

Discussion Paper

Trawl Catcher/Processor Vessel Replacement

(AFA and Amendment 80 vessels)

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AGENDA C-5(a)

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Note: This document has not been comprehensively reviewed by NOAA General Counsel

Table of Contents

Summary	1
Background.....	2
(1) Rationale for the Current Legal Interpretation that the CRP does not Prohibit an AFA Vessel from Replacing an Amendment 80 Vessel	9
(2) Whether Allowing an AFA Vessel to Replace an Amendment 80 Vessel Would Meet the Purposes of the CRP	11
(3) Other Applicable Statutory Requirements for Replacement of Amendment 80 and AFA vessels	11
(4) The Applicability of Sideboards should an AFA Vessel Replace an Amendment 80 vessel.....	16
(5) Policy and Regulatory Considerations for Replacement of Amendment 80 vessels with AFA vessels, or AFA Vessels with Amendment 80 Vessels	16
References.....	29
Persons Consulted.....	29

Summary

At its June 2012 meeting, the North Pacific Fishery Management Council (Council) requested that NOAA Fisheries develop a discussion paper examining the potential impacts of allowing American Fisheries Act (AFA) vessels to be used as Amendment 80 replacement vessels. Current regulations prohibit AFA vessels from use as Amendment 80 replacement vessels. This discussion paper describes (1) the rationale for the current legal interpretation that the Capacity Reduction Program (CRP) does not prohibit an AFA vessel from replacing an Amendment 80 vessel, (2) whether allowing an AFA vessel to replace an Amendment 80 vessel would meet the purposes of the CRP, (3) other applicable statutory requirements for replacement of Amendment 80 and AFA vessels, (4) the applicability of sideboards (catch limitations) should an AFA vessel replace an Amendment 80 vessel, and (5) policy and regulatory considerations for replacement of Amendment 80 vessels with AFA vessels, or AFA vessels with Amendment 80 vessels.

NOAA Fisheries has reviewed the CRP, and continues to believe that the CRP does not prohibit the Council from recommending, or NOAA Fisheries from regulating, the use of AFA vessels as Amendment 80 replacement vessels. Further, the use of AFA vessels as Amendment 80 replacement vessels is consistent with the purposes of the CRP. Other provisions in the AFA and the Magnuson-Stevens Fishery Conservation and Management Act would need to be considered should the Council recommend further analysis. However, other statutes do not appear to prohibit the use of AFA vessels as Amendment 80 replacement vessels.

AFA sideboard measures would continue to apply to an AFA vessel when operating as an Amendment 80 replacement vessel. If the Council recommends further analysis, the Council could develop alternatives to explicitly modify AFA sideboards that would apply to these hybrid AFA/Amendment 80 replacement vessels so that these vessels could effectively operate in the Amendment 80 fishery.

This paper includes a qualitative review of issues for the Council to consider in deciding whether to move forward with this action. Overall, the impacts of allowing AFA vessels to replace Amendment 80 vessels are difficult to quantify given the limited information on the specific vessels being replaced, and limited operational, asset value, and cost data. The effects of allowing AFA vessels to participate in the Amendment 80 fishery are primarily economic and would not substantially change total catch or effort in the North Pacific. Importantly, the impacts would depend on how the Council designs the provisions for AFA vessel participation in the Amendment 80 fishery.

It is unlikely that any AFA catcher vessels could meet the necessary operational requirements to be effective Amendment 80 replacement vessels. AFA catcher/processors are the most viable Amendment 80 replacement vessels. If the prohibition on the use of AFA vessels in Amendment 80 fishery is removed, only 3 of the 20 AFA catcher/processors meet the other regulatory criteria to qualify as Amendment 80 replacement vessels. However, in future years AFA vessels could be built to specifically meet the requirements for use as hybrid AFA/Amendment 80 vessels and more than the 3 vessels currently identified could qualify. If the Council recommends further analysis, the Council could develop alternatives to modify one, some, or all of the regulatory criteria now required for Amendment 80 replacement vessels, with differing impacts on the number of AFA vessels that could be used as Amendment 80 replacement vessels.

AFA vessels could more cheaply and rapidly replace some Amendment 80 vessels than newly constructed vessels. They could also provide for more economically efficient groundfish fisheries. However, Amendment 80 vessel owners believe these new entrants are not necessary to meet their needs for new vessels, and would destabilize existing business relationships, markets, and economics of the fishery. NOAA Fisheries does not have adequate data at this time to quantitatively assess these claims. The use of AFA vessels in the Amendment 80 fishery would likely increase consolidation in the Bering Sea and Aleutian Islands groundfish fisheries, may reduce crew employment, and could reduce the number of replacement vessels likely to be built. If the Council recommends further analysis, the Council could develop alternatives to limit the total amount of harvest or maximum number of AFA vessels that could be used in the Amendment 80 sector to control the rate of new entrants. These measures could slow consolidation and moderate the potential impact on the Amendment 80 sector.

Background

The American Fisheries Act (AFA)

In 1998, Congress enacted the American Fisheries Act of 1998 (AFA) (Public Law 105-227, Title II of Division C). The AFA had two primary objectives; (1) to complete the process begun in 1976 to give U.S. interests a priority in the harvest of U.S. fishery resources, and also (2) to significantly de-capitalize the Bering Sea pollock fishery. Congress believed that the state of overcapacity that existed in the Bering Sea/Aleutian Islands Management Area (BSAI) pollock fishery at the time of passage of the AFA in 1998 was the result of mistakes in, and misinterpretations of, the 1987 Commercial Fishery Industry Vessel Anti-Reflagging Act (Anti-Reflagging Act) Pub. L. 100-293 that only Congress had the capacity to fix (Cong. Rec. 1998, 12777-12782).

In addition to addressing what Congress believed were mistakes in the Anti-Reflagging Act (i.e. exempting some vessels from use in U.S. fisheries that were rebuilt in foreign shipyards), and providing for the de-capitalization of the BSAI pollock fleet, the AFA resolved longstanding allocation issues in the BSAI pollock fishery which began in 1991 with the passage of Amendments 18/23 to the Fishery Management Plan for BSAI groundfish (FMP). These amendments established separate inshore and offshore allocations of pollock in the BSAI and Gulf of Alaska (GOA). The AFA and its implementing regulations were intended to (1) de-capitalized the BSAI pollock fleet through the buyout of nine pollock trawl catcher/processors (C/Ps) and the subsequent scrapping of eight of these vessels, (2) establish a fixed allocation between the inshore and offshore sectors, (3) establish a catch share program involving fishery cooperatives for the inshore sector, and (4) establish management measures to address the spillover effects of these actions.

The Amendment 80 Program

In June 2006, the Council adopted Amendment 80 to the FMP, NOAA Fisheries published a final rule in 2007, and regulations became fully effective starting with the 2008 fishing year (72 FR 52668, September 14, 2007). Amendment 80 established a specific type of catch share program, a limited access privilege program (LAPP), for trawl C/Ps that are not authorized to conduct directed fishing for pollock under the AFA. These non-AFA trawl C/Ps¹ are referred to as Amendment 80 vessels, or the Amendment 80 sector. Amendment 80 was intended to reduce potential bycatch reduction costs, encourage fishing practices with lower discard rates, and promote opportunities for the sector to increase the value of harvested species. The management program implemented by the final rule is commonly known as the Amendment 80 Program.

The Amendment 80 Program allocates a quota share (QS) permit to a person, based on a vessel's catch history of six species (the Amendment 80 species: Atka mackerel, Aleutian Islands Pacific ocean perch, flathead sole, Pacific cod, rock sole, and yellowfin sole) in the BSAI, from 1998 through 2004. In order to receive an allocation of QS, a person must own the catch history of an original qualifying non-AFA trawl C/P subsector vessel (Amendment 80 vessel) that met specific criteria. These criteria are set forth in the Catcher Processor Capacity Reduction Program (CRP), which is contained within the Department of Commerce and Related Agencies Appropriations Act, 2005 (Public Law No. 108-447).

The CRP is primarily a statute that identifies specific conditions under which a capacity reduction program may be implemented for a "catcher processor subsector." The CRP identifies four catcher processor subsectors: AFA trawl catcher processor; non-AFA trawl catcher processor; longline catcher

¹ These vessels are prohibited from directed fishing for pollock in the Bering Sea under the AFA, with the exception of one vessel the F/V *Ocean Peace* that is eligible to directed fish for a limited amount of pollock as defined under the section 208(e)(21) of the AFA. Non-AFA trawl catcher/processors participate in flatfish, rockfish, Pacific cod, and Atka mackerel fisheries in the BSAI and to a lesser extent flatfish, rockfish, and Pacific cod fisheries in the GOA.

processor²; and pot catcher processor. Section 219(g)(1) of the CRP states that “[o]nly a member of a catcher processor subsector may participate in the catcher processor sector of the BSAI non-pollock groundfish fishery.” The “non-AFA trawl catcher processor subsector” is defined in section 219(a)(7) and section 219(a)(8) defines non-pollock groundfish:

(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 Limitation Program] 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 on non-pollock groundfish during the period of January 1, 1997 through December 31, 2002.

(8) NON-POLLOCK GROUND FISH 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.

NOAA Fisheries determined that 28 vessels originally qualified for the Amendment 80 Program based on the criteria established in the CRP (see Table 1). Regulations require a person who owns the catch history of an original qualifying Amendment 80 vessel to apply to NOAA Fisheries for an Amendment 80 QS permit. NOAA Fisheries has issued QS permits based on the catch history of all but one of the 28 originally qualifying Amendment 80 vessels. Based on the interpretation of the CRP at the time the Amendment 80 Program was implemented, only the 28 vessels identified were eligible to fish in the Amendment 80 sector. As originally implemented, Amendment 80 vessels could only be replaced by another original Amendment 80 vessel. This regulation effectively prevented the replacement of Amendment 80 vessels with new vessels, or other vessels outside of the 28 identified originally qualifying Amendment 80 vessels.

Owner ₁	Amendment 80 Vessel(s) with length overall (LOA) as reported on Federal Fisheries Permit ₂	LLP license currently assigned to vessel and Maximum Length Overall ₂
Fishing Company of Alaska (FCA), Inc. (Management entity for owner)	Alaska Juris (238 ft)	LLG 2082 (238 ft)
	<i>Alaska Ranger</i> ₃ (203 ft)	LLG 2118 (203 ft)
	Alaska Spirit (221 ft)	LLG 3043 (221 ft)
	Alaska Victory (227 ft)	LLG 2080 (227 ft)
	Alaska Voyager (203 ft)	LLG 2084 (228 ft)
	Alaska Warrior (215 ft)	LLG 2083 (215 ft)
United States Seafoods, LLC (Management entity for owners)	Ocean Alaska (107 ft)	LLG 4360 (124 ft)
	Alliance (107 ft)	LLG 2905 (124 ft)
	Legacy (132 ft)	LLG 3714 (132 ft)
	<i>Prosperity</i> (138 ft - QS assigned to LLP license derived from vessel -- LLG 1802)	N/A
	Vaerdal (124 ft)	LLG 1402 (124 ft)

² NOAA Fisheries implemented a capacity reduction program for the longline catcher processor subsector under the authority of the CRP (September 24, 2007, 72 FR 54219).

	Seafreeze Alaska (295 ft)	LLG 4692 (296 ft)
Iquiqui U.S., LLC	Arica (186 ft)	LLG 2429 (186 ft)
	Cape Horn (158 ft)	LLG 2432 (158 ft)
	Rebecca Irene (140 ft)	LLG 3958 (140 ft)
	Tremont (124 ft)	LLG 2785 (131 ft)
	Unimak (185 ft)	LLG 3957 (185 ft)
	Constellation (150 ft)	LLG 1147 (150 ft)
	Defender (124 ft)	LLG 3217 (124 ft)
	Enterprise (120 ft)	LLG 4231 (132 ft)
	Harvester Enterprise (181 ft)	LLG 3744 (183 ft)
Fishermen's Finest (Management Entity for owners)	American No. 1 (160 ft)	LLG 2028 (160 ft)
	US Intrepid (185 ft)	LLG 3662 (185 ft)
Ocean Peace, Inc. (Management Entity for owners)	Seafisher (230 ft)	LLG 2104 (230 ft)
	Ocean Peace (219 ft)	LLG 2138 (219 ft)
Arctic Sole Seafoods	Ocean Cape – Replacement for <i>Arctic Rose</i> (99 ft QS assigned to LLP derived from originally qualifying vessel)	LLG 3895 (122 ft)
Golden Fleece	Golden Fleece (104 ft) – Not assigned QS	LLG 2524 (124 ft)

1 Ownership data are derived from multiple sources, including information provided on Amendment 80 QS applications, Restricted Access Management (RAM) LLP database (<http://www.alaskafisheries.noaa.gov/ram/llp.htm#list>), Groundfish Forum (<http://www.groundfishforum.org>), and personal communications with company representatives.

2 Length overall (LOA) data for vessels derived from RAM Federal Fisheries Permit (FFP) database at <http://alaskafisheries.noaa.gov/sustainablefisheries/amds/80/default.htm>. Maximum length overall (MLOA) for the LLP licenses from the RAM LLP database (see URL above). Vessel lengths listed in the RAM database may differ from vessel lengths listed in United States Coast Guard Vessel Documentation files.

3 Vessels that are no longer active in the Amendment 80 sector due to an actual total loss, constructive total loss, or permanent ineligibility to receive a U.S. Fishery Endorsement under 46 USC 12108, are noted in italics.

NOAA Fisheries implemented regulations at § 679.4(o)(v) requiring that Amendment 80 QS units assigned to an Amendment 80 QS permit are non-severable from that Amendment 80 QS permit and if transferred, then the Amendment 80 QS permit must be transferred in its entirety to another person. Of the 28 originally qualifying vessels, several vessels are no longer active in the Amendment 80 fleet due to an actual or constructive total loss (i.e., *F/V Alaska Ranger*, *F/V Arctic Rose*, *F/V Prosperity*), or because those vessels have been reflagged under foreign ownership and are no longer eligible to re-enter U.S. fisheries under the provisions of 46 U.S.C. 12113 (i.e., *F/V Bering Enterprise*). In cases where an original qualifying vessel has suffered a total or constructive loss, or is no longer eligible to receive a fishery endorsement (i.e., the vessel has been removed through a vessel buyback program, or has been reflagged as a foreign vessel), the regulations required that an Amendment 80 QS permit must be permanently assigned to the License Limitation Program (LLP) license, described in detail below, initially assigned to that original qualifying vessel, thus creating an Amendment 80 LLP/QS license. Three Amendment 80 QS permits are currently assigned to LLP licenses.

Most of the annual total allowable catch (TAC) for the six defined Amendment 80 species is assigned to the Amendment 80 sector. A portion of the TAC for the Amendment 80 species is also assigned to the Western Alaska Community Development Quota (CDQ) Program, and to participants outside of the Amendment 80 sector to accommodate either incidental catch in other fisheries, or more limited directed fisheries.

Once issued, Amendment 80 QS permits may be assigned annually to either an Amendment 80 cooperative or to the Amendment 80 limited access fishery. Amendment 80 QS permit holders assigning their permit to an Amendment 80 cooperative are eligible to receive an exclusive harvest privilege for a portion of the TAC for the six defined Amendment 80 species, as well as a portion of the BSAI halibut, Bristol Bay red king crab, snow crab, and Tanner crab prohibited species catch (PSC) assigned to the Amendment 80 sector. Those Amendment 80 QS permit holders who assign their permits to the Amendment 80 limited access fishery do not receive an exclusive harvest privilege. NOAA Fisheries apportions a specific percentage of the Amendment 80 species and PSC allowances among Amendment 80 cooperatives and the Amendment 80 limited access fishery based on the aggregate Amendment 80 QS held by all of the QS permits assigned to Amendment 80 cooperatives or the Amendment 80 limited access fishery. The cornerstone of the Amendment 80 Program is the opportunity it provides participants to form cooperatives, receive an exclusive allocation privilege, avoid a “race for fish”, and tailor their fishing operations to the available resource in a more productive manner.³

NOAA Fisheries also requires participants in Amendment 80 fisheries to meet the requirements of the LLP program (63 FR 52642, October 1, 1998). The LLP program limited the number, size, and specific operation type of vessels that may be used in most groundfish fisheries in the EEZ off Alaska. Once issued, transferable LLP licenses authorize holders to conduct directed fishing for LLP groundfish species in the management areas endorsed on each LLP license. All LLP licenses for groundfish were designated for use by either catcher vessel (CV) or C/P operational type designation. This designation prescribed the authorized behavior of the LLP license holder on the vessel on which the license would be used. LLP licenses were issued with a specific vessel length category based on the size of the eligible vessel at the time of qualification for the LLP. LLP licenses specify the maximum length overall (MLOA) of the vessel to which that LLP license may be assigned. The Amendment 80 specifically requires that Amendment 80 vessels must be assigned an LLP license endorsed for trawl gear with a C/P designation in the BS or AI.

As with other North Pacific LAPPs, the Council and NOAA Fisheries attempted to mitigate potentially adverse effects of the Amendment 80 program on non-LAPP fisheries that could be caused by the increased economic and operational efficiencies that LAPPs can provide participants. Specifically, once a harvest privilege is allocated, Amendment 80 QS permit holders may consolidate their operations through cooperative management and use Amendment 80 vessels in other fisheries. This could increase competition and the race for fish in non-Amendment 80 fisheries. To prevent this, the Amendment 80 program established a suite of measures, commonly called sideboard limits, to protect participants in other federally managed fisheries from increased participation by Amendment 80 vessel owners.

The Council identified Gulf of Alaska (GOA) groundfish fisheries as the fisheries most likely to be at risk of increased harvest pressures with the implementation of the Amendment 80 program. The Council determined that without sideboards limiting Amendment 80 vessel harvests, GOA groundfish fisheries could be subject to increased fishing pressure from Amendment 80 vessels because of: (1) the harvest patterns of the Amendment 80 sector; (2) the lack of other fisheries in the BSAI that can be targeted by Amendment 80 vessels (i.e., pollock is managed under the AFA, crab is managed under the BSAI Crab Rationalization Program, and Pacific cod is allocated to the Amendment 80 sector); and (3) the lack of specific gear or sector allocations for many species in the GOA. The Amendment 80 program established three types of GOA sideboard limits for Amendment 80 vessels other than the F/V *Golden Fleece*. Amendment 80 vessels are limited in the amount of groundfish and halibut PSC they may catch in the GOA. Also, only specific Amendment 80 vessels are allowed to directed fish for flatfish in the GOA. The Amendment 80 Program also established specific management measures applicable to the F/V *Golden Fleece*.

³ The Council and NOAA Fisheries have reviewed the potential and actual benefits of cooperative management in the analyses prepared for the Amendment 80 Program, and Amendment 93 (modifying the Amendment 80 cooperative formation standards). Those analyses are available at: www.fakr.noaa.gov.

Challenge to the Amendment 80 Program – Amendment 80 Replacement Vessel Provisions

Shortly after NOAA Fisheries published the final rule implementing Amendment 80, Arctic Sole Seafoods, the owner of an originally qualifying Amendment 80 vessel that was lost, challenged NOAA Fisheries' statutory interpretation of section 219(a)(7) of the CRP. Arctic Sole Seafoods contended that the lack of replacement vessel language in the Amendment 80 Program was arbitrary and capricious. On May 19, 2008, the U.S. District Court for the Western District of Washington (Court) issued a decision invalidating those regulatory provisions that limit the vessels used in the Amendment 80 Program to only the 28 vessels meeting the qualification criteria in section 219(a)(7) of the CRP. In *Arctic Sole Seafoods, Inc. v. Gutierrez*, 622 F.Supp.2d 1050 (W.D. Wash. 2008), the Court found the statutory language of the CRP ambiguous as to whether replacement of an original 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 court's decision explained that the CRP does not prevent non-qualifying vessels from being used as replacement vessels in the Amendment 80 sector.

After receiving the Court's decision, NOAA Fisheries immediately developed an interim policy for vessel replacement consistent with the Court's decision. In October 2008, NOAA Fisheries asked the Council to clarify the conditions under which an Amendment 80 vessel may be replaced consistent with the Court's decision, the CRP, and the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In response, the Council developed Amendment 97 to the FMP.

Provisions Established Under Amendment 97

In June 2010, the Council recommended Amendment 97. NOAA Fisheries: published the notice of availability for Amendment 97 on March 6, 2012 (77 FR 13253); published the proposed rule on April 4, 2012 (77 FR 20339); received and considered public comment on the FMP and the proposed rule; approved Amendment 97 on June 6, 2012; and published a final rule on October 1, 2012.

Regulations implementing Amendment 97 provide vessel owners the ability to replace their vessels on a one-for-one basis for any reason and at any time. Amendment 97 allows the Amendment 80 sector to improve the retention and utilization of catch through vessel upgrades and provide vessel owners the flexibility to construct, rebuild, or purchase other vessels that can incorporate improved design, safety, and processing opportunities that are not currently available on all vessels. Amendment 97 attempts to balance the need for vessel owners to improve and enhance their operations, while limiting the potential adverse effects that vessel replacement could have in participants in other fisheries. Amendment 97 is intended to address the regulatory deficiencies that were identified by, and addressed by, the court order resulting from *Arctic Sole Seafoods, Inc. v. Gutierrez*. Regulations implementing Amendment 97 established the following provisions:

- (1) allow Amendment 80 vessels to be replaced for any reason at any time, up to a one-for-one vessel replacement;
- (2) prohibit AFA vessels from being used as Amendment 80 replacement vessels;
- (3) establish a maximum vessel length for Amendment 80 replacement vessels and modify the maximum length overall (MLOA) on LLP licenses assigned to Amendment 80 replacement vessels;
- (4) establish a process for reassigning an Amendment 80 Quota Share (QS) permit to either an Amendment 80 replacement vessel or an Amendment 80 LLP license;
- (5) impose sideboard limitations on replaced vessels;
- (6) apply GOA sideboard measures that apply to all qualifying Amendment 80 vessels to their replacement vessels, with exceptions for the F/V *Golden Fleece*;
- (7) establish specific regulatory restrictions and requirements that apply to any vessel that replaces the F/V *Golden Fleece*;
- (8) allow replacement vessels to conduct directed fishing for GOA flatfish if the Amendment 80 vessel being replaced was authorized to conduct directed fishing for GOA flatfish;
- (9) require owners to demonstrate to NOAA Fisheries a replacement vessel's compliance with

U.S. Coast Guard safety requirements; and

(10) establish a process by which vessel owners can apply to NOAA Fisheries for approval to use an Amendment 80 replacement vessel in the Amendment 80 sector.

In addition, Amendment 97 is intended to demonstrate to the U.S. Maritime Administration (MARAD) that the Council and NOAA Fisheries have authorized Amendment 80 replacement vessels to exceed specific vessel limits set forth in the AFA and therefore Amendment 80 replacement vessels that exceed these limits are eligible to receive a certificate of documentation consistent with 46 U.S.C. 12113 and MARAD regulations at 46 CFR 356.47.

Several criteria must be met before NOAA Fisheries will approve an application for a vessel owner to replace an Amendment 80 vessel (see 10 above). Once a complete Amendment 80 vessel replacement application is received by NOAA Fisheries, the Regional Administrator will approve a vessel that is eligible to participate in Federal fisheries as an Amendment 80 replacement vessel provided that:

- The replacement vessel does not exceed 295 feet (89.9 m) LOA;
- The replacement vessel was built in the United States and, if ever rebuilt, rebuilt in the United States;
- The replacement vessel is not a permitted AFA vessel;
- The replacement vessel is classed and load lined or, if the vessel cannot be classed and load lined, the vessel is enrolled in the U.S. Coast Guard ACSA program;
- Only one replacement vessel is named as a replacement for any one replaced vessel at a given time; and
- The replacement vessel is not otherwise prohibited from participation.

The criteria that a vessel owner must meet before NOAA Fisheries can approve an Amendment 80 replacement vessel encompass regulations deemed necessary by the Council under section 303(c) of the MSA (i.e., the maximum size limit, one-for-one replacement, and safety requirements), as well as regulations developed by NOAA Fisheries under section 305(d) of the MSA (i.e., U.S. construction requirements, prohibition on the use of AFA vessels, and that vessels are not otherwise prohibited from participation). Section 305(d) of the MSA states that NOAA Fisheries has general responsibility to carry out any fishery management plan or plan amendment approved by NOAA Fisheries and that NOAA Fisheries may promulgate such regulations in accordance with the Administrative Procedure Act (APA) as may be necessary to discharge that responsibility. One criterion in particular, the prohibition on the use of AFA vessels as Amendment 80 vessels, has elicited interest among participants in the AFA and Amendment 80 sectors. The following sections characterize how this prohibition was established in the regulations implementing Amendment 97.

Rationale Prohibiting AFA Vessels as Amendment 80 Replacement Vessels

The information provided in this section is provided in additional detail in the final rule implementing Amendment 97 (October 1, 2012). The analysis used by the Council in the development of Amendment 97 included a summary of the interim guidance NOAA Fisheries prepared for vessel replacement. That analysis stated, "Because the CRP makes a clear distinction between the AFA and non-AFA trawl catcher/processor subsectors, an AFA catcher/processor as defined by the CRP would be ineligible to fish as a non-AFA trawl catcher/processor and could not replace an Amendment 80 vessel." No additional explanation for this statement is provided in the analysis. This statement remained in the analysis during the Council's consideration of Amendment 97, the interpretation of the CRP was not challenged during the Council process, the Council did not consider an alternative that would allow the use of AFA vessels as Amendment 80 replacement vessels, and thus the analysis does not include an evaluation of those considerations. As a result, the Council did not recommend a prohibition or other limitation on the use of an AFA vessel as an Amendment 80 replacement vessel in its final motion on Amendment 97 in June 2010.

In February 2012, before the start of Secretarial review of Amendment 97, NOAA Fisheries received a letter from a member of the public asserting that the CRP and the court's decision in *Arctic Sole Seafoods, Inc. v. Gutierrez* does not prohibit the use of an AFA vessel as an Amendment 80 replacement vessel. The commenter stated that "[t]he distinction the CRP draws between AFA and non-AFA vessels is only for purposes of specifying which vessels owners initially qualified for the Amendment 80 sector" and that while an owner of a vessel had to meet the criteria specified in section 219(a)(7) to initially qualify for the non-AFA trawl C/P subsector, including the criterion that the vessel not be an AFA trawl C/P, "[t]he CRP does not limit the universe of vessels that a qualified owner may then draw from to replace the vessel through which it initially entered the Amendment 80 sector."

In April 2012, NOAA Fisheries published the proposed rule for Amendment 97 (77 FR 20339, April 4, 2012). In the proposed rule, NOAA Fisheries advised that following receipt of the letter, it re-examined the CRP and decision in *Arctic Sole Seafoods v. Gutierrez*. Based on that re-examination, NOAA Fisheries stated that the CRP did not prohibit use of an AFA vessel, and that in the absence of an explicit regulatory prohibition recommended by the Council, the rule as proposed did not prohibit use of an AFA vessel. NOAA Fisheries invited the public to comment on the proposed rule, including the potential use of AFA vessels as Amendment 80 replacement vessels.

NOAA Fisheries received extensive public comment on the question of whether the CRP prohibits the use of AFA vessels as Amendment 80 replacement vessels, the lack of Council consideration or analysis of this issue, and the potential economic impacts that could result from the use of AFA vessels as Amendment 80 replacement vessels. The comments, and NOAA Fisheries' response, are described in the detail in the final rule for Amendment 97 (October 1, 2012).

Following consideration of all comments received during the public comment periods, NOAA Fisheries determined that a regulatory provision prohibiting the use of AFA vessels as Amendment 80 replacement vessels was necessary to implement Amendment 97 as recommended by the Council and approved by NOAA Fisheries. NOAA Fisheries recognizes that the Council did not specifically articulate the prohibition in their motion for Amendment 97 but the prohibition was implicitly incorporated into Amendment 97. The Council based its motion for Amendment 97 on the analysis that stated AFA vessels could not be used as Amendment 80 replacement vessels and on public comments presented to it. NOAA Fisheries conclusion was not challenged while the Council was considering Amendment 97.

NOAA Fisheries concluded that the decision making record for Amendment 97 supports a regulation prohibiting AFA vessels from participating as Amendment 80 replacement vessels for the following reasons--

- The analysis before the Council did not analyze the potential effects of allowing AFA vessels to be used as Amendment 80 replacement vessels, but did explicitly state that AFA vessels could not be used;
- Allowing AFA vessels to be used as Amendment 80 replacement vessels could adversely affect Amendment 80 sector participants as suggested in public comment received on the proposed rule, and a prohibition would preclude that potential harm;
- The prohibition does not adversely affect existing operations of any AFA vessel owners or operators currently⁴;
- Permitting AFA vessel to participate as Amendment 80 vessels may result in fleet consolidation in excess of what anticipated in the analysis prepared for Amendment 97.
- Given the information available, NOAA Fisheries cannot conclude that the impacts resulting from the use of AFA vessels as Amendment 80 replacement vessels would be consistent with Amendment 97 and the FMP, as required by section 304⁵ of the MSA.

⁴ The *Ocean Peace* is active in both the Amendment 80 and the AFA sectors. However, that vessel has been consistently active in these fisheries since the AFA and the Amendment 80 programs were implemented. Amendment 97 does not affect the ability of the *Ocean Peace*, or its replacement to continue fishing as it does currently provided it meets the requirements for AFA and Amendment 80 vessel replacement.

The prohibition is consistent with the FMP and other applicable law for the following reasons--

- The prohibition on using AFA vessels as Amendment 80 replacement vessels will not prevent either the Amendment 80 or the AFA sectors from achieving the conservation and management goals and objectives set forth in the FMP for these sectors;
- The prohibition is a logical outgrowth of the proposed rule and its inclusion is consistent with the Administrative Procedure Act (APA); and,
- The regulatory prohibition on the use of AFA vessels as Amendment 80 replacement vessels does not prevent the BSAI non-pollock groundfish catcher/processor subsectors from achieving the goals and objectives of the CRP, the ability of the Amendment 80 sector to replace qualifying Amendment 80 vessels under the CRP, and does not prevent the owners of AFA trawl C/P vessels from participating in a capacity reduction plan under the CRP.

NOAA Fisheries included the prohibition under section 305(d) of the MSA. Nothing in the CRP overrides the Council's and NOAA Fisheries' authority under the MSA to impose reasonable criteria for vessel replacement consistent with the MSA (and other applicable law) to achieve the fishery management goals and objectives of the FMP. Even if the provisions of the CRP could be construed as requiring the use of AFA vessels as Amendment 80 replacement vessels, section 303 of Public Law 111-348 states that "Notwithstanding any other provision of law, the Secretary of Commerce may promulgate regulations that allow for the replacement or rebuilding of a vessel qualified under subsections (a)(7) and (g)(1)(A) of section 219 of the [CRP]." This provision, passed into law after the CRP, authorizes NOAA Fisheries to prohibit by regulation the use of AFA vessels as Amendment 80 replacement vessels even if the provisions of the CRP could be construed to require it.

During the June 2012 Council meeting, NOAA Fisheries consulted with the Council, as required by section 304(b) of the Magnuson-Steven Act, regarding the agency's intent to add a regulation to the final rule implementing Amendment 97 that would prohibit AFA vessels from participating as Amendment 80 replacement vessels. NOAA Fisheries also urged the Council to consider the issue of AFA vessels as Amendment 80 replacement vessels and develop a policy recommendation on the issue. After receiving the agency's report, the Council received comment from the public on the proposal to add a regulation to the final rule prohibiting use of AFA vessels. Following receipt of public comment, the Council discussed NOAA Fisheries' approach and did not object to the inclusion of the prohibition in the Amendment 97 final rule. Some Council members stated that a prohibition was not included at the time of Council final action on Amendment 97 because at that time, the Council understood the CRP precluded the use of AFA vessels as Amendment 80 replacement vessels. In light of NOAA Fisheries' request, the Council recommended the development of a discussion paper that examines the potential impacts of the use of AFA vessels as Amendment 80 replacement vessels. The following sections examine the issues the Council identified in June 2012.

(1) Rationale for the Current Legal Interpretation that the CRP does not Prohibit an AFA Vessel from Replacing an Amendment 80 Vessel

This section summarizes NOAA Fisheries' view of the CRP that is provided in additional detail in the final rule implementing Amendment 97. Section 219(a)(7) of the CRP as interpreted by the court

⁵ Section 304 of the Magnuson-Stevens Fishery Conservation and Management Act authorizes the Secretary of Commerce to-- review fishery management plans (FMP), review regulations to determine if they are consistent with the FMP, prepare and review Secretarial Plans, establish fees, rebuild overfished fisheries, designate fisheries authority over a fishery if the geographic range extends to more than one Council, to prepare an FMP for highly migratory species, and repeal or revoke FMPs.

sets forth the criteria that an owner of a vessel must meet to originally qualify for participation in the Amendment 80 sector. When the original qualification criteria at section 219(a)(7) have been met, the owner of a qualifying vessel may replace that vessel with a vessel that does not meet all the original qualification criteria. The court interpreted the CRP as limiting the universe of owners eligible to participate in the BSAI non-pollock groundfish fishery. It accomplished this objective by limiting eligibility to a person who owns a particular type of vessel with a particular catch history and who has a particular license. However, a person who owns an eligible vessel is no longer bound by the statutory criteria when replacing that vessel. As the court noted in *Arctic Sole Seafoods, Inc. v. Gutierrez*, nothing in the CRP indicates that Congress was concerned with which particular vessels are used in the BSAI non-pollock groundfish fishery. Therefore, the owner of a non-AFA trawl C/P vessel must satisfy the criteria specified in section 219(a)(7) of the CRP to originally qualify for the non-AFA trawl C/P subsector and the Amendment 80 sector, but the owner of such a vessel may replace it with a vessel that might not meet the original qualifying criteria of the CRP but is otherwise eligible to participate in the BSAI non-pollock groundfish fishery. For these reasons, NOAA Fisheries' view is that the CRP does not prohibit the use of an AFA vessel as an Amendment 80 replacement vessel.

Overall, the purpose of the CRP is to remove excess harvesting capacity from the C/P sector of the non-pollock groundfish fishery (section 219(e)(1)) through a vessel buyback program that is financed through a capacity reduction loan. The use of an AFA vessel as an Amendment 80 replacement vessel does not undermine the provisions of the CRP. As NOAA Fisheries stated in the Amendment 97 proposed rule, nothing in the CRP or the court's decision supports a view that the criterion at section 219(a)(7)(A), which excludes AFA trawl C/Ps from the universe of originally qualifying Amendment 80 vessels, should extend to an Amendment 80 replacement vessel. The purpose of the CRP is to promote sustainable fisheries management through the removal of excess harvesting capacity from the C/P sector of the non-pollock groundfish fishery. The use of an AFA vessel as an Amendment 80 replacement vessel does not undermine this purpose. The owner of a vessel that is both an AFA vessel and an Amendment 80 replacement vessel could still participate in a capacity reduction plan developed by one or more of the subsectors in which the owner is a member. Additionally, the owner of a vessel that is both an AFA vessel and an Amendment 80 replacement vessel would continue to be a member of a C/P subsector, and therefore eligible to participate in the BSAI non-pollock groundfish fishery. Also, the use of an AFA vessel as an Amendment 80 vessel would not increase the harvesting capacity of either the AFA or the Amendment 80 sectors. Generally, if AFA vessels were used as Amendment 80 replacement vessels, NOAA Fisheries expects the total harvesting capacity in the BSAI C/P sector would decrease rather than increase as AFA vessels replace Amendment 80 vessels and the replaced Amendment 80 vessel is removed from participation in BSAI and GOA groundfish fisheries. This overall reduction in harvesting capacity would be consistent with the goals of the CRP.

In addition, nothing in the CRP requires the Council or NOAA Fisheries to permit the use of AFA vessels as Amendment 80 replacement vessels. The regulatory prohibition on the use of AFA vessels as Amendment 80 replacement vessels, like other Amendment 80 replacement vessel criteria (e.g., maximum vessel length and U.S. Coast Guard safety requirements), does not prevent the BSAI non-pollock groundfish C/P subsectors from achieving the purpose of the CRP, which is to reduce excess harvesting capacity through the development of capacity reduction plans. The prohibition does not prevent owners of AFA vessels from participating in BSAI non-pollock groundfish fisheries as members of the AFA trawl C/P subsector or prevent the owners of AFA trawl C/P vessels from participating in a capacity reduction plan under the CRP. The prohibition does not prevent Amendment 80 vessel owners from replacing qualifying Amendment 80 vessels. Additionally, nothing in the CRP overrides the Council's and NOAA Fisheries' authority under the MSA to impose reasonable criteria consistent with the MSA and other applicable law to achieve the fishery management goals and objectives of the FMP. Even if the provisions of the CRP could be construed as requiring the use of AFA vessels as Amendment 80 replacement vessels, section 303 of Public Law 111-348 states that "Notwithstanding any other provision of law, the Secretary of Commerce may promulgate regulations that allow for the replacement or rebuilding of a vessel qualified under subsections (a)(7) and (g)(1)(A) of section 219 of the [CRP]."

This provision, passed into law after the CRP, authorizes NOAA Fisheries to prohibit by regulation the use of AFA vessels as Amendment 80 replacement vessels even if the provisions of the CRP require it.

(2) Whether Allowing an AFA Vessel to Replace an Amendment 80 Vessel Would Meet the Purposes of the CRP

As noted above, nothing indicates that the CRP prohibits an AFA vessel from being used to replace an Amendment 80 vessel, or that the use of an AFA vessel as an Amendment 80 replacement vessel would be contrary to the purposes of the CRP. Some constituents in the Amendment 80 sector disagree with NOAA Fisheries' view of the CRP and offer a different narrative that describes the Congressional intent under the CRP. NOAA Fisheries has reviewed these comments and maintains its position.

(3) Other Applicable Statutory Requirements for Replacement of Amendment 80 and AFA vessels

In addition to the CRP, the Council and NOAA Fisheries would need to consider provisions in the AFA and MSA in particular. The information presented here is not intended to be a comprehensive legal review, but notes areas for additional consideration should this discussion paper be advanced.

AFA Sideboard Provisions

Sections 211 and 213 of AFA appear particularly relevant. This discussion paper focuses on the potential implications of these sections of the AFA as they apply to the 20 AFA trawl C/Ps listed in the AFA⁶. At this time, NOAA Fisheries has no information to indicate that AFA catcher vessel owners are seeking to enter the Amendment 80 fishery, and it appears unlikely that they would do so (see Section 5 for additional detail). Section 211(a) of the AFA provides general authority for the Council to protect other fisheries (i.e., non-directed pollock fisheries) from the adverse impacts caused by the AFA.

SEC. 211. PROTECTIONS FOR OTHER FISHERIES; CONSERVATION MEASURES.

(a) GENERAL.—The North Pacific Council shall recommend for approval by the Secretary such conservation and management measures as it determines necessary to protect other fisheries under its jurisdiction and the participants in those fisheries, including processors, from adverse impacts caused by this Act or fishery cooperatives in the directed pollock fishery.

Although section 211(a) is stated affirmatively, that the Council shall recommend measures to protect other fisheries from potentially adverse affects caused by the AFA, it appears equally true that the Council should not recommend measures that would not protect other fisheries from potentially adverse affects caused by the AFA. The AFA has provided AFA vessel owners with fixed allocations and the ability to effectively consolidate or otherwise improve the efficiency of their operations. This may provide AFA vessel owners with the capacity to expand into other fisheries that would not have otherwise been available without the AFA. Some in the Amendment 80 sector contend that the entry of AFA

⁶ Section 208(e)(1) through (20) lists the specific trawl catcher/processor vessels that are eligible to directed fish for pollock. Section 208(e)(21) identifies general criteria that would allow an unlisted catcher/processor to qualify and limits the total catch of any such vessel to 0.5 percent of the directed fishing allowance available for AFA catcher/processors – effectively 0.5 percent of 40 percent of the AFA directed fishing allowance. Only one vessel, the *Ocean Peace* meets the criteria of sections 208(e)(21).

vessels into the Amendment 80 sector would have an adverse impact on existing Amendment 80 fishery operations by introducing a new, potentially more efficient competitor who is currently excluded. These claims have not been analyzed, but at a minimum, it appears that the Council would need to fully assess those claims and determine that relieving the current prohibition on AFA sideboards would still serve the purpose of protecting the Amendment 80 fishery from adverse impacts caused by the AFA. Section 211(b) establishes sideboards for AFA trawl/catcher processors. These provisions are specific to the 20 AFA C/Ps listed in the AFA, and do not specifically apply to the *Ocean Peace*.

(b) CATCHER/PROCESSOR RESTRICTIONS.— (1) GENERAL.—The restrictions in this subsection shall take effect on January 1, 1999 and shall remain in effect thereafter except that they may be superseded (with the exception of paragraph (4)) by conservation and management measures recommended after the date of the enactment of this Act by the North Pacific Council and approved by the Secretary in accordance with the Magnuson-Stevens Act.

(2) BERING SEA FISHING.—The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) are hereby prohibited from, in the aggregate—

(A) exceeding the percentage of the harvest available in the offshore component of any Bering Sea and Aleutian Islands groundfish fishery (other than the pollock fishery) that is equivalent to the total harvest by such catcher/processors and the catcher/processors listed in section 209 in the fishery in 1995, 1996, and 1997 relative to the total amount available to be harvested by the offshore component in the fishery in 1995, 1996, and 1997;

(B) exceeding the percentage of the prohibited species available in the offshore component of any Bering Sea and Aleutian Islands groundfish fishery (other than the pollock fishery) that is equivalent to the total of the prohibited species harvested by such catcher/processors and the catcher/processors listed in section 209 in the fishery in 1995, 1996, and 1997 relative to the total amount of prohibited species available to be harvested by the offshore component in the fishery in 1995, 1996, and 1997; and

(C) fishing for Atka mackerel in the eastern area of the Bering Sea and Aleutian Islands and from exceeding the following percentages of the directed harvest available in the Bering Sea and Aleutian Islands Atka mackerel fishery—

(i) 11.5 percent in the central area; and

(ii) 20 percent in the western area.

(3) BERING SEA PROCESSING.—The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) are hereby prohibited from—

(A) processing any of the directed fishing allowances under paragraphs (1) or (3) of section 206(b); and

(B) processing any species of crab harvested in the Bering Sea and Aleutian Islands Management Area.

(4) GULF OF ALASKA.—The catcher/processors eligible under paragraphs (1) through (20) of section 208(e) are hereby prohibited from—

(A) harvesting any fish in the Gulf of Alaska;

(B) processing any groundfish harvested from the portion of the exclusive economic zone off Alaska known as area 630 under the fishery management plan for Gulf of Alaska groundfish; or

(C) processing any pollock in the Gulf of Alaska (other than as bycatch in non-pollock groundfish fisheries) or processing, in the aggregate, a total of more than 10 percent of the cod harvested from areas 610, 620, and 640 of the Gulf of Alaska under the fishery management plan for Gulf of Alaska groundfish.

The AFA sector has indicated that some relief from the existing sideboard limits would be necessary for AFA vessels to effectively participate as Amendment 80 replacement vessels. (Additional detail on AFA sideboard management is provided in the following section). The AFA does allow these sideboard measures to be modified. As noted in section 211(b)(1), the Council may recommend, and NOAA Fisheries can approve, modifications to these sideboard limits, with the exception of those applicable to the GOA in section 211(b)(4).

Most recently, the Council recommended changes to AFA C/P sideboard limits under Amendment 80.⁷ Specifically, regulations modified the calculation method for assigning groundfish sideboard limits for most Amendment 80 species, modified the calculation method and application of BSAI crab PSC limits, fixed the BSAI halibut PSC sideboard limit, and relieved all AFA vessels from the yellowfin sole sideboard limit when the amount of yellowfin sole TAC available to non-Amendment 80 participants reached a specific amount (see the Amendment 80 final rule for additional detail 72 FR 52668, September 14, 2007). The proposed rule to Amendment 80 noted that it would be appropriate to relieve the yellowfin sole sideboard limits at high levels of TAC “[b]ecause yellowfin sole would be allocated to the Amendment 80 sector for exclusive harvest, [and] the need for AFA sideboard limits would be greatly reduced because AFA vessels would not be directly competing with the vast majority of harvesters active in the yellowfin sole fishery” (72 FR 30072). The potential implications of modifying these AFA sideboard limits were analyzed in the EA/RIR/IRFA supporting Amendment 80. Section 213(c)(1) of the AFA reiterates that the Council can recommend, and NOAA Fisheries may implement, changes to a broad range of provisions in the AFA, presumably including the protection measures and sideboard limits established under sections 211(a) and 211(b)⁸.

(c) CHANGES TO FISHERY COOPERATIVE LIMITATIONS AND POLLOCK CDQ ALLOCATION.—The North Pacific Council may recommend and the Secretary may approve conservation and management measures in accordance with the Magnuson-Stevens Act—

(1) that supersede the provisions of this title, except for sections 206 and 208, for conservation purposes or to mitigate adverse effects in fisheries or on owners of fewer than three vessels in the directed pollock fishery caused by this title or fishery cooperatives in the directed pollock fishery, provided such measures take into account all factors affecting the fisheries and are imposed fairly and equitably to the extent practicable among and within the sectors in the directed pollock fishery;

Section 213(c)(1) allows measures in section 211 to be superseded, provided they are done “for conservation purposes or to mitigate adverse effects in fisheries.” As with the discussion of 211(a), at a minimum it appears that the Council would need to establish its rationale as to how modifying existing sideboard limits for AFA vessels would “mitigate adverse effects in other fisheries... taking into account all factors affecting the fisheries.”

Some in the AFA sector have suggested that AFA sideboards established under section 211(b) are not applicable to Amendment 80 species, or crab and halibut PSC that is available to the Amendment 80 sector. Advocates for this interpretation note that NOAA Fisheries does not subject an AFA C/P fishing on behalf of CDQ group for non-pollock groundfish to specific AFA sideboards in the BSAI. In a letter

⁷ Regulations implementing Amendment 85 relieved BSAI Pacific cod sideboard limits applicable to AFA catcher/processors (September 4, 2007, 72 FR 50788), stating that “[t]he establishment of a separate Pacific cod allocation to this sector [AFA trawl C/P sector] negates the need for the BSAI Pacific cod sideboard which protects the historic share of the non-AFA trawl C/P sector from being eroded by the AFA trawl C/P vessels.”

⁸ This paper does not examine issues of statutory construction and the specific interplay, for example, between section 211(b)(1) that expressly prohibits modification of the GOA sideboards established under section 211(b)(4) and the general authority to supersede section 211 provided under section 213(c)(1). If this paper is advanced for analysis those issues could be examined further.

dated August 1, 2011⁹, NOAA Fisheries notified AFA participants that AFA sideboards did not extend to AFA vessels fishing on behalf of a CDQ group. In this letter NOAA Fisheries noted that any harvest of groundfish species by an AFA vessel that are not allocated under the CDQ program will be limited by the AFA harvesting sideboards and the attendant prohibition on directed fishing in section 679.7(k)(1)(v). In that letter, NOAA Fisheries has indicated that such fish are generally available to the vessels in the offshore sector and application of the sideboards under these circumstances would protect the participants in other fisheries, and thereby further the purpose behind the sideboards. NOAA Fisheries was careful to note in the August 1, 2011 letter that AFA C/Ps were not relieved from sideboards generally.

Constituents from the AFA sector argue that extending AFA sideboards to fisheries that are no longer subject to increased competition from the AFA sector (e.g., Amendment 80 fisheries) is not necessary because these sideboards do not protect participants in non-AFA fisheries. Furthermore, they argue any extension of these catch limits is inconsistent with the plain language text of AFA section 211(b)(2) that requires AFA sideboards to apply only to AFA vessels that are pursuing the “harvest available.” Under this interpretation, AFA sideboards would not extend to the operations of an AFA trawl C/P serving as Amendment 80 replacement vessel when such a vessel is operating in an Amendment 80 fishery because the specific portion of the TAC assigned to the Amendment 80 sector is “not available” to the AFA C/P sector. Similar logic would also apply to PSC reserved for the Amendment 80 sector that is “unavailable” to the AFA C/P sector (see AFA section 211(b)(2)(A)). In conclusion, some participants in the AFA fleet state that AFA C/Ps operating in Amendment 80 fisheries should not have to operate under AFA sideboards because the sideboards would not accrue to the benefit of the AFA sector and in both cases the allocations are unavailable to the AFA sector.

NOAA Fisheries maintains its position that the AFA sideboards would continue to apply to AFA vessels acting as Amendment 80 replacement vessels unless the Council recommends and NOAA Fisheries acts to modify existing regulations. NOAA Fisheries’ letter concerning operations in the CDQ was limited to that specific case. Previous actions by the Council and NOAA Fisheries under Amendments 80 and 85 explicitly modified or removed AFA C/P sideboards affecting Amendment 80 species and PSC where desired, and not, when not desired, to accomplish specific policy goals. The Council’s active management of AFA C/P sideboards appears to be consistent with sections 211(a), 211(b)(1) and 213(c)(1) of the AFA which allows the Council to recommend modifying sideboards after assessing the impacts on non-pollock fisheries.

As a general policy matter, if the Council wished to advance this issue for further analysis and action, the Council would still be required to analyze and consider a reasonable range of alternatives for allowing AFA vessels to operate as Amendment 80 replacement vessels. Assessing the impact of AFA sideboard limits would be a part of that analytical process. **NOAA Fisheries recommends that if the Council proceeds with this action, it consider the specific implications of modifying AFA C/P sideboard limits in the context of the analysis and provide specific recommendations as it deems appropriate.**

Where possible, the Council and NOAA Fisheries have relied on the standard Council practice to develop policy and regulation, rather than an interpretation of a letter written for a different and more specific purpose. NOAA Fisheries recommends doing so in this case as well. Additional information on AFA sideboard limits is provided in the following section.

Section 602 of the Coast Guard Authorization Act – Amendment to the AFA

On October 15, 2010, the Coast Guard Authorization Act of 2010 (Coast Guard Act) was signed into law. Additional information on the effects of the Coast Guard Act on AFA vessel replacement are addressed in the AFA Vessel Replacement analysis prepared by Council staff for this October 2012 meeting (Agenda C-5(b)). Section 602 of the Coast Guard Act amends the AFA, primarily section 208(g) of the AFA, to allow for vessel replacement or rebuilding for the purpose of improve vessel safety and operational efficiencies (including fuel efficiency). Prior to the Coast Guard Act, AFA vessels could only

⁹ This letter can be found at <http://www.fakr.noaa.gov/sustainablefisheries/amds/80/default.htm> .

be replaced for actual total loss or a constructive total loss of the vessel. Under the Coast Guard Act, the rebuilt or replacement AFA vessel will be eligible in the same manner as the replaced vessel and subject to the same restrictions as the replaced vessel. Fishing permits and licenses held by the owner of the replaced AFA vessel shall be transferred to the rebuilt vessel or replacement vessel.

In addition, the Coast Guard Act prohibits replacement AFA catcher vessels from harvesting fish in any federal fishery outside of the North Pacific, except for the Pacific whiting fishery. The Coast Guard Act also eliminates the size and horsepower limitations that apply to rebuilt vessel and replacement vessels. In other words, a rebuilt or replacement AFA vessel can exceed the maximum length overall (MLOA) specified on the assigned LLP license. However, to protect non-AFA GOA fishery participants from an influx of new capacity from rebuilt or replaced AFA vessels, the Coast Guard Act prohibits any vessel that is rebuilt or replaced that exceeds the MLOA specified on the license that authorizes fishing for groundfish from participating in the GOA groundfish fisheries. At a minimum, an AFA vessel must still be named on an LLP license with the appropriate endorsements and a sufficiently large MLOA to accommodate the vessel's length overall to participate in the GOA.

The Coast Guard Act also limits the use of replaced AFA vessels. The Coast Guard Act stipulates that any AFA vessel that is replaced is prohibited from fishing in any fishery (unless the vessel is used to replace another AFA vessel).¹⁰ So, once a vessel is replaced (if not used as an AFA replacement vessel), that vessel loses not only its AFA fishing privileges, but also any fishing privileges in other fisheries, including AFA sideboard fisheries. In other words, the vessel would not be permitted to fish under a sideboard and would appear to lose any sideboard exemption in the GOA.

Once the vessel is removed from the pollock fishery, the vessel is prohibited from fishing in any fishery (unless that vessel is used to replace another AFA vessel). As a consequence, the removed vessel would also appear to lose any sideboard status associated with its AFA fishing privilege.

The Coast Guard Act modified provisions under 208(g) so that it also removed the requirement that AFA replacement vessels have to be "built in the United States and, if ever rebuilt, rebuilt in the United States." Instead, the Coast Guard Act requires that AFA replacement vessels be "a vessel documented with a fishery endorsement under section 12113 of title 46, United States Code." This modification allows AFA vessels that currently have a fishery endorsement under section 12113 of title 46, United States Code to be used as AFA replacement vessels even if those vessels were not built, or rebuilt, in the United States. NOAA Fisheries has not reviewed the *Congressional Record* or other sources to determine if Congress provided any guidance on the use of AFA vessels built, or rebuilt, outside of the United States in fisheries other than the directed pollock fishery in the Bering Sea. This change in section 208(g) has been interpreted by some to indicate that the provision in Amendment 97 that requires Amendment 80 vessels to be built, or rebuilt, in the United States is not consistent with current law. NOAA Fisheries notes that this provision is specifically applicable to AFA replacement vessels.

Magnuson-Stevens Act (MSA)

The Council would also need to ensure that any action to allow AFA vessels to be used as Amendment 80 replacement vessels is consistent with MSA. At this time, NOAA Fisheries has not identified specific provisions of the MSA that would specifically limit the ability of AFA vessels to be used as Amendment 80 replacement vessels. Several National Standards would likely be of particular interest to the Council, specifically the implications of consolidation of fishing operations on AFA on the allocation of fishing privileges (National Standard 4), and the effects on efficient utilization of fishery resources (National Standard 5).

¹⁰ The Coast Guard Act amended section 208(g)(5) of the AFA to read "(5) LIMITATION ON FISHERY ENDORSEMENTS.—Any vessel that is replaced under this subsection shall thereafter not be eligible for a fishery endorsement under section 12113 of title 46, United States Code, unless that vessel is also a replacement vessel described in paragraph (1)."

As noted in Section 1, section 303 of Public Law 111-348 provides NOAA Fisheries the authority to promulgate regulations that allow for the replacement or rebuilding of a vessel qualified under the CRP.

Other statutes may be applicable to this issue, but they have not been analyzed at this time.

(4) The Applicability of Sideboards should an AFA Vessel Replace an Amendment 80 vessel.

As noted in the previous section, NOAA Fisheries continues to believe that AFA sideboards do apply to AFA vessels, even if they were operating as Amendment 80 replacement vessels unless specifically modified through an action recommended by the Council and implemented by NOAA Fisheries. The potential methods the Council could consider if it wished to modify the sideboard limits are described in detail in the following section.

(5) Policy and Regulatory Considerations for Replacement of Amendment 80 vessels with AFA vessels, or AFA Vessels with Amendment 80 Vessels

This paper includes a qualitative review of the issues the Council may want to consider if it wanted to consider allowing AFA vessels from being used in the Amendment 80 sector. This discussion paper does not include a quantitative assessment of the potential impacts or benefits of the use of AFA vessels as Amendment 80 vessels on groundfish fishing operations because many of the potential effects identified by the public are difficult to assess due the lack of available data. Moreover, the Council has not provided a comprehensive suite of alternatives and options to compare.

As a matter of policy, the Council could choose not to take any action and AFA vessels would continue to be prohibited from use as Amendment 80 replacement vessels under the final rule implementing Amendment 97. Alternatively, the Council could initiate an analysis to consider options to allow the use of AFA vessels as Amendment 80 replacement vessels. Future analysis of this issue will require the Council to develop a clear purpose and need statement. NOAA Fisheries does not propose one here. Although the Council did request information on the potential for Amendment 80 vessel owners to purchase AFA vessels, that information is only briefly examined in this discussion given the overall emphasis of the Council's request.

Joint Participation in the AFA and Amendment 80 Sectors

Currently, nothing expressly prohibits AFA vessel owners from purchasing an existing Amendment 80 vessel and associated QS permit and becoming active in the fishery. To date, no such transactions have occurred, and NOAA Fisheries is not aware that any are pending. In fact, the available public comment indicates that such transfers are generally opposed by participants in the Amendment 80 sector. However, transfers and consolidation of Amendment 80 vessel ownership has increased in recent years (e.g., a recent transaction consolidated ownership of the *Ocean Peace* and *Seafisher*). All of these transactions have occurred among existing participants in the Amendment 80 sector. A similar pattern of an initial phase of consolidation occurred in other catch share program in the North Pacific (e.g., halibut and sablefish IFQ, BSAI Crab) as participants seek greater efficiencies in their operations. Generally, the rate of consolidation tapers off over time. These consolidations may make it difficult for AFA vessel owners to access and compete for the presumably more limited potentially available fishing operations and QS now available in the Amendment 80 fishery. At a minimum, purchasing the holding of these consolidated operations may substantially increase the costs of entry for AFA vessel owners.

AFA vessel owners purchasing an Amendment 80 vessel and remaining active in both the AFA and Amendment 80 fisheries would need to operate both vessels. These additional operational costs

could disadvantage AFA vessel owners seeking entry relative to Amendment 80 vessel owners who are able to consolidate their fishing operations and reduce their marginal costs. At this time, NOAA Fisheries does not have reliable estimates on the costs of purchasing an Amendment 80 vessel and associated QS. Recent transactions have been conducted between private parties. If an AFA vessel owner were able to participate in the Amendment 80 fishery with an AFA vessel, some of these operational costs could be offset. This would be particularly true if the AFA vessel was no longer actively fishing in the directed pollock fishery (i.e., the vessel is a member of a cooperative and other vessels in the cooperative harvest pollock derived from the vessel according to the cooperative contract), if the AFA vessel was only marginally involved in the pollock fishery, or the AFA vessel was already active in non-pollock fisheries and adapted for those fisheries (e.g., yellowfin sole, Pacific cod). As described in Table 2, many AFA vessels have been active in non-pollock groundfish fisheries in recent years. This information may indicate those vessels that appear capable or likely to have an interest in entering the Amendment 80 fishery as a replacement vessel.

It is also possible that an Amendment 80 vessel owner could purchase an AFA vessel. Anecdotally, participants in the Amendment 80 fishery have indicated that the cost of purchasing an AFA vessel with the appropriate equipment and the associated “rights” for the directed pollock fishery is not feasible. NOAA Fisheries has not assessed these claims, and may be limited in doing so given the limited data available on asset values in the AFA fishery. Because AFA C/Ps do not receive a vessel specific allocation of pollock under the AFA, fishing by specific vessels in the AFA C/P sector is subject to the provisions of the voluntary cooperative established by the AFA C/Ps. Conceivably, AFA C/P vessel owners could choose to lease or establish other contractual arrangements with other members in the AFA C/P sector that would effectively limit the ability of a specific AFA C/P to be used to directed fish for pollock. Any such provisions would not be regulatory provisions established by NOAA Fisheries, but would need to be enforced through civil proceedings. Theoretically, an AFA C/P that is sold to an Amendment 80 member with contractual provisions that limited its ability to be used to directed fish for pollock, or receive pollock revenues associated with that vessel, could be less costly for an Amendment 80 vessel owner to purchase. At this time, NOAA Fisheries does not have information available to ascertain if contractual provisions such as this are possible or likely within the AFA C/P sector, or the effect of such provisions on the potential costs of an AFA C/P vessel. These issues could be examined further if the Council advances this issue for analysis.

Potential Impacts of AFA Vessels in the Amendment 80 Sector

Depending on the capabilities of specific vessels relative to the vessels being replaced AFA vessels could improve efficiency in Amendment 80 fishing operations (i.e., capacity reduction, upgrades for improved retention and utilization, and flexibility to incorporate a broad range of processing opportunities) and improve safety similar to those achieved with a new vessel construction. Allowing AFA vessels to participate as Amendment 80 replacement vessels may allow the Amendment 80 fleet, overall, to modernize in a shorter amount of time and at a lower cost than new vessel construction. It is likely that AFA vessels would be available as replacement vessels sooner than a newly construction replacement vessel due to time need to design and construct a new vessel.

If an Amendment 80 vessel owner can reasonably acquire an AFA vessel as a replacement vessel, it may be a practicable means to achieve the modern safety and efficiency goals established by the Council and NOAA Fisheries under Amendment 97. The demand for AFA vessels will vary among Amendment 80 participants and demand is impossible to predict due to the multiple unknown variables such as future interest rates for financing, the depreciation and upkeep costs of older vessel, fuel efficiency, fishing efficiency, the utility of a specific AFA vessel for the fishing plan of a given Amendment 80 vessel owner, and other factors. At this time, NOAA Fisheries does not have available data to assess the relative costs of purchasing and maintaining an AFA vessel rather than rebuilding or constructing a new Amendment 80 replacement vessel.

The Amendment 80 sector has raised concerns about the competitive advantage that AFA vessel owners would have by entering into Amendment 80 fisheries. Some assert that AFA vessel owners could

enter the Amendment 80 sector with a more efficient fishery platform and a limited debt burden relative to the debt burden that current Amendment 80 participants would have if they chose to finance replacement of an existing Amendment 80 vessel with one that had the same capabilities as an existing AFA vessel. Amendment 80 constituents claim that such an advantage could lead to predatory business practices that would destabilize the existing cooperatives and negatively affect vessel operators and crew. Some have asserted that these practices would result in AFA vessel owners entering the Amendment 80 fishery specifically to create economic conditions unfavorable to current Amendment 80 participants, and in the long-term reduce the value of Amendment 80 QS and vessels, thereby further reducing the costs of entry for AFA vessel owners seeking to consolidate their fishery operations. . At this time, NOAA Fisheries does not have data to assess the relative costs of entry of AFA vessels into the Amendment 80 sector, or how those costs may change over time if additional AFA vessels entered the Amendment 80 fishery.

Given the stated opposition by many Amendment 80 vessel owners to the entry of AFA vessels, it is not clear that those vessels would be welcome to participate in an existing cooperative. Under current regulations, a minimum of two unique persons, not linked through ownership of control¹¹, holding at least 7 QS permits are required to form an Amendment 80 cooperative. AFA vessels could be limited to the Amendment 80 limited access fishery if they cannot join a cooperative with existing Amendment 80 participants or form a cooperative with new AFA entrants into the Amendment 80 sector. Depending on the amount of QS (and resulting annual TAC) held by these AFA vessels, it may encourage vessels currently assigned to Amendment 80 cooperatives to join the Amendment 80 limited access fishery in a race for fish with these AFA vessels in an effort to outcompete the vessels. NOAA Fisheries cannot predict the willingness of Amendment 80 vessel owners to coordinate with AFA vessels to establish cooperatives, or the likelihood that they would choose to enter the Amendment 80 limited access fishery in a race for fish with AFA vessels. Overall, the Council would want to consider these possible scenarios in any future analysis. Generally, the Council has promoted the Amendment 80 Program, and revisions to the program to encourage cooperative participation.¹²

It is impossible to accurately predict the changes to BSAI C/P fleet overall should AFA vessels be used as Amendment 80 replacement vessels; however, should the Council recommend additional analysis should consider the potential for downstream impacts of AFA vessel replacement on the Amendment 80 vessel replacement. As noted earlier in this preamble the Coast Guard Act authorized the owners of AFA vessels to rebuild or replace their vessel to improve vessel operational efficiency. It is conceivable that the efficiency gains the AFA fleet sustains through gradual replacement of the AFA fleet could free up some vessel capacity for use in both the Amendment 80 and AFA fisheries. Similarly, over time AFA replacement vessels could be designed for efficient use in both Amendment 80 and AFA fisheries. Any increase in efficiencies coupled with a reduction in vessels may increase the cost effectiveness of utilizing AFA vessels as Amendment 80 replacement vessels. This ultimately could lead to fewer newly constructed vessels in the Amendment 80 fleet than anticipated under Amendment 97 (i.e. one hybrid AFA/Amendment 80 vessel harvesting pollock and Amendment 80 species previously undertaken as two separate AFA and Amendment 80 vessels).

There is not enough information to predict the amount of fleet consolidation that may occur if AFA vessels are permitted to be used as Amendment 80 replacement vessels; however, the Council and NOAA Fisheries assumed some consolidation of the Amendment 80 fleet would occur as a result of Amendment 97. The Amendment 97 analysis (NOAA Fisheries 2012b) provides a comprehensive overview of the Amendment 80 fleet but it does not include the use of AFA vessels as Amendment 80 vessels, with the sole exception of the F/V *Ocean Peace*. Consolidation of the Amendment 80 fleet

¹¹ Ownership and control is established through a threshold commonly known as the AFA 10% threshold. Additional detail is provided in the final rule for Amendment 80.

¹² For example, the Council adopted Amendment 93 to the FMP to reduce barriers to forming an Amendment 80 cooperative (see 76 FR 68354).

would have impacts on fishing communities, crew, target species, and bycatch of non-target species not specifically considered under Amendment 97.

It is reasonable to assume that fleet consolidation resulting from the availability of AFA vessels as Amendment 80 replacement vessels would ultimately result in job attrition. Specifically, AFA vessels entering the Amendment 80 fleet would likely bring their own crews resulting in a loss of jobs in the Amendment 80 sector. Generally, AFA C/P vessels have larger crew components than Amendment 80 vessels, and may not require additional crew to fish in an Amendment 80 fishery. Some displaced crew could be retained by AFA/Amendment 80 vessel owners if they have specific skills necessary for fishing in the Amendment 80 sector. The reduction in crew employment could impact specific communities dependent on BSAI groundfish fisheries. These AFA/Amendment 80 hybrid vessels could operate out of different ports, and increase revenues to specific communities and decrease it in others relative to existing AFA and Amendment 80 vessel operations. Some loss of jobs due to fewer vessels actively harvesting and processing groundfish in the BSAI could be offset by an increase in the amount of fish harvested per vessel, a corresponding increase in fishing days, and the additional processing of seafood products. Further analysis would be required to assess the potential impacts of vessel consolidation on employment.

The entrance of non-historic participants into Amendment 80 fisheries may alter the timing and operations of various fisheries in the BSAI. For example, if AFA vessels are used in both the pollock and Amendment 80 fisheries, the timing of specific fisheries could change as vessel operators seek to maximize the efficiency of their vessel operations. These changes could affect markets for Amendment 80 vessel operators. This could lead to a fundamental shift in the supply and demand for these seafood products and affect the price and rents available to both Amendment 80 and AFA participants. Further analysis could explore the potential magnitude of these changes and their effects on harvest rates, geographic distribution of the fishery, and potential impact on salmon, halibut, and crab PSC as these new entrants entered the fishery. It is difficult to predict how new entrants would fish relative to existing participants or whether shifts in fishing patterns would have an appreciable effect on harvest rate, PSC rates, or species composition. Overall, because hybrid AFA/Amendment 80 vessels would still be subject to the limits established by their member Amendment 80 cooperative contract, or the Amendment 80 limited access fishery TAC, dramatic changes in the overall harvests of target fisheries or PSC would not be expected. However, new entrants could impact the overall harvest patterns within a given cooperative, particularly if those vessels have not previously been active in those fisheries. These concerns could be addressed through terms and conditions in an Amendment 80 cooperative to establish specific allocations, buffers, or other means of compensation if cooperative members felt additional limitations were warranted.

Potential Effects on Current Amendment 80 Vessel Replacement Efforts

Depending on the type, and number of AFA vessels allowed to enter the Amendment 80 fishery (see the following section), removing the regulatory prohibition on AFA vessels participating as Amendment 80 replacement vessels may not substantially affect decisions by Amendment 80 vessel owners to enter into new vessel construction contracts. If very few AFA vessels are allowed to enter the Amendment 80 fishery, or if those AFA vessels are tightly restricted, those AFA vessels may not provide an adequate substitute for new vessel construction. In that case, Amendment 80 vessel owners would continue to look favorably at new vessel construction in large part because there are not enough AFA vessels available to meet the needs and requirements for Amendment 80 replacement vessels.

Alternatively, by making AFA vessels available to Amendment 80 QS holders, could risk existing and future investments that fishery participants have made in new vessel construction because new vessel construction may no longer be the most economically feasible option. The availability of AFA vessels could provide an Amendment 80 vessel owner with a low cost alternative to new vessel construction. It is unclear how many, or if any, AFA vessels may eventually be eligible to participate in Amendment 80 fisheries. The availability of AFA vessels as alternatives to new construction could alter lending entities' risk assessments that are conducted to finance new construction. NOAA Fisheries lacks the expertise to determine exactly how such assessments are conducted or what factors are considered, but

this issue has been raised as a concern by constituents in the Amendment 80 sector. A future analysis could explore these potential impacts in more detail.

Provisions of Amendment 97 Subject to Change

Amendment 97 included four requirements for Amendment 80 replacement vessels that would likely be the focus of the Council in any future analysis including--.

- The replacement vessel cannot be a listed AFA C/P (or an AFA catcher vessel)
- The replacement vessel was built in the United States and, if ever rebuilt, rebuilt in the United States.
- The replacement vessel is classed and load lined or, if the vessel cannot be classed and load lined, the vessel meets the requirements of the U.S. Coast Guard ACSA program.
- The replacement vessel does not exceed 295 feet LOA.

Conceivably, the Council could recommend changes to one, some, or all of these provisions, with differing impacts on the number of AFA vessels that could be used as Amendment 80 replacement vessels. Obviously, if the Council chose to modify most, or all of these criteria it would effectively be reconsidering Amendment 97 in its entirety and developing a new Amendment 80 vessel replacement action. Table 2 lists all of the AFA C/Ps and indicates which of these criteria each of the vessels can meet. Anywhere from 3 to 20 of the currently listed AFA C/Ps could be eligible to fish in the Amendment 80 sector.

Table 2: Description of the AFA catcher/processor fleet*.

AFA C/Ps	LOA on FFP (ft)	Classed	Load lined	Built or Rebuilt in Foreign Shipyard	Number of Amendment 80 Vessel Replacement Criteria met	Participated in Non-Pollock Groundfish Fisheries from (2007-2012)
Northern Glacier	201	YES	YES	NO	4 of 5	YES
American Enterprise	210	NO	YES	NO	2 of 5	NO
Ocean Peace**	219	YES	YES	NO	5 of 5	YES
U.S. Enterprise	224	NO	YES	NO	3 of 5	NO
Starbound	240	YES	YES	NO	4 of 5	YES
Ocean Rover	256	YES	YES	YES	3 of 5	YES
Seattle Enterprise	270	NO	YES	NO	3 of 5	YES
Highland Light	270	YES	YES	NO	4 of 5	NO
American Dynasty	272	YES	YES	YES	3 of 5	YES
Arctic Fjord	275	YES	YES	YES	3 of 5	YES
Kodiak Enterprise	275	NO	YES	NO	3 of 5	YES
Pacific Glacier	276	YES	YES	YES	3 of 5	NO
Endurance	278	YES	YES	YES	3 of 5	NO
American Triumph	285	YES	YES	YES	3 of 5	YES
Katie Ann***	296	YES	YES	NO	3 of 5	YES
Island Enterprise	304	NO	YES	NO	2 of 5	YES
Arctic Storm	334	YES	YES	NO	3 of 5	YES
Northern Jaeger	336	YES	YES	YES	2 of 5	YES
Northern Eagle	341	YES	YES	YES	2 of 5	YES
Northern Hawk	341	YES	YES	YES	2 of 5	YES
Alaska Ocean	376	YES	YES	YES	2 of 5	NO

*Note—Amendment 97 establish only four criteria for Amendment 80 replacement vessels. This table separates the ‘classed and load lined’ requirement into two separate requirements. This was necessary because some AFA vessel are not both classed and load lined.

**The F/V *Ocean Peace* is currently eligible to participate in both Amendment 80 and AFA fisheries; however, the F/V *Ocean Peace* is not a listed AFA trawl C/P.

*** The vessel owner of the *Katie Ann* has indicated that this vessel may have a LOA specified on the FFP that is slightly longer than the LOA of the vessel. The LOA specified here is based on the FFP assigned to the *Katie Ann*. If a marine survey, or other appropriate documentation, indicated that the LOA of the *Katie Ann* was less than or equal to 295 feet LOA, and that revised shorter LOA was designated on the FFP, this vessel could meet 4 of the 5 existing criteria required to qualify as an Amendment 80 replacement vessel.

If any of the currently listed AFA vessels were to be replaced by a vessel that met the other criteria established under Amendment 97 (i.e., the AFA vessel was built in the U.S., load lined and classed, and less than 295 ft LOA), then that AFA replacement vessel could qualify as an Amendment 80 replacement vessel if the prohibition on the use of an AFA vessel was removed. At this time, NOAA Fisheries does not have information indicating that AFA replacement vessels are currently being built that meet these criteria. However, as AFA vessel owners replace their vessels, they may have an incentive to design vessels that can meet the criteria established under Amendment 97 if this provision were to change. The following paragraphs describe the potential number of existing qualifying vessels that could be used as Amendment 80 vessels if specific criteria in Amendment 97 were changed.

Removing the prohibition on listed AFA C/Ps would allow a maximum of 3 currently listed AFA C/Ps to be used as Amendment 80 replacement vessels. In total, only 4 AFA C/Ps including the F/V *Ocean Peace* meet the Amendment 80 replacement vessel requirements established at 50 CFR

679.4(o)(4)(A) through (C), the *Northern Glacier*, the *Ocean Peace*, the *Starbound*, and *Highland Light* (GAO 1998). Because the *Ocean Peace* is already active as both an AFA and Amendment 80 vessel, it is not considered further here. The rationale for prohibiting listed AFA C/Ps from serving as Amendment 80 replacement vessels is discussed at length earlier in this paper and is not repeated here. The Council would need to provide rationale to allow these additional three vessels to be used in the Amendment 80 sector in any future analysis.

Removing both the AFA prohibition, and the requirement that vessels have to be built, or rebuilt, in the United States would allow 9 currently listed AFA C/Ps to be active in the Amendment 80 sector, the 3 mentioned above as well as the *Ocean Rover*, *American Dynasty*, *Arctic Fjord*, *Pacific Glacier*, *Endurance*, and *American Triumph*. The regulation at 50 CFR 679.4(o)(4)(i)(B) requiring that new vessels be built in the United States, or if ever rebuilt, rebuilt in the United States is consistent with current vessel replacement regulations for trawl C/Ps participating in the AFA C/P subsector (see 50 CFR 679.4(l)(7)(i)(B)). As noted in Section 2.4.6.2 of the EA/RIR/FRFA prepared for Amendment 97, the requirement that vessels be built or rebuilt in the United States was applicable law for other trawl C/Ps (i.e., AFA C/Ps) operating in the Bering Sea at the time the Council took final action on Amendment 97.¹³ Generally, statutes governing vessel construction have required that new vessels be built, or rebuilt, in the United States (e.g., 46 U.S.C. §§ 12102(a), 12151(b)). This requirement is consistent with the MSA, and other applicable law. This provision is also consistent with NOAA Fisheries' understanding at the time the Amendment 97 rule was proposed that Amendment 80 vessel owners were seeking contracts with U.S. shipyards to construct new vessels.

Under the AFA, a number of vessels that had been built, or rebuilt, in overseas shipyards were identified as eligible to continue to receive a U.S. fisheries endorsement. The Council could consider modifying the U.S. vessel construction provision under Amendment 97 to allow these vessels to be used as Amendment 80 replacement vessels. If the Council recommended that this provision be eliminated, additional analysis would examine any requirements on U.S. construction under applicable maritime law.

NOAA Fisheries notes that the current regulatory provision in Amendment 97 could affect the ability of some Amendment 80 vessels that have been built, or rebuilt, overseas from being used as an Amendment 80 replacement vessel. Only three vessels in the Amendment 80 fleet, the *Alaska Spirit*, *Alaska Victory*, and *Seafisher*, appear to have been built, or rebuilt, in overseas shipyards so the overall impact of these vessels being excluded as Amendment 80 replacement vessels is not likely to have a significant impact on the ability of the Amendment 80 fleet to harvest their allocations. For example, if owners of other Amendment 80 vessels want to consolidate their Amendment QS and have harvest the QS on another vessel under the current cooperative structure. There is no limitation on the amount of Amendment 80 species that may be caught on one vessel; if other Amendment 80 vessel owners want to retire their vessels, they can assign the Amendment 80 QS associated with that vessel to the LLP license that is originally derived from that Amendment 80 vessel. As long as there is adequate capacity in the Amendment 80 fleet to effectively harvest its allocations, a vessel owner would not need to replace these vessels.

Removing the AFA prohibition, U.S. construction standards, load line and classification requirements would allow an additional four vessels (*American Enterprise*, *U.S. Enterprise*, *Seattle Enterprise*, and *Kodiak Enterprise*) to be used as Amendment 80 replacement vessels. A total of 13 of the 20 listed AFA C/Ps could be used under this scenario. None of the AFA vessel are currently members of the U.S. Coast Guard's Alternative Compliance and Safety Agreement (ACSA) Program and it is unclear whether they would be eligible for the program should they be approved as Amendment 80 replacement vessels. Further analysis is necessary to determine if individual AFA vessels would be eligible for the ACSA Program.¹⁴

¹³ At the time the Council recommended Amendment 97, section 208(g) of the AFA required that any AFA replacement vessel "be built in the United States, or if ever rebuilt, rebuilt in the United States."

¹⁴ Personal communication Captain Christopher Woodley USCG, August 28, 2012

During the development of Amendment 97, the U.S. Coast Guard, and representatives from the National Institute for Occupational Health and Safety strongly supported the load line and classification provisions to enhance and improve safety requirements for vessels active in the Amendment 80 sector. The Council and NOAA Fisheries supported these efforts throughout the development of Amendment 97. If the Council chose to remove this requirement, the analysis would need to assess the potential implications on safety and whether removing this requirement would be contrary to the goals of National Standard 10 (promote the safety of life at sea) under the MSA. Extended detail on safety issues is provided in the analysis and final rule for Amendment 97, and is summarized here.

Under current law, any fish processing vessel that is built or undergoes a major conversion after July 27, 1990, is required by 46 U.S.C. 4503 to meet all survey and classification requirements prescribed by the American Bureau of Shipping or another similarly qualified classification society. A classification society is a non-governmental organization that establishes and maintains technical standards and rules for the construction (hull, machinery, and other vital systems) and operation of ships and offshore structures. The classification society will also validate that construction is completed according to these standards and will carry out regular surveys to ensure continued compliance with the standards. Similarly, all vessels 79 feet or greater that are built or converted for use as a fish processing vessel after January 1, 1983, are required by 46 U.S.C. 5102 to have a load line. A load line establishes the maximum draft of the ship and the legal limit to which a ship may be loaded for specific water types and temperatures. A load line is intended to ensure that a ship has sufficient freeboard so that the vessel has the necessary stability to operate safely.

Due to a variety of concerns, classification societies have not recently classed or load lined vessels greater than 20 years old, and do not appear likely to do so in the foreseeable future. Therefore, it is unlikely that AFA vessels that are not currently classed or load lined could become so given the age of the vessels. Specific detail on the age of each AFA vessel is not available, and could be included in further analysis. AFA C/Ps not currently classed or load lined are thought to be over 20 years old, and are unlikely to be classed or load lined if not already so. The Alternative Compliance and Safety Agreement (ACSA) program was designed, in part to improve safety of Amendment 80 vessels not classed or load lined. No AFA vessels are currently part of this program. The ACSA program is designed to achieve numerous safety, economic, and fishery management goals, both directly and indirectly.

While the U.S. Coast Guard and Amendment 80 vessel owners have seen significant improvements in vessel safety as a result of the ACSA program, there are limitations to its long-term effectiveness. Newly constructed fish processing vessels have to meet the full suite of modern safety standards—including all construction, stability, and manning requirements—intended to ensure such a vessel is inherently safer. Under Amendment 97, any newly constructed replacement vessel, or any modified replacement vessel, will be required to be classed and load lined. These provisions are intended to improve safety at sea by requiring Amendment 80 replacement vessels to meet safety requirements established for fishing vessels in recent years.

If the Council recommended removing all of the previous criteria mentioned, as well as the 295 foot maximum length overall, then all 20 AFA vessels would be eligible to be used as Amendment 80 replacement vessels. The Council would effectively be recommending a new Amendment 80 vessel replacement action and would need to develop a rationale for revising its recently adopted program.

Amendment 80 Vessels as AFA Replacement Vessels

Although there is no statutory requirement prohibiting the use of Amendment 80 vessels as AFA replacement vessels, current Amendment 80 vessels may not meet the needs of AFA vessel owners. In the future, Amendment 80 replacement vessels may meet modern safety and efficiency standards; however, today's fleet is generally shorter, less fuel efficient, and less likely to meet the improved vessel safety and operational efficiencies standards intended by the Coast Guard Act for AFA replacement vessels. As noted earlier, few of the Amendment 80 vessels are classed or load lined, and have factory construction specifically designed to meet the needs of non-pollock groundfish fisheries and may be ill-suited for pollock processing without substantial reconstruction. Generally, Amendment 80 vessels have

smaller crew components than AFA vessels, and may be unable to adequately house the crew needed to operate efficiently in the directed pollock fishery.

Sideboard Limits

Tables 3 and 4 describe the allocations, sideboard limits, and PSC limits a vessel eligible to participate in both Amendment 80 fisheries and AFA fisheries would have to meet. Table 3 and 4 do not include catch information. Non-pollock catch for AFA vessels from 2008 through 2012 can be found in Table 5. Once a harvest limit is reached, or predicted to be reached, NOAA Fisheries closes directed fishing for those species. The sideboard limits mandated in the AFA are not “hard caps” that result in the closure of all fishing by AFA vessels once a sideboard limit is reached. However, all vessels fishing in both the AFA and Amendment 80 fisheries would be limited by the sideboards displayed in Tables 3 and 4 unless modified by the Council (see previous sections on AFA sideboards for additional detail).

Generally, the catch of non-pollock groundfish by listed AFA vessels increases in years when the Bering Sea pollock TAC is low, or in years like 2011 when large aggregations of pollock are more difficult to locate. Although there is not a well-established trend of harvest rates from 2007 through 2012, listed AFA vessels have increased their catch of yellowfin sole, arrowtooth/Kamchatka flounder, and other flatfish since 2010, as shown in Table 5. The data for 2012 are incomplete; however, the catch of yellowfin sole by listed AFA trawl C/Ps is expected to be similar or perhaps increase from 2011¹⁵. AFA vessels targeting fish in the BSAI trawl limited access fishery for yellowfin sole are allocated a specific portion of the TAC.

¹⁵ Personal communication with Josh Keaton NOAA Fisheries on August 20, 2012

Table 3. The 2012 AFA catcher/processor allocations ¹ and sideboard limits ² in the BSAI (Amounts in Metric Tons)		
Species	Area/Season	AFA
Pollock	BSAI	419,040 ¹
Sablefish	BS	15
	AI	-
Atka mackerel	Eastern AI A season	-
	Easter AI B season	-
	Central AI A season	553 ²
	Central AI B season	553 ²
	Western AI A season	134 ²
	Western AI B season	134 ²
Rock sole	BSAI	2,875 ²
Greenland turbot	BS	37 ²
	AI	10 ²
Arrowtooth flounder	BSAI	43 ²
Kamchatka flounder	BSAI	30 ²
Flathead sole	BSAI	1,097 ²
Alaska plaice	BSAI	20 ²
Other flatfish	BSAI	158 ²
Pacific ocean perch	BS	10 ²
	Eastern AI	100 ²
	Central AI	4 ²
	Western AI	30 ²
Northern rockfish	BSAI	33 ²
Shortraker rockfish	BSAI	7 ²
Rougheye rockfish	EBS/EAI	4 ²
	CAI/WAI	4 ²
Other rockfish	BS	15 ²
	AI	15 ²
Squids	BSAI	8 ²
Skates	BSAI	198 ²
Sharkes	BSAI	2 ²
Octopuses	BSAI	7 ²
Sculpins	BSAI	42 ²
Yellowfin Sole	BSAI	36,297 ¹
Pacific cod	BSAI	5,361 ¹

Table 4. The 2012 Apportionment of Prohibited Species Catch Allowances to Amendment 80, BSAI Trawl Limited Access, and AFA Sectors.				
PSC species	Total trawl PSC ¹	Amendment 80 sector ²	BSAI trawl limited access fishery	AFA catcher/processor sideboard limit
Halibut mortality (mt) BSAI	3,675	2,325	875	286
Herring (mt) BSAI	2,094	n/a	n/a	n/a
Red king crab (animals) Zone 1 ¹	97,000	43,293	26,489	606
<i>C. opilio</i> (animals) COBLZ ²	7,029,520	3,085,323	2,017,544	960,436
<i>C. bairdi</i> crab (animals) Zone 1	980,000	368,521	411,228	122,520
<i>C. bairdi</i> crab (animals) Zone 2	2,970,000	627,778	1,241,500	132,611
¹ Section 679.21(e)(3)(i)(A)(2) allocates 326 mt of the trawl halibut mortality limit and § 679.21(e)(4)(i)(A) allocates 7.5 percent, or 67 mt, of the non-trawl halibut mortality limit as the PSQ reserve for use by the groundfish CDQ program.				
² The Amendment 80 program reduced apportionment of the trawl PSC limits by 150 mt for halibut mortality and 20 percent for crab. These reductions are not apportioned to other gear types or sectors.				

Table 5. Catch of non-Pollock Groundfish by Listed AFA Vessels (metric tons)
(Excludes F/V *Ocean Peace*)

Target Species	2007	2008	2009	2010	2011	2012*
Pacific cod	2,285	2,602	3,093	3,096	2,216	1,490
Arrowtooth/Kamchatka	-	-	-	-	320	1,137
Yellowfin Sole	27,212	22,883	13,694	24,099	37,579	23,106
Other Flatfish (except Yellowfin & Arrowtooth/Kamchatka)	550	983	3,591	161	2,901	5,182
Other**	-	1	-	49	-	1,171
Total	30,047	26,468	20,377	27,404	43,016	32,087
* 2012 data through August 20, 2012						
** Other target species including Rockfish and Atka Mackrel						

As noted earlier in this discussion paper, the Council could recommend that NOAA Fisheries modify AFA sideboards to meet a specific policy objective after the Council has made an affirmative finding that doing so is consistent with the FMP, the MSA, and the AFA.

If the Council chose to advance this issue for further analysis and action, the Council would need to select a reasonable range of alternatives to consider the impacts of sideboards in allowing AFA vessels

to operate as Amendment 80 replacement vessels. The Council could consider the following potential alternatives to address sideboards.

- 1 Status Quo: Do not relieve any sideboards.
- 2 Remove AFA sideboards completely, including species that are not allocated to the Amendment 80 sector
- 3 Remove only those AFA sideboards applicable to Amendment 80 species, including PSC limits
- 4 Vessel owners choose to participate solely in the AFA or Amendment 80 sectors on annual basis, seasonal, or other basis

The status quo would likely restrict the use of AFA vessels to prosecute any Amendment 80 fishery other than Pacific cod or yellowfin sole (at recent levels of TAC) that are not subject to AFA sideboards.

Alternatively, the Council could recommend removing all, or some, of the AFA sideboards to meet a specific policy objective. This could include species that are not currently allocated to the Amendment 80 sector (e.g., Alaska plaice, arrowtooth flounder). Although AFA/Amendment 80 vessels would be subject to the limitations established by the amount of available CQ (if operating in an Amendment 80 cooperative), or Amendment 80 TAC (if operating in the Amendment 80 limited access fishery), those same restrictions would not apply to AFA/Amendment 80 vessels that are also relieved of sideboards for non-allocated species such as Alaska plaice, arrowtooth flounder, or Greenland turbot. Some participants in the Amendment 80 sector, or other fisheries (e.g., hook-and-line C/Ps in the Greenland turbot fishery) could face additional harvest pressures if these species can be targeted by AFA/Amendment 80 vessels that may be seeking to maximize harvests by expanding into fisheries previously unavailable to them.

Allowing vessels to choose to participate in either the AFA fishery—and be subject to AFA sideboards in the BSAI while directed fishing for pollock, or in the Amendment 80 fishery—and be subject to limitations applicable to Amendment 80 vessels in the BSAI, could provide a mechanism to allow vessels to switch between fisheries without requiring a change in the calculation of AFA sideboard limits. As a practical matter, tracking vessel operations on a year-by-year basis imposes substantially less burden on NOAA Fisheries' catch accounting system than allowing vessels to make this election more frequently. Given the complexity of the catch accounting system, allowing vessels in the AFA sector to switch between operational types within a season could substantially increase NOAA Fisheries' operational costs to reprogram and track catch and sideboard limits. Although AFA vessels can now select to harvest in the AFA or CDQ fisheries on a haul-by-haul basis, the necessary programming to track these operations has already been developed, and these fisheries are more limited in scope, fisheries, and potential participants than would likely be the case for AFA/Amendment 80 vessels. **Given anticipated costs, NOAA Fisheries would not recommend allowing AFA vessels to switch between AFA and Amendment 80 operations on a haul-by-haul or seasonal basis.**

Another approach that does not appear tractable is to modify AFA sideboard limits on a case-by-case basis as vessels enter the Amendment 80 fishery. This approach would require the Council and NOAA Fisheries to determine how much the AFA sideboard limit should be reduced, and modify that limit through a subsequent regulatory amendment. Determining the specific amount of the AFA sideboard limit applicable to a specific vessel would require the Council to develop some method for assigning a portion of the existing limit. This could be based on the proportion of landings made by an AFA vessel during the time period used to establish the AFA sideboards in most cases (1995 – 1997), but this proportional method is difficult to apply to Atka mackerel sideboard limits that are specifically assigned in the AFA and are not based on aggregate harvests by AFA C/Ps. Furthermore, modifying sideboard limits on a case-by-case basis would require NOAA Fisheries to initiate rulemaking to adjust these limits. This additional administrative burden could impose substantial costs on NOAA Fisheries, and there would likely be a delay between the entrance of an AFA vessel into the Amendment 80 fishery

and the regulations implementing the change in the AFA sideboard limits. **Given anticipated costs and delayed implementation, NOAA Fisheries would not recommend further consideration of this method for modifying sideboard limits.**

Applicability of LLP licenses to AFA Vessels Replacing Amendment 80 Vessels

Any future analysis would need to clarify how LLP license requirements would be modified to allow AFA vessels to operate as Amendment 80 vessels. Regulations at 50 CFR 679.4(k) limit the use of Amendment 80 LLP licenses on AFA vessels, and AFA LLP licenses on Amendment 80 vessels.

The Council could also choose to look at severability of LLP license endorsements on for future transfers (e.g., allow an AFA endorsement to be reassigned to an Amendment 80 LLP license); however, severability of endorsements is not typical and is only authorized for a few Aleutian Island trawl endorsed LLP licenses. Generally, the Council and NOAA Fisheries have limited the ability for endorsements to be transferred between licenses to reduce the risk of increasing capacity in the fishery as endorsements are reassigned to LLP licenses with greater MLOAs or that are endorsed to fish in more regulatory areas than the LLP license to which the endorsement is currently assigned. Another option for the Council would be to recommend that NOAA Fisheries establish regulations that enable AFA vessels operating as Amendment 80 replacement vessels to retain two LLP licenses, one endorsed for the AFA sector and one endorsed for use in the Amendment 80 sector. The Council would need to examine the potential implications of “stacking” LLP licenses and define the specific limitations applicable to vessels that are assigned both LLP licenses.

Other Limitations on AFA vessels operating as Amendment 80 vessels

In addition to the existing AFA sideboards, the Council could recommend additional limits on the use of AFA vessels as Amendment 80 replacement vessels. These measures could slow or moderate the potential impact of new entrants into the Amendment 80 sector. For example, the Council could consider

- (1) Limits on the total amount of Amendment 80 fisheries that may be harvested by an AFA/Amendment 80 vessel, and/or AFA/Amendment 80 vessels generally.

These limits could be phased in over time to allow the Amendment 80 sector to adapt to these potential changes. These limitations could address some of the concerns raised by Amendment 80 participants. The Council would need to consider how these limits would be set so as not to set limits so low as to effectively limit the ability of AFA vessels to participate in the Amendment 80 fishery.

- (2) Council could limit the total number of AFA vessels serving as Amendment 80 replacement vessels.

This approach would less directly limit the harvests of AFA vessels in the Amendment 80 sector, but it would provide some overall constraint on the number of new entrants in the Amendment 80 sector. As with the previous option, the number of AFA/Amendment 80 vessels could be increased over time to allow additional time for Amendment 80 participants to adapt to potential changes in the fishery.

AFA catcher vessels as AFA replacement vessels

It may be possible for an AFA catcher vessel to be converted into Amendment 80 replacement vessels; however, this is less likely due to cost of undergoing the major conversion that would be required for a catcher vessel to become a modern and efficient catcher/processors. Moreover, NOAA Fisheries has no information from representatives of the AFA catcher vessel sector to indicate that they would be interested in becoming an Amendment 80 replacement vessel.

Only four AFA catcher vessels are classed and load line certified. The remainder of the fleet is only required to meet the basic fishing vessel safety regulations found in 46 CFR Part 28. Any newly-built AFA catcher vessels would have to meet the requirements for classification and load line. Existing

AFA catcher vessels (built before 1995) which are modified in a way that changes their dimensions (lengthening, sponsoning, changes in fish hold size) after July 1, 2012 would have to meet yet to be developed Alternate Safety Compliance program standards required by the Coast Guard Act (46 USC 4503(d)(2)). When such a program is developed, it will be developed in cooperation with the commercial fishing industry and may be developed for a specific region and fishery (such as the AFA catcher vessel fleet). Since all replacement AFA catcher vessels will be classed and load lined, and extensively modified AFA catcher vessels must meet the ACSA standards, replaced or rebuilt AFA catcher vessels could be eligible to be used as Amendment 80 replacement vessels, if the prohibition on their use were removed and those vessels met the other criteria established under Amendment 97.

References

GAO (General Accounting Office) Report, July 16, 1998. GAO/RCED-98-234R Implementation of the Anti-Reflagging Act.

NOAA Fisheries 2012a, AFA Vessel Replacement on GOA Sideboards Discussion Paper, February 2012.

NOAA Fisheries 2012b, Final Regulatory Impact Review/Final Environmental Assessment/Initial Regulatory Flexibility Analysis Amendment 97 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area Amendment 80 Vessel Replacement, June 2012.

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