

APRIL 2006
NPFMC
Gulf of Alaska Rationalization
MSA Authority and Antitrust Concerns

At its February 2006 meeting, the Council requested staff to seek assistance from NOAA GC concerning the following two issues:

- 1) clarify the extent of Council authority under the Magnuson Steven Act to adopt any of the alternatives under consideration; and
- 2) address any antitrust concerns that arise under system of cooperative structures and processor associations that would be established under the alternatives under consideration.

This paper was drafted by staff with assistance from NOAA GC, in response to the Council request. The paper briefly summarizes the alternatives, provides a brief discussion of the extent of MSA authority for the alternatives, and summarizes antitrust issues that arise from the cooperative structure and processor associations prescribed by the alternatives. The paper also provides suggested revisions to the elements of the alternatives to address the antitrust concerns cited.

The Alternatives

To Council motion outlines sets of alternatives by gear type for catcher processors and catcher vessels. The structural aspects of the different alternatives for purposes of the issues discussed in this paper apply universally regardless of gear type. This paper, therefore, does not distinguish the alternatives by gear type.

Catcher processor alternatives

The three catcher processor alternatives are outlined in Table 1.

Table 1. Modified Gulf of Alaska groundfish rationalization alternatives – catcher processors

<u>Alternative 1</u> Status quo	<u>Alternative 2</u> Co-op/IFQ	<u>Alternative 3</u> Co-op/limited access
No Action	Harvester IFQ-cooperative	Sector Allocations
	Shares allocated to individuals by gear type	Harvest histories allocated to individuals in cooperatives and annual harvest allocations to cooperatives
	All Catcher Processors	Sectors: CP Trawl, CP Longline, CP Pot
	Cooperative	Cooperative
	CP Provisions	CP Provisions
	No Processor Provisions	No Processor Provisions
	those that do not join cooperatives fish IFQs with option for PSC reduction	those that do not join co-ops fish open access with option for PSC reduction

Alternative 1 is the **status quo**, under which the LLP would be maintained. **Alternative 2** would create a **cooperative/IFQ** program under which share holders would be permitted to form cooperatives. Although limits on transfers of shares between gear types could be applied, cooperatives could be formed among holders of shares for different gear. Share holders that choose not to join cooperatives would receive their allocations as individual quota with a possible reduction in their PSC allocations. Under **Alternative 3** is a **co-op/limited access** program, under which sector allocations would be made to three different catcher processor sectors; the trawl sector, the longline sector, and the pot sector. The program would be history based, with holders of qualified history eligible to join a cooperative within that sector. A cooperative would receive an annual harvest allocations based on the history of its members. Holders of qualified histories that chose not to join a cooperative would be permitted to fish in a limited access fishery that will receive an allocation based on the qualified histories of sector members that chose not to join a cooperative. The PSC allocation to the limited access fishery could be reduced.

Catcher vessel alternatives

Table 2 outlines the Council’s alternatives for the fixed gear catcher vessel sector. The Council has specified 6 alternatives that would apply to catcher vessels. Alternative 2 Low applies only to “low producing” fixed gear catcher vessels. Alternatives 2A High and 2B High apply to both trawl catcher vessels and “high producing” fixed gear catcher vessels. The remainder of the alternatives apply to call catcher vessels.

Table 2. Modified Gulf of Alaska groundfish rationalization alternatives – fixed gear catcher vessels

<u>Alternative 1</u> Status quo	<u>Alternative 2 Low</u> Co-op/IFQ	<u>Alternative 2A High</u> Co-op/IFQ with processor limited entry	<u>Alternative 2B High</u> Co-op/IFQ with processor linkages	<u>Alternative 2C</u> Co-op/IFQ with harvest shares to processors	<u>Alternative 3</u> Co-op/limited access with processor linkages
No Action	Harvester IFQ	Harvester IFQ cooperative with license limitation for processors	Harvester IFQ cooperative with license limitation for processors and processor linkage	Harvester IFQ cooperative with processor allocation	Sector allocations with processor linkage
	Shares allocated to individuals	Shares allocated to individuals	Shares allocated to individuals	Shares allocated to individuals	Harvest histories allocated to individuals in cooperatives and annual harvest allocations to cooperatives
	low producing fixed gear CV	high producing fixed gear CV	high producing fixed gear CV	fixed gear CV	Longline CV, Pot CV
	Cooperative	Cooperative	Cooperative	Cooperative	Cooperative
	no processor delivery obligation	license limitation for processors with X% delivery obligation	license limitation for processors with specific processor linkages with X% delivery obligation and share reduction penalty to move between cooperatives	allocation of 10, 20, or 30% of harvest shares to qualified processors	specific processor linkages
	those that do not join co-ops fish IFQs	those that do not join co-ops fish IFQs subject to closed class delivery requirement with option for PSC reduction	those that do not join co-ops fish IFQs subject to processor linkage delivery requirement with option for PSC reduction	those that do not join co-ops fish IFQs	those that do not join co-ops fish open access with option for PSC reduction

Alternative 1 is the **status quo**, which would continue the LLP. **Alternative 2 Low** would create an **co-op/IFQ** program that would apply to only the “low producing” fixed gear sector, participants that receive allocations either below the average or below the 75th percentile of fixed gear allocations. Participants would be permitted to form cooperatives to coordinate harvest activities. **Alternative 2A High** would a **co-op/IFQ with processor limited entry** program for high producing fixed gear catcher vessels and trawl catcher vessels. This alternative would allocate harvest shares that could be fished as IFQs or in a cooperative with a processor limited license program that requires a portion of each harvester’s allocation to be delivered to a licensed processor. Processor licensing would be based on historic processing. Share holders would be permitted to form cooperatives to manage their members’ allocations. Share holders that choose not to join cooperatives would continue to receive their allocations as individual quota with a possible reduction in their PSC allocations. **Alternative 2B High** would create a **co-op/IFQ with processor linkages** program for high producing fixed gear catcher vessels and trawl catch vessels. This alternative would also create a harvester share program with a system of processor limited licenses. Harvester/processor linkages would be established, under which a share holder would be required to deliver a specific percentage of landings to the linked processor. Linkages would be based on the share holder’s landings history. A share holder could change the processor to which its shares are linked, but would be subject to a share reduction penalty when making that change. Share holders would be permitted to form cooperatives to manage their allocations. Share holders that chose not to join a cooperative would receive individual allocations (which would be subject to the processor linkage), but may be subject to a reduction in their PSC allocations. **Alternative 2C** would create a **co-op/IFQ with allocations of harvest shares to processors**. This program would also create a harvester IFQ program with a portion of the harvest share pool (between 10 and 30 percent) allocated to eligible processors based on their processing history. Share holders would be permitted to form cooperatives, with non-cooperative members receiving individual allocations. **Alternative 3** would create a **co-op/limited access program with processor linkages** program. This alternative is a history-based cooperative program, under which cooperatives would receive annual harvest share allocations based on the qualified histories of their members. Cooperatives would be required to be associated with a processor, but the details of that relationship would be determined by negotiations among the cooperative members and the processor.¹ Initially, each holder of qualified history would be eligible to join a cooperative associated with the processor to which it delivered the most pounds during a specific time period. Holders of qualified history that choose not to join a cooperative would be permitted to fish in a limited access fishery that would receive an annual allocation based on the histories of non-members of cooperatives. The allocation of PSC to the limited access fishery could be reduced.

Scope of Magnuson Stevens Act authority

The Magnuson Stevens Act authorizes the regulation of fishing and authorizes the allocation of fishing privileges. Several of the catcher vessel alternatives included for analysis would go beyond the current authority of the Council and Secretary of Commerce under the Magnuson Stevens Act because they directly regulate onshore processing.² The only catcher vessel alternatives that are authorized under the Act are the cooperative/IFQ alternative (Alternative 2 Low – for low producing fixed gear vessels) and cooperative/IFQ with harvest share allocations to processors (Alternative 2C). Alternatives 2A and 2B

¹ This alternative contains an option that would remove the cooperative/processor association requirement from “low producing” fixed gear vessels.

² Reauthorization of the MSA is currently under consideration in Congress. Since the exact language of any revision to the Act and any supporting statements of statutory intent are uncertain, it is not possible to determine whether those revisions may authorize any of the current alternatives.

involve limitations on landing and processing of catch. These alternatives are not authorized under the Magnuson Stevens Act and would require Congressional authorization to be implemented. Under Alternative 3, the requirement that a harvester join a cooperative in association with a specific processor is effectively an allocation of processing privileges. This alternative is also not authorized under the Magnuson Stevens Act and would require Congressional approval to be implemented.

Antitrust Considerations

Under all of the alternatives, harvesters would be permitted to join a cooperative that would coordinate the harvest of the allocations of its members. If not properly defined, the function of these cooperatives has the potential to raise antitrust concerns.³ The general activity of these cooperatives is the harvest of fish, so for clarity these cooperatives are often referred to and should be thought of as “harvest cooperatives”. The creation of a harvest cooperative necessarily raises the question of whether the cooperative would qualify for the antitrust exemption of the Fishermen’s Collective Marketing Act. Under the terms of all of the alternatives, processor affiliated vessels (i.e., vessels owned or controlled by a processor) are qualified for harvest cooperative membership. Allowing or requiring harvest cooperative membership by these entities likely disqualifies that cooperative from the antitrust exemption of the FCMA, limiting the activities that the cooperative can engage in. As a result, a harvest cooperative clearly cannot engage in negotiations of the price or terms of delivery of catch to a processor. Both sections of the motion (section 2 and section 3) currently provide that processor affiliates cannot participate in price negotiations. The motions, however, could be clarified further concerning the limited role intended of these cooperatives. In a prior action (the rockfish pilot program), the Council similarly clarified the nature of cooperatives by including the following two provisions:

The cooperatives formed under this program are harvest associations that are intended only to conduct and coordinate harvest activities of their members and are not FCMA cooperatives. Processor affiliated vessels will be permitted to join harvest cooperatives to the extent permitted by antitrust laws.

Co-op membership agreements will specify that processor affiliated harvesters cannot participate in price setting negotiations except as permitted by general antitrust law.⁴

These provisions could be included in the following sections:

T2A-6	P2L-6	L2L-6
T2B-6	P2HA-6	L2HA-6
T2C-6	P2HB-6	L2HB-6
	P2C-6	L2C-6
	P3L2-8	L3L2-8.

Issues specific to Alternative 3

Under Alternative 3, for each primary species group for which a harvester receives an allocation that harvester will be required to join a cooperative in association with a processor. Under the terms of the alternative, processor affiliated catcher vessels (i.e., vessels owned or controlled by a processor) are qualified for harvest cooperative membership. Allowing or requiring harvest cooperative membership by

³ The cooperative structure under Alternative 3 creates some antitrust issues that are not relevant to Alternative 2. As a result, a more expansive discussion of Alternative 3 follows this general discussion.

⁴ These changes have generally been incorporated into the trawl sector alternatives.

these entities could disqualify that cooperative from the antitrust exemption of the FCMA, limiting the activities that the cooperative can engage in. As a result, a harvest cooperative clearly should not engage in any negotiations of the price or terms of delivery of catch to a processor. Since the contracts between harvesters and associated processors are intended to govern the terms of their relationship (including delivery obligations and the transfer of shares on severing the relationship), the negotiation of the terms of that agreement are not an appropriate role for a harvest cooperative. Harvesters without processor affiliations could enter a separate FCMA cooperative for negotiation of those terms, but that FCMA cooperative need not have (and in some cases may be prohibited from having) the same membership as the harvest cooperative.⁵

In considering the effect of the alternative, it should be noted that the provision requiring a harvest cooperative to accept membership of any eligible participants subject to the same terms and conditions as govern all other harvest cooperative members cannot effectively guarantee any harvester price or terms of delivery or exit agreement terms because the harvest cooperative agreement cannot contain those provisions, since the harvest cooperative need not be an FCMA cooperative.

To carry forward the intention of the current motion consistent with this understanding of the role of cooperatives the Council could revise the sections T3-5, P3-5, and L3-5 with the following changes:

Initial Cooperative Requirements

*Catcher vessel co-ops may be formed by eligible harvesters (the co-op) subject to the terms and conditions of a co-op membership agreement. In order to receive an allocation of GH under this program, **an eligible harvester** ~~co-ops~~ must enter into a duly executed contractual agreement (Contract) with the processor the harvester is initially eligible to join a cooperative in association with.*

*Contracts established under this section shall specify the terms and conditions for transferring GQ or GH from the cooperative, including mechanisms whereby a member exiting the co-op (or transferring GH from the co-op) compensates the remaining co-op members and/or the associated processor for exiting the co-op (or transferring GH from the co-op). Compensation can take on any form agreed to by the ~~members~~ **eligible harvester** and the associated processor, including permanent transfer of some or all GH generated by the existing participant to the remaining co-op members and/or the associated processor.*

*Following the initial co-op period, new GH can be generated by eligible harvesters that have never been co-op members only by joining a co-op **and entering into a Contract with the processor the harvester is initially eligible to join a cooperative in association with.** **The Contract must meet the harvester/processor contract requirements for initial co-op membership** ~~a co-op in association with the eligible processor pursuant to the terms of an agreement that meets the requirements for an initial co-op.~~*

Any shareholder under this program is intended to comply with all existing laws concerning the documentation of vessels and entry of vessels to U.S. fisheries in fishing those shares. Shareholders unable to enter a vessel into U.S. fisheries may lease share holdings or use holdings through cooperative membership to the extent permitted by the program, but not in contravention of current law pertaining to entry of vessels in U.S. fisheries.

In addition, sections T3-11, P3-11, and L3-11 could be revised to include the following changes:

⁵ As currently written, T3-5, P3-5, and L3-5 require a contract between a harvest cooperative and its associate processor that includes the terms under which a harvester may exit the cooperative and association. To be consistent with current antitrust law, this provision should be modified so that each “cooperative member” is required to enter a contract with the processor defining the terms under which the cooperative member may exit the cooperative and the processor association.

General Cooperative Requirements

The following provisions apply to all cooperatives:

- a) *The harvesters that enter into a co-op membership agreement shall be the members of the co-op. The processor will be an associate of the cooperative but will not be a cooperative member.*
- b) *Except for CP cooperatives, a pre-season Contract between **an** eligible, willing harvesters in association with a processor is a pre-requisite to **cooperative membership and** a cooperative receiving an allocation of GQ **based on the history of that harvester**. For an initial co-op, the Contract must meet the initial cooperative agreement requirements.*
- c) *The co-op membership agreement and the Contract will be filed with the RAM Division. The ~~Contract~~ **cooperative agreement** must contain a fishing plan for the harvest of all co-op fish.*
- d) *Co-op members shall internally allocate and manage the co-op's allocation per the ~~Contract~~ **cooperative agreement**.*
- e) *Subject to any harvesting caps that may be adopted, GH or GQ may be transferred and consolidated within the co-op to the extent permitted under the **cooperative agreement** ~~Contract~~.*
- f) *The **cooperative agreement** ~~Contract~~ must have a monitoring program. Monitoring and enforcement requirements would be at the co-op level. Co-op members are jointly and severally responsible for co-op vessels harvesting in the aggregate no more than their co-op's allocation of primary species, secondary species and halibut PSC mortality, as may be adjusted by inter-cooperative transfers.*
- g) *Co-ops may adopt and enforce fishing practice codes of conduct as part of their membership agreement. Co-ops may penalize or expel members who fail to comply with their membership agreement.*
- h) ***The cooperatives formed under this program are harvest associations that are intended only to conduct and coordinate harvest activities of their members and are not FCMA cooperatives. Processor affiliated vessels will be permitted to join harvest cooperatives.** Co-op membership agreements will specify that processor affiliated harvesters cannot participate in price setting negotiations, except as permitted by general antitrust law, code of conduct, mechanisms for expelling members, or exit agreements, **except as permitted by general antitrust law**.*
- i) *Co-op membership agreements shall allow for the entry of other eligible harvesters into the co-op under the same terms and conditions as agreed to by the original **cooperative** agreement. Harvesters that have never been a member of a cooperative must enter an agreement that meets all requirements for an initial co-op, as specified under initial cooperative agreement requirements.*
- j) *The cooperatives formed under this program are harvest associations that are intended only to conduct and coordinate harvest activities of their members and are not FMCA cooperatives. Processor affiliated vessels will be permitted to join harvest cooperatives.*