



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
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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 exception¹, 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 include the above requirement also contained the following provision: “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.”

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

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