.2.12 notes that vessels under 60 feet LOA are not subject to the Federal Observer Program and therefore vessel owners may have an incentive to increase vessel width or depth but stay below 60 feet LOA to avoid the additional costs of observer coverage. A similar consideration would also apply to vessels under 125 feet LOA that are subject to 30 percent observer coverage rather than 100 percent coverage if 125 feet LOA or greater. This dynamic would need to be addressed by the Council and rationale provided for not applying a vessel capacity limit to the 60 - 124 foot LOA vessel size class.

detrimental effects on LLP holders that have exhibited participation in, and dependence on, the fixed gear Pacific cod fisheries," it is not clear why other measures such as trip limits, gear restrictions, or quota-based management may not be better suited to the apparent concern about a "race for fish" within a specific component of the fixed gear fleet. The APA and the RFA require that the Council and NMFS consider alternatives that may reduce costs on small entities and reporting burdens for the affected industry.

For a specific example, the LOA to width ratio in Component 6 examines only one alternative, a 1:3 ratio. The Council has not articulated why this specific ratio is appropriate, whether a policy of establishing a 1:3 ratio would effectively reduce capacity as desired, whether alternative approaches could better achieve the Council's objectives, or how the proposed action would avoid creating incentives for vessel owners to increase vessel capacity by building or modifying vessels with a width and LOA slightly under a 1:3 ratio. In addition, the Council would need to provide additional detail on whether vessel capacity restrictions would be sufficient to address the specific purpose and need statement, and whether vessel owners could increase their harvesting capacity through other means such as improved gear, engine capacity, navigation equipment, or other measures, thereby frustrating the intent of this provision.

A similar suite of questions would need to be addressed for the SGT option. Currently, the analysis provides an indication that a maximum SGT of 100 tons may be appropriate but the Council has not provided a rationale for why this may be the case. An additional complication in the SGT alternative, as the analysis notes, is the incomplete and inconsistent data on gross tonnage depending on the source used. The data currently available to the Council may not provide an accurate description of the actual gross tonnage of vessels, and any SGT limit recommended by the Council may affect more or less vessels than expected once the data have been more extensively reviewed.

Technical Aspects of Vessel Capacity Measurements

Establishing clear descriptions of vessel depth and width is complicated by the range of vessel construction and measurement tools. Experience with the implementation of a LOA regulation suggests that defining specific nautical terms unambiguously is challenging and enforcement actions that may disqualify a vessel's use with a specific LLP license are often the subject of appeal and litigation. As an example, NMFS redefined LOA in 2001 based in part on the results of enforcement actions on LOA that had attempted to define LOA as the distance between the "stem" and "stern" of vessels. Specifically, questions arose about whether bulwarks were considered part of the stem or stern of a vessel and subsequent litigation on these issues resulted in the need for additional clarifying regulatory action. Even with a revised definition of LOA, vessel owners have modified vessels by removing bulwarks, installing detachable bowsprits, modifying decking, and making other modifications that still allow a vessel to be operational under the regulatory definition of LOA. If vessel operators perceive a similar incentive to modify their vessels to meet definitions of width or depth, similar modifications are possible.

Obviously, NMFS would attempt to design regulations that are clearly understood, but past experience suggests that specific terms are subject to interpretation and are likely to be litigated. NOAA Office of Law Enforcement (OLE) has coordinated with a marine surveyor to explore a potential definition of width. A draft definition is attached to this document. A similar draft definition of depth is being developed but is unavailable at this time.

Unlike LOA measurements that can be relatively easily verified by measuring a vessel at dock, width measurements are not easily determined by visually inspecting a vessel. As an example, vessel superstructure can impede line-of-sight measurement, and motion of the vessel, even while at dock, can make accurate measurements difficult. Any protrusions of a vessel below waterline could not be reliably measured. In addition, any field measurement or estimate of a vessel's width or depth that contemplated or resulted in an enforcement action against a vessel owner would require a high degree of accuracy. For example, SGT calculations require multiplying length by width by depth, and a small error in one or two of these calculations could be the difference between being over or under a specific SGT limit. Depth measurements cannot be reliably made unless a vessel is in drydock. These conditions make it highly unlikely, if not impossible, for enforcement personnel to reliably determine the accuracy of a reported width or depth measurement in the field. To avoid the potential inaccuracies of field measurements, USCG regulations require that vessel width and depth measurements be made while a vessel is in drydock to reduce the effect of these complicating factors. NMFS would require that a similar protocol be used for vessel capacity measurements recommended by the Council.

NMFS would require that measurements be conducted by certified marine surveyors or marine architects to avoid the risk of unintentional or intentional misreporting. The potential complexity of measurements would require that a standard approach be adopted by all surveyors. Individuals that self-report their vessel depth or width would be less likely to apply a uniform standard and may have little incentive to do so. To ensure up-to-date measurements, NMFS would require vessel owners to periodically measure the vessel to ensure that any modifications that affected a vessel's dimensions are provided. Preliminary discussions with NMFS, NOAA OLE, and USCG personnel suggest that defining a change in vessel dimensions that would require remeasurement is particularly difficult, and NMFS would have to rely on the vessel owner to self-report any such modifications. A requirement for regular remeasurement of a vessel is likely to result in more accurate information. NMFS has not determined the appropriate requirement for remeasurement, but annual, biannual, or triannual time frames have been discussed. NMFS would likely require that a survey be conducted for a vessel prior to approving the designation of an LLP license for that vessel if that vessel does not have a certified survey on file.

Timing these measurements with vessel shipyard activity may not be practical given the number of vessels encompassed by the scope of the proposed action and the limited number of potential surveyors. As currently worded, Component 6 would apply to all vessels in the GOA fixed gear fleet. This could encompass potentially thousands of vessels in the GOA given the number of

vessels currently active, and the potential for new vessels to be used in the fixed gear fleet as LLP licenses are transferred and designated for new vessels. NOAA OLE personnel have contacted a marine surveyor in Alaska to provide an estimate of the number of certified marine surveyors and the approximate cost of a survey. Approximately three or four certified surveyors are active in Alaska, and five or six certified surveyors are active in the Puget Sound region of Washington with expertise in surveying fishing vessels. Many of these surveyors also provide services for recreational or other commercial vessels and are frequently in high demand.

The cost of a survey can vary considerably depending on the time required and travel expenses. If a survey is coordinated with multiple vessels at one port, the travel costs can be apportioned among multiple vessels. However, if relatively few or only one vessel is being surveyed in a more remote port, travel costs could increase substantially. One marine surveyor estimated that a survey just for length, width, or depth could cost approximately $13 to $20 per foot of measurement depending on the surveyor. These costs are independent of travel expenses. For example, a survey of a 58 foot LOA and 22 foot wide vessel at a more remote port could cost $1,200 for the survey assuming $15 per foot for the survey (58 + 22) *15)), plus approximately $1,500 for travel and lodging assuming no other vessels were surveyed at that time. These estimates are only approximate and would likely differ substantially depending on the specific conditions of the survey. Given the potential number of vessels to be surveyed, the costs of a survey, and the need for regular remeasurement, the total reporting burden and cost to the industry to implement Component 6 could be substantial.

Implementation Considerations

The Council has recommended establishing an endorsement on all fixed gear LLP licenses with maximum width of 1 foot for every 3 feet of LOA of the vessel to which that LLP license was assigned on a specific date (December 8, 2008). Vessel owners must report LOA to NMFS, and presumably NMFS would use the LOAs reported on the Federal Fishing Permits (FFPs) for determining vessel LOA and then calculate the maximum width that would apply to the LLP license that had been used on that vessel. The maximum width would be determined based on a self-reported LOA, that LOA could have been erroneously reported to, or entered into, the NMFS database. NMFS would need to provide an opportunity for the affected industry to amend NMFS data to correct the vessel LOA. NMFS has generally provided an opportunity for the regulated industry to challenge NMFS data used to limit or otherwise constrain fishing operations, and a similar policy would be applied to LOA measurements used to establish a width endorsement. Industry challenges of NMFS' records would be subject to the appeals process conducted by the Office of Administrative Appeals. The final resolution of appeals can take considerable time depending on the nature of the claim and the staffing available to process those claims. An appeal would need to be resolved before an LLP license could be reissued with the applicable width or SGT endorsement.

Additional complications arise when the LLP license holder receiving the endorsement is not the owner of the vessel that was used on December 8, 2008. A vessel owner may have little incentive to remeasure a vessel if it would benefit only an LLP license holder no longer associated with that vessel. It is not clear that NMFS could require that a vessel owner remeasure a vessel, or require that vessel owner allow an LLP license holder whose LLP license was previously used on that vessel to remeasure that vessel. This lack of vessel and LLP license linkage creates the potential that an LLP license holder could receive an endorsement based on an erroneous measurement with no recourse to correct the problem. An alternative approach would be to base the width on the MLOA of the LLP license rather than attempting to link the license to a specific vessel. This approach would be much simpler to implement and would not require a potentially long, contentious, and expensive process of remeasuring a vessel's LOA, or the potential delays in endorsing a specific LLP license if the existing LOA is challenged and appealed. Because the MLOA is listed on the LLP license it is no longer subject to challenge through the appeals process and calculating the width endorsement from that MLOA using a simple ratio would not be subject to appeals procedures.

Component 6 states that "vessels would be required to report width measurements to RAM." This provision is more problematic than computing the width based on a simple calculation based on the LLP MLOA as described above. In most cases, vessel operators may not have accurate estimates of the width of their vessel. Discussions with USCG, NOAA OLE, and RAM personnel as well as the review of the data provided by Council staff indicates that width measurements may not have been reliably taken or reported, or may be based on documentation from the vessel builder that may not reflect subsequent modifications to the vessel. It is highly unlikely that vessel owners could reliably report width of their vessels as of December 8, 2008. As with the LOA measurement, NMFS would have to provide an opportunity for vessel owners to amend any previously reported width, further delaying the implementation of this regulation. Similarly, if the Council chose to implement a SGT limit, measurements of vessel LOA, width, and depth would be subject to amendment and appeal process procedures.

If the Council chose to require vessel owners to measure their vessels and obtain certified length, width, or depth measurements, NMFS would not be able to require those measurements until after the effective date of a final rule. Requiring vessel owners to measure their vessels and provide those measurements to RAM before the issuance of a width or SGT endorsement on an LLP license could cause substantial delays in the implementation of any vessel capacity endorsement. Because these measurements would need to be conducted while the vessel is in drydock, timing a vessel survey with shipyard activity could be problematic, particularly if large numbers of vessels are subject to this provision. Similar complications would arise if vessel owners were to report their vessel's SGT on December 8, 2008.

An additional complication arises when granting an exemption to the 1:3 ratio or SGT limit for LLP licenses that, at the time of implementation, are assigned to vessels that exceed the 1:3 width to length ratio, or a specific SGT limit. Assigning a "grandfathered" width or SGT to an

LLP license would be simplified by allowing vessel operators to provide information to NMFS certifying that an LLP license was assigned to a vessel that exceeded the 1:3 width to LOA ratio or SGT limit, as well as a copy of a certified survey for that vessel at the time that the LLP license was assigned to that vessel. To avoid the complications of using potentially inaccurate or incomplete measurements, any certified measurement of a vessel exceeding the 1:3 ratio or SGT limit recommended by the Council would need to be based on the width or SGT of the vessel to which an LLP license was assigned after the date that the rule became effective rather than on a fixed date in the past.

The Council has not specified how a maximum width would be established for LLP licenses that were assigned to a vessel without an FFP and a known LOA, or that were not assigned to any vessel as of December 8, 2008. The simplest solution would be to determine the width based on the MLOA of the LLP license. Assigning the LLP license a width endorsement based on its use onboard another vessel at some other point in time prior December 8, 2008 presents the same difficulties described above.

Definition: "Width"

Pertaining to a vessel, ship or boat hull dimensions:

The greatest molded breadth or beam of a vessel hull, as measured athwartship (side to side) or perpendicular to the vessel centerline longitudinal axis to reflect the hull full width profile.

Methodology

Measured from the outermost edge of the upper bulwark cap then across to the outermost edge of the opposite side, as a perpendicular line, to the vessel longitudinal centerline, at the greatest molded beam of the hull.

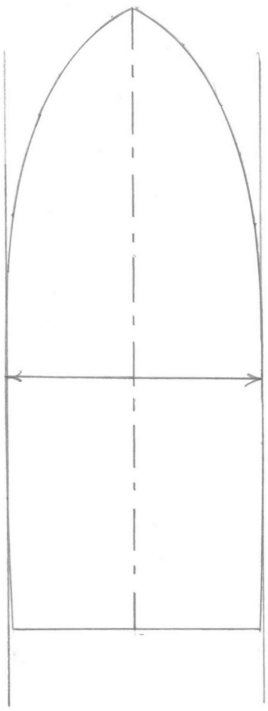
In addition, a side measurement is necessary to include permanent hull attachments such as extensions or protrusions intended to or inadvertently do increase the displacement of the vessel, such as sponsons or a new style hull section, but to exclude bolt-on or weld- on items such as moorage fenders, hook or pot guards. This will require a vertical line at 90° off the athwartship measurement line, described above, then down along the hull shell (side) toward the keel, past the hull chine, and even with the keel bottom, by plumb bob.

Rationale

A 2-dimensional measurement, as illustrated below, is necessary to ensure all aspects of the vessel molded width, which includes permanently affixed protrusions, such as hull designs, specialized guards, sponsons, etc., are taken into account.

Illustration

Measurement No. 1



Measurement No.2