Item C-3(b)
Central Gulf of Alaska trawl catch share program
North Pacific Fishery Management Council
February 2013

Over the course of the past few years, the Council has advanced a number of actions to reduce the use of prohibited species catch (PSC) in Gulf of Alaska fisheries. Throughout the discussions of PSC reductions in the Gulf fisheries, the Council has acknowledged that a more comprehensive revision of management measures would aid fleets in achieving PSC reductions. At its October 2012 meeting, the Council adopted a purpose and need statement identifying goals and objectives for such an action to provide tools for effective management of PSC in the Central Gulf of Alaska trawl groundfish fishery. To further its efforts in the development of the program, the Council requested staff to provide this discussion paper outlining various catch share options to meet its objectives and describing other comparable programs that have considered and applied the limited access privilege program (LAPP) provisions in the Magnuson Stevens Act (MSA) to meet similar objectives.

To guide its development of a catch share program for the Central Gulf trawl fisheries, the Council adopted the following purpose and need statement and goals and objectives:

Purpose and need statement

Management of Central Gulf of Alaska (GOA) groundfish trawl fisheries has grown increasingly complicated in recent years due to the implementation of measures to protect Steller sea lions and reduced Pacific halibut and Chinook salmon Prohibited Species Catch (PSC) limits under variable annual total allowable catch (TACs) limits for target groundfish species. These changes complicate effective management of target and non-target resources, and can have significant adverse social and economic impacts on harvesters, processors, and fishery-dependent GOA coastal communities.

The current management tools in the GOA Groundfish Fishery Management Plan (FMP) do not provide the Central GOA trawl fleet with the ability to effectively address these challenges, especially with regard to the fleet's ability to best reduce and utilize PSC. As such, the Council has determined that consideration of a new management regime for the Central GOA trawl fisheries is warranted.

The purpose of the proposed action is to create a new management structure which allocates allowable harvest to individuals, cooperatives, or other entities, which will eliminate the derby-style race for fish. It is expected to improve stock conservation by creating vessel-level and/or cooperative-level incentives to eliminate wasteful fishing practices, provide mechanisms to control and reduce bycatch, and create accountability measures when utilizing PSC, target, and secondary species. It will also have the added benefit of reducing the incentive to fish during unsafe conditions and improving operational efficiencies.

The Council recognizes that Central GOA harvesters, processors, and communities all have a stake in the groundfish trawl fisheries. The new program shall be designed to provide tools for the effective management and reduction of PSC and bycatch, and promote increased utilization of both target and secondary species harvested in the GOA. The program is also expected to increase the flexibility and economic efficiency of the Central GOA groundfish trawl fisheries and support the continued direct and indirect participation of the coastal communities that are

dependent upon those fisheries. These management measures shall apply to those species, or groups of species, harvested by trawl gear in the Central GOA, as well as to PSC. This program will not modify the overall management of other sectors in the GOA, or the Central GOA rockfish program, which already operates under a catch share system.

Goals and Objectives

1. Balance the requirements of the National Standards in the Magnuson Stevens Act
2. Increase the ability of the groundfish trawl sector to avoid PSC species and utilize available amounts of PSC more efficiently by allowing groundfish trawl vessels to fish more slowly, strategically, and cooperatively, both amongst the vessels themselves and with shore-based processors
3. Reduce bycatch and regulatory discards by groundfish trawl vessels
4. Authorize fair and equitable access privileges that take into consideration the value of assets and investments in the fishery and dependency on the fishery for harvesters, processors, and communities
5. Balance interests of all sectors and provide equitable distribution of benefits and similar opportunities for increased value
6. Promote community stability and minimize adverse economic impacts by limiting consolidation, providing employment and entry opportunities, and increasing the economic viability of the groundfish harvesters, processors, and support industries
7. Improve the ability of the groundfish trawl sector to achieve Optimum Yield, including increased product retention, utilization, landings, and value by allowing vessels to choose the time and location of fishing to optimize returns and generate higher yields
8. Increase stability relative to the volume and timing of groundfish trawl landings, allowing processors to better plan operational needs as well as identify and exploit new products and markets
9. Increase safety by allowing trawl vessels to prosecute groundfish fisheries at slower speeds and in better conditions
10. Include measures for improved monitoring and reporting
11. Increase the trawl sector's ability to adapt to applicable Federal law (i.e., Endangered Species Act)
12. Include methods to measure the success and impacts of all program elements
13. Minimize adverse impacts on sectors and areas not included in the program
14. Promote active participation by owners of harvest vessels and fishing privileges

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Catch share program

Based on the Council's purpose and need statement, its motion requesting this discussion paper, and deliberations, this paper assumes that the Council's action will be a catch share program. The Council's motion explicitly requests that the paper outline catch share program options and discuss applicable MSA LAPP requirements. The purpose and need statement provides for a program that allocates the available catch to individuals, cooperatives, or other entities, which suggests the creation of a catch share program. In addition, several aspects of that purpose and need statement parallel the MSA LAPP considerations. During deliberations, the Council also discussed its intention to create a catch share program. Based on these factors, this paper addresses only catch share program provisions. While the Council's motion and deliberations clearly identify its purpose as the development of a catch share program, the purpose and need statement and goals and objectives could accommodate a variety of different program elements. The

remainder of this paper reviews various program elements as they relate to the Council's purpose and need statement.

As the Council begins developing alternatives, it should note that the MSA prescribes certain aspects of the development of catch share programs. In some cases, the MSA requires that the Council include certain elements in the program, such as excessive share caps that limit the percentage of the limited access privileges that may be held by any person. In other cases, the MSA puts limitations on the Council's authority, such as the prohibition on share terms exceeding 10 years. In other cases, the Council is required to consider specific factors in the development of program provisions, such as the requirement that the Council consider current and historical harvests in making share allocations. These requirements do not dictate that the Council include (or exclude) specific provisions, but instead require that the Council consider various factors in determining a program element. In addition, the Council is required to consider the inclusion of certain elements in its program, such as "measures to assist, when necessary and appropriate, entry-level and small vessel owner-operators, captains, crew, and fishing communities through set-asides of harvesting allocations". With respect to these aspects of the program, if, at any time after due consideration, the Council determines that an element is not appropriate for the program, it need not include the provision in the program or an alternative, provided that through its deliberations it has given the element due consideration and justified its exclusion from the program. The discussion of possible program elements that follows includes references to applicable provisions of the MSA to assist the Council through its consideration of those elements.

Species

The first aspect of the program for the Council to consider is which species should be allocated. Both the purpose and need statement and the goals and objectives for the action focus on the need to create a management environment in which harvesters are better able to avoid PSC and more efficiently use available PSC. This focus suggests that any catch share program would allocate PSC species to enable better management of those catches by participating vessels. Target, non-target, and secondary species are also a consideration in the Council's purpose and need statement. The Council states its intent to "create accountability measures when using target and secondary species" and "promote increased utilization of both target and secondary species". The Council also states that the "management measures shall apply to those species, or groups of species, harvested by trawl gear in the Central GOA, as well as PSC". These statements suggest that the allocations in the program would extend beyond PSC to "target and secondary species". Notwithstanding the purpose and need statement, during its deliberations the Council stated that it would be willing to consider alternatives that allocate only PSC, if those alternatives achieve its goals and objectives.

Under the action, the Council intends PSC reductions and efficient utilization to arise from vessels fishing more slowly, strategically, and cooperatively. In considering species allocated under the program, the effects of their inclusion (or exclusion) on slowing fishing or leading to more cooperative or strategic fishing should be considered. In addition, the Council also intends that the program contribute to the stability of volume and timing of landings to allow better planning by processors. The allocation of PSC would create an individual incentive for each participant to obtain the greatest value from PSC usage. Whether PSC allocations alone are sufficient to achieve the goals of the program will depend on whether other measures can be adopted that would allow for these PSC allocations to be fished in a manner that provides for the slowing and coordination of fishing and stable timing and volume of landings as intended for the action.

PSC allocations would be intended to provide each holder with an exclusive and limiting share of the available PSC. The participant could then choose what species to target, when, where, and how, to attain the greatest value of catch subject to the constraint of the PSC allocation. In the absence of constraining limits on retainable species, these allocations are likely to allow each participant to achieve the greatest

value in the fishery, given a limited quantity of permitted PSC. In other words, as long as unlimited quantities of target species are available, PSC quotas may effectively allow participants to respond to more constraining limits on PSC; however, if target species are limiting, PSC quotas alone (without target species allocations or other program attributes) are unlikely to result in a slowing or coordination of fishing.

When target species are limiting, a participant with PSC quota will face a choice in determining a level of PSC avoidance. Knowing that the target species TAC will be constraining, the participant must decide whether more rapidly harvesting the target species (and using more PSC quota in the process) will increase the participant's share of the available target species sufficiently to justify forgoing future fishing because of the potentially constraining PSC allocation. For example, in the Gulf, some participants may choose to fish more aggressively for Pacific cod during the A season to increase profits in that fishery but losing the opportunity to use PSC allocations in a later season.[1] Each vessel will need to balance the value of more rapidly using their PSC to obtain a larger share of the A season Pacific cod TAC against lower A season Pacific cod catches and a greater quantity of PSC in later seasons. If A season Pacific cod generates relatively high profits in comparison to other seasonal and species targets, vessels are likely to be willing to use more PSC to obtain a greater share of the available A season Pacific cod. In other words, a race for fish (A season Pacific cod) may result despite the PSC quotas. In this race, participants do not disregard PSC rates, but choose a PSC rate that sacrifices PSC quota at a rate that equalizes the difference between profit attained from the additional share of the A season Pacific cod and the profit derived from the use of PSC for harvest of less valuable species later. This incentive structure could affect the ability (or tendency) of the fleet to achieve optimum yield. In other words, the potential of participants to adjust effort to attain individual profits could lead to fish being unharvested because of relatively higher PSC usage. Whether optimum yield would be affected would depend on the structure of incentives for PSC savings in any reallocation.

The Council could consider a few means of addressing this shortcoming. One measure that might be to develop a system for redistributing PSC quotas based on PSC performance. Under such a system, annual adjustments to PSC allocations could be based on a vessel's performance in a fishery. So, a vessel that disregarded PSC rates in a season to obtain a greater share of that season's Pacific cod would receive a smaller allocation of PSC in the following year. Whether such a program would function effectively would depend on the ability of the Council to fairly weight PSC performance. Improperly weighting performance may create incentives for participants to deploy fishing effort (or withhold effort) simply to manipulate competitors' PSC apportionments. While development of specific methods of apportioning PSC will be needed to assess these effects, the potential for a system to allow for these manipulations must be considered. Additional complexity will arise when considering the number of fisheries and seasons and interactions across fisheries and seasons. Developing a system that creates reasonable incentives to avoid PSC at all times could be challenging. In addition, any reapportionment based on performance will pose some implementation challenges. NOAA Fisheries will need to develop a system for administering apportionments, which will necessarily require application and appeals processes. These added burdens suggest that adjustments to apportionments should occur over a period of several years, rather than annually.

Another suggested means of alleviating the race for target catches is to apportion PSC periodically, such as on a weekly basis. A vessel that wishes to fish a particular week in a specific target could apply for a PSC distribution for that fishing. PSC would be distributed based on availability of both target and PSC allocations and the number of vessels intending to fish. The extent to which this system of distributions

[1] It should be noted that developing seasonal bycatch quotas may have a similar effect. If seasonal bycatch quotas are not binding (or are perceived as not binding), participants can be expected to race for a share of the available target catch with limited (or less) consideration for PSC rates.

would achieve the Council's objectives is uncertain. Making small PSC distributions that are certain to constrain would slow effort. A series of small constraining allocations may not allow vessels to achieve efficiencies through deciding when to fish in each of the various targets. It is possible that cooperative elements could be incorporated into the alternative to achieve the coordination of activities across vessels intended by the Council. Perhaps the greatest complication with this alternative would arise for its administration. NOAA Fisheries would need to process fishing applications weekly. Appropriate division of PSC allocations would need to be determined for each directed fishery. In addition, management of catches of non-directed species would also need to be developed in a manner that accommodates reasonable incidental catches, without creating an incentive for targeting species that are not open to directed fishing. Likely as a result of the complication of removing these incentives, no known program allocates only PSC.

Inclusion of target species allocations may address some of these concerns. Target allocations would allow vessels to determine when to fish within a season or year to achieve the greatest return from available PSC. Secure target species allocations would allow a share holder to decide when and where to fish based on a variety of factors (including target species catch rates, availability of incidental species, PSC rates, market conditions, and weather) without concern for others depleting the availability of the target species. While allocating target species with constraining allowable catch limits may address the potential for participants to race for those species, the full allocation of all target species could reduce the potential for the fleet to achieve optimum yield or decrease total harvests, as well as affect incentives for improved PSC utilization. Specifically, the complete allocation of low value targets that are not fully utilized could reduce harvests of those species relative to a program that leave those species unallocated, particularly if share markets are not fluid. For example, if arrowtooth flounder is fully allocated, participants in the fisheries who are interested in harvesting arrowtooth flounder will likely attempt to save on PSC in other targets to ensure that they have adequate PSC available to support harvest of their arrowtooth allocations. These participants could be even more interested in saving PSC, if they believed that additional arrowtooth would be available for harvest beyond their allocations. The additional arrowtooth harvests could be considered a reward for reducing PSC use in harvesting allocated target species. In a fully functioning market, arrowtooth allocations would be acquired by persons who place the highest value on those shares. On the other hand, if share holders are reluctant to trade their surplus arrowtooth allocations[2] (or if the transaction costs associated with those transfers exceed the value of the shares),these incentives will be dampened. In addition, the need and basis for allocating the portion of the allowable catch that is historically unutilized is not apparent. Leaving some portion of the allowable catch of a species that is not fully utilized unallocated could improve the incentives for more fully utilizing that allocation, as well as improving returns from PSC usage by those participants that are interested in harvesting that species. Alternatively, the Council could consider rollovers of unharvested allocations or opening fisheries as limited access fisheries to participants with unused PSC to harvest unused allocations of participants who have fully utilized their available PSC. These types of elements may or may not be effective depending on the structure of transfers under the program.

Although including target species in the allocations may help address concerns raised in the purpose and need statement, it is possible that the race for fish could persist for some species, if only PSC and target species are allocated. Currently, other species (most importantly sablefish) may be harvested in target fisheries for other species up to a maximum retainable amount (MRA), which is based on retention of species in directed fisheries. In the current limited access derby fisheries, managing harvests of valuable species that are not open for directed fishing through MRAs has proven effective. Vessels balance their directed harvests with harvests of MRA limited species. This management is effective in derby fisheries, where participants must trade time targeting directed species with time targeting MRA species; however,

[2] Program elements may impact willingness to lease shares. For example, if PSC allocations are made on a weekly basis, persons might be less willing to lease arrowtooth shares earlier in the year.

in a catch share fishery, participants who are not subject to time pressures can catch up to the MRA for all MRA species. If participants value MRA species higher than the allocated directed species, a race may result, with participants racing to avoid being shut out of the MRA species. The allocation of these MRA species (which in the rockfish program are referred to as 'secondary species') may be useful to avoid creating a race. Modifications to the Amendment 80 sector species may also be appropriate both in terms of the harvest limitation structure and species included. For example, sideboard limits for Pacific cod and pollock could be included under a target fishery allocation. Sablefish, which currently is not an Amendment 80 sideboard species, could be allocated as a secondary species.

Prohibited species	Target species	Secondary species
Halibut Chinook salmon	Pollock Pacific cod Deepwater flatfish Shallow water flatfish Flathead sole Atka mackerel Arrowtooth flounder	Sablefish Shortraker rockfish Rougheye rockfish Thornyhead rockfish
Consider allocating in: 1) PSC only, 2) target and PSC, and 3) target, secondary, and PSC programs	Consider allocating in 1) target and PSC and 2) target, secondary, and PSC programs	Consider allocating in 1) target, secondary, and PSC programs

Sector definitions

In all other catch share programs in the North Pacific, separate sectors are defined for catcher vessels and catcher processors. The division of shares between sectors has typically been established based on the historical distribution of catches between the sectors. The Council has generally credited only catch processed onboard to the catcher processor sector and reported catch (landed catch and reported at-sea discards) in the catcher vessel sector. This action only applies to the trawl sector, so it is assumed that if catch history is used to determine allocations, only trawl harvests would be included.

Initial allocations and eligibility

The MSA and the Council's purpose and need statement provide substantial guidance for the development of initial allocations[3]. The MSA requires that the Council "establish procedures to ensure fair and equitable initial allocations, including consideration of:

(i) current and historical harvests
(ii) employment in the harvesting and processing sectors

[3] MSA § 303A(b) states that any LAPP allocation creates an access privilege and not a right, title, or interest in the fishery. That privilege may be revoked, limited, or modified at any time without compensation to the person granted the fishing privilege.

(iii) investments in, and dependence, upon the fishery; and
(iv) current and historical participation of fishing communities."[4]

The Council's goals and objectives for the action also provide that the program's privileges should "take into consideration the value of assets and investments in the fishery and dependency on the fishery for harvesters, processors, and communities." The purpose and need statement also states that the action should "support the continued direct and indirect participation of communities that are dependent on [the Central Gulf trawl] fisheries."

Traditionally, allocations in catch share programs have been made to harvesters; however, in reviewing the MSA provisions and the Council's purpose and need statement, it should be noted that the allocation considerations extend beyond harvesting histories to investments in and dependence on the fisheries, employment in processing, and participation of fishing communities. These factors suggest that the Council consider whether other groups should be included in the initial allocation.

The MSA also suggests that the Council consider set asides or economic assistance for purchases of shares to benefit entry level and small vessel owner-operators, crews, captains, and fishing communities, where necessary and appropriate.[5] First, the Council could consider including communities in the initial allocation. The purpose and need statement suggests that the decision of whether to make these allocations and allocations themselves should be based on investments in and dependence on the Central Gulf trawl fisheries. Similarly, processors could be included in the initial allocation. Again, based on the purpose and need statement, investments in and dependence on the fisheries should be the basis for this decision and these allocations. In considering whether to make these allocations, the Council should consider the overall structure of the program and its objectives for the action. While the purpose and need statement recognizes the need to preserve the stake of dependent communities and processors on the Central Gulf trawl fisheries, other avenues may be available to protect those interests. In addition, the Council should consider the effects on harvest sector participants that arise from reducing their allocations to accommodate allocations to other interests.

The MSA at §303A(c)(5)(B) requires the Council to consider the basic cultural and social framework of the fishery, emphasizing two aspects of that framework. The sustained participation of communities dependent on the fishery is one aspect of cultural and social framework that is emphasized. The establishment of cooperative/processor associations could be argued to support sustained participation of communities in the fishery, as those associations are plant specific, and thereby, grounded in their home communities. The Council may also include regional or port specific landing requirements to address community interests. The Council is also directed to consider procedures to prevent excessive geographic consolidation in the harvesting and processing sectors as a part of its efforts to consider the cultural and social framework of the fishery. The current program contains no provision to address concerns over geographic consolidation of either harvesting or processing. On their face, these provisions appear intended to ensure that Council considers historic community interests in the fisheries, but not to a level that leads to excessive geographic consolidation.

Other set asides could also be created to benefit entry level participants and small vessel owner-operators. In considering whether to include one of these set asides in the program, the Council should consider the structure of the existing fleet, as well as the need to and potential benefits of accommodating entry or small owner-operated vessels in these fisheries. Specifically, the Council should consider whether these fisheries should accommodate additional entry at the outset (and, if so, how much entry) and whether the

[4] MSA §303A(c)(5)(A)
[5] MSA §303A(c)(5)(C). If the Council elects to consider set asides, it will need to consider the management of those set asides.

fishery should have additional set asides for small owner-operated vessel. In considering the set asides, the Council should also consider the degree to which these factors are addressed by other provisions in the program, such as loan program elements and active participation requirements.

The development of policies promoting sustained participation of owner-operated vessels is another emphasized cultural and social framework aspect. The current program contains no preferences or requirements for owner-operators. Whether any provisions for sustaining owner-operator participation in the fishery are appropriate depends on the Council's view of the cultural and social framework of the fishery and whether maintaining that fleet characteristic is consistent with the goals of the Council for the fishery. In any case, the Council is directed by this section to consider this possible aspect of the fishery in development of the program.

Similarly, set asides for captains and crews should also be considered by the Council. In considering these set asides, the Council should consider whether a set aside is needed to ensure that captains and crews are treated equitably under the program. In the case of any of these set asides, the Council must consider the appropriate management and distribution of the set asides. The Council's action must include a means of identifying the distribution of the set aside and the mechanism for ensure that the benefits of the set aside are realized as intended. As the Council considers set asides, the interests of the intended beneficiaries of the set aside should be balanced against the interests of current harvest sector participants and other share recipients, whose allocations would need to be reduced to accommodate any set aside.[6]

While the MSA and the purpose and need statement suggests that allocations should be based on historical participation and investments in and dependence on the fishery, the Council is also required by the MSA to consider the auction of shares for the initial allocation or any subsequent distribution of shares. If appropriate, an auction system or other program to collect royalties for the initial (or any subsequent distribution of) allocations must meet the requirements for allocations. The MSA requires any revenues generated from an auction or other royalty collect program to be deposited in a Limited Access System Administration Fund. Funds are available to the Secretary to administer a central registry of permits and to implement management in the fishery in which the fees were collected. The central registry is intended, in large part, to establish a system of permit registration to allow the establishment of security interests in fishing permits.

The auction, however, must be designed to meet other limited access privilege program requirements of the MSA (including the provisions applicable to the distribution of shares discussed above).[7] In other words, any distribution under an auction should be structured to be fair and equitable, consider current and historical harvests, as well as fishery employment, investments, dependence, and participation. In considering an auction, the Council should consider the types of restrictions that might need to be placed on an auction to ensure that broader social and management goals are achieved. For example, the auction should be structured to ensure that a fair and equitable distribution of shares results that considers current and historical harvests, fishery employment, dependence, and participation. It may not be possible to meet these objectives, if the entire initial allocation is auctioned. On the other hand, it may be possible to phase in an auction of a portion of the available shares and meet the program objectives. For example, a portion of the initial allocation could expire after a period of years and be auctioned. Developing such an auction should be considered in the context of other program elements. If those program elements (including elements intended to achieve PSC reductions as well as elements intended to achieve social goals) reduce production efficiency substantially, it may not be appropriate to further burden fishery participants

[6] The MSA includes additional requirements concerning community eligibility and participation. If the Council wishes to proceed with allocations to communities, close attention to these requirements will be needed. MSA §303A(c)(3)

[7] MSA §303A(d)

through auctioning of shares. If the Council wishes to pursue the auction of shares (either in the initial allocation or in a subsequent allocation), additional information to support the development of options for consideration can be brought forward.

In some cases, the Council has elected to reduce the allocation of a species to a sector from historical levels to meet specific management purposes. For example, shortraker rockfish and rougheye rockfish allocations to the catcher processor sector in the rockfish pilot program and rockfish program were reduced from historical levels to protect the shortraker stock. In other cases, the Council has elected to use MRA management to ensure that a small historical allocation would prove inadequate for a sector attempting to maintain historical harvests of target species. In the rockfish program, shortraker rockfish and rougheye rockfish were not allocated to the catcher vessel sector and Pacific cod were not allocated to the catcher processor sector for this reason.

Method of distributing initial allocations
Auctions
Participant eligibility

Possible recipients of initial allocations
Harvesters
Processors
Captains and crew
Fishing communities

Possible set aside beneficiaries
Entry level participants
Small vessel owner-operators
Captains and crews
Fishing communities

Basis for initial allocations
Both the MSA and the Council's purpose and need statement suggest that initial allocations should be largely based on participation and investments in and dependence on the fishery. In most programs, the Council has relied on the existing fishery management for defining the recipient of an allocation. For example, license holders received allocations in the crab rationalization program and the rockfish program. Under Amendment 80, allocations were made to vessel owners, as participation in those fisheries was defined by vessel ownership at the time the program was implemented. Given that participation in the fishery is currently defined by License Limitation Program (LLP) licenses, those licenses could be used to define eligibility to receive an allocation based on fishery harvesting dependence. Even if the Council relies on LLP licenses for defining qualification for the program, it could also consider whether a threshold level of historical participation should be required. Applying a minimum threshold might benefit eligible harvesters and reduce transaction costs by eliminating marginal participants who are unlikely to receive a fishable allocation. In addition, marginal participants who are excluded by a low threshold may also benefit, if the program includes sideboards that might compromise their position in other fisheries. A simple qualifying provision (such as one with the requirement that a vessel have participated in the Central Gulf trawl fisheries in a certain number of years) would likely be easiest to assess the effects of and implement.

In prior programs, the Council has relied exclusively on historical catches to make allocations. Typically, histories from a number of years are considered, often with each eligible participant permitted to drop one or more years of the lowest catch to accommodate fluctuations in catches and unexpected circumstances. In other regions, other measures have been used to make allocations. In the Atlantic surf clam and ocean

quahog program, allocations were based 80 percent on historical harvests and 20 percent on vessel size (length, width, and depth). The size component of the allocation was intended to recognize investments in the fishery. In the South Atlantic wreckfish fishery, half of the initial allocation was based on catch histories and half was divided equally among the eligible participants. The Council could consider adopting measures other than catch histories for allocating shares. Allocating a portion of the fishery equally to all persons eligible could avoid the potential of creating unfishable allocations. On the other hand, distributing shares to persons with minimal history may be argued to be inconsistent with the requirement to allocate shares based on fishery dependence.[8] Regardless of the basis for the allocation, the Council should justify its decision based on the criteria of the MSA and its purpose and need statement.

If the Council elects to include secondary and PSC allocations in the program, it will need to determine the method of making those allocations. The rockfish program included secondary species allocations of Pacific cod, sablefish, shortraker rockfish, rougheye rockfish, and thornyhead rockfish, which had all been subject to MRAs in the rockfish limited access fishery. These secondary allocations were made to the catch vessel sector and catcher processor sector based on sector catch histories. Within each sector, these allocations were distributed in proportion to target catch histories. In the rockfish program, the PSC apportionment to the program was based on overall PSC usage in the rockfish fisheries. That apportionment was then divided between the sectors and distributed within each sector based on target rockfish catches. In Amendment 80, PSC allocations were distributed among the various target fisheries based on historical PSC usage in those targets. Under that program, eligible vessels received PSC allocations based on their target allocations and the historical PSC rates in those targets. Differences in PSC usage and secondary species catches in the Central Gulf trawl fisheries (e.g., salmon catch in pollock fishery compared to salmon catch in the Pacific cod fishery) may be appropriately considered in these different apportionments to maintain historical distribution of PSC and secondary distributions among the targets and preserve the historical balance of usage of those species between the catcher vessel and catcher processor sectors.

In the development of this action, the Council will need to consider that currently halibut PSC is apportioned between the deep-water and shallow-water complexes Gulf-wide. To develop apportionments for a catch share program in the Central Gulf will require that a portion of the available PSC be separated to support the ongoing (and continuing) limited access fisheries in other Gulf management areas (i.e., the Eastern Gulf and Western Gulf). The Council should consider options for making this apportionment that will allow for continued prosecution of all fisheries. In both the rockfish program and Amendment 80, after apportionment of PSC to the Amendment 80 sector based on historical participation, the remaining PSC was left to support other sectors' continuation of the limited access fisheries.

Bycatch incentives

An alternative may be to provide for incentive plan agreements (similar to those created by the Bering Sea pollock fisheries). In that program, cooperatives that form incentive plan agreements that create incentives for Chinook PSC avoidance at all times are subject to a higher PSC limit. In considering this alternative, it should be noted that Bering Sea pollock cooperatives are formed to receive an allocation of Bering Sea pollock. Whether such a structure of multiple cooperatives could be used to create incentives to avoid halibut PSC in several target fisheries over several seasons without exclusive target allocations is questionable. Under such a structure, if multiple incentive plans are permitted, it is possible that

[8] For example, if the only eligibility criterion is having a Central Gulf endorsed trawl LLP, it is possible that a person's connection to the fishery is the acquisition of the license. Although the license acquisition is clearly an investment in the fishery, it reflects only an investment in a fishing privilege, and not an investment in a fishery operation.

cooperatives will each have an incentive to maintain the minimum necessary measures to improve members' catch in the most profitable target fisheries.

Development of a system of bycatch quotas will require that the Council follow the process for the development of limited access privileges. Any such program would need to promote safety, conservation and management, and provide social and economic benefits. Any allocation of limited access privileges would need to be "fair and equitable" and would need to consider of a number of factors including current and historical participation and dependence on the fishery, as well as effects on communities, crews, and entry to the fishery. Distribution of these quotas could be determined based on a variety of criteria. For example, each LLP license holder in the Gulf could be 1) apportioned the same number of allowances each year; 2) apportioned a number of allowances based on the vessel's historical PSC usage; or 3) apportioned a number of allowances based on the vessel's history in each fishery that uses PSC (with the apportionment based on the relative PSC rates in those fisheries. Rules governing or prohibiting transferability would need to be considered, as well as limits on share use and holdings. Social and economic effects of the program on communities would also be a consideration.
Any system of bycatch quotas would also require consideration of modifications to monitoring. In trawl fisheries, the Council has typically required 100 percent observer coverage on catcher vessels and 200 percent observer coverage on catcher processors that participate in catch share programs. Under the revised observer program (which is scheduled to be implemented next year) observer coverage in the longline halibut and sablefish program could vary with operation type and vessel length. Depending on the timing of any action and progress relative to the development of electronic monitoring and its potential provide adequate management information, it may be possible to consider the use of electronic monitoring for some participants. Considerations of whether those levels of coverage are adequate for a different program would be needed, if the Council elects to advance a system of bycatch quotas.

Although it might be appealing to make PSC allocations (or even target or secondary species allocations) in a manner that rewards persons who used less PSC historically, available records are unlikely to be adequate to make such a distinction. Recall that observer coverage levels in the CG GOA trawl fisheries have been low and observed rates are often applied to unobserved vessels. As a result, PSC estimates at a vessel level are unavailable.

If processors are included in the allocations under the program, the Council will need to determine processor eligibility, in addition to the means of allocating shares to those eligible processors. Since processor entry to the fisheries is not limited, criteria for defining processor eligibility would need to be developed. Since processor dependence is likely demonstrated by landings, the most likely metric for eligibility (as well as the basis for allocations) would be those landings. Depending on the program's allocations, the Council might also need to consider whether processors should receive allocations of all species or only a limited subset of species. The choice of species to include in processor allocations would likely affect the negotiating dynamics between harvesters and processors, depending on the extent to which processors prefer to use those allocations to entice deliveries from harvesters and the provisions governing the use of shares under the program. For example, a cooperative structure might allow processors to access their allocations only through a cooperative. If the processor allocations are of species that are limiting, harvesters in the cooperative may concede more terms in a negotiation of the use of those allocations. The Council would also have to consider the basis for distributing allocations of the secondary species and PSC among processors, if the Council provides processors with allocations of those species.

If the Council elects to include allocations to captains and crew in the program, provisions defining those allocations would be needed. Eligibility and allocation criteria would need to be defined, which could differ between captains and crew. Since allocations to individual crewmembers might be very small, the Council could consider the development of options for management of an allocation as a pool. This type

of management is likely to take some time to develop and may require a system of oversight to ensure that the benefits of the allocation are realized as intended by the Council. The Council should consider whether the need for this type of a structure could be avoided by protecting crew interests through other measures or through developing provisions for crew to form cooperative associations for management of individually held crew allocations.

Basis for allocations to harvester sector participants (vessels/captains/crew)
Catch histories
Investment (i.e., vessel dimensions)
Equal allocations (to all eligible harvesters)

Basis for allocations to processing sector participants
Processing histories
Equal allocations (to all eligible processors)

NMFS Annual Allocation types

Allocations under the program could take a few different forms and be subject to a few different types of management. For example, shares could be managed as IFQ in a manner similar to the halibut and sablefish IFQ program. The program could alternatively be managed as a combined IFQ and cooperative program like the crab program. Under that program, share holders have a choice between fishing individually held quota (or IFQs) or shares being held by a cooperative that oversees their harvest. Another possible structure would be similar to the rockfish program, in which harvesters can only access allocations through cooperative membership. Incorporating a cooperative membership requirement could serve a few program purposes. Typically, cooperative management of allocations will reduce management costs, by shifting the oversight of the distribution of shares among member vessels to the cooperative. In addition, the Council in the past has used cooperative management to achieve other management objectives, such as bycatch avoidance. Reporting requirements in Amendment 80 cooperatives are intended to achieve bycatch goals. In the Bering Sea pollock fishery, the Council has also created a structure of Chinook salmon incentive plan agreements to reduce Chinook bycatch. Entry into an incentive plan agreement allows parties to that agreement to fish under a higher cap, provided the agreement meets specific bycatch control standards and the members achieve a multiyear performance standard. Use of cooperative (and collective) management structures in these manners may help efficiently achieve management objectives.

The Council could also consider including regional fishery associations in the program. Regional fishing associations are voluntary associations of the holders of quota designated for use in a region that meet criteria established by the Council.[9] If the Council believes that the regional fishery association provides a more desirable structure for its allocations than cooperatives, it could choose to undertake the development of a system of regional fishery associations. Regional fishing associations cannot receive an initial allocation of quota (or, as interpreted by NOAA GC, be implemented in a manner that augments a share holder's quota on joining the association). Although this limitation could reduce the appeal of regional fishery associations to share holders, the Council could create incentives for regional fishing association membership through other measures. For example, applying different limitations on transfers of shares or share use caps to vessels that are members of a regional fishing association could create an adequate incentive for share holders to join an association. If the Council elects to include regional fishery

[9] The Council's authority to establish cooperative allocations in a fishery was implicit in its ability to make allocations of shares in fisheries prior to authorization of the program. This authority continues to exist, provided those cooperative allocations continue to satisfy the general requirements for share allocations under the Council's LAPP authority. The 2007 MSA revision, however, supplemented the Council's authority with the authority to establish regional fishery associations. See MSA §303A(c)(4)).

associations in the program, it must develop participation criteria considering several factors, including traditional fishing and processing practices and fishery dependence, the cultural and social framework of the fishery, economic barriers to access, economic and social impacts on harvesters, captains, crew, processors, and fishery dependent businesses in the region, the administrative and fiduciary soundness of the association, and the expected effectiveness, operational transparency, and equitability of the fishery association plan. The Council should consider whether the development of these measures would create an unacceptable delay in implementation of the program, or if alternative management structures (such as cooperatives) can achieve the intended effects with less administrative complication and burden.[10]

If the Council elects to adopt a cooperative program, elements of cooperative management must be defined. These elements are typically defined through cooperative agreements and cooperative reporting requirements. Depending on the nature of bycatch reduction elements, bycatch reduction performance could be reported. Cooperative formation requirements will need to be defined. In considering these requirements, the Council should be attentive to the need to provide a reasonable fishing opportunity to persons who choose not to join a cooperative. In other fisheries, such as the catcher vessel sector in the Bering Sea pollock cooperative program, participants that choose not to join a cooperative may fish in a limited access fishery targeting the collective allocations of persons who do not join a cooperative. A similar opportunity could be provided in this case. If the Council is concerned that bycatch reduction incentives might be lacking in a limited access fishery, the allocation to the limited access fishery could be adjusted to address that concern.

NMFS Annual Allocation types
Individual/Partnership/Corporate
Cooperatives
Regional fishing associations

Processor provisions
In the past, the Council has relied on a variety of provisions and program structures to protect processor interests. The Council's first catch share program, the halibut and sablefish IFQ program, included no provisions to protect or benefit processing interests. In part, due to the response of processors to the redistribution of interests under the IFQ program, the three subsequent catch share programs adopted in the North Pacific all include processor specific provisions. The operation of those provisions, as well as the type and level of protections differ. In each case, Congress authorized the recognition of processors. Further discussion of the Council's authority to recognize processors in a catch share program follows a brief description of the processor provisions in these existing catch share programs.

In 1998, Congress passed the American Fisheries Act (AFA) establishing the second catch share program in the North Pacific. Congress specifically defined most aspects of the program, including the processor provisions. The AFA created cooperatives in the Bering Sea pollock fishery. The legislation also defined processors qualified to accept deliveries from the fishery based on processing histories during specific years. Under the program, an inshore catcher vessel owner is qualified for a single cooperative that must associate with the qualified processor to which the vessel delivered the majority of its catch in the preceding year. In addition, each cooperative must deliver 90 percent of its annual catch to its associated processor. A vessel owner who chooses not to join a cooperative may enter a vessel in a limited entry, derby fishery that fishes the allocations of vessels that are not in a cooperative. All catch from the fishery

[10] To date, no regional fishing associations exist in any fishery in the country. Setting up regional fishing associations would therefore require development of the administrative structure for those management entities. Cooperatives are established in several fisheries in the North Pacific and could likely be efficiently adapted to serve a variety of management, bycatch and social objectives, including some of those that might be intended to be addressed through regional fishing associations and community allocations.

must be delivered to a qualified processor. The cooperative membership and delivery provisions are intended to protect processing interests in the fishery by limiting the ability of a harvester to move among cooperatives and redirect landings to a processor other than the processor to which the vessel historically delivered.[11]

Under the Bering Sea and Aleutian Islands crab rationalization program, processors were issued processor quota shares (PQS) based on qualifying processing history. Holders of PQS are issued individual processor quota (IPQ) that authorize the receipt of a specific number of pounds of crab in a year. An equal number of pounds of "Class A IFQ" are issued to harvesters, who must match those IFQ with an equal amount of IPQ to make deliveries of crab harvests authorized by the IFQ. The program includes an arbitration system to resolve disputes over delivery terms (including prices) for deliveries made with Class A IFQ.

The Council also included processor specific protections in the Central Gulf rockfish pilot program, which Congress specifically authorized for a term of 5 years (including a 2 year extension). Processors were qualified for the program based on meeting a processing threshold during specific years defined by Congress. To receive an exclusive allocation under that program, an eligible harvester was required to join a cooperative associated with the processor that it delivered the most catch to during a specific qualifying period. The terms of the cooperative agreements (and processor associations) were not specified, but it was anticipated that those agreements would require deliveries to the associated processor. Similar to the Bering Sea pollock cooperative program, all catch from the inshore fishery must be delivered to a qualified processor.

Congressional legislation directly advanced each of these programs, making explicit reference to processing interests. Congress specifically defined the processor protections in the Bering Sea pollock cooperatives and specifically authorized the Council-defined processor protections in the crab rationalization program. Congress also directed the Council to develop the rockfish pilot program, with a explicit requirement that the program recognize processing history for specified years; however, the directive gave no guidance concerning the manner in which the processing history should be recognized. The Council chose to recognize this history by creating the requirement for a cooperative/processor association as a condition of receiving an exclusive allocation. In addition, each participating vessel qualified for a single cooperative, the one associated with the processor to which it delivered the most pounds in the processing history years identified by Congress. Since the program's term was only three years (with a two year extension), no opportunity to move among cooperatives (and thereby processor associations) was provided. A vessel that chose not to enter the cooperative it qualified for could fish in a limited access fishery that received the allocation of all vessels that chose not to join a cooperative.

In determining the scope of alternatives, the Council should consider the breadth of its authority to protect processing interest. NOAA General Counsel has consistently maintained that the Council's authority is based on its authority to meet management and conservation objectives (see Attachment 1: September 30, 2009 NOAA GC memo). NOAA General Counsel also maintains that establishing processing privileges for the purpose of limiting processing entry are not within the scope of that authority. Allocation consequences incidental to a clearly articulated biological, conservation, or management purpose may be permissible, depending on the record supporting the action. Although prior management actions have created processing privileges in some fisheries in the North Pacific, in each case, Congress specifically authorized that processing privilege. Without specific authority for the creation of such a privilege, the Council is limited to its more general management and conservation authority.

[11] Catcher vessels in the offshore sector (who delivered to either motherships or catcher processors historically) are qualified for an offshore sector. The allocations (and distributions) in these sectors are not specified, but are subject to agreement of all vessels eligible for the sector (including motherships and catcher processors).

Eligibility to Hold Shares and Transferability

The Council must also define eligibility to hold and use shares under the program. While the MSA requires that persons who "substantially participate in the fishery" be authorized to hold and use shares, the criteria for substantial participation are not defined.[12] In most of the Council's programs, minimum historical participation in fisheries is required to acquire catch shares. In the halibut and sablefish IFQ program, only persons receiving an initial allocation and individuals that meet a 150 day U.S. commercial fishery sea time requirement may acquire shares. Similarly, in the crab program, persons must meet a 150 day sea time requirement. Corporations also may acquire shares, provided those corporations have a 20 percent owner that meets the sea time requirement. In the Bering Sea pollock fishery, Amendment 80 cooperative program, and the rockfish cooperative program, shares are acquired by acquiring the license or vessel that carries the program harvest privilege. Generally, this qualifies any person who is eligible to document a fishing vessel to acquire the shares, as that is a requirement for vessel ownership or holding a license. Vessel documentation requires either individual U.S. citizenship or that a corporation or partnership have at least 25 percent U.S. citizen ownership. Vessel and license ownership requirements can help to avoid some of the issues that arise from inactive share holders. Even with these provisions for share holdings, some license holders or vessel owners may choose not to fish their allocations, instead entering other fisheries or allowing their vessels to remain idle. The Council could also consider authorizing community entities to acquire shares, even if it elects not to make allocations to those entities. This eligibility to acquire shares could be extended to existing community entities in the Gulf, including the entity that represents the City of Kodiak and Kodiak Island Borough in the crab program or small entities eligible to acquire halibut and sablefish quota shares.

The Council is also required to define a policy and criteria for transfers consistent with the Council's policy concerning allocation and consolidation limits.[13] These eligibility and transfer provisions interact, as the eligibility to acquire shares may effectively define the transfer criteria. In considering transfers, the Council should consider both long term transfers (or transfers of privileges that entitle the holder to receive annual allocations) and short term transfers (or transfers of annual allocations). In the halibut and sablefish IFQ program and the crab rationalization program, long term share holdings (or quota shares) are divisible and transferable to eligible persons. The rockfish program currently limits transfers of long term privileges through the limitations on transfers of LLP licenses and the limits on excessive consolidation of shares. LLP licenses may only be transferred to persons eligible to document a fishing vessel and may not cause the recipient to exceed the rockfish share limit or result in the person holding more than 10 LLP licenses. Leasing is limited to cooperatives in the program. In addition, to protect shoreside interests, catcher vessel shares may not be transferred to a catcher processor cooperative. A process for monitoring transfers (including sale and lease of shares is also required) (see §303A(c)(7) and its reference to §303A(c)(5)). LLP license transfers and leases of shares between cooperatives are monitored by the Restricted Access Management Division. In addition, the Council has generally prohibited the transfer of catcher vessel shares to catcher processors, as a means of protecting shore-based industries. The Council could include these measures in the program, if they believe that they are consistent with their policies for the fishery (including policies intended to affect the cultural and social framework of the fishery).Other elements of a program are likely to interact with the structure defined for transfers. For example, in cooperative programs, annual allocations to cooperatives, which are then harvested by vessels registered to fish for the cooperative. Movement of shares among vessels within a cooperative occurs without agency documented transfers, but is undertaken through the cooperative's internal management of its members and their catches. In these instances, cooperative membership requirements and defining structures (such as membership thresholds for formation, member liability for

[12] See §303A(c)(5)(E).
[13] See §303A(c)(7).

cooperative harvests, and cooperative reporting requirements) help define the Council's policy on share transfers.

The program must also ensure no share holder acquires an excessive share of harvest privileges by establishing a maximum share (or percent of the share pool that may be held, or used by any person) and to establish any other limitation necessary to prevent an inequitable concentration of shares under the program (see §303A(c)(5)(D)). In addition, the Council is required to consider procedures to address concerns over any excessive consolidation of harvesting and processing in the fishery (see §303A(c)(5)(B)(ii)). In establishing its catch share programs, the Council has always set limits on share consolidation (or excessive shares). The halibut and sablefish program establishes separate share holding limits for each species, each with limits on aggregate holdings of shares for Gulf management areas and aggregate holdings of shares for Bering Sea management areas. Separate limits are also established for share holdings of each species in Southeast. In addition, to these limits on share holdings, the Council also set limits on the percentage of the share pool that may be fished from any vessel. The crab program also limits the percentage of the quota share pool in each fishery that may be held by any person and fished from any vessel. To increase the incentive for cooperative membership, vessel limits do not apply to vessels fishing cooperative allocations. The caps in these two programs are applied using the "individual and collective rule", under which each share holder is credited with 100 percent of direct holdings and any proportional interest in indirect holdings.[14] Both the Bering Sea pollock cooperative program created by the American Fisheries Act and the cooperative program created by Amendment 80 for non-pollock catcher processors in the Bering Sea and Aleutian Islands include limits on share holdings and vessel harvests. Share holdings limits under these programs are implemented using a "threshold rule", under which a person is credited with all direct holdings plus all indirect holdings of any share holding entity in which the person holds above a specific threshold interest.[15] The Central Gulf rockfish program also includes limits on share holdings and vessel harvests, as well as a limit on the amount of catcher vessel quota that may be held by a single cooperative. Caps differ by species and sector in recognition of the different interests and historical harvest practices.

The Bering Sea pollock cooperatives governed by the American Fisheries Act and the crab rationalization program both include processing privileges. These programs also include limits on consolidation in the processing sector. Since processing privileges are deemed by NOAA General Counsel to be beyond the general Magnuson Stevens Act authority of the Council, these programs may not be the best guide to the Council's consideration of whether limits on consolidation of processing are necessary for this program. The Central Gulf rockfish program also limits consolidation in processing. The program includes a requirement that all landings be delivered to Kodiak. The limit on processing consolidation is believed to be necessary to maintain a modicum of competition in the fishery.

In both the halibut and sablefish IFQ program and the crab program, the Council identified certain classes of shares that are subject to additional transfer constraints. In the IFQ program, issuances of small amounts of shares are subject to a "block" provision, which prevents their division or consolidation with other share holdings. Under that program, a block must be transferred as a unit and any person holding a block may hold only one other block or any amount of unblocked share in the same regulatory area. In the crab program, 3 percent of the IFQ are issued as "C shares" or crew shares. C shares may be acquired only by persons meeting an active participation requirement and in the future will be subject to an ongoing active participation requirement under which the holder must meet certain threshold activity

[14] For example, under the individual and collective rule a person who holds 100 shares directly and owns 30 percent of a corporation that holds 100 shares would be credited with holding 130 shares.
[15] Under a 10 percent threshold, a person who holds above a 10 percent interest in a partnership would be credited with all share holdings of the partnership.

requirements to receive IFQ allocations and maintain those holdings. Depending on the Council's goals for the program and other aspects of the program, such as share divisibility, limits on fleet consolidation

Limits on share use

The Council could incorporate a variety of limitations on share use. A full retention requirement for all species (possibly excluding halibut PSC) could be adopted to ensure that all catch is accounted fully. Community protection measures, such as regional and community landing requirements, are authorized by the MSA.[16] In the crab program, historical distributions of landings are maintained through regional landing requirements. The distribution of landings applies to only 90 percent of the catcher vessel allocation (that portion of the allocation that is also subject to the IPQ landing requirements). In addition, some fisheries are excluded from the requirement. The *C. bairdi* fisheries are excluded, as those fisheries are harvested, in part, incidentally to the Bering Sea *C. opilio* and Bristol Bay red king crab fisheries. Attaching a landing requirement to these incidental harvests was believed to be overly constraining on delivery patterns. A similar concern may arise in the Gulf fisheries, as incidental harvests are common in most fisheries. These concerns may be addressed by a more flexible rule that imposes the landing requirement based on the target and allows for a share of the landings to be directed to other areas. For example, a regional protection could include a requirement that in excess of a certain percentage of target deliveries from a fishery be delivered in a certain geographic location. This rule would allow both incidental catches and some share of targeted landings to be delivered elsewhere. To prevent abuse of the rule, the percentage landing requirements would need to be set appropriately to allow flexibility while achieving the intended purpose of constraining a reasonable share of landings to the location of concern.

The MSA includes a limitation on the term of shares, under which all privileges (or shares) under the program must be issued for a limited period (not to exceed 10 years). Shares are required to be reissued at the end of the period, unless revoked, limited, or modified. The Council is required to establish terms for the revocation, limitation, or modification of shares. The Council also may provide for the redistribution of any shares revoked or for the reacquisition of shares limited under this provision (see §303A(f)). The Council could elect to define certain actions or violations as possible grounds for revocation, limitation, or modification of an allocation under the program. Any such change in status of the allocation will occur only after notice and opportunity for a hearing. The authority for deciding whether a revocation, limitation, or modification occurs will remain at the discretion of NOAA Office of Law Enforcement and NOAA General Counsel. The redistribution could be as simple as proportional redistribution to current share holders, which would likely result in the reissuance of all allocations in most cases. Alternatively, the Council could choose another method of reallocation. Reallocation based on bycatch performance could be considered, but administration of such a measure could be challenging and will depend on the degree to which bycatch performance is fully verifiable and whether a program can be developed to administer allocations in a timely manner.

Sideboards

The Council has included sideboards in most catch share programs to prevent recipients of exclusive harvest privileges from expanding effort in other limited entry fisheries. Sideboards to limit harvests (most importantly in Western Gulf trawl fisheries) could be considered as a part of this action. Sideboard limits could be defined based on historic participation or other criteria developed by the Council, and define a maximum amount of target, secondary, and PSC species that may be harvested in fisheries outside the catch share program. The Council could also consider exempting vessels that receive small allocations and have substantial historical catches in sideboarded fisheries from any sideboards[17]. In

[16] See §303A(c)(5)(B).

[17] A similar approach was used during the development of Amendment 80 when a vessel was not included in the Amendment 80 program allocations and not subjected to sideboard limitations, because of the vessel's historic harvest patterns.

addition, vessels with no history could be excluded altogether from sideboarded fisheries. Prohibitions are relatively straightforward to monitor and achieve the intended purpose in some cases.

Management and oversight

The Council is required to include a cost recovery program[18] to cover the incremental costs of the program (including data collection, analysis, and enforcement costs). This charge is limited to 3 percent of the ex vessel gross revenues from program landings.[19] *Any cost recovery fees are in addition to any other fees charged under the MSA.*

Up to 25 percent of cost recovery fees may be set aside to support a loan program for purchase of shares by fishermen who fish from small vessels and first-time purchases of shares under the program.[20] If the Council wishes to establish such a loan program, it is directed to recommend loan qualify criteria (defining small vessel participants and first-time purchasers), as well as the portion of fees to be allocated for loan guarantees.

The cost recovery requirement includes a requirement that the Council develop a methodology and means to identify and assess the management, data collection and analysis, and enforcement of the program. The Council is considering developing a data collection program to be implemented prior to this action, which is discussed in a separate paper. As a part of this action the Council should consider modifications of that program to collect data relevant to the catch share elements of this program (such as transfers of shares).

In conjunction with NOAA Fisheries, the Council should explore observer coverage requirements. Typically, the Council has required 200 percent observer coverage on catcher processors and 100 percent observer coverage on catcher vessels. The action should also explore appropriate observer coverages at processing plants, which might include an appropriate catch monitoring and control plan, similar to that used in the rockfish program. These elements are appropriately developed by NOAA Fisheries as the program is identified.

The Council is required to undertake a formal detailed review of the program 5 years after implementation to determine the progress of the program in achieving the goals of the program and the MSA. Additional reviews will be conducted every 7 years thereafter coinciding with the fishery management plan review.[21] As a part of these reviews, the Council could assess whether management, data collection and analysis, and enforcement needs are adequately met.

State water management

Any program that anticipates a share of the harvest will be taken from state waters (i.e., inside 3 nautical miles of shore) will need to be coordinated with the State of Alaska, as the State manages all waters inside 3 nautical miles. The State of Alaska's process for limiting entry to its fisheries differs greatly from the federal process followed by the Council and NOAA Fisheries. Consequently, it is possible that if the Council issues catch shares up to the TAC, and the State opens waters inside 3 nautical miles for fishing, vessels fishing without the required federal permits would be permitted to fish without limitation as long as the fishery remains open. Federally permitted vessels would be subject to the terms of their federal permits therefore those vessels could be constrained by their allocations under the program. Additional protections could be incorporated into the program that might prevent some vessels from attempting to take advantage of the opportunity to fish beyond their federal allocations by surrendering federal permits.

[18] See MSA §304(d)
[19] See MSA §303A(e).
[20] See MSA §303A(g).
[21] See MSA §303A(c)(1)(G).

For example, the Council could extend the limitation on the frequency that a vessel may surrender and have reissued federal fishing permits (FFPs) to prevent vessels from moving in and out of State waters.

Western gulf parallel trawl fisheries have historically accounted for a greater percentage of the area's total catch of those fisheries in the Central gulf. However, even if a catch share program is only applied to the Central gulf, the impacts on the Western gulf trawl fisheries should be considered.

	Area	2007	2008	2009	2010	2011	2012
		Pacific Cod					
Parallel trawl fishery catch (mt)	CG	69	138	63	52	86	113
TAC (mt)		28,405	29,453	23,641	33,986	40,362	42,705
% parallel trawl fishery catch		0.24%	0.47%	0.27%	0.15%	0.21%	0.27%
Parallel trawl fishery catch (mt)	WG	1,127	392	297	767	347	1,252
TAC (mt)		20,141	20,885	16,175	23,254	22,785	24,024
% parallel trawl fishery catch		5.59%	1.88%	1.83%	3.30%	1.52%	5.21%
		Pollock					
Parallel trawl fishery catch (mt)	CG	8,516	10,249	8,463	10,705	5,311	12,565
TAC (mt)		35,830	32,821	25,156	39,922	57,600	72,156
% parallel trawl fishery catch		23.77%	31.23%	33.64%	26.81%	9.22%	17.41%
Parallel trawl fishery catch (mt)	WG	9,126	5,081	9,495	15,067	10,725	19,810
TAC (mt)		25,012	17,602	15,249	24,199	27,031	30,270
% parallel trawl fishery catch		36.48%	28.86%	62.27%	62.26%	39.68%	65.45%

Since the Central gulf and Western gulf have limited trawl pollock and Pacific cod fisheries in State waters, it is possible to require any trawl vessel with an LLP or an federal fisheries permit to have the appropriate operation type, gear, and area endorsements on the LLP and FFP; and the GOA area designation and the appropriate gear and operation type designations on the FFP in order to participate in the Western gulf or Central gulf Pacific cod parallel waters fishery. This approach was taken for the GOA Pacific cod split that was implemented in 2012.

When developing a catch share program, the Council should carefully consider whether the program's provisions will create incentives and opportunities for increased effort by participants in State water fisheries. It is also important to consider whether the individuals that could qualify to receive very limited allocations or those that do not meet the eligibility requirements, may forgo their federal permits to enter State trawl fisheries in either the Central gulf or Western gulf.

The Council could also consider requesting that the State close state waters to trawl fishing by persons or vessels using permits issued in the Federal program.[22] These options will need to be coordinated with the State Board of Fisheries, but could be most effective in ensuring that the rationalization program does not cause unintended additional effort to move into State waters fisheries.

[22] If this action is extended to the Western Gulf, the option to close State waters may be infeasible, as substantial amounts of Pacific cod are harvested inside 3 nautical miles in the Western Gulf.

Attachment 1

INSERT NOAA GC PAPER (PDF FILE IN EMAIL)

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

September 30, 2009

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

FROM: Lisa L. Lindeman, Regional Counsel
NOAA General Counsel, Alaska Region

SUBJECT: Council's Authority to Develop Management Measures For the Central Gulf of Alaska Rockfish Fishery

STATEMENT OF THE ISSUES

The North Pacific Fishery Management Council (Council) requested the preparation of a Legal Memorandum examining whether it has the authority to proceed with certain alternatives to develop a program to manage the Central Gulf of Alaska rockfish fishery upon the expiration of the Gulf of Alaska Rockfish Demonstration Program (Rockfish Program), as outlined in a letter from the Council's Executive Director to Lisa L. Lindeman, NOAA's Alaska Regional Counsel, dated July 2, 2009 (Attachment 1). The Council also requested answers to several subsidiary questions.

SHORT ANSWERS

1. Does the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA), authorize requiring a harvester to deliver his or her catch to a specific shore-based processor (i.e., "fixed linkages" between harvesters and shore-based processors)?

No. Requiring fixed linkages between harvesters and shore-based processors is similar to issuing processor quota, which is not authorized by the Magnuson-Stevens Act except for the Crab Rationalization Program.

2. Does the Magnuson-Stevens Act authorize allocation of harvesting privileges to shore-based processors? If so, does the Magnuson-Stevens Act authorize specifying that such harvest privileges cannot be used on vessels affiliated with the shore-based processor?

Yes and yes. Harvesting privileges can be issued to shore-based processors if other requirements of the Magnuson-Stevens Act are met. Also, the Magnuson-Stevens Act does not prevent specifying that harvest privileges issued to a shore-based processor must be used on vessels not affiliated with that shore-based processor if the record supports that such a requirement is necessary to achieve a legitimate objective and complies with national standard 5.

3. Does the Magnuson-Stevens Act authorize forfeiture of harvesting privileges for recipients who choose not to join cooperatives with specific shore-based processor linkages?

No. The Magnuson-Stevens Act does not authorize specific shore-based processor linkages; therefore, there is no authority to require a recipient to forfeit privileges for choosing not to participate in an activity that is not authorized. However, requiring forfeiture of harvesting privileges (or a portion thereof) for choosing not to participate in an authorized activity is allowed if the record supports that such a requirement is necessary to achieve a legitimate objective.

4. Does the Magnuson-Stevens Act authorize the Council to establish an exclusive class of shore-based processors that would be the recipients of all, or a specific portion of all, landings from a fishery? Would the transferability of the exclusive privilege of receiving landings affect that authority, if it exists?

The answers are dependent on the purpose of the action and the record developed by the Council. The Magnuson-Stevens Act does not authorize placing a limit on the number of shore-based processing sites if the purpose is to allocate shore-based processing privileges. Transferability of those privileges would not change the conclusion that the Magnuson-Stevens Act does not authorize such an action. However, if the Council developed an adequate record demonstrating that an action, which had the practical effect of limiting the number of sites to which deliveries could be made, was necessary for legitimate management or conservation objectives (e.g., protection of processing sector employment or protection of fishing communities that depend on the fisheries) and not a disguised limited entry program, then there could be a legal basis for such an action.

BACKGROUND

The Rockfish Program, developed under the authority of the Magnuson-Stevens Act and section 802 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004 (CAA-2004), is scheduled to expire in 2011. The Rockfish Program has cooperatives that were modeled after American Fisheries Act (AFA) cooperatives, and

require harvesters that are members of a cooperative to land all their catch to a specific shore-based processor. According to a Memorandum from Lisa L. Lindeman, NOAA's Alaska Regional Counsel to the Council, dated February 3, 2005 (2005 Opinion) (Attachment 2), the "fixed linkage" between harvesters and shore-based processors, i.e., AFA-style cooperatives, was authorized by "section 802 and the legislative history" to section 802. The 2005 Opinion provides the legal basis for this conclusion (see Attachment 2). The Council is currently evaluating alternatives for a program to manage rockfish upon the expiration of the Rockfish Program. The Council must use the authority of the Magnuson-Stevens Act to develop the new program, as the authority of CAA-2004 will no longer be available to the Council after the expiration of the Rockfish Program in 2011. The Council provided in a letter to Lisa L. Lindeman, NOAA's Alaska Regional Counsel (Attachment 1) its current alternatives for a program to manage rockfish and several subsidiary questions in order to determine its authority in developing that program.

ANALYSIS FOR QUESTION 1

1. Does the Magnuson-Stevens Act, as amended by the MSRA, authorize requiring a harvester to deliver his or her catch to a specific shore-based processor ("fixed linkages" between harvesters and shore-based processors)?

Unlike the current Rockfish Program, the Council's proposals must depend exclusively on authority under the Magnuson-Stevens Act. According to a Memorandum from Lisa L. Lindeman, NOAA's Alaska Regional Counsel to the Council, dated September 20, 1993 (1993 Opinion) (Attachment 3), the Magnuson-Stevens Act does not authorize the Council or the Secretary of Commerce (Secretary) to allocate shore-based processing privileges. This conclusion was based on the Magnuson-Stevens Act's definition of fishing, which was found to not include shore-based processing. In the 1993 Opinion, the shore-based processing program being evaluated would have issued Individual Processing Quota (IPQ). Two important questions must be resolved before the conclusion of the 1993 Opinion can be considered relevant to the Council's current rockfish proposals. First, has Congress changed the Council's or Secretary's authority under the Magnuson-Stevens Act to allow the allocation of shore-based processing privileges? Second, would requiring a fixed linkage between harvesters and shore-based processors, as contemplated by the Council, be considered an allocation of a shore-based processing privilege?

Has Congress changed the Council's or the Secretary's authority under the Magnuson-Stevens Act to allow the allocation of shore-based processing privileges?

As recently as October 30, 2007, Eileen M. Cooney, NOAA's Northwest Regional Counsel, in a letter to the Chairman of the Pacific Fishery Management Council (2007 Letter) (Attachment 4),

stated that the Magnuson-Stevens Act did not authorize the allocation of shore-based processing privileges. This determination was made with full recognition of the recent reauthorization of the Magnuson-Stevens Act by MSRA in 2006. The letter relied on the 1993 Opinion and further provided that:

"The recent Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) does not change our 1993 legal analysis. While section 303A of the Magnuson-Stevens Act adds specific consideration of processors among other sectors or participants in several paragraphs, it does not make any modifications to the basis for NOAA's 1993 opinion. Significantly, section 303A specifically establishes the requirements for a 'limited access privilege program to *harvest* fish.' 16 U.S.C. §1853a (emphasis added)."

Nothing has occurred since the 2007 Letter to change NOAA Office of the General Counsel's opinion that the Magnuson-Stevens Act, with one exception[1], does not authorize the creation or allocation of shore-based processing privileges.

Would requiring a fixed linkage between harvesters and shore-based processors, as contemplated by the Council, be considered an allocation of a shore-based processing privilege?

The 2007 Letter looked at a proposal by the Pacific Fishery Management Council that is similar to the Council's proposals for the Central Gulf of Alaska rockfish fishery. The Pacific Council's proposal would have obligated catcher vessels that were members of shore-based cooperatives to deliver their catch to specific shore-based processors that were also members of the cooperative. The connection to the shore-based processor was based on landing history. This description of the Pacific Council's proposal seems similar to the Council's description for "fixed linkages" between harvesters and shore-based processors, including the landing history basis for the connection between catcher vessels and shore-based processors. In the Council's proposal, the landing history of a catcher vessel would be the basis for the obligation to deliver to a specific shore-based processor.

The 2007 Letter describes the Pacific Council's proposal in detail, including two provisions that are relevant to the issues being addressed by this opinion. One provision would allow, through

[1] Section 313(j) of the Magnuson-Stevens Act required the Secretary to implement "the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003." That program included individual processing quota (IPQ). However, the same Congressional Act (CAA-2004) that amended the Magnuson-Stevens Act to included the above requirement also contained the following provision: "A Council or the Secretary may not consider or establish any program to allocate or issue and individual processing quota or processor share in any fishery of the United States other than the crab fisheries of the Bering Sea and Aleutian Islands."

mutual consent of the shore-based processor and the catcher vessel, delivery to an entity other than the shore-based processor to which the catcher vessel was obligated. The other would allow a person to choose not to join the cooperative; however, the result would be fishing in a derby-style opening with all other participants who choose not to join a cooperative.

The conclusion of the 2007 Letter was that these two provisions did not change the status of the proposal as a shore-based processing privilege. Obligating a catcher vessel to deliver to a shore-based processor (i.e, a "fixed linkage" between a harvester and shore-based processor) had the effect of allocating a shore-based processing privilege. According to the 2007 Letter, the two provisions may have eliminated the unauthorized requirement in the particular circumstances described but it did not eliminate the effect of allocating a shore-based processing privilege, an activity that was found not to be authorized by the Magnuson-Stevens Act.

Another key point in the 2007 Letter is that when Congress intended to authorize the allocation of shore-based processor privileges in a fishery management program, Congress enacted specific legislation to authorize that allocation. This included the Rockfish Program,[2] the very program the Council is planning to replace with this action, and other programs specifically authorized by statute (e.g., AFA Pollock Cooperatives and Bering Sea Crab Rationalization Program).[3]

CONCLUSION FOR QUESTION 1

Based on the answers to the two questions above, the conclusion of the 1993 Opinion is relevant to the Council's proposals. The Magnuson-Stevens Act does not authorize requiring a harvester to deliver his or her catch to a specific shore-based processor (i.e., "fixed linkages" between harvesters and shore-based processors).

ANALYSIS TO QUESTION 2

2. Does the Magnuson-Stevens Act authorize allocation of harvesting privileges to shore-based processors? If so, does the Magnuson-Stevens Act authorize specifying that such harvest privileges cannot be used on vessels affiliated with the shore-based processor?

The 1993 Opinion provides a step-by-step analysis for why the Magnuson-Stevens Act authorizes fishing (i.e., harvest) privileges but not shore-based processing privileges (see Attachment 3). The 1993 Opinion also indicates that harvest privileges can be issued to persons other than harvesters if such allocations are consistent with national standard 4 and other

[2] The current Rockfish Program is set to expire, by statute, in 2011.
[3] The CAA-2004 authorized the Crab Rationalization's Individual Processing Quota and the Rockfish Program's "AFA-style" cooperatives with "fixed linkages." The AFA authorized Cooperatives with "fixed linkages."

applicable law. In 2005, the Pacific Fishery Management Council asked NOAA's Northwest Regional Counsel what legal issues or constraints were posed by allowing IFQ (harvest privileges) to be issued to, or held by, fish processors. In a letter dated June 10, 2005 (2005 Letter) (Attachment 5), Eileen M. Cooney, NOAA's Northwest Regional Counsel responded that "[t]he Council has considerable leeway in making the decision about who may be issued or hold IFQ [or harvest privileges]; processors as well as other groups or persons could be issued or hold IFQs [or harvest privileges]." The 2005 Letter goes on to say that any such action must be consistent with national standard 4, other applicable provisions, and "must have a record developed to support it."

The Magnuson-Stevens Act, as reauthorized by the MSRA in 2006, still supports the position of the 1993 Opinion and the 2005 Letter. The specific limits on who may be initially issued limited access privileges to harvest fish are in section 303A(c)(1)(D), which limits eligibility to United States citizens, corporations, partnerships, or other entities established under the laws of the United States or any State, and permanent resident aliens, and in section 303A(c)(4)(A)(v), which provides that Regional Fishery Associations (RFAs) are not "eligible to receive an initial allocation of a limited access privilege but may acquire such privileges after initial allocation."

Therefore, the Magnuson-Stevens Act authorizes the allocation of harvest privileges to shore-based processors if other requirements of the Act are met, e.g., eligibility requirements for limited access privileges found at sec. 303A(c)(1)(D), allocation requirements of national standard 4 found at sec. 301(a)(4), allocation requirements for limited access privilege programs found at sec. 303A(c)(5), and other applicable provisions. The record developed by the Council and the Secretary must support the allocation and demonstrate compliance with these requirements.

Furthermore, the Magnuson-Stevens Act provides discretion in developing authorized programs if the record demonstrates that a legitimate management or conservation objective is served by the requirements included in an authorized program. According to the 2005 Opinion, the Council and Secretary can include a requirement in a program if they articulate a rational reason why that requirement is necessary to meet a legitimate management or conservation objective and all other requirements of the Magnuson-Stevens Act are met. Therefore, if the Council adequately explains in the record a legitimate management or conservation objective for requiring that harvest privileges issued to shore-based processors be used only on vessels that are not affiliated with the shore-based processor, and takes into consideration that national standard 5 prohibits management measures that "have economic allocation as its sole purpose," then such a requirement could be included in the program.

CONCLUSION FOR QUESTION 2

The Magnuson-Stevens Act authorizes issuing harvesting privileges to shore-based processors if other requirements of the Act and other applicable laws are met. Also, the Magnuson-Stevens Act does not prevent specifying that harvest privileges issued to a shore-based processor must be used on vessels not affiliated with that shore-based processor if the record adequately explains that such a requirement is necessary to achieve a legitimate objective.

ANALYSIS FOR QUESTION 3

3. Does the Magnuson-Stevens Act authorize forfeiture of harvesting privileges for recipients who choose not to join cooperatives with specific processor linkages?

As explained in ANALYSIS FOR QUESTION 2, the Council has the authority to include requirements in a program if they articulate a rational reason why the requirements are necessary to meet a legitimate management or conservation objective. However, when the Council does not have the authority to take an action, requiring persons to conform to an activity that is not authorized could not be considered necessary to meet a legitimate management or conservation objective. Therefore, based on the conclusion that the Magnuson-Stevens Act does not authorize "fixed linkages" between harvesters and shore-based processors (see ANALYSIS FOR QUESTION 1 above), it follows that the Magnuson-Stevens Act does not authorize the Council to penalize a person for not engaging in an activity that is not authorized.

The above conclusion is consistent with the 2005 Opinion (see Attachment 2). In 2005, the Council asked whether it had the authority to reduce the limited access rockfish allocations to eligible applicants who chose not to join cooperatives. The 2005 Opinion concluded that if the Council chose to reduce the allocation for those participants that decided not to join a cooperative, the Council would need to articulate a rational reason why that determination was consistent with the requirements of the Magnuson-Stevens Act, including national standard 4. However, the 2005 Opinion was responding to a question where the combined authorities of the Magnuson-Stevens Act and CAA-2004 formed the legal basis for the use of "AFA-style cooperatives" for the Rockfish Program. This allowed "fixed linkages" between harvesters and processors that are not allowed under the authority of the Magnuson-Stevens Act alone. The reauthorization of the Magnuson-Stevens Act did not change that conclusion. The Council, in determining what harvest allocations are issued to eligible applicants, has the discretion to modify those allocations to meet management and conservation objectives if it considers the relevant criteria outlined in section 303A(c)(5), it articulates a rational reason why the determination is fair and equitable to all eligible applicants and reasonably calculated to promote conservation, and, most importantly, it has the statutory authority to take the action. The

Council's current statutory authority distinguishes the present circumstances from the circumstances the Council faced in 2005 where it was relying on the combined authorities of the Magnuson-Stevens Act and CAA-2004.

CONCLUSION FOR QUESTION 3

The Council cannot require forfeiture of harvest privileges for not joining cooperatives with specific shore-based processor linkages in the present circumstances because the Council does not have the authority under the Magnuson-Stevens Act to establish cooperatives with specific shore-based processor linkages.

ANALYSIS FOR QUESTION 4

4. Does the Magnuson-Stevens Act authorize the Council to establish an exclusive class of shore-based processors that would be the recipients of all, or a specific portion of all, landings from a fishery? Would the transferability of the exclusive privilege of receiving landings affect that authority, if it exists?

This question, like Question 2, is similar to a question asked by the Pacific Fishery Management Council in 2005. In a letter to the Chairman of the Pacific Fishery Management Council dated June 10, 2005 (2005 Letter) (Attachment 5), Eileen M. Cooney, NOAA's Northwest Regional Counsel opined that "under the [Magnuson-Stevens Act], no program that amounts to an allocation of shore-based processing privileges can be implemented (except for one recent exception for specific Alaska fisheries)." The program referenced as the exception is the Crab Rationalization Program, which is a program that has specific and exclusive authorization for Individual Processing Quotas (IPQs). The 2005 Letter also stated:

"In general, a limit could not be placed on the number of processing sites if the purpose were to allocate shoreside [shore-based] processing privileges. However, the licensing or permitting of processor sites could be allowed for enforcement or monitoring purposes, as long as the requirements were necessary for conservation and management of the fishery and not a disguised limited entry program. Incidental allocation consequences could be permissible depending on the record. Provisions that have the practical effect of limiting the number of ports or sites to which deliveries could be made could be defensible if the record is clear that they are designed for biological, conservation or management purposes."

The Magnuson-Stevens Act, as amended by MSRA, provides that "[i]n developing a limited access privilege program to harvest fish a Council or the Secretary shall consider the basic cultural and social framework of the fishery, especially through the development of policies to

promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend of the fisheries, including regional or port-specific landing or delivery requirements." Sec. 303A(c)(5)(B)(i). It also provides that when such a limited access privilege program is developed, procedures should be established to ensure fair and equitable initial allocations through consideration of "employment in the harvesting and processing sectors [and] the current and historical participation of fishing communities." Sec. 303A(c)(5)(A)(ii) and (iv).

The above cited provisions of the Magnuson-Stevens Act, added by the MSRA, indicate that the advice provided in the 2005 Letter is still sound. If the Council or the Secretary provides adequate justification in the record of a legitimate objective for limiting the number of sites to which deliveries can be made, and the other criteria found in sec. 303A(c)(5) are considered, then provisions that have the practical effect of limiting the number of sites to which deliveries can be made could be defensible. Port specific and regional specific landing or delivery requirements are explicitly contemplated in the language of the Magnuson-Stevens Act as a way "to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on fisheries." Sec. 303A(c)(5)(B)(i). However, site specific landing or delivery requirements are not mentioned in the Magnuson-Stevens Act. This alone does not necessarily preclude site specific landing or delivery requirements; however, as discussed below, establishing a sufficient record to support such an approach could be difficult. The Council and the Secretary would have to demonstrate that provisions that have the practical effect of limiting the number of sites to which deliveries could be made are needed to meet a legitimate objective—such as promoting the sustained participation of fishing communities that depend on the fisheries—and are not merely a means to allocate shore-based processing privileges. A discussion of fishing communities and processors found in the Senate Commerce Committee Report for S. 2012 (which became MSRA), S. REP. 109-229 (2006), supports this interpretation.

"The bill also contains specific provisions that would authorize the issuance of quota to fishing communities and for the creation of regional fishing associations (RFAs). These provisions were created in response to the concerns of communities and shoreside [shore-based] businesses around the country over the economic harm that could result from consolidation of quota in IFQs [individual fishing quotas] and similar programs. Many of these concerns were reflected in hearings and expert reports, including the 1999 National Research Council report required under the SFA [Sustainable Fisheries Act of 1996]. While some groups argued that allocating specific shares of processing privileges ("processor shares") would provide economic stability to communities, other groups believed that no special status should be granted to processors. *The Committee chose to take a broader, community-based view and allow allocation of harvesting privileges to communities, and the inclusion of processors and other shore-based business in*

RFAs with LAPP holders which would allow for the designation or linkage to a region or community."[4] S. REP. 109-229, pg. 25. (Emphasis added)

The linkage endorsed by the Committee Report is to a region or community, and not to a specific shore-based processor or an exclusive class of shore-based processors. The linkage referred to in the Committee Report corresponds to the explicit language in the Magnuson-Stevens Act (sec. 303A(c)(5)(B)(i)). Nevertheless, the statutory language in sec. 303A(c)(5)(B)(i) is not exclusive—it contemplates that measures other than regional or port specific landing requirements could be used to promote legitimate management or conservation objectives. Therefore, if the Council could build a record justifying an exclusive class of shore-based processors as a means to meet a legitimate management or conservation objective (i.e., protection of processing sector employment or protection of fishing communities that depend on the fisheries), then there could be a legal basis for including such provisions. It is beyond the scope of this letter to comment on whether as a logical or factual matter such a record could be developed.

Finally, allowing transferability could help overcome some of the difficulties in developing a record to justify limiting landings or deliveries to shore-based processors in specific ports or regions, depending on how the transferability provisions were established. However, transferability alone would not eliminate the need to show that site specific landing or delivery requirements are necessary to a legitimate management or conservation objective, nor would it eliminate the hurdle of showing that the establishment of an exclusive class of shore-based processors is not just a means to issue exclusive shore-based processing privileges.

CONCLUSION FOR QUESTION 4

The Magnuson-Stevens Act does not authorize placing a limit on the number of shore-based processing sites if the purpose is to allocate shore-based processing privileges. Transferability of those privileges would not change the conclusion that the Magnuson-Stevens Act does not authorize such an action. However, if the Council developed an adequate record demonstrating that an action that had the practical effect of limiting the number of sites to which deliveries

[4] The Report goes on to say: "In an RFA, the quota would be allocated to the harvester but classified for use in a specific region in order to maintain a relative balance between the harvesting sector receiving the quota and the communities, processors, and other fishery-related businesses that have become dependent on the resource entering the port. Establishment of such RFAs would allow for mitigation of any impacts of a LAPP on a variety of community and fishery-related business interests, without allocation to individual companies of an exclusive right to process fish. The bill would also allow a Council to consider regional or port-specific landing requirements to maintain a relative balance of the commercial industry sectors, such that fishermen, processors, and communities could participate in and benefit from the rationalized fishery." S. REP. 109-229, pp. 27-28.

could be made was necessary for legitimate management or conservation objectives (e.g., protection of processing sector employment or protection of fishing communities that depend on the fisheries) and not a disguised limited entry program, then there could be a legal basis for such an action.

Attachments

cc: Jane H. Chalmers
Acting NOAA General Counsel

John Lepore, Attorney-Advisor
NOAA General Counsel, Alaska Region

Robert D. Mecum, Acting Administrator
NOAA Fisheries, Alaska Region

ATTACHMENT 1

North Pacific Fishery Management Council

Eric A. Olson, Chairman
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July 2, 2009

received
6 JUL 2009

Ms. Lisa Lindeman
NOAA General Counsel
P.O. Box 21109
Juneau, AK 99802

Dear Lisa:

As you are aware, the current management program for the Central Gulf of Alaska rockfish fisheries is set to expire after the 2011 season. In the absence of the development of a follow on management program, the fishery will revert to limited access management. To address this contingency, the Council is considering alternative management programs for the fisheries intended to continue the benefits of the existing management. Given the reauthorization of the Magnuson Stevens Act, and the attendant provisions for LAPPs, the Council seeks your assistance in discerning the scope of its authority to develop management programs under its MSA authority. Specifically, the Council is considering a variety of alternatives derivative of the current management program intended to protect processor investment and dependence on these fisheries. To that end, the Council requests NOAA GC's interpretation of the Council's authority to develop the management measures described below. We request an opinion on these options in time for review at our October 2009 meeting.

<u>The current program – fixed harvester/processor linkages</u>

Among the alternatives proposed for analysis is the current management program. The current program was established under Section 802 of the Consolidated Appropriations Act of 2004, which provided:

> SEC. 802. GULF OF ALASKA ROCKFISH DEMONSTRATION PROGRAM. The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) and historic participation of fish processors (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in Central Gulf of Alaska. Such a pilot program shall (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historical harvesting of such bycatch species. The pilot program will sunset when a Gulf of Alaska Groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from date of implementation, whichever is earlier.

Under this authority (together with the more general authority provided by the Magnuson Stevens Act), the Council developed, and the Secretary approved, a management program under which each harvester with history during the statutorily designated vessel participation period may access an exclusive allocation of rockfish by joining a cooperative. The allocation to each cooperative is based on the harvest histories of its members during the statutorily designated vessel participation period. Each harvester is eligible to join a single cooperative that is associated with the processor to which it delivered the most

pounds of rockfish during the statutorily designated processor participation period. The terms of that association are subject to the negotiation between the cooperative and the processor, but are generally expected to include obligations for the harvester to deliver certain catches to the processor. Harvesters that choose not to join a cooperative are permitted to fish in a limited access fishery (without exclusive allocation). The allocation to the limited access fishery is based on the harvest histories of vessels participating in that fishery. All catch from the limited access fishery must be delivered to one of the processors which qualifies for association with a cooperative, based on harvester landing histories. The program provides no latitude for harvesters to move among cooperatives (or change processor associations).

An allocation of harvest shares to processors

A second alternative under consideration would divide the harvest share allocation between historic harvest sector participants and historic processing sector participants. Under this alternative, a fixed percentage of the harvest share pool (i.e., exclusive harvest share allocations) would be divided among harvester sector participants based on harvest histories during a specified time period. The remaining portion of the harvest share pool would be divided among processing sector participants based on processing histories during a specified time period.

The allocations of harvest shares to processors in this alternative would be intended to protect processor investments and dependences on the fishery and processor employment; however, some stakeholders have argued that while a harvesting privilege may provide indirect financial remuneration to a processor, it does little protect the processing operation on which the processor and its employees rely. Similarly, the harvest share allocation to processors may impinge on the protection to harvesters by the program depriving members of that sector of a portion of the harvest share allocation, as well as create an incentive for processors to vertically integrate by developing harvest capacity. To mitigate against this potentiality, the Council has included an option in this alternative that would require that a processor's allocation of harvest shares be harvested by a vessel that is not affiliated with the processor.[1] This provision is intended to lead processors to use the harvest share allocation to negotiate for landings from harvesters, rather than develop or expand a processor's interest in the harvest sector. In addition, the Council has elected to examine alternative structures that may more directly protect the interests of processors and their employees, without depriving harvesters of the interests they have developed.

Severable harvester/processor association – one time forfeiture

This alternative parallels the current program by establishing a system of cooperatives that harvesters must join to access exclusive harvest privileges. At the outset, a harvester is eligible to join a cooperative in association with the processor to which it delivered the most pounds during a specified time period. If a harvester elects not to join that cooperative, it may move to another cooperative (and processor association) by forfeiting a portion of its harvest allocation. The forfeiture would be made either directly to the processor losing the harvester association or to the cooperative associated with that processor. The Council is examining two options defining the harvest share forfeiture. Under the first, the forfeiture would be a permanent transfer of the long term harvest share privilege. Under the second, the forfeiture would be a short term (i.e., one or two year) forfeiture of a portion of the harvest share privilege. After the forfeiture, the harvester would be eligible to join a cooperative in association with any processor in the

[1] It is unclear whether this provision can be effectively implemented, as tracking of individual share usage in a cooperative management program may be infeasible. It is possible that a variant of this provision could be developed that would prevent processors using these allocations to expand harvest sector activity in a manner that does not impose an unreasonable administrative burden.

community to which it delivered the most pounds in a designated time period.[2] As a result, all cooperatives would be required to maintain a processor association. Although the terms of harvester/cooperative associations are subject to negotiation, it is anticipated that these associations will include harvester delivery obligations. The processor leverage in negotiating those obligations would be expected to be greater for the processor identified for the original association with a harvester that has not severed that original association, since harvesters that have severed the original association can negotiate with several processors, all of which will be on equal footing. Perpetuating the processor associations in this manner is believed to be an important component for maintaining stability in the processing sector.

When evaluating this alternative, a few characteristics should be considered it. First, no limit on processor entry is provided; any processor may choose to compete for deliveries. Second, although a harvester must associate with a processor that is based in the community to which it delivered the most pounds during a specific period, the program may (or may not) include a requirement that deliveries be made in that community.[3] Third, although a processor association is required, after the first association is severed, no preference is given to any processor over any other processor (including any new entrant) provided the processor operates in the community in which the harvester historically delivered the most pounds. And lastly, in the event harvesters elect to sever their initial associations and incur the forfeiture of shares, the result is a harvest share distribution that is very similar to the direct allocation of harvest shares to processors proposed in the previous alternative.

Severable harvester/processor linkages – ongoing forfeitures

This alternative is identical to the previous alternative except with respect to the forfeiture of shares by a harvester when severing a processor association. Each time a harvester severs a processor association (moving to a cooperative that associates with another processor) that harvester would forfeit a portion of its annual allocation for one or two years to either the processor (or the associated cooperative). The alternative would use a harvester's landing histories to identify the original processor association, which may be severed at any time, subject to the forfeiture requirement. Once the initial association is severed, the harvester would be permitted to associate with any processor in the community to which it delivered the most pounds in the qualifying period. Each subsequent association could be severed, but would be subject to the same forfeiture as the initial association severance. As with the preceding alternative, the ongoing associations are intended to increase stability in the processing sector. The ongoing forfeitures would contribute to greater long run stability (as harvesters sever their first associations). As with the preceding alternative, no explicit processor delivery requirement would be established by the program, but delivery requirements could be included in the negotiated associations. A community delivery requirement is being considered, and no limit on processor entry would be included in the program.

If it is determined that either of the two program options described above are allowable, a related question is whether there is a limit on the magnitude of the forfeiture which can be established by the Council. Currently, the Council is considering forfeitures of between 0 and 30% of a harvester's quota (of either QS or annual IFQ).

Additional questions

During Council discussion of these issues at the June 2009 meeting, a more generic question was raised relative to the Council's authorities for managing or limiting processing activities. Specifically, the Council would like to know the bounds of its authority for establishing a 'closed class' of processors, or

[2] Based on preliminary analyses, all harvesters in the program have made a plurality of deliveries to processors based in Kodiak. That community is currently home to at least 8 processors that have received deliveries from the rockfish fishery.

[3] If a community landing requirement is incorporated in the program, it is likely that all landings would be required to be made to Kodiak, which may raise concerns for geographic overconsolidation of processing.

an exclusive class of processors for particular fisheries. Expressed somewhat differently, the question could be posed as whether a limited entry program could be established for processors under which qualified processors would:

1) be the exclusive markets for delivery of landings in a fishery, or
2) be exclusive markets for delivery of a specific portion of the landings in a fishery.

An ancillary question arises, which is, would development of a means for transfer of processor limited entry permits (or privileges) affect the determination of whether authority exists for establishing such a limited entry system for processors.

The Council appreciates the ongoing advice of NOAA GC relative to these and other issues. In this instance we request a specific legal opinion so that we can proceed with consideration of viable alternatives under a constrained timeline for implementation. Please contact me or Dr. Mark Fina if you have any questions regarding this request.

Sincerely,

Chris Oliver
Executive Director

CC: Council members

ATTACHMENT 2

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

February 3, 2005

MEMORANDUM FOR: Stephanie Madsen, Chair
North Pacific Fishery Management Council

Chris Oliver, Executive Director
North Pacific Fishery Management Council

FROM: Lisa L. Lindeman
Alaska Regional Counsel

SUBJECT: Rockfish Demonstration Program

This memorandum responds to the request of the North Pacific Fishery Management Council (Council), including requests from Council staff,[1] for guidance from NOAA General Counsel on the appropriate construction of section 802 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations, 2004 (CAA–2004).[2]

The specific questions include:

(1) What is the scope of section 802?

(2) Whether the Council has authority to change the years specified in section 802 for recognizing the historic participation of fishing vessels and processors? Whether a processor must have processed in each of the years 1996 to 2000 to be eligible for the Central Gulf of Alaska (CGOA) Rockfish Demonstration Program (Rockfish Program)?

(3) Whether the Rockfish Program includes West Yakutat?

(4) Whether a person who is eligible under the Rockfish Program has authority to exercise an option not to participate in the Rockfish Program and instead participate in the five percent set-aside?

(5) Whether the Council has authority to reduce limited access rockfish allocations to eligible applicants who choose not to join cooperatives?

[1] Letters from Chris Oliver, Executive Director, North Pacific Fishery Management Council, to Lisa Lindeman, NOAA-GC, dated February 25, 2004, and December 29, 2004.

[2] Pub. L. No. 108-199, 118 Stat. 110.

(6) What management programs for shoreside processors are authorized by section 802 (e.g., processor shares, "AFA-style" cooperatives[3], or limited licenses for shoreside processors)?

We have reviewed the statutory language, legislative history and relevant case law, and a summary of our responses to these six questions follows.

Summary Conclusions:

(1) Section 802 requires the Secretary of Commerce (Secretary) and the Council to recognize the historic participation of fishing vessels and fish processors for specific time periods, geographical areas, and rockfish species when establishing the Rockfish Program.

(2) Section 802 does not authorize recognition of the historic participation of fishing vessels or processors in years other than those specified in section 802. Further, Section 802 defines the range of years, but does not specify that a processor must have actually processed in each of those years in order to be eligible to participate in the Rockfish Program.

(3) Section 802 does not authorize the inclusion of West Yakutat in the Rockfish Program. Section 802 specifically uses the phrase "Central Gulf of Alaska" as the geographical area for the Rockfish Program. The CGOA as defined in the Fishery Management Plan for the Groundfish of the Gulf of Alaska and in regulations at 50 CFR part 679 does not include West Yakutat. The use of catch history from the CGOA and West Yakutat to qualify a person for a Central Gulf endorsement under the License Limitation Program for Groundfish has no impact on the Rockfish Program authorized under section 802.

(4) Section 802 does not authorize any person who is eligible to participate in the Rockfish Program to exercise an option not to participate in the program and participate in the five percent set-aside. Section 802 explicitly states that the five percent set-aside is for "catcher vessels *not eligible* to participate in the [Rockfish Program]," and not for an eligible person who chooses not to participate (emphasis added).

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[3] The phrase "AFA-style cooperatives" is not further defined in the letter. We interpret the phrase to mean cooperatives authorized by and formed under provisions of the American Fisheries Act (AFA), Div. C, Title II, Pub. L. No. 105-277, 112 Stat. 2681 (1998), 16 U.S.C. 1851nt. Under the AFA, NOAA Fisheries allocates individual quotas of the inshore Bering Sea (BS) pollock total allowable catch (TAC) to inshore catcher vessel cooperatives that form around a specific inshore processor and agree to deliver at least 90 percent of their pollock catch to that processor. This interpretation is consistent with the common understanding of the phrase as used by the Council, which is to allow the formation of harvesting cooperatives that are allocated a percentage of the TAC and are formed around a particular processor. The cooperatives engage only in harvesting activities and may include processor-owned catcher vessels. The Council has not interpreted the phrase, and we do not interpret the phrase, to mean cooperatives that automatically enjoy antitrust immunity under the Fishermen's Collective Marketing Act, 15 U.S.C. 521 (FCMA).

(5) The Council has authority to reduce limited access rockfish allocations for eligible applicants who choose not to join cooperatives. Section 802 does not distinguish between fishing vessels that choose to participate in cooperatives under the pilot program and those that choose not to participate in cooperatives. However, under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Council and the Secretary are authorized to make such a distinction as long as the administrative record includes support demonstrating why such a distinction would be fair and equitable to all eligible applicants and reasonably calculated to promote conservation.

(6) Section 802 authorizes the Council and Secretary to develop a program that would establish "AFA-style" cooperatives or a program that would establish limited entry licenses for processors in the CGOA rockfish fishery. However, section 802 does not authorize the establishment of processor shares since they are prohibited under section 804 of the CAA. The legislative history supports the position that the Council is authorized to consider a broad range of "appropriate" management schemes, including "AFA-style" cooperatives, which are specifically mentioned in the legislative history. Appropriate management tools would be those that meet applicable legal standards (i.e., decisions cannot be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law) and that are not specifically prohibited. Antitrust concerns also must be taken into consideration in creating a program under section 802.

Discussion and Analysis:

(1) What is the scope of section 802?

Section 802 provides:

> The Secretary of Commerce, in consultation with the North Pacific Fishery Management Council, shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) and the historic participation of fish processors (1996 to 2000, best 4 of 5 years) for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in the Central Gulf of Alaska. Such a pilot program shall: (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program; and (2) establish catch limits for non-rockfish species and non-target rockfish species currently harvested with pacific ocean perch, northern rockfish, and pelagic shelf rockfish, which shall be based on historic harvesting of such bycatch species. The pilot program will sunset when a Gulf of Alaska Groundfish comprehensive rationalization plan is authorized by the Council and implemented by the Secretary, or 2 years from the date of implementation, whichever is earlier.

What this language authorizes is discussed in detail in our response to question 6. This response

deals only with the scope of the provision.

First, section 802 requires the Council and the Secretary to establish a Rockfish Program for CGOA rockfish with specific provisions. Other than for management of the rockfish fisheries specified in section 802 (i.e., pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in the Central Gulf of Alaska), section 802 does not affect the existing authorities of the Council and the Secretary under the MSA relative to management of fisheries under their jurisdiction.

Second, section 802 provides very specific instructions about the Rockfish Program, including what years to recognize for historic participation of fishing vessels and processors, what fish to include, a set-aside for persons not eligible to participate in the program, and a time limit on the program. It does not provide any other authority beyond what can be read or reasonably construed from its plain language.

Third, section 802 and the MSA must be read to give effect to both, to the maximum extent possible. Erlenbaugh v. United States, 409 U.S. 239, 243 (1972) (*quoting* United States v. Freeman, 3 How. 556, 564 (1845)). However, giving effect to both also "'assumes that the implications of a statute may be altered by the implications of a later statute.' This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) (*quoting* United States v. Fausto, 484 U.S. 439, 453 (1987)). Thus, the Secretary and the Council must comply with both section 802 and the MSA, but where section 802 makes specific provisions for the CGOA rockfish fishery, the more specific provisions govern.

(2) Does the Council have authority to recognize the historic participation of fishing vessels and processors in years other than those specified in section 802? Must a processor have processed in each of the years 1996 to 2000 to be eligible for the Rockfish Program?

Section 802 does not merely authorize the Secretary of Commerce, in consultation with the Council, to manage the CGOA rockfish fishery in accordance with its terms, it requires the Secretary to manage that fishery in accordance with its terms. This specific requirement overrides any other options that might have otherwise been available under the MSA.

Section 802 specifies what years the Council must use to recognize the historic participation of processors (i.e., 1996 to 2000, best 4 of 5 years). To recognize other years would be inconsistent with the plain language of section 802, which clearly sets out the years Congress requires the Council to use when recognizing historic participation of processors for the Rockfish Program. Further, Congress specified a range of years, but did not specify that a processor must have actually processed fish in each of the years. Therefore, a processor that processed in some but not all of the years 1996 to 2000 would be eligible for the Rockfish Program. However, being determined as eligible under the Rockfish Program under criteria developed by the Council precludes the possibility of participating in the five percent set-aside (see discussion and analysis

under question 4).

(3) Does the Rockfish Program includes West Yakutat?

The language in section 802 requires that the Rockfish Program established by the Secretary in consultation with the Council recognize the historic participation for "pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in the *Central Gulf of Alaska*" (emphasis added). The Central Gulf of Alaska, as defined in the Fishery Management Plan for the Groundfish of the Gulf of Alaska and regulations at 50 CFR part 679, does not include West Yakutat. Therefore, the Rockfish Program does not include West Yakutat.

(4) Does a person who is eligible under the Rockfish Program have authority to exercise an option not to participate in the Rockfish Program and instead participate in the five percent set-aside?

Pursuant to section 802, the Rockfish Program must "provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program, which shall be delivered to shore-based fish processors not eligible to participate in the pilot program . . .." The language of section 802 clearly provides that the set-aside is for catcher vessels and shore-based processors not eligible to participate in the Rockfish Program. Although it could be argued that under the Council's and Secretary's MSA authority to manage *catcher vessels*,[4] they could develop a program that would allow an eligible catcher vessel to exercise an option not to participate, such an argument would conflict with the specific provision of section 802 that provides: "[s]uch a pilot program shall: (1) provide for a set-aside of up to 5 percent for the total allowable catch of such fisheries for catcher vessels not eligible to participate in the pilot program." Therefore, if a person is eligible under the Rockfish Program developed by the Council and the Secretary, that person cannot opt out and participate in the set-aside.

(5) Does the Council have authority to reduce limited access rockfish allocations to eligible applicants who choose not to join cooperatives?

Section 802 provides that the Secretary and Council "shall establish a pilot program that recognizes the historic participation of fishing vessels (1996 to 2002, best 5 of 7 years) . . . for pacific ocean perch, northern rockfish, and pelagic shelf rockfish harvested in the Central Gulf of Alaska." The language in section 802 does not distinguish between fishing vessels that choose to participate, and those that choose not to participate, in cooperatives. This, in and of itself, does not mean that the Secretary and Council could not distinguish between those two group of vessels, it only means that section 802 does not require the Secretary and Council to distinguish between

[4] This would not apply to shoreside processors, since the MSA does not authorize such action. Memorandum for the North Pacific Fishery Management Council from Lisa L. Lindeman, NOAA General Counsel–Alaska Region, on Magnuson Act authority to allocate fishing and processing privileges to processors, September 20, 1993.

those two groups. Limited access programs, by their very nature, exclude or limit certain groups. Alliance Against IFQs v. Brown, 84 F.3d 343 (9th Cir. 1996). However, if the Council and Secretary choose to make such a distinction, they would still be required to abide by the national standards of the MSA, including the requirements of national standard 4, which provides that "[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges." Therefore, if eligible applicants were penalized for not choosing to join cooperatives, the Council would need to articulate for the record a rational reason why such action was fair and equitable to all eligible applicants, and why it is reasonably calculated to promote conservation.

(6) What management programs for shoreside processors are authorized by section 802 (e.g., processor shares, "AFA-style" cooperatives[5], or limited licenses for shoreside processors)?

Legislative Intent

The legislative history of section 802 shows that Congress' primary purpose was to provide the Council and the Secretary limited discretion to develop a pilot program for management of CGOA rockfish. Congress chose to do so by requiring in the statute that the Council recognize the historic participation of fishing vessels and fish processors. Congress also chose to specify in the statute the range of years for eligibility. Congress did not, however, define specifically what it meant by "historic participation." However, as Senator Stevens explained during Senate debate on CAA-2004,[6] "the 'historic participation of fish processors' under this pilot program should be considered pursuant to the cooperative model under the American Fisheries Act, or any other manner the North Pacific Council determines is appropriate" as long as the Council does not include processor quotas.[7] As a statement of one of the legislation's sponsors, Senator Stevens'

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[5] The phrase "AFA-style cooperatives" is not further defined in the letter. We interpret the phrase to mean cooperatives authorized by and formed under provisions of the American Fisheries Act (AFA), Div. C, Title II, Pub. L. No. 105-277, 112 Stat. 2681 (1998), 16 U.S.C. 1851nt. Under the AFA, NOAA Fisheries allocates individual quotas of the inshore Bering Sea (BS) pollock total allowable catch (TAC) to inshore catcher vessel cooperatives that form around a specific inshore processor and agree to deliver at least 90 percent of their pollock catch to that processor. This interpretation is consistent with the common understanding of the phrase as used by the Council, which is to allow the formation of harvesting cooperatives that are allocated a percentage of the TAC and are formed around a particular processor. The cooperatives engage only in harvesting activities and may include processor-owned catcher vessels. The Council has not interpreted the phrase, and we do not interpret the phrase, to mean cooperatives that automatically enjoy antitrust immunity under the Fishermen's Collective Marketing Act, 15 U.S.C. 521 (FCMA).

[6] Congressional Record Online, January 22, 2004 (Senate) [Page S152].

[7] Section 804 of CAA-2004 specifically prohibits processor quota shares in any fishery other than the BSAI crab fishery.

statement "deserves to be accorded substantial weight in interpreting the statute."[8] The legislative history does not further define an AFA-style cooperative or indicate whether Congress intended a cooperative that requires a catcher vessel to deliver to a particular processor or a cooperative that also enjoys antitrust immunity under the FCMA.[9] It also does not further define what other manner of management would be appropriate.

It can be reasonably assumed that in crafting section 802, Congress was familiar with the circumstances surrounding the CGOA rockfish fishery and management tools that could be used to better conserve and manage the rockfish in the Central GOA. The Council's discretion to choose a management system is bounded by the authorities granted by section 802 and the MSA. Hence, based upon section 802 and the legislative history, the Council may develop a management program that includes AFA-style cooperatives (authorized by section 802's legislative history–"cooperative model under the American Fisheries Act") and harvester quota issued to onshore processors (authorized by section 802 or the MSA). The Council also could develop other appropriate management systems, which could include limited licenses for processors (authorized by section 802's legislative history–"any other manner the North Pacific Council determines is appropriate"[10]), but not processor quota (processor quota is specifically prohibited, as explained below). Although the cooperative model under the AFA was the management program that was specifically mentioned in the legislative history, the Council should analyze other programs that would be based on processors' historic participation as reasonable alternatives to cooperatives.

Individual processor quotas are not authorized for CGOA rockfish, as there is no authority to issue processor quota under the MSA except for BSAI crab fisheries, and in his floor statement, Senator Stevens specifically stated that "[t]he Gulf of Alaska rockfish pilot program does not authorize individual processing quota share for processors in this fishery."[11] Section 802 was passed concurrently as part of the same appropriations legislation as section 804. Section 804 provides:

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[8] Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1975).

[9] Cf footnote 3, supra. We interpret "cooperative model under the American Fisheries Act" consistent with our interpretation of "AFA-style cooperatives."

[10] The Council and Secretary have recognized the historic participation of fishing vessels under the MSA through license programs, such as the North Pacific License Limitation Program (LLP) for groundfish (50 CFR 679.4(k)). Under the LLP, the Council recognized historic participation by requiring, among other things, that a vessel must have fished during certain years and in certain areas and had a minimum number of landings to show some sustained level of participation. Under section 802, we believe the Council could recognize the historic participation of shoreside processors by similarly requiring that they must have processed a minimum level of fish during 1996 to 2000 to show a sustained level of participation in the processing sector. For example, the Council could require that a processor have processed one pound of rockfish during the specified years if the administrative record demonstrates that was a reasonable level of historic participation, or they could require that a processor have processed 10,000 tons of rockfish during each of those years to show historic participation.

[11] Congressional Record Online, January 22, 2004 (Senate) [Page S152].

"A Council or the Secretary may not consider or establish any program to allocate or issue an individual processing quota or processor share in any fishery of the United States other than the crab fisheries of the Bering Sea and Aleutian Islands."[12] Individual sections of a statute should be construed together. Erlenbaugh, at 244. If Congress had intended to allow processing quota or shares in the Rockfish Program, Congress could have specifically exempted it along with the BSAI crab fisheries from the prohibition on processing quota or shares.

Antitrust Concerns

We are concerned about potential antitrust implications if the Council recommends a program that allows catcher vessels owned or affiliated with shoreside processors to join "AFA-style cooperatives" in the CGOA rockfish fishery. A similar question arose in connection with processor-affiliated vessels participating in cooperatives in the BSAI pollock fishery. At the request of the Department of Commerce General Counsel, in 1999, DOJ reviewed the question of whether under the AFA, catcher vessels owned by shoreside processors could participate in inshore fishery cooperatives in the BSAI pollock fishery and enjoy the antitrust immunity specifically provided to fishery cooperatives under the FCMA and the Capper-Volstead Act, 7 U.S.C. 291.[13] Section 210 of the AFA established a framework for the formation of fishery cooperatives in the BSAI pollock fishery. Section 210(b) set out the precise criteria for the formation of inshore catcher vessel cooperatives. Section 210(a) referred to fishery cooperatives implemented under the FCMA. DOJ looked at whether the reference to the FCMA in section 210(a) effectively incorporated into the AFA the limits of the FCMA so as to preclude the participation of processor-owned catcher vessels in the AFA cooperatives. DOJ analyzed the existing case law interpreting the scope of the FMCA and the Capper-Volstead Act exemptions, which it found had not dispositively resolved the question. However, taking into account the specific language of the statute and the legislative history, DOJ determined that given the structure of the BSAI pollock fishery, Congress must have intended to allow participation by processor-affiliated catcher vessels, because the specific requirements for co-op eligibility could not be met without including such vessels. Interpreting the AFA to exclude processor-owned catcher vessels would have defeated the primary purpose of the Act. Because the participation of integrated catcher vessels in such cooperatives was critical to achieving Congress' purposes, DOJ concluded Congress must have intended that such vessels could be included in cooperatives that would enjoy antitrust immunity under the FCMA.

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[12] Although the prohibition in section 804 expires at the end of the 2004 fiscal year because it is part of an appropriation act that expires at the end of the fiscal year (unless Congress passes a continuing resolution for that appropriation) and because it does not amend a permanent statute or have any words of futurity (e.g., hereafter, or for 2 years), it still provides legislative intent, along with the legislative history of section 802, that the authority granted in section 802 does not include the authority to issue individual processing quota or processor shares.

[13] Memorandum for Andrew Pincus, General Counsel, Department of Commerce, from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, December 10, 1999 (DOJ Memo).

Here, unlike the AFA, the statute does not include statutory language establishing a specific structure for fishery cooperatives and does not refer to the FCMA. Neither the statute nor the legislative history clearly indicates that Congress' intent can only be achieved with AFA-style cooperatives. In fact, the floor statement indicates Congress' intent to provide broad discretion to the Council to recognize the historic participation of fish processors pursuant to the AFA co-op model or any other manner the Council deems appropriate. Based solely on the legislative history, we believe an argument can be made to support the Council's developing a program under which catcher vessels form cooperatives to receive a guaranteed allocation of rockfish TAC and deliver their catch to a particular shoreside processor. However, unlike DOJ's determination with respect to the AFA cooperatives, we do not believe a credible argument can be made that FCMA antitrust immunity would extend to such cooperatives in the CGOA rockfish fishery. After reviewing DOJ's AFA opinion, we believe section 802 does not provide a solid basis upon which to conclude that FCMA immunity could extend to cooperatives in the rockfish fishery that include processor-owned catcher vessels. The factors DOJ relied upon to determine that AFA cooperatives that include processor-affiliated catcher vessels could enjoy antitrust immunity under the FCMA are not present in this case.

Notwithstanding the lack of antitrust immunity, harvesting cooperatives established pursuant to section 802 that include processor-owned or affiliated vessels may be able to avoid antitrust problems to the extent they operate consistent with the "Antitrust Guidelines for Collaboration Among Competitors," issued by DOJ and the Federal Trade Commission (FTC) in August 2000. The Guidelines state DOJ's and FTC's antitrust enforcement policy with respect to competitor collaborations. As NOAA-GC has explained with respect to harvesting cooperatives under the crab rationalization program,[14] generally, if the activity of the cooperative does not have an anticompetitive effect and promotes efficiency, it is unlikely DOJ would determine the activity violates the antitrust laws. However, some activities by members could, under certain circumstances, violate the antitrust laws.

We stress that while this memorandum provides a credible basis for the Council to develop AFA-style cooperatives, it does not provide a basis for arguing such cooperatives would have antitrust immunity. As with crab harvesting cooperatives, we strongly recommend that counsel for non-FCMA cooperatives consider seeking a business review letter from DOJ before commencing any activity if they are uncertain about the legality of their clients' proposed conduct under the antitrust laws.

cc: Jane Chalmers
Sam Rauch
John Lepore
Jim Balsiger

[14] Memorandum for James W. Balsiger, Administrator, Alaska Region, from Lisa L. Lindeman, Alaska Regional Counsel, "Harvesting Cooperatives under the Crab Rationalization Program," December 4, 2004.

ATTACHMENT 3

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

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September 20, 1993

MEMORANDUM FOR: North Pacific Fishery Management Council

FROM: Lisa L. Lindeman
NOAA General Counsel--Alaska Region

SUBJECT: Magnuson Act authority to allocate fishing and processing privileges to processors

BACKGROUND

The North Pacific Fishery Management Council (NPFMC) is currently reviewing potential elements and options for the Comprehensive Rationalization Plan (CRP) in the North Pacific groundfish and crab fisheries. One of the elements, initial assignment of quota share, currently contains five options for consideration by the NPFMC.[1] One option is described as initially allocating a portion of the harvesting quota share to processors under a limited access system. Another option, known as the two-pie system, is described as allocating Individual Processor Quota (IPQ) to processors, creating a limited access system for processing in addition to a limited access system for harvesting. Proponents of an initial allocation to processors contend that allocations of fishing privileges must be fair and equitable and must consider past and current participation in the fisheries. They argue that allocating fishing privileges only to the harvesting fleet fails to recognize the participation and capital investments made by the processing sector of the fishing industry.

You have requested a legal opinion from NOAA General Counsel as to whether the NPFMC and the Secretary of Commerce (Secretary)

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[1] As of June 28, 1993, there are five recommended options for the initial assignment of quota share:
(A) to vessels or vessel owners at the time IFQ is issued;
(B) to vessel owners at time of landings activities, considering two general types of recipients: (1) those still in the fisheries and (2) those who have exited the fisheries;
(C) assign harvesting quota share to other fisheries investors including processors, skippers, and crew;
(D) coastal communities; and
(E) assign separate processor quota share (the two-pie system).

have the statutory authority under the Magnuson Fishery Conservation and Management Act (Magnuson Act or the Act) to implement either of these two options. This memorandum answers these questions first by analyzing what types of allocations are authorized under the Act and then analyzing whether the Act requires that all allocations be allocated among harvesters. The third section of the memorandum presents a summary of issues that may arise when a Council considers making allocations to persons other than harvesters.[2]

SUMMARY OF FINDINGS

1. There is authority under the Magnuson Act to allocate fishing privileges. The Magnuson Act requires the Councils and the Secretary to implement measures regulating fishing that are necessary and appropriate for the conservation and management of the fishery. The Councils and the Secretary also have the authority to limit access to one or more fisheries. Access to these fisheries is limited by the allocation of fishing privileges.

2. The Magnuson Act defines "fishery" as one or more stocks of fish and any fishing for such stocks. The term "fishing" under the Magnuson Act includes harvesting activities and operations at-sea in support of or in preparation for harvesting activities. At-sea processing is an operation at-sea in support of harvesting. On-shore[3] processing is not "fishing."

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[2]In a memorandum from Chris Oliver dated August 13, 1993, a third question was also asked: If there is authority under the Magnuson Act to allocate harvesting or processing privileges to processors, are there any legal obstacles to allocating those privileges to foreign-owned processors? The answer to this question will require more legal analysis than time permits before the September Council meeting. However, a memorandum addressing this question can be prepared and presented at the December Council meeting if the Council is still interested in the answer to this question. Mr. Oliver's memorandum is attached to this memorandum.

[3]For purposes of this memorandum, "on-shore processor" means processors that are located landward of the baseline of the United States and "on-shore processing" means processing activities conducted at facilities located landward of the baseline. It is important to note that the definition of "on-shore" for purposes of this memorandum differs from the definition of "inshore" used in 50 CFR 672.2 and 675.2. The definition of inshore includes more than on-shore processors.

3. Because the Councils and the Secretary have the authority to allocate fishing privileges, an IPQ system that allocates Individual At-Sea Processing privileges is authorized under the Act. Allocations of other fishing privileges, such as at-sea transshipping privileges and at-sea supplying privileges are also authorized. However, an IPQ system that purports to create and allocate individual on-shore processing privileges is not authorized under the Magnuson Act.

4. There is authority under the Magnuson Act to allocate fishing privileges to harvesters, processors and to other persons or groups as long as such allocations are consistent with the national standards, including national standard 4, other provisions of the Magnuson Act and other applicable law.

5. Any allocation scheme considered by the Councils and the Secretary that allocates fishing privileges to persons other than harvesters will encounter fairness and equity questions that must be addressed in the administrative record.

CAVEAT

The reader should keep in mind that this memorandum does not address the adequacy of any record developed by any Council to support the creation and allocation of at-sea processing privileges or to support an allocation of fishing privileges to on-shore processors. The analysis is completely theoretical; Secretarial approval and legal defense of any measure that establishes at-sea processing privileges or that initially allocates fishing privileges to on-shore processors would depend on the existence of a record justifying the measure and demonstrating the net benefits to be derived from implementation.

DISCUSSION

When Congress charges an agency with the responsibility of carrying out a statute, such as the Magnuson Act, questions concerning Congressional delegations of authority to that agency may arise. Judicial review of an agency's interpretation of statutory authority is governed by the test set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.[4] The first part of the Chevron test requires a determination of "whether Congress has directly spoken to the precise question at issue" and "whether the intent of Congress is clear." If not,

[4] 467 U.S. 837 (1984). In this case, the Environmental Protection Agency issued regulations based on its interpretation of the Clean Air Act's statutory language concerning treatment of pollution sources within a single plant.

the second prong of the Chevron test is applied and a reviewing court must decide whether the agency's interpretation is based on a reasonable construction of the statute.[5] In applying this deferential standard of review, the court should uphold an agency's interpretation of a statute it administers as long as the interpretation is permissible.[6] If Congress was not "clearly averse" to the agency's interpretation,[7] and if the interpretation is, "not manifestly contrary to the statute," it should be upheld.[8] Finally, courts should be most deferential in cases involving complex regulatory schemes. Since a reviewing court would apply the Chevron test to determine whether the Secretary has the authority to develop and implement an IPQ system, the Chevron test will be used in responding to the NPFMC's questions.

There is no explicit language in the Magnuson Act authorizing the Councils and the Secretary to establish an IPQ limited access system for processors or to allocate harvesting privileges to processors. Moreover, Congress' intent concerning the Councils' and the Secretary's authority, or lack thereof, to establish either of these two systems is not clearly stated. Failing to resolve the issue using the first prong of the Chevron test, an examination of the statutory language and the legislative history of the Magnuson Act, past legal opinions and case law is necessary to determine whether the Act contains implicit authority to establish such systems.

I. Allocations that are authorized under the Magnuson Act.

Fundamental to answering the question of whether the Councils and the Secretary have the authority to allocate processing privileges are the answers to the questions of what types of allocations are authorized by the Magnuson Act and whether the Act requires that all allocations be allocated among harvesters.

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[5] 467 U.S. at 842-43.

[6] National Fisheries Institute v. Mosbacher, 732 F. Supp. 210, 217 (D.D.C. 1990).

[7] Stinson Canning Co., v. Mosbacher, 731 F. Supp. 32, 37 (D. Me. 1990).

[8] Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1447 (9th Cir. 1990).

a. The Councils and the Secretary have the authority to allocate fishing privileges.

The only specific reference in the Magnuson Act for allocating privileges appears in subsection 301(a)(4), or national standard 4.[9] National Standard 4 states:

> Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:
>
> > . . . (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(Emphasis added.) Although national standard 4 contains the only specific reference to allocating fishing privileges, many other sections of the Magnuson Act focus on the Councils' and the Secretary's authority to regulate fishing and the fishery. Subsections 303(a) and (b) authorize the Councils and the Secretary to prepare fishery management plans (FMPs) for "fisheries."[10] Additionally, subsection 303(a) contains a list of those provisions Congress, through the Magnuson Act, requires the Councils and the Secretary to include in each FMP. Subsection 303(a)(1)(A) states that any FMP prepared must "contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States which are (A) necessary and appropriate for the conservation and management of the fishery to prevent overfishing and to protect, restore, and promote the long-term health and stability of the fishery." (Emphasis added.) Subsection 303(a)(2) requires a description of the fishery including all vessels involved, fishing gear used, actual and potential revenues from the fishery, recreational interest in the fishery, and nature and extent of foreign fishing and native American treaty fishing

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[9] 16 U.S.C. 1851(a)(4).

[10] "Fishery" is defined by the Act as "(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks." 16 U.S.C. 1802(8) (Emphasis added.)

rights. The remaining subsections of 303(a) continue to focus on other aspects of the "fishery" or "fishing."

Other support can be found in subsection 303(b), and specifically subsection 303(b)(6). Subsection 303(b)(6) authorizes the Councils and the Secretary to establish systems for limiting access to the fishery in order to achieve optimum yield. Factors that need to be considered by the Councils and the Secretary all focus on the fishery to which limited access would apply: present participation in the fishery; historical fishing practices in and dependence on the fishery; the economics of the fishery; the capability of fishing vessels used in the fishery to engage in other fisheries;[11] and the cultural and social framework relevant to the fishery.

Given the Magnuson Act's emphasis on the Councils' and the Secretary's authority to regulate "fishing," it logically follows that, in order to limit access, the Councils and the Secretary would allocate fishing privileges to fish for one or more stocks of fish.

b. "Fishing" does not include on-shore processing.

Although it is clear that the Councils and the Secretary have the authority to allocate fishing privileges, the next question is what constitutes "fishing." "Fishing" is defined in the Magnuson Act at subsection 3(10) as:

> (A) the catching, taking or harvesting of fish; (B) the attempted catching, taking, or harvesting of fish; (C) any other activity that can reasonably be expected to result in the catching, taking or harvesting of fish; or (D) any operations at-sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C). Such term does not include any scientific research activity which is conducted by a scientific research vessel.[12]

In 1978, NOAA General Counsel prepared a legal opinion analyzing the Secretary's statutory authority to deny applications for permits that would authorize foreign vessels to operate in the EEZ. The Secretary wanted to know whether she had the authority to deny those permits on the basis that U.S. fish

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[11]Some other sections of the Act are 2(b)(1) and (3) (purposes of the Act are to conserve and manage the fishery resources off the coasts of the United States and to promote domestic commercial and recreational fishing.) 16 U.S.C. 1801(b)(1) and (3).

[12]16 U.S.C. 1802(10).

processors had the capacity or intent to receive and process the fish concerned. Although the 1978 legal opinion addresses a different question than the ones before the NPFMC now, its analysis of the term "fishing" and conclusion that the term "fishing" included processing conducted at-sea but did not include processing conducted on-shore are relevant to this discussion.[13]

First, the 1978 opinion interpreted subsection 3(10)(D) as including processing as a support or preparation activity described in subparagraphs (A) through (C) but only if the processing is "at-sea." Second, it interpreted subsection 3(10)(C) as not including on-shore processing as "fishing:"

> In our view, the logical interpretation of section 3(10)(C) would restrict its application to activities at-sea which directly result in the catching of fish. An activity on land which merely provides an incentive to catch fish is insufficiently related to the catching of fish to constitute "fishing" under section 3(10)(C). This conclusion is consistent with the legislative history of the FCMA which at no point indicates that the term "fishing" was intended to include on-shore processing. It is also consistent with section 2(b)(1) which refers to the need to manage the fishery resources off the coasts of the U.S.[14]

The 1978 opinion concluded that the Secretary did not have sufficient authority under the Magnuson Act to disapprove the applications on the basis that U.S. fish processors had the capacity or the intent to receive and process fish harvested from the EEZ. This conclusion led Congress to amend the Magnuson Act later that same year to provide the Secretary with the necessary statutory authority. That amendment[15] became known as the processor preference amendment.

Most relevant to the immediate question of whether "fishing" includes on-shore processing are the changes that were not made to the Magnuson Act by the processor preference amendment. Congress contemplated amending the definition of "fishing" by deleting subsection (D) in order to separate "processing" from the harvesting aspects of "fishing."[16] The term "processing" would have been defined, thus clearly separating the two

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[13]General Counsel Opinion No. 61, at 12 (1978).

[14]Id., at 10 (1978).

[15]Authorization, Appropriations--Fishery Conservation and Management Act of 1976, Pub. L. No. 95-354, 92 Stat. 519 (1978).

[16]S. Rep. No. 935, 95th Cong., 2d Sess. 2-3.

activities. As finally passed, however, the amendment did not change the definition of "fishing" or define "processing." Representative Murphy provided the following explanation for the decision to leave the definitions unchanged:

> In the end, we decided to leave the [Magnuson Act] definitions unchanged on this point while, at the same time, making clear the act was intended to benefit the entire fishing industry. I want to emphasize that, even though the final bill does not include the House clarification, it is the understanding of the House that "fishing" in section 3 of the [Magnuson Act] does include "processing" and that, for that reason, the proposed clarification is unnecessary.

124 Cong. Rec. H8265-66 (August 10, 1978) (statement of Rep. Murphy). Although Representative Murphy stated that the definition of "fishing" includes "processing," he did not clarify whether his use of the term "processing" included only at-sea processing or both at-sea and on-shore processing.

Despite Representative Murphy's lack of clarification, the definition of "fishing" in the Magnuson Act continues to exclude on-shore processing. The 1978 legal opinion concluded that subsection (C) did not include any processing activities, and that subsection (D) included processing activities but only those conducted at-sea. Congress' contemplated changes would only have deleted subsection (D) from the fishing definition in order to keep the entire definition of "fishing" related to catching, taking, or harvesting, and not to processing. When Congress chose not to amend the definition, but clarified that the definition included processing, it had to be referring only to subsection (D). Even with the knowledge that NOAA General Counsel interpreted subsection (D) as applicable only to at-sea processing, Congress did not delete the phrase "at-sea" from the definition. Therefore, only processing at-sea is considered fishing under the Magnuson Act. On-shore processing does not constitute "fishing" as that term is defined by the Magnuson Act.

c. <u>The Councils and the Secretary do not have the authority to create and allocate on-shore processing privileges</u>.

If "fishing" does not include on-shore processing, then can the Councils and the Secretary establish an IPQ limited access system that creates and allocates on-shore processing privileges? Based on the preceding discussion, the Councils and the Secretary do not have the authority to allocate on-shore processing privileges or establish a system that contained such allocations. Assuming that the two-pie system is one that includes allocations of on-shore processing privileges, it would most likely fail under the <u>Chevron</u> test as an unreasonable agency interpretation of statutory authority. Therefore, this memorandum concludes

that the portion of the IPQ option that allocates individual on-shore processing quota would be an invalid extension of the Councils' and the Secretary's statutory authority.

The NPFMC may be presented with the argument that subsection 303(b)(10) of the Act would provide the Councils and the Secretary with the authority to allocate on-shore processing quota. Subsection 303(b)(10) states:

> Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may--(10) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

Proponents of the two-pie system may argue that an IPQ system is necessary and appropriate for the conservation and management of the fishery because conservation and management measures include the promotion of economic and social goals included in the Magnuson Act. Establishing an IPQ system would achieve the Magnuson Act's economic and social goals because on-shore processors would not be at a competitive disadvantage and possibly driven out of business as the at-sea processing sector drove up the price of fish.[17] An IPQ system would balance the playing field so that on-shore processors and the communities that benefit economically, socially and culturally from the existence of an on-shore processor would be protected.[18]

This argument fails to withstand scrutiny on two grounds. First, subsection 303(b)(10) was not included by Congress as a means for the Councils and the Secretary to circumvent any limits on their statutory authority contained in other sections of the Magnuson Act. Subsection 303(b)(10) provides the Councils and the Secretary with the discretionary ability to develop necessary and appropriate conservation and management measures not enumerated in subsections 303(a) or (b). To interpret 303(b)(10) in such a sweeping manner would swallow up the other provisions of the Act. Second, there is nothing within the subsection to expand the definition of fishing.

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[17] See Attachment (memorandum from Chris Oliver dated August 13, 1993).

[18] Id.

d. The Councils and the Secretary have the authority to allocate fishing privileges which include harvesting privileges, at-sea processing privileges, or privileges to conduct operations in support of or in preparation for harvesting.

Using the same statutory analysis presented earlier, the Councils and the Secretary have the authority to allocate fishing privileges. Since "fishing" includes at-sea processing, a system that allocates at-sea processing privileges would most likely be deemed a reasonable interpretation of statutory authority. Therefore, that portion of the two-pie system that allocates Individual At-Sea Processor Quota, or that allocates at-sea processing privileges, is authorized. Although the two-pie system currently envisioned by the NPFMC would be beyond the Councils' and the Secretary's authority to implement, a system that allocates at-sea processing privileges based on at-sea processing history would indirectly allocate a portion of the total allowable catch for on-shore processing. Such indirect allocation to on-shore processors has been recognized as a legitimate exercise of statutory authority.[19] It must be stressed that such a system would have to be supported by an adequate record and a Secretarial finding that the system is consistent with the Magnuson Act and other applicable law.

It is important to note that, in addition to the Councils' and the Secretary's authority to allocate at-sea processing privileges, it is also within the Councils' and the Secretary's authority to allocate privileges for activities conducted at-sea that are in support of, or in preparation for, the catching, taking or harvesting of fish. Such at-sea activities could include transshipping, fueling, or crew provisioning to list just a few examples. To repeat, the Councils and the Secretary would have to provide a record that justify such an allocation under the Magnuson Act and other applicable law.

II. Does the Magnuson Act require that all fishing privileges be allocated among harvesters?

Although it is within the Councils' and the Secretary's discretionary authority to allocate fishing privileges among only harvesters, does the Magnuson Act actually limit the Councils' and the Secretary's authority to making allocations only to persons that have a harvesting history or are currently

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[19]See Memorandum dated December 1, 1989, for the North Pacific Fishery Management Council from Margaret H. Frailey and Craig R. O'Connor re: Limitations on Roe Stripping (concluding that on-shore processors could only be regulated indirectly as an incidence of managing "fishing."

harvesting fishery resources? Statutory language and past allocations demonstrate that the Magnuson Act authorizes the Councils and the Secretary to allocate fishing privileges to a wide range of individuals or groups, and does not limit those allocations to only harvesters.

The Act authorizes the Councils and the Secretary to establish FMPs that contain measures applicable to fishing that are necessary and appropriate for the conservation and management of the fishery and that promote the long-term health and stability of the fishery.[20] Drawing from the previous discussion, harvesters, along with at-sea processors, transshippers, suppliers, and other persons involved in at-sea support activities, are all fishing. Because the Councils and the Secretary are authorized to regulate fishing by making allocations of fishing privileges, these "fishermen" are all examples of persons to whom the Councils and Secretary can allocate fishing privileges. This analysis alone demonstrates that authority to allocate fishing privileges under the Magnuson Act extends beyond the harvester.

Previous allocations made by the Secretary also support the interpretation that the Magnuson Act authorizes the Councils and the Secretary to allocate fishing privileges to various persons and groups and not solely to harvesters. One of the most well-known allocations is the surf clam and ocean quahog ITQ system. In this plan, the Mid-Atlantic Council chose to allocate surf clam and ocean quahog quota initially to vessel owners. Initial allocations of harvesting privileges were made to vessel owners based on the vessel's reported landings between January 1, 1979, and December 31, 1988.[21] The regulations also provide for the transfer of allocation percentage or cage tags to "any person eligible to own a documented vessel under the terms of 46 U.S.C. 12102(a)."[22] By selecting vessel owners for initial allocation and anyone who can document a vessel under 46 U.S.C. 12102(a) for transfers of allocation percentage or cage tags, the Mid-Atlantic Council clearly chose to allocate ITQ to persons that may or may not have ever harvested fish.[23] While the specific question of

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[20]16 U.S.C. 1853(a)(1)(A).

[21]50 CFR 652.20(a) (1992).

[22]50 CFR 652.20(f)(1) (1992).

[23]This allocation decision was raised in Sea Watch International v. Mosbacher. Plaintiffs claimed that the allocation to vessel owners was unfair and inequitable because it "ignored the high rate of vessel turnover in the industry, excluding individuals with a substantial catch history who recently sold a vessel, and award[ed] a "windfall" to individuals

whether the Councils and the Secretary had the authority to allocate fishing privileges to vessel owners was not raised, a reviewing court found that the Secretary had the authority to establish an ITQ system and that the surf clam and ocean quahog ITQ system was supported by an administrative record that justified the Secretary's decision to approve it.[24]

Another example is the Community Development Quota (CDQ) allocation made by Amendment 18 to the FMP for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (BSAI). As stated in the regulations, "one half of the pollock TAC placed in the reserve for each subarea will be assigned to a Western Alaska CDQ for each subarea. Portions of the CDQ for each area may be allocated for use by specific western Alaska communities in accordance with the community fishery development plans . . . ."[25] The purpose behind the allocation was "to help develop commercial fisheries in western Alaska communities" and one of the eligibility requirements was that a community not have previously developed harvesting or processing capability sufficient to support substantial fisheries participation in the BSAI.[26]

An argument that the language in national standard 4 limits the Councils and the Secretary to allocating fishing privileges to U.S. fishermen has not been supported by a reviewing court. In AFTA v. Baker, Intervenor-Plaintiff American Independent Fishermen (AIF) challenged the Secretary's allocation of pollock and Gulf of Alaska Pacific cod to the inshore component, claiming that such allocations were outside of the Secretary's statutory authority. Arguing that because the inshore component included on-shore processors and national standard 4 authorizes allocations only to U.S. fishermen, which does not include on-shore processors, AIF asked the court to find the allocation invalid. The judge disagreed with AIF, finding that "national standard 4 does not express 'clear Congressional intent' to

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with little or no [catch] history who recently purchased a vessel." Ruling on whether the allocation was fair and equitable under national standard 4, rather than an unauthorized extension of the Secretary's authority, the court did not agree with plaintiffs' claim and found that the record supported the Mid-Atlantic Council's use of vessel, rather than individual, catch data. Sea Watch Int'l v. Mosbacher, 762 F. Supp. 370, 377 (D.D.C. 1991).

[24] Id., at 375-76.

[25] 50 CFR 675.20(a)(3)(i) (1992).

[26] 57 FR 46139, 46139, 46140 (1992) (codified at 50 CFR part 675) (proposed October 7, 1992).

prohibit the allocation which AIF challenges" and found that the challenged regulations allocated fishing privileges among fishermen.[27] Judge Rothstein continued by stating that "[the regulations] in effect regulate offshore catcher-processors, which would otherwise preempt the coastal sector of the fishing industry."[28]

Based on this analysis, there is no explicit or implicit statutory requirement that the Councils and the Secretary allocate, either initially or by subsequent transfer, fishing privileges only to harvesters. To the contrary, the Magnuson Act has been construed as authorizing the Councils and the Secretary to make allocations of fishing privileges to harvesters as well as other persons or groups. Relying on the authority established by this interpretation, the Councils and the Secretary have allocated fishing privileges among various "fishermen," harvesters as well as others. And as long as an allocation is consistent with the Magnuson Act and other applicable law, a reviewing court is not likely to determine that such an interpretation is "manifestly contrary" to Congressional intent.

III. Allocations of fishing privileges must be consistent with national standard 4.

It is important to keep in mind that any allocation of fishing privileges must be consistent with national standard 4. National standard 4 requires that allocations be fair and equitable, reasonably calculated to promote conservation and carried out such that no particular individual, corporation or other entity acquires an excessive share of fishing privileges. Any allocation scheme that a Council selects must demonstrate how it complies with these three requirements.

Recognition of capital investment and past participation of processors, specifically on-shore processors, in the initial allocation of quota share raises several fairness and equity difficulties. First and foremost is the fact that allocations of fishing privileges that benefit one group to the exclusion or detriment of another must be justified in the administrative record developed by the Councils and the Secretary. If a Council adopts an allocation scheme that allocates fishing privileges to vessel owners, leaseholders and on-shore processors, for example, it will have to explain why other participants, such as skippers and crewmembers, were excluded from receiving an allocation.

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[27] American Factory Trawler Ass'n v. Baker, Civ. No. 92-870R, Order at 17 (W.D. Wash. July 24, 1992).

[28] Id., at 18.

Compounding the difficulties in developing such a justification is determining how much quota to allocate to persons that do not have a documented catch history. Can on-shore processor investment in buildings and equipment be equated to catch histories and investments in vessels for harvesters such that the allocations would result in a fair and equitable distribution of fishing privileges? If a Council can devise a method of determining the appropriate allocation of quota shares for on-shore processors, would it be able to devise a method for determining the appropriate allocation of quota shares for skippers and crewmembers. It is a question whether the Councils and the Secretary would be able to adequately justify an allocation scheme that allocates fishing privileges to some participants that cannot document a catch history but excludes other participants that cannot document a catch history. It must be remembered that the Councils and the Secretary clearly have the authority to allocate fishing privileges among those persons dependent on the fishery. However, the Councils and the Secretary must be able to justify the allocation scheme as fair and equitable and not arbitrary and capricious.

A third problem is that any initial allocations of fishing privileges to persons other than harvesters may represent a reduction to quota available for harvesters. The allocation "pie" is a finite resource; an allocation of fishing privilege to one person represents a loss of fishing privileges to another. Finally, an initial allocation of fishing privileges to vessel owners or skippers results in an allocation of fishing privileges to U.S. citizens due to U.S. Coast Guard documentation laws and manning requirements. Allocations to some crewmembers or on-shore processors may result in allocations to alien crewmembers or foreign owners.

Because of the implications of each allocation scheme, it is important for a Council to examine the goals and objectives to be attained by allocations of fishing privileges and determine which allocation scheme will achieve the desired results.

CONCLUSION

In conclusion, an allocation scheme that allocates at-sea processing privileges is permissible under the Magnuson Act. As long as the Councils and the Secretary allocate fishing privileges to achieve a purpose recognized under the Act and that furthers the achievement of optimum yield and is consistent with the national standards, other provisions of the Magnuson Act and other applicable law, NOAA General Counsel concludes that such an allocation scheme is authorized under the Act. However, it must be stressed that the more complex the allocations and the basis used for dividing those allocations among participants, the more

difficult it could be to defend under an arbitrary and capricious standard and the more costly it would be for the National Marine Fisheries Service to implement.

cc: Meredith J. Jones
Jay S. Johnson
Margaret F. Hayes

Attachment

ATTACHMENT 4

Agenda Item D.7.c
Supplemental NOAA General Counsel Comments
November 2007

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel, GCNW
7600 Sand Point Way N.E.,
Seattle, Washington 98115-6349

October 30, 2007

Donald K. Hansen
Chairman
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR 97220-1384

Dear Mr. Hansen:

This letter is in response to the Council's request for legal review of the Trawl Individual Quota alternatives that have been preliminarily adopted for analysis. We have not concluded our review of the entire program, which will continue during the development and consideration of the program. We do, however, have several comments at this stage of development.

First, we stress that a proper written record, including a detailed explanation and justification for the various alternatives and their major components, is required for agency decision making. NMFS needs a clear record of the rationale in order to make (and defend if necessary) a reasoned decision on approval and implementation. We will continue working with Jim Seger and Merrick Burden to ensure that the rationale and justification are sufficiently documented as part of the Environmental Impact Statement and associated documents.

Next, we have determined that several provisions of the shoreside cooperative proposal are not consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. §§1801 et seq. As you will recall, GCNW's letter of June 10, 2005, which is enclosed, stated our opinion that "under the MSA, no program that amounts to an allocation of shorebased processing privileges can be implemented (except for one recent exception for specific Alaska fisheries)." Additionally, we stated that "a limit could not be placed on the number of processing sites if the purpose were to allocate shoreside processing privileges." We also stated that "requiring that fishermen sell their fish only to specific processors that hold IFQ is the equivalent of allocating on-shore processing privileges and thus is not authorized by the MSA."

The following provision of the alternative entitled "Co-ops for Catcher Vessels Delivering to Shoreside Processors" adopted by the Council at its June 2007 meeting limits the number of processing sites in order to provide those sites with processing privileges and therefore is beyond the agency's authority under the MSA:[1]

> --In the first two years of the program, the only shoreside processors that are eligible to get Shoreside Processor (SSP) Permits and receive fish from whiting harvesting cooperatives are those that processed at least 1,000 mt of whiting in each of any two years from 1998 through 2004.

The following provisions of the June 2007 shoreside co-operative alternative obligates catcher vessel deliveries to a specific processor and thus establish a specific amount of whiting that must be delivered to specific shoreside processors. These provisions have the effect of allocating shoreside processing privileges and therefore are beyond the agency's authority under the MSA.

> --During the first two years of co-op formation, permit owners that join a co-op shall be required to deliver their whiting catches to the co-op qualified processors that were the basis of their landing history during the period **Years Option 1, 2001; Years Option 2, 2000; Years Option 3, 2000-2003.** Determination of the processor(s) to which a permit holder is obligated will take into account any successors in interest (see following paragraph). Transfers may take place within the co-op between permit holders to allow a permit holder to make deliveries exclusively to one processor so long as the total allocation received by the co-op, based on the permit holders that are members therof, is distributed between the various co-op qualified processors on a pro rata basis based on the landing history of the members of the co-op during the period **[SAME YEAR(S) SELECTED IN THE FIRST SENTENCE].**
>
> --After the first two years: (Option 1: catcher vessels are "released from delivery obligations to the processor(s) that were the basis of its history.") **Option 2:** Thereafter any catcher vessels participating in a co-op is linked indefinitely to the processor they are delivering to under the initial linkage requirement. The permit can sever that linkage by participating in the non-co-op fishery for a period of **[Options: 1 to 5 years]**. After completing their non co-op obligation, the permit is then free to reenter the co-op system and deliver to a processor of their choosing. Once the vessel reenters the co-op system and elects to deliver their fish to a processor, a new linkage is then established with that processor. Should the permit later choose to break the new linkage, the non-co-op participation requirements again apply.
>
> --Co-op allocation: Each year NMFS will determine the distribution to be given to each co-op based on the landing history calculation of catcher vessel permits

[1]We are working from a draft prepared by the Council following the Council meeting, dated July 11, 2007, which incorporates revisions by the Council to earlier drafts.

registered to participate in the co-op that year. In addition, NMFS will determine the landing history linking each co-op to each processor, if any.

–Mutual agreement exception: By mutual agreement of the catcher vessel permit owner and shoreside processor to which the permit's catch is obligated, a catcher vessel may deliver to a shoreside processor other than that to which it is obligated. The transfer may be temporary or permanent. In either case the vessel's catch taken under that permit will continue to be obligated to its permanent processor (which is the transferor processor if the transfer is temporary or the transferee processor if the transfer is permanent) subject to the terms of the transfer agreement. To make an additional change from its processor link (a change that is not by mutual agreement) the permit will need to be used in the non-co-op fishery for the prescribed time.

–Inter- or intra- co-op transfers by limited entry permit owners must deliver co-op allocation (shares) to the shoreside processor to which the shares are obligated unless released by mutual agreement.

–If a shoreside processor transfers its SSP permit to a different shoreside processor or different owner, the catcher vessel's obligation remains in place unless changed by mutual agreement for participation in the non-co-op fishery.

We are aware that the alternative contains provisions that proponents may suggest eliminate the allocation of processing privileges: the shoreside processor limitation is for only the first two years of the program; the catcher vessel- processor linkage or obligation is for only the first two years of the program under one of the options; catcher vessels are not obligated to join a co-op and thus be obligated to a processor (instead they would fish in the non-co-op fishery where the quota is available to all catcher-vessels in the non-co-op fishery); and the obligation can be extinguished by mutual agreement of the processor and the catcher vessel. These provisions do not, however, eliminate the allocation, under certain circumstances, of the shoreside processing privilege. In general, the portions of the shoreside proposal that are not just a continuation of an existing management system include one or more of the elements that are beyond the MSA authority.

As we noted in our June 10, 2005, letter, it is "NOAA's longstanding opinion that the MSA does not provide the legal authority to establish a 'processor quota' system for shorebased processors," because shorebased processing is not "fishing" as that term is defined in the statute. The legal basis for this opinion is detailed in the enclosed Memorandum for North Pacific Fishery Management Council from Lisa Lindeman, NOAA Regional Counsel, Alaska Region, Magnuson Act authority to allocate fishing and processing privileges to processors, September 20, 1993. Nothing in any subsequent legislation changes our legal analysis. In recognition of this legal opinion, Congress specifically passed legislation to authorize processor quotas in the American Fisheries Act, Div. C, Title II, Subtitle II, Pub. L. 105-277, and in the Consolidated Appropriations Act of 2004 , Pub.L. 108-199, section 801, which amended section 313(j) of the Magnuson-Stevens Act (the crab rationalization program). The recent Magnuson-

Stevens Fishery Conservation and Management Reauthorization Act (MSRA) does not change our 1993 legal analysis. While section 303A of MSRA adds specific consideration of processors among other sectors or participants in several sections, it does not make any modifications to the basis for NOAA's 1993 opinion. Significantly, section 303A specifically establishes the requirements for a "limited access privilege program to *harvest* fish". 16 U.S.C. §1853a (emphasis added).

We are available to work with the staff, the TIQC and the GAC to modify the alternative such that it is consistent with the MSA and, to the extent possible, meets the goals of the original language.

We are aware that the Council has asked specific questions about any potential anti-competitiveness implications of the alternatives, including the processor linkage in the mothership coop and the issue of excessive shares. We have initiated informal discussions on the alternatives with the Department of Justice, with the intent of notifying the Council of any issues in a timely manner.

We look forward to continuing to work with you as you move forward on this important rationalization program.

Sincerely,

Eileen M. Cooney
NW Regional Counsel

ATTACHMENT 5

Agenda Item C.5.c
Supplemental General Counsel Letter
June 2005

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel, GCNW
7600 Sand Point Way N.E.,
Seattle, Washington 98115-6349

June 10, 2005

Donald K. Hansen
Chairman
Pacific Fishery Management Council
7700 NE. Ambassador Place, Suite 200
Portland, Oregon 97220-1384

Dear Mr. Hansen:

This letter is in response to your letter, dated January 27, 2005, in which you requested a NOAA General Counsel opinion on any legal issues or constraints posed by several alternatives under consideration during the ongoing development of a possible individual fishing quota (IFQ) program for the West Coast limited entry trawl groundfish fishery. Mariam McCall, representing NOAA General Counsel, provided oral responses to the letter at the February 23-24, 2005, meeting of the Ad Hoc Groundfish Trawl Individual Quota Committee. Her responses have been incorporated in the Draft Summary Minutes of that meeting and are summarized below.

Questions 1 and 2: What are the legal issues or constraints posed by "allowing IFQ to be held (owned) by fish processors, at any time," and "issuing IFQ to fish processors at the time of initial allocation of shares?"

Response: The Council has considerable leeway in making the decision about who may be issued or hold IFQ; processors as well as other groups or persons could be issued or hold IFQs. Any allocation decision must have a record developed to support it. As part of the record, the requirements of Magnuson-Stevens Fishery Conservation and Management Act (MSA) National Standard 4 and section 303(b)(6), among other provisions, must be considered.

Question 3: What are the legal issues posed by requiring fishermen to sell their fish to particular processors by establishing a license limitation system for processors or an individual processing quota (IPQ)? The Council also requests information on other legal issues that might be associated with limiting the processors to whom a harvester might sell fish.

Response: As you are aware, it is NOAA's longstanding opinion that the MSA does not provide the legal authority to establish a "processor quota" system for shorebased processors. See Memorandum for North Pacific Fishery Management Council from Lisa Lindeman, NOAA General Counsel, Alaska Region, Magnuson Act authority to allocate fishing and processing privileges to processors, September 20, 1993 (enclosed). Thus, under the MSA, no program that amounts to an allocation of shorebased processing privileges can be implemented (except for one recent exception for specific Alaska fisheries). As for any potential legal issues, providing a legal opinion on a hypothetical program that assumes new authority to establish limited entry

systems for processors is difficult because the parameters of the hypothetical program have not been developed. I understand you are interested in having the antitrust questions referred to the Department of Justice, however, it is unlikely that DOJ could provide meaningful advice at this point in the process. As you are aware, DOJ provided comments on a proposed Alaska crab IPQ program in August of 2003. At that time, the crab program had been developed in detail by the Council, and legislation authorizing it was anticipated shortly. Enclosed is a copy of that letter from DOJ to the NOAA General Counsel.

Question 4: What are the legal issues posed by requiring that fishermen sell their fish to processors that hold IFQ? The primary difference between this and an IPQ program would be that the processors and fishers would purchase their individual quota from a single IFQ pool rather than pools split into IPQ and IFQ.

Response: Requiring that fishermen sell their fish only to specific processors that hold IFQ is the equivalent of allocating on-shore processing privileges and thus is not authorized by the MSA.

Question 5: What are the legal issues posed by limiting or restricting in any way the number of fish processors that may purchase fish from fishermen?

Response: In general, a limit could not be placed on the number of processing sites if the purpose were to allocate shoreside processing privileges. However, the licensing or permitting of processor sites could be allowed for enforcement or monitoring purposes, as long as the requirements were necessary for the conservation and management of the fishery and not a disguised limited entry program. Incidental allocation consequences could be permissible depending on the record. Provisions that have the practical effect of limiting the number of ports or sites to which deliveries could be made could be defensible if the record is clear that they are designed for biological, conservation or management purposes.

Question 6: What are the legal issues posed by accumulation caps, including whether there are legal issues to be considered in developing options with different caps for different types of entities and how the legal considerations may change on whether caps are applied to amounts used on a vessel, amounts owned and amounts controlled (leased or owned).

Response: The response will depend on the record and the rationale developed to support proposed caps, and the justification to support the measures as necessary conservation and management measures. Once the Council has identified the accumulation caps to be considered, and adequate analysis and background information is available, it may be possible to request a Department of Justice opinion on antitrust or related issues. In general, while it is possible to ascertain and monitor the ownership of quota as recorded with NOAA Fisheries, it would be very difficult to ascertain and monitor the control of quota.

You also forwarded some questions that the IQ Committee included in the report of its October 2004 meeting. The report included two basic questions. First, if a rebuilding OY is exceeded, would the IQ fishery need to be shut down? And second, could quota overages or underages be rolled over to the next year?

Response: There is not a legal prohibition on doing this if the overall plan is structured such that this makes biological sense. For example, the rebuilding plans, and the FMP itself, would need to be structured to ensure that a variable OY (as a result of overages and underages) would meet the rebuilding targets and the OY requirements. You would also have to deal with how this affected the rest of the groundfish fishery. Finally, there would need to be a conclusion that it would not be so complex that in reality it couldn't be tracked.

As always, Mariam McCall and I are available to discuss these issues further.

Sincerely,

Eileen M. Cooney
NW Regional Counsel

Enclosures