

REVIEW DRAFT

Measures to protect West Coast groundfish fisheries from adverse impacts as a result of the AFA

1.0 Introduction

The American Fisheries Act of 1998 (AFA) contains several provisions specific to the Bering Sea and Aleutian Islands (BSAI) pollock fishery and requirements for the Pacific Fisheries Management Council (Council) to recommend measures to protect against adverse impacts resulting from the AFA. Among the provisions of the AFA that affect vessels and processors in North Pacific fisheries are (1) allocation of the walleye pollock directed fishery allowance among the catcher vessels of the inshore component, catcher/processors of the offshore component, and catcher vessels harvesting pollock for motherships in the offshore component; (2) declaration of eligible vessels and processors – specifically naming catcher vessels, catcher/processors, and motherships eligible to participate in the offshore component; and (3) specific eligibility requirements for catcher vessels and shoreside processors in the inshore component.

The AFA also contains guidelines for "cooperatives" within each component of the fishery. Through these cooperative arrangements, harvesters and processors may arrange fishing and processing to optimally utilize their respective allocations. The AFA anticipates that, because these AFA-qualified entities can arrange their pollock fishery opportunities, these entities may be empowered to increase their participation in non-pollock fisheries (including West Coast fisheries) where they had previously participated only marginally or not at all. At issue is the concern that traditional West Coast groundfish fishery participants could be displaced by AFA-qualified harvesters and processors that do not have prior fishing history in West Coast groundfish fisheries.

Section 208 of the AFA (Eligible Vessels and Processors) is scheduled to sunset on December 31, 2004. Because vessel or processor eligibility could affect whether or not these entities benefit from the AFA, the Council should state the expected duration of the recommended measures.

2.0 Need for Action

To protect against spill over effects into the West Coast groundfish fishery, the AFA requires the Pacific Council to "recommend for approval by the Secretary conservation and management measures to protect fisheries under its jurisdiction and the participants in those fisheries from adverse impacts caused by this Act or by any fishery cooperatives in the directed pollock fishery" (Section 211.c.3). These side-board recommendations are due no later than July 1, 2000.

Protective management measures may be needed because participants in cooperatives are likely to have increased flexibility to arrange fishing schedules, enabling entry into other fisheries. Specifically, historic West Coast groundfish fishery participants could be harmed if AFA-qualified vessels and/or processors participating in pollock fishing cooperatives rearrange their pollock fishing schedules to increase participation in non-pollock fisheries such as the West Coast groundfish fishery. To participate in most limited entry groundfish fisheries, vessels only need to purchase a general limited entry permit, and a permit is not required to participate in the open access fisheries. Because new limited entry permit holders and entrants into the open access fishery would have access rights that are equal to those who have historically participated in the fishery, speculative entry by AFA-qualified entities may occur. To prevent harm to current participants in West Coast fisheries, the Council is required to recommend protective management measures. Moreover, additional effort entering the groundfish fishery could exacerbate existing management problems and erode the effectiveness of measures recommended by the Council.

The AFA states:

SEC. 211. Protections for other fisheries; conservation measures.

(b) Catcher/processor restrictions.

(5) Fisheries other than the North Pacific.

The [AFA eligible] catcher/processors... and motherships... are hereby prohibited from harvesting fish in any fishery under the authority of any regional fishery management Council... other than the North Pacific Council, except for the Pacific whiting fishery, and from processing fish in any fishery under the authority of any such regional fishery management Council other than the North Pacific Council, except in the Pacific whiting fishery, unless the catcher/processor or mothership is authorized to harvest or process fish under a fishery management plan recommended by the regional fishery management Council of jurisdiction and approved by the Secretary.

The AFA explicitly prohibits catcher/processors and motherships named in the law from participating in fisheries other than North Pacific fisheries and the Pacific whiting fishery. The catcher/processor and motherships will be unable to use their AFA-eligibility to increase participation in West Coast groundfish fisheries. However, AFA-eligible catcher/processors and motherships could increase or optimize their participation in the Pacific whiting fishery.

The AFA also states:

SEC. 211. Protections for other fisheries; conservation measures.

(c) Catcher vessel and shoreside processor restrictions.

(3) Fisheries other than the North Pacific.

(A) By not later than July 1, 2000, the Pacific Fishery Management Council... shall recommend for approval by the Secretary conservation and management measures to protect fisheries under its jurisdiction and the participants in those fisheries from adverse impacts caused by this Act or by any fishery cooperatives in the directed pollock fishery.

(B) If the Pacific Council does not recommend such conservation and management measures by such date, or if the Secretary determines that such conservation and management measures recommended by the Pacific Council are not adequate to fulfill the purposes of this paragraph, the Secretary may by regulation implement adequate measures including, but not limited to, restrictions on vessels which harvest pollock under a fishery cooperative which will prevent such vessels from harvesting Pacific groundfish, and restrictions on the number of processors eligible to process Pacific groundfish.

As stated previously, the rationale for establishing protective measures is to restrict harvesters and processors from using the operational advantage provided by the AFA (and cooperatives) to increase participation in other fisheries. In their analysis, the North Pacific Fisheries Management Council (NPFMC) lists, 91 catcher vessels eligible in the inshore categories; 14 catcher vessels eligible in both the inshore and mothership sectors; 7 catcher vessels eligible in the mothership sector; and 7 catcher vessels eligible in the catcher/processor sector (Attachment 1). Their analysis also indicates that 8 plants, owned by 7 companies qualify under the AFA. Based on these estimates, there are 119 catcher vessels and 7 companies eligible to participate in cooperatives under the AFA.

3.0 Alternatives, Including Status Quo

3.1 Previous Council Action

In September 1999, the Council adopted a control date of September 16, 1999¹ and directed staff to

¹*Federal Register* / Vol. 64, No. 226 / Wednesday, November 24, 1999 / Proposed Rules. [NMFS] announces a control date of September 16, 1999, after which vessels eligible for benefits under the

develop an amendment to the groundfish FMP based on two industry-sponsored proposals. Measures in the Midwater Trawlers Cooperative proposal would restrict participation of AFA-qualified vessels in whiting and groundfish fisheries. Measures in the West Coast Seafood Processor's Association proposal speak to restricting participation in the whiting fishery and the West Coast groundfish fishery by processors that do not meet stated criteria.

3.2 Alternatives

Alternative 1 – Status Quo: Do not recommend to the Secretary of Commerce conservation or management measures to protect fisheries and the participants in those fisheries from adverse impacts caused by the AFA or by any fishery cooperatives in the directed pollock fishery. It is possible the Secretary of Commerce, through NMFS, may determine that protective measures are warranted and implement, through regulation, such measures.

Alternative 2: Adopt for recommendation to the Secretary of Commerce the following management measures for harvesters:

A) AFA qualified catcher vessels that have not harvested at least 50 tons of whiting in the mothership fishery in the years 1994 through September 16, 1999 will be ineligible to participate in the mothership fishery for whiting in the future.

B) AFA qualified vessels that have not landed at least 50 tons in the shore-based whiting fishery in the years 1994 through September 16, 1999 will be ineligible to participate in the shore-based whiting fishery in the future.

C) AFA qualified vessels that do not have shore-based landings of groundfish other than whiting in the years 1994 through September 16, 1999 will be prohibited from participating in those fisheries in the future. Bycatch amounts of other groundfish in the Pacific whiting fishery shall not be eligible for qualifying a vessel under these provisions.

Note that, as proposed in September 1999, Alternative 2.A would prohibit shore-based vessels that are AFA qualified, but did not harvest 50 tons of whiting in the mothership fishery during the qualifying period, from entering the mothership fishery in the future.

Additionally, the proposed restrictions in Alternative 2 would not apply to AFA-eligible catcher/processors or motherships, as they specify catcher vessels in the whiting mothership fishery and vessels participating in shore-based fisheries.

Alternative 3: Processor options.

Suboption 3.A. Adopt for recommendation to the Secretary of Commerce the proposal submitted by the West Coast Seafood Processors' Association, modified to restrict only processors that benefitted under the AFA.

American Fisheries Act (AFA) may be subject to restrictions on participation in the Pacific Coast groundfish fisheries. The intended effect of announcing this control date is to discourage speculative entry into the Pacific coast groundfish fisheries by AFA-qualified vessels while the Pacific Fishery Management Council (Council) develops recommendations to protect the Pacific Coast groundfish fisheries from adverse impacts caused by the AFA.

(i) WHITING PROCESSORS: An AFA processor (or receiving station²) may receive unsorted whiting during the shore-based whiting season only if it:

(a) received at least 1000 mt of whiting during the regular whiting season in 1998 and 1999; or held state or federal authorization to receive or process unsorted whiting in 1998 and 1999.

(b) Once during the calendar year, a company that owns or controls a processor or receiving station listed under paragraph (a) may substitute a listed facility with an [unlisted] facility owned or controlled by the same company.

Clarification requested: This provision in Alternative 3, sub-option A.i.b, as proposed by the WCSPA, appears to pertain to a limited entry system for whiting processors. In deliberating these alternatives, the Council required these restrictions to apply specifically to those processors that benefitted from the AFA. It is not clear whether the Council intended to include establishing a groundfish processor permit system as a management alternative.

Clarification requested: By including 1998 in the history for participation in the whiting fishery, it appears that one AFA-qualified shore-based processor that processed whiting only in 1999 may be precluded from processing whiting in the future. The Council may want to modify the options to consider 1999 only, or may want to change the qualifying periods from "1998 and 1999" to "1998 or 1999."

Changes from the original WCSPA proposal (for reference, the original motion is in Attachment 2):.

The WCSPA proposal stated which processors could receive "unsorted" landings of whiting in the future. The exemption against sorting whiting currently applies to vessels that are issued an EFP. It is not clear how making this sorting exemption permanent and applying it to processors relates to providing protection from AFA processors. Therefore, the word "unsorted" has been deleted in (i)(a), with regards to receiving unsorted whiting in the future. The original WSPCA proposal also stated that "No restrictions will be placed on landing whiting outside of the regular season." This is not included for analysis since it is beyond the scope of protection from AFA processors. The original WCSPA proposal also included a processor permit system that would limit issuance of permits to groundfish processors with a history of participation in the Pacific coast groundfish fishery before 2000, and could be expanded to include whiting processors and receiving stations authorized through paragraph (i). This proposal was not limited to AFA processors and would have precluded participation by non-AFA processors that did not have a history. Consequently, this part of the WCSPA proposal is deleted, and is replaced with the following alternative 3 that is intended to address protection from AFA processors.

Suboption 3.B. Restrict processors that benefitted under AFA from entering the Pacific coast groundfish fishery. This means that AFA-benefitted processors with history in the Pacific groundfish fishery would be allowed to remain. Criteria to define "history in the Pacific groundfish fishery" have not been established, but the same years applied to the whiting fishery in Suboption 3A could be a starting point. The original WCSPA proposal stated "No attempt is being made to exclude legitimate participants who are already involved in the processing sector of these fisheries," therefore, staff will not evaluate the impacts of preventing AFA processors from operating in the Pacific coast groundfish fishery, regardless of history in the Pacific groundfish fishery.

Suboption 3.C. Status quo. No AFA restriction on processors operating in the Pacific coast groundfish fishery. Although some processors would benefit from less competition, it might be detrimental to remove the option for other processors who might want to be bought-out or otherwise acquired by AFA-benefitted processors.

²"Receiving station," in reference to the whiting fishery, is defined as "a facility receiving unprocessed whiting from a vessel where the whiting will be transported to another location for processing."

Additional issues pertaining to Alternative 3:

- The proposals for processor restrictions appear to limit future entry of processing companies (including companies that benefitted from the AFA), however, NMFS has not published advance notice of a proposed rulemaking relative to a control date for processors.
- Should consider that restrictions on AFA-benefitting processors could harm current West Coast processors who may choose to sell their operations in the future. That is, under the proposed restrictions West Coast processors would be unable to sell their operations to processors that benefitted from the AFA.
- Need to clarify what benefit is gained by restricting participation of AFA-eligible processors or processing companies and what harm do these measures protected against.
- Identify the AFA-eligible processors or processing companies and specify what they can and cannot do in terms of participation in West Coast groundfish fisheries.

4.0 Discussion

As noted above, the purpose of these proposed management measures is to protect West Coast groundfish fisheries from potential harm that might result from the AFA or by any fishery cooperatives in the directed pollock fishery. At issue is the potential displacement of traditional West Coast groundfish participants by AFA-qualified vessels/processors, who may time their participation in the BSAI pollock fishery to maximize participation in West Coast groundfish fisheries where they had marginally (if at all) participated in the past. Thus, an important consideration in developing the Council's recommendations is the need to demonstrate a direct relationship between the proposed restrictions and the AFA.

Proposed Alternative 2 and Alternative 3-sub-option3.A.i.a appear to relate to protecting against impacts caused by the AFA or by any fishery cooperatives in the directed pollock fishery, as they relate directly to limiting the participation of AFA qualified vessels and protecting the participation of traditional West Coast groundfish harvesters and processors. As noted previously, it is not apparent from Alternative 3-sub-option3.B how creating a groundfish processor permit system relates to protecting against harm caused by the AFA.

In the North Pacific, the NPFMC has requested NMFS establish a series of new permit requirements to fulfill the statutory requirements of the AFA:

"... this action would establish new permit requirements for AFA catcher/processors, AFA catcher vessels, AFA motherships, AFA inshore processors, and AFA inshore cooperatives. Any vessel used to engage in directed fishing for a non-CDQ allocation of pollock in the BSAI, and any processor that receives pollock harvested in a non-CDQ directed pollock fishery in the BSAI would be required to maintain a valid AFA permit onboard the vessel or at the plant location at all times that non-CDQ pollock is harvested or processed."

Unless otherwise advised, staff currently is assuming that a vessel or processor that is AFA-qualified is assumed to ultimately become AFA-permitted, which is assumed to be equivalent to benefitting under the AFA. The lists of AFA-qualified or permitted vessels or processors are prepared by the Alaska Region NMFS or the NPFMC. For purposes of analyzing this rule, we will use the best available information: AFA-permitted entities, if available, and otherwise AFA-qualified entities.

However, not all AFA-permitted vessels or processors may chose to join cooperatives.³ Thus, depending on how "benefitting from the AFA" is defined, the Council might need to specify whether management

³The NPFMC defines participation in a cooperative as "any use of a vessel's catch history by a cooperative, whether by direct harvest, lease, sale, or stacking of quota."

restrictions apply to all AFA-permitted catcher vessels and processors or only those that join cooperatives. If restrictions only apply to AFA-permit holders that join cooperatives, the permit system being developed for NPFMC managed fisheries may provide the necessary information for analyzing who would be qualified to participate in West Coast groundfish fisheries. It may be necessary for the Council to specify vessels and/or processing companies that are ineligible to participate in West Coast groundfish fisheries.

In its recommendations to the Secretary, the Council will need to explain the rationale underlying the various qualifying criteria. For example, for catcher vessels – why is 50 tons of previous landings the appropriate threshold?; is there a significant reason for specifying 1994 through September 16, 1999 as the qualifying time period? Similarly, for processors – why receipt of 1,000 tons in the specific years 1998 **and** 1999?

As management measures are implemented it will be necessary to quantify the harvesting and processing history required for future participation in West Coast groundfish fisheries. NMFS may need to establish procedures to determine past participation and a process for participants to appeal the determinations.

In sum, as the Council proceeds with developing these management measures, it will be important to note that the Council's recommendations will need to specify the vessels and/or processors that would be excluded, and include justification for the management measures. That is, restrictions on participation in the whiting or other groundfish fisheries would have to be directly related to entities benefitting from the AFA. Moreover, it may be necessary to (1) establish that the management measures comply with National Standard 4 (i.e., are fair and equitable) and (2) perform Regulatory Impact Review and Regulatory Flexibility Act analyses to assess whether economic impacts that may result from the management measures are justified.

At this time, to facilitate analysis, it would be helpful if the Council would (1) review the suite of alternatives to ensure they reflect the Council's intent; (2) specify whether restrictions apply to all AFA-qualified vessels or only those AFA-qualified vessels that join cooperatives; (3) specify how processors or processing companies that benefitted from the AFA are to be identified; (4) explain the rationale for the participation requirements (e.g., 50 tons of whiting rather than some other quantity; 1994 through 1999 rather than other years); and (5) define "benefitting from the AFA."

Analysis could include:

1. list the anticipated harmful effects that recommended measures aim to prevent;
2. quantify how the management measures will protect the non-AFA harvester and/or processor from harm;
3. determine whether anticipated harmful effects have a high probability of occurrence versus perception of problem, before protective measures are implemented;
4. explain the significance of the qualifications necessary for participation (e.g., 50 tons landed); and
5. specify how the recommended management measures target vessels or processors that "benefitted" from the AFA (i.e., define linkages between restrictions and protection of existing participants).

As stated in Alternative 1 (status quo), if the Council does not recommend conservation or management measures to the Secretary of Commerce, the AFA authorizes the Secretary of Commerce to "implement adequate measures including, but not limited to, restrictions on vessels which harvest pollock under a fishery cooperative which will prevent such vessels from harvesting Pacific groundfish, and restrictions on the number of processors eligible to process Pacific groundfish."

5.0 Timeline for Council action

Progress report to the Council in March 2000; preliminary action in April 2000; final action in June 2000; Council recommendations forwarded to NMFS July 1, 2000.

Attachment 1

Attachment 2

Alternative 3: Adopt for recommendation to the Secretary of Commerce the following management measures for processors (the Council amended this proposal such that *restrictions apply only to those processors that benefitted from the AFA*):

Pacific whiting fishery

- i) As part of the of the annual groundfish specification/regulations for 2000, NMFS will publish a list of processors and receiving stations that: a) received at least 1000 tons of whiting during the regular whiting season in 1998 and 1999; or b) held state or federal authorization to receive or process unsorted whiting in 1998 and 1999.
- ii) Beginning with the shore-based whiting season in 2000, vessels may land unsorted whiting during the shore-based whiting season only at processors or receiving stations included in the list under (1).
- iii) During the course of any shore-based whiting season, NMFS will allow a company that owns or controls a processor or receiving station listed under paragraph (1) one opportunity to substitute a listed facility with another owned or controlled by the same company.
- iv) No restrictions will be placed on landing whiting outside of the regular whiting season.
- v) "Processor" is defined under Pacific groundfish FMP to include motherships; "receiving station" will be defined as "a facility receiving unprocessed whiting from a vessel where the whiting will be transported to another location for processing."

West Coast groundfish fishery

The Council will commit to initiating a process in 2000 to establish a groundfish processor permit system, to go into effect in 2001. The system will include limiting issuance of permits to those groundfish processors with a history of participation in the processing sector through 1999. Issues such as enforcement, need for data collection, protection of public health and safety, transferability, and identification of appropriate permit holders (individuals/companies/facilities) will be considered as part of the Council process. The permit system may incorporate whiting processors and receiving stations included in the Pacific whiting fishery provisions above.