

July 29, 2011

Joseph M. Sullivan  
Mundt MacGregor L.L.P.  
4005 20<sup>th</sup> Avenue West, Suite 221  
Seattle, WA 98199-1290  
[jsullivan@mundtmac.com](mailto:jsullivan@mundtmac.com)

Re: Proposed Operations of the NORTHERN GLACIER in CDQ fisheries

Dear Mr. Sullivan:

Thank you for your letter of July 15, 2011, on behalf of Glacier Fish Company LLC (Glacier), which addresses whether American Fisheries Act (AFA) harvesting sideboards should apply to the operations of listed AFA catcher/processors that are engaged in harvesting Community Development Quota (CDQ) allocations of non-pollock groundfish on behalf of a CDQ group. We understand that Glacier wishes to use its vessel, the NORTHERN GLACIER, a listed AFA catcher/processor, to harvest CDQ allocations of several groundfish species on behalf of and pursuant to a contractual arrangement with, four CDQ groups (collectively, the CDQ Groups), including the Norton Sound Economic Development Corporation (Norton Sound).<sup>1</sup>

By this letter, the National Marine Fisheries Service, Alaska Region (NMFS), clarifies that under our regulations, AFA harvesting sideboards would not restrict the harvest of groundfish species that have been allocated to the CDQ Groups under the CDQ program<sup>2</sup> (CDQ Groundfish) by the NORTHERN GLACIER, provided that such harvest is on behalf of the CDQ Groups. During such operations, harvest of prohibited species will accrue against the CDQ PSQ reserve. However, any harvest by the NORTHERN GLACIER of groundfish species that are not allocated to the CDQ Groups under the CDQ program<sup>3</sup> will be limited by the AFA harvesting sideboards and attendant prohibitions on directed fishing.

The AFA rationalized the pollock fishery in the Bering Sea and, among other things, allocated ten percent of the pollock total allowable catch (TAC) to the CDQ groups, identified by name twenty catcher processors that would be eligible to harvest and process Bering Sea pollock,

---

<sup>1</sup> According to information you have provided to the agency, Norton Sound holds a sizeable minority ownership interest in Glacier, which in turn owns the NORTHERN GLACIER.

<sup>2</sup> In the 2011 fishery, CDQ Groundfish includes Pacific cod, Yellowfin sole, Flathead sole, rock sole, Arrowtooth flounder, and Greenland turbot in the Bering Sea.

<sup>3</sup> In the 2011 fishery, this includes Greenland turbot in the Aleutian Islands, Kamchatka flounder, Alaska plaice, other flatfish, and Pacific ocean perch in the Bering Sea.

allowed these eligible catcher/processors to form harvesting cooperatives, and allocated a portion of the pollock TAC to the catcher/processor sector. Recognizing that the rationalization of the Bering Sea pollock fishery could create a variety of competitive advantages for AFA vessels, Congress imposed harvesting sideboards, which restrict the participation of listed AFA catcher/processors in non-pollock groundfish fisheries in the Bering Sea and Aleutian Islands Management Area.

The language of the AFA does not require NMFS to apply AFA sideboards to restrict the harvest of CDQ Groundfish. The AFA established specific sideboards that apply to the groundfish harvest of listed AFA catcher/processors:

The [listed AFA catcher/processors] 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[.]

AFA Section 211(b)(2)(A). On its face, this provision limits the twenty listed AFA catcher/processors from exceeding a certain percentage “of the harvest available in the offshore component” of any Bering Sea and Aleutian Islands [non-pollock] groundfish fishery[.]” The AFA defines “offshore component” as “all vessels not included in the definition of ‘inshore component’<sup>[4]</sup> that process groundfish harvested in the Bering Sea and Aleutian Islands Management Area.” AFA Section 205(10). CDQ Groundfish are available for harvest and processing only by CDQ groups or their hired agents, *see* 16 U.S.C. §§ 1855(i)(B)-(C); 50 C.F.R. § 679.31. CDQ Groundfish may not be harvested or processed by vessels in the offshore component unless those vessels contract with a CDQ group to harvest or process such fish. Therefore, NMFS does not consider CDQ Groundfish “available in the offshore component” of the non-pollock groundfish fishery. In NMFS’s view, the harvest of CDQ Groundfish does not count toward the harvest of groundfish “available in the offshore component” of the fishery. As a result, the harvest of CDQ Groundfish by an AFA catcher/processor cannot cause the aggregate harvest by all AFA catcher/processors to exceed the applicable percentage of harvest available in the offshore component and such harvest is not subject to the AFA sideboard restriction.

Moreover, it would not further the purpose behind AFA sideboards to construe the sideboards to restrict the harvest of CDQ Groundfish. NMFS has consistently viewed the AFA harvesting

---

<sup>4</sup> “Inshore component” is defined as “the following categories that process groundfish harvested in the Bering Sea and Aleutian Islands Management Area: (A) shoreside processors, including those eligible under section 208(f) [of the AFA]; and (B) vessels less than 125 feet in length overall that process less than 126 metric tons per week in round-weight equivalents of an aggregate amount of pollock and Pacific cod[.]” AFA Section 205(6).

sideboards as measures intended to protect participants in other fisheries against the competitive advantages resulting from rationalization of the Bering Sea pollock fishery. When we adopted a final rule to implement the AFA, NMFS described the general purpose behind AFA sideboards: “to protect the participants in other fisheries from spillover effects resulting from the rationalization of the BSAI pollock fishery and the formation of fishery cooperatives in the BSAI pollock fishery.” 67 Fed. Reg. at 79,702 (Dec. 30, 2002); *see also* 50 C.F.R. § 679.64(a) (“The Regional Administrator will restrict the ability of listed AFA catcher/processors to engage in directed fishing for non-pollock groundfish species to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the BS subarea directed pollock fishery.”). This view is consistent with the description of these measures in the AFA. *See, e.g.*, AFA section 211 (entitled “**Protections for other fisheries; conservation measures**”).

NMFS adopted regulations to implement the AFA in 2002. These implementing regulations state that NMFS “will establish annual AFA catcher/processor harvest limits for each groundfish species” or complex for which TAC is specified, and describe how NMFS will calculate the sideboard limits, 50 C.F.R. § 679.64(a). It is clear that, at a minimum, the sideboards apply to the harvesting operations of AFA catcher/processors in the Bering Sea and Aleutian Islands trawl limited access fisheries. These provisions do not, however, identify the specific harvesting operations to which these sideboard limits will apply.<sup>5</sup> *Id.*

NMFS regulations also include a provision which states that it is unlawful for any person to “[u]se a listed AFA catcher/processor to engage in directed fishing for a groundfish species or species group in the BSAI after the Regional Administrator has issued an AFA catcher/processor sideboard directed fishing closure for that groundfish species or species group under § 679.20(d)(1)(iv) or § 679.21(e)(3)(v).” 50 C.F.R. § 679.7(k)(1)(v). NMFS does not interpret this provision as prohibiting the NORTHERN GLACIER from engaging in directed fishing, under contract to Norton Sound, to harvest (and process) Norton Sound’s allocation of CDQ Groundfish.

We interpret section 679.7(k)(1)(v) consistent with the language of AFA section 211(b)(2)(A), under which the sideboard limits apply only to the harvest of groundfish available to vessels in the offshore sector, and in light of the general purpose of AFA sideboards—to protect

---

<sup>5</sup> The AFA grants the Council and NMFS authority to supercede the sideboard provisions of the Act. AFA Section 213(c). This may enable the Council and NMFS to adopt sideboard limits for AFA catcher/processors that differ from, or apply more broadly than, the sideboard limits established under AFA section 211(b)(2)(A). Indeed, when we adopted regulations to implement the harvesting sideboards for AFA catcher/processors, NMFS noted that it would depart from the statutory language of section 211(b) in several specified respects, including by basing the sideboard limits on the catcher/processors’ historic retained catch of non-pollock groundfish. The Council and NMFS did not, however, purport to supercede AFA section 211(b) by applying the sideboard limit broadly to the harvest of any groundfish that are not generally available for harvest or processing by vessels in the offshore component.

participants in other fisheries from spillover effects arising out of the formation of fishery cooperatives. Here, there is no need to protect Norton Sound against the spillover effects of the formation of fishery cooperatives. Under the CDQ program, Norton Sound enjoys an exclusive allocation of the CDQ Groundfish at issue. Moreover, CDQ Groundfish are not available for harvest and processing by NORTHERN GLACIER, other AFA catcher/processors, or any other vessels in the “offshore sector” absent a contractual arrangement with Norton Sound. Under NMFS’s interpretation, therefore, section 679.7(k)(1)(v) does not prohibit the NORTHERN GLACIER from engaging in directed fishing for CDQ Groundfish when the vessel is fishing under contract to harvest Norton Sound’s exclusive allocation of CDQ Groundfish.

Any harvest by the NORTHERN GLACIER of groundfish species that are not allocated to Norton Sound under the CDQ program<sup>6</sup> will be limited by the AFA harvesting sideboards and the attendant prohibition on directed fishing in section 679.7(k)(1)(v). 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. Thus, any catch of these groundfish species would accrue towards the AFA sideboard limit. If NMFS has issued an AFA catcher/processor directed fishing sideboard closure for any of these species, the NORTHERN GLACIER would be prohibited from engaging in directed fishing for such species, 50 C.F.R. § 679.7(k)(1)(v), and any permissible retention of incidental catch would be limited by the applicable maximum retainable amount.

If you have any questions regarding this matter, please contact Forrest Bowers in our Sustainable Fisheries Division at (907) 586-7240 ([forrest.bowers@noaa.gov](mailto:forrest.bowers@noaa.gov)). Thank you for your continued cooperation in our efforts to sustainably manage our Federal fisheries.

Sincerely,

James W. Balsiger, Ph.D.  
Alaska Regional Administrator

cc: Sherrie Meyers, NOAA Office of Law Enforcement, Alaska Region  
Brent Pristas, NOAA Office of Law Enforcement, Alaska Region  
Susan Auer, NOAA General Counsel, Enforcement and Litigation  
Glenn Merrill, Sustainable Fisheries Division, Alaska Region  
Clayton Jernigan, NOAA General Counsel, Alaska Region  
Lisa Lindeman, NOAA General Counsel, Alaska Region

---

<sup>6</sup> In the 2011 fishery, this includes Greenland turbot in the Aleutian Islands, Kamchatka flounder, Alaska plaice, other flatfish, and Pacific ocean perch in the Bering Sea.

Chris Oliver, North Pacific Fishery Management Council  
Eric Olson, North Pacific Fishery Management Council

G:\Administrative\Correspondence\Letter to Joe Sullivan re applicability of AFA sideboards to harvest of CDQ fish\_NORTHERN GLACIER\_July 29 2011.ltr.docx

R:\region\archives\2011\aug\Letter to Joe Sullivan re applicability of AFA sideboards to harvest of CDQ fish\_NORTHERN GLACIER\_July 29 2011.ltr