

Intersector Allocation Issue: Recommended FMP and Regulatory Amendatory Language That Complies with the Council's Intent Regarding Annual Management of Fishery Set-Asides

The term “set-asides” has been used to refer to the amounts of fish deducted “off the top” from the ACL (previously termed OY) and, for the whiting fishery, off the trawl sector. There has been some question about the flexibility that set-asides do or don't provide. A GMT statement from the Council's June 2010 meeting clarified some of the flexibility related to set-asides as follows (Agenda Item B.7.b, Supplemental GMT Report, June 2010):

The sum of these [off-the-top] amounts (tribal, research, incidental open access, EFP) should be specified in regulation through the biennial specifications and management measures process so that it is clear how the fishery harvest guideline has been determined. Similarly, in cases where a commercial harvest guideline is specified, the recreational estimates should be documented so that it is clear how the commercial harvest guideline has been determined. However, these amounts that are deducted from the ACL to come up with the fishery harvest guideline are somewhat flexible as long as the summed amount that is deducted from the ACL is not exceeded. For example, if research catch is higher than originally estimated, but incidental open access amounts are lower than expected and the sum of all amounts deducted from the ACL is not exceeded, no action needs to be taken.

The amount of fish deducted from the ACL to determine the fishery harvest guideline is not available to be allocated to other sectors (trawl or non-trawl). However, if either of those sectors (trawl or non-trawl) exceeds their allocation, or conversely, the amount of fish that comes “off the top” is exceeded, no sector is held harmless from that overage as stated in the Am 21 DEIS. ... If either the trawl or non-trawl exceeds their allocation or an estimate or set-aside amount is exceeded, there is no harm as long as the ACL for that species is not exceeded.

The regulations implementing the above interpretations of Amendment 21 were deemed through the Council during the trawl rationalization deeming process. The current regulations are a change in the way the Council and NMFS manage set-aside amounts or yields that are deducted to cover non-directed fishing activities before allocations to directed groundfish fisheries are applied. The change is that these “off-the-top” amounts are no longer available to be changed inseason or re-allocated to the trawl or non-trawl sectors. This effectively strands resources that could otherwise be utilized in directed fisheries if there are cases where it is not needed to cover the proposed activity. For instance, if there is a set-aside for EFPs during the biennial

specifications process but EFPs are not approved or are conducted and completed without using the entire yield set aside to cover EFPs, this resource cannot be used for directed fisheries.

The Council could reconsider its intent under Amendment 21 that the amounts of yield set aside to cover these sources of fishing-related mortality can be routinely changed downward, as appropriate, by the Council and NMFS in an inseason action. In such cases, the set-aside yield could be re-allocated to directed groundfish fisheries. The Council and NMFS would need to consider in their deliberations regarding an inseason adjustment of a set-aside whether there is an increased risk of exceeding an ACL by re-allocating yield to directed fisheries that was originally set aside to accommodate expected bycatch or catch in research and EFP activities. For example, in cases where yield is set aside to cover expected bycatch in a fishery (e.g., a tribal fishery), it is unlikely that an inseason action can be considered to decrease the set aside if the fishery is ongoing and there is still a chance that the bycatch could occur. This is because the timing of bycatch events is inherently unpredictable.

The Council revisited this issue at its March 2011 meeting and affirmed its intent to maintain more flexible management of set aside amounts as part of its preliminary preferred alternative (PPA). The Council's PPA covered inseason adjustments to "off-the-top" yields set aside for research catches, exempted fishing permit activities, catches in tribal fisheries, and groundfish bycatch in non-groundfish fisheries (i.e., incidental open access fisheries). The elements of the Council PPA are reflected in the regulatory language provided below. NMFS has now determined that an environmental assessment will need to be produced to support the NMFS decision process. However, this determination does not require a delay in the Council decision on its final preferred alternative (FPA).

The following excerpted regulatory language from CFR 660.55(j) describing fishery set-asides provides the amended regulatory language in ~~strikeout~~ and underscoring that clarifies the Council's intent under Amendment 21 based on the Council PPA. Note that the use of the term "tribal fishing activities" and how those set-asides are managed will need to be discussed in further detail with the treaty tribes.

"Fishery set-asides. Annual set-asides are not formal allocations but they are amounts which are not available to the other fisheries ~~during at the start of the~~ fishing year. For the catcher/processor and mothership sectors of the at-sea Pacific whiting fishery, set-asides will be deducted from the limited entry trawl fishery allocation. Set-aside amounts will be specified in Tables 1a through 2d of this subpart and may be adjusted through the biennial harvest specifications and management measures process. In the case of set-asides to accommodate planned research activities, fishing activities authorized under approved exempted fishing permits, tribal fishing activities, or projected bycatch in non-groundfish fisheries, set-aside amounts may be adjusted downward inseason and, if practicable, can be re-allocated to directed groundfish fisheries. In the case of inseason adjustments

to set-asides to accommodate tribal fishing activities, the process involves NMFS-tribal coordination and agreement from the tribes to reapportion the set-aside to be made available for other uses.”