YUKON RIVER DRAINAGE FISHERIES ASSOCIATION

February 16, 2010

Robert D. Mecum, Acting Administrator
Alaska Region, NMFS
NOAA
P.O. Box 21668
Juneau, AK 99802
Email: salmonbycatcheis@noaa.gov

Re: Bering Sea Chinook Salmon Bycatch Management Final Environmental Impact Statement and Regulatory Impact Review

Dear Mr. Mecum:

The Yukon River Drainage Fisheries Association (YRDFA) appreciates the opportunity to comment on the Final Environmental Impact Statement (FEIS) on Chinook salmon bycatch management measures in the Bering Sea pollock fishery. YRDFA is an association of commercial and subsistence fishers on the Yukon River. The region we represent is home to some of the world's most prolific salmon resources, and the world's furthest migrating salmon runs on the Yukon River. These salmon provide a primary source of food for humans and the dogs which are essential to the continued viability of the subsistence way of life in Western Alaska. For many residents the commercial salmon harvest also provides the only means of income for those who live in the remote villages of Western Alaska. The incredibly high bycatch numbers of recent years pose a grave threat to Western Alaska's salmon and the Western Alaskan people who depend on these salmon for vital subsistence needs and commercial harvests.

We appreciate the significant changes which have been made to the FEIS since it was released in draft form and appreciate the time and energy National Marine Fisheries Service (NMFS), North Pacific Fishery Management Council (Council) and Alaska Department of Fish and Game (ADF&G) staff have put into this document. However, the Council's preferred alternative remains woefully inadequate to meet the purpose of this action, which is to reduce salmon bycatch. To this end we repeat our recommendation for immediate implementation of the following measures rather than the Council's preferred alternative:

* Adopt a hard cap of no more than 32,500 salmon (Alternative 2, Suboption vii) immediately with the following options and suboptions;
    - A/B Season split: 58/42 (Seasonal Distribution Option 1-2);
    - Allocation to the co-op level with allocation based pro rata on pollock allocation (Sector Apportionment Option 1);

725 CHRISTENSEN DRIVE, SUITE 3-B • ANCHORAGE, ALASKA 99501
TELEPHONE: 907-272-3141 • 1-877-99YUKON(9-8566)
FAX: 907-272-3142 • EMAIL:info@yukonsalmon.org
WWW.YUKONSALMON.ORG

Beyond our specific recommendations for a final preferred alternative, we note the following deficiencies in the FEIS:

I. The Preferred Alternative

A. Cap Level

The cap levels included in the Council's preferred alternative – both the 60,000 upper limit under Annual Scenario (AS)1, and the 47,591 AS1 performance standard and AS2 hard cap – far exceed those recommended by our organization and many other Western Alaskans and managers. A cap at the 29,000-32,500 level was endorsed by groups throughout Western Alaska, including, but not limited to, the Association of Village Council Presidents (AVCP), Alaska Federation of Natives (AFN), Tanana Chiefs Conference, Kawerak, Inc., the Western and Eastern Interior Regional Advisory Councils (RACs), as well as many individual tribes and communities. This lower cap was also supported by two of the boards responsible for managing these fisheries in-river: the Federal Subsistence Board and the Alaska Board of Fisheries. Cap levels below those of the preferred alternative were also recommended by the U.S. Fish and Wildlife Service, the U.S. Department of State and the Yukon River Panel. This lower cap level will provide protections to salmon populations while allowing the pollock fishery to operate. It will also reduce bycatch to levels experienced before the Yukon River Salmon Agreement was signed, honoring our international commitments under this treaty and providing necessary protections to Chinook salmon throughout Western Alaska.

The difference between our recommended cap level and even the performance standard cap under the Council's preferred alternative exceeds 4,000 Yukon River Chinook salmon in some years.[1] Compared to the 68,100 cap level,[2] the difference is almost 7,000 Yukon River Chinook salmon.[3] While these amounts may seem small to some, when compared with harvests on the Yukon River these amounts are significant. In 2009, the commercial catch of Yukon River Chinook salmon was only 131 fish in 2009 and 4,641 fish in 2008. Subsistence restrictions were in place in 2008, with even more severe restrictions in 2009.[4] Because of these dismal runs, a commercial fishery failure was recently declared by the Secretary of Commerce for Yukon River Chinook salmon for 2008 and 2009. In 2008, estimated Chinook salmon spawning escapement into Canada was only 32,700 fish, 27 percent below the Yukon River Panel agreed upon goal of 45,000 fish required for harvest sharing and Canadian escapement. In Canada, subsistence (aboriginal) fishers voluntarily restricted themselves to half of their historic take. In one community these voluntary

[1] North Pacific Fishery Management Council and National Marine Fisheries Service, Final Environmental Impact Statement, Table 5-60 at 359 (December 2009) [hereinafter FEIS].
[2] Note that the 68,100 cap level is the closest cap to the Council's preferred alternative which is analyzed in the FEIS, we therefore use it as a reference for the 60,000 cap level here.
[3] FEIS at 359.
[4] Alaska Department of Fish and Game (ADF&G), Yukon River Chinook Salmon Stock Status and Action Plan 2010; a Report to the Alaska Board of Fisheries, Special Publication 09-26 at 38 (December 2009) *available at* http://www.sf.adfg.state.ak.us/FedAidpdfs/Sp09-26.pdf.

restrictions resulted in a total Chinook salmon harvest of only 160 Chinook salmon. The aboriginal harvest for the entire Canadian portion of the run was 2,766 fish. There was no directed commercial Chinook salmon fishery on the Yukon in 2008, and the commercial chum fishery was delayed to allow Chinook salmon to pass through, reducing the chum salmon harvest as well. From this perspective, the difference in the amount of Yukon River Chinook salmon caught between our recommended cap and the Council's preferred alternative is significant and cannot be ignored in the FEIS.

1. National Standard 9

National Standard 9 requires that NMFS and the Council minimize bycatch to the extent practicable. In the end, the numbers embodied in the preferred alternative are simply too high to adequately protect salmon and meet the obligations of National Standard 9. In 2003, which was an average to high bycatch year on a broad historical scale, AS1 under the preferred alternative resulted in a zero percent reduction in bycatch, and AS2 only resulted in a 5 percent reduction.[5] Except in the very highest bycatch years of 2006 and 2007, the PPA AS1 cap level of 60,000 is essentially status quo, resulting in no salmon bycatch reductions and no forgone pollock revenue.[6] The stated goal of this action, in compliance with National Standard 9 of the Magnuson-Stevens Act (MSA),[7] is to reduce salmon bycatch: "the purpose of the proposed action is to minimize non-Chinook and Chinook salmon bycatch to the extent practicable."[8] A hard cap of 60,000 has been exceeded only three times in the past eighteen years. A cap at this level does not reduce bycatch to the extent practicable as required under National Standard 9, but maintains bycatch levels which are in fact higher than historical averages.

While the Council has justified a higher cap on the basis that they must balance National Standard 9 with National Standard 1, which requires that conservation and management measures prevent overfishing, while achieving, on a continuing basis, the optimum yield (OY) from each fishery for the United States fishing industry. However, the FEIS shows that even at the lowest cap level analyzed – 29,300 – OY was achieved overall throughout the time period analyzed in the FEIS.[9] This time period includes the highest bycatch on record, and the three highest bycatch levels in the past eighteen years, so the fact that OY was achieved even with these bycatch levels suggests that a bycatch cap at the lowest level analyzed of 29,300 is indeed practicable for the pollock fleet, and would comport with National Standard 1. This being the case, a 60,000 hard cap is not necessary to meet National Standard 1 or the practicability requirement of National Standard 9, and in fact seems designed more to protect the pollock fishery's revenues than the health of Western Alaska's salmon and those who depend upon them.

[5] FEIS at 335, Table 5-41.
[6] North Pacific Fishery Management Council and National Marine Fisheries Service, Final Regulatory Impact Review, Table 6-7 at 212 (December 2009) [hereinafter RIR].
[7] Magnuson-Stevens Fishery Management and Conservation Act, 16 U.S.C. §1851(a)(9) (2000).
[8] Notice of Intent to Prepare an EIS, 72 Fed. Reg. 72996 (Dec. 26, 2007).
[9] FEIS at 505-506.

In addition, the preferred alternative, as discussed at length in Council deliberations, relies on the logic that it is not "practicable" for the pollock fishery to maintain bycatch levels below 47,591 Chinook salmon in all years. The structure of the preferred alternative allows the pollock fishery to catch up to 60,000 Chinook salmon in two out of any five years with no penalty. The rationale cited by the Council for this structure was the "lightning strike" nature of salmon bycatch, i.e. the idea that in certain years the pollock fishery simply cannot avoid bycatch despite behavioral changes and therefore a higher cap would be justified. However, no analysis is presented in the FEIS to support this conclusion. Many involved in the pollock fishery have suggested that the extremely high numbers in 2007 were due to fishing behavior, and in particular the egregiously bad practices of some participants in the fishery that year, including fishing later in the year when Chinook salmon bycatch is historically high. While this assumption that there are situations in which the pollock fishery cannot control their bycatch forms the basis for the higher cap under the Council's preferred alternative, there is absolutely no evidence presented in the FEIS to support the assumption about the ability to avoid salmon bycatch upon which this structure relies.

Finally, National Standard 9 requires the Council and NMFS to adopt a precautionary approach when faced with uncertainty and to improve data regarding bycatch species, including information about the type of fish, disposition, and other characteristics.[10] The EIS acknowledges that information about Chinook salmon stocks—where they come from, where they are likely to be during the pollock season, etc…— is lacking. That information is necessary to understand and mitigate the effects of the action, and to better avoid bycatch in the first place. Therefore, the Council and NMFS must undertake the appropriate research to get that information and, while the information is still lacking, must adopt a precautionary approach and set a lower cap for Chinook salmon bycatch.

2. National Standard 8

National Standard 8 requires the Council and NMFS take the importance of fishery resources to fishing communities into account.[11] This includes all of the western Alaska communities that depend on Chinook salmon, both as a subsistence resource and for commercial fishing. As the FEIS recognizes, in some communities, Chinook salmon constitutes the primary source of income. It provides revenues through commercial fishing and is a central part of subsistence lifestyles in many communities. The effect of low Chinook salmon returns on these communities is devastating. In fact, the Secretary of Commerce recently took the step of declaring the Yukon Chinook salmon fishery a disaster.[12] In reporting that declaration, NMFS recognized that the 2008 commercial Chinook salmon harvest was reduced to 89% below its five year average while there was no commercial Chinook salmon fishery on the Yukon in 2009. Similarly, there have been significant restrictions on subsistence harvest because of low Chinook salmon returns. While reductions in salmon bycatch in the pollock fishery would not entirely repair the damaged Chinook salmon

[10] *See* 50 C.F.R. § 600.350(d)(3)(iii), (d)(1).
[11] *See* 50 C.F.R. § 600.345.
[12] U.S. Dep't of Commerce, *Commerce Secretary Gary Locke Announces "Fishery Failure" Determination for Alaska Chinook Salmon*, Commerce News, www.nmfs.noaa.gov/mediacenter/docs/Chinook_salmon_locke.pdf (Jan. 15, 2010).

fishery for commercial and subsistence users, every additional fish that escapes the pollock fleet's nets will make a difference for these hard hit communities. In comparison to the complete shutdown of the commercial Chinook salmon fishery and the significant restrictions on subsistence communities that rely on Chinook salmon for a major part of their diets, the impact of reducing bycatch on the pollock fishery is minor.[13]

3. Other Applicable Laws

In addition, the Council and NMFS must consider other applicable laws in meeting their obligations under National Standard 9.[14] At least three obligations should provide guidance in setting a bycatch cap here: the Alaska National Interest Lands Conservation Act (ANILCA), the Pacific Salmon Treaty, and the Endangered Species Act (ESA). As the EIS acknowledges,[15] ANILCA provides for a subsistence priority in Alaska.[16] That priority is not met when subsistence fisheries are restricted, in part as a result of high bycatch levels in the pollock fishery. In addition, as has been discussed in many of the comments submitted to the Council and NMFS, the Yukon River Salmon Agreement of the Pacific Salmon Treaty requires the U.S. to meet escapement goals, allowing sufficient Chinook salmon to reach Canada each year. Those goals have not been met in recent years. In addition a 60,000 hard cap calls into question the United States' compliance with its treaty obligation under the Yukon River Salmon Agreement to "increase the in-river run of Yukon River origin salmon by reducing marine catches and by-catches of Yukon River salmon."[17]

As the EIS recognizes,[18] salmon stocks from the Pacific Northwest that are listed under the ESA are among those caught in the bycatch from the pollock fleet. As discussed in Oceana's comments regarding the draft EIS/RIR, there is not enough information available to determine how many lower 48 listed Chinook salmon are caught each year. The effects of Chinook salmon bycatch on the viability of these species is therefore unknown, and take may exceed permissible levels. All of these obligations counsel in favor of adopting a lower Chinook salmon bycatch cap.

B. A/B Season split & Allocation of Bycatch Caps

The recommended 58/42 A/B season split provides essential protections to maturing salmon which are bound for their natal rivers in the coming summer. According to the DEIS, "there is a tendency for the number of AEQ Chinook salmon released to natal rivers to increase as the A season allocation is reduced."[19] The Council's preferred alternative, on the other hand, provides a 70/30 A/B Season split, which is higher than historical rates and places a majority of the available bycatch quota in the A season, with the highest impact to river-bound Chinook salmon. Further,

[13] *See* FEIS at 341 (showing that, even in the highest bycatch years, the pollock fleet would still be able to harvest the majority of its TAC under a lower bycatch cap).
[14] *See* 50 C.F.R. § 600.350(d)(3)(iii).
[15] *See* FEIS at 23.
[16] 16 U.S.C. § 3114.
[17] Pacific Salmon Treaty, Annex IV Chapter 8 (27)(Yukon River Salmon Agreement)(2002).
[18] *See* FEIS § 5.2.8.
[19] RIR at 301.

the preferred alternative allows 80% of the A season cap to be rolled over to the B season, further reducing the true seasonality of the two caps.

The Council's preferred alternative also allocates bycatch caps to the sectors based 75 percent on historical bycatch levels and 25 percent on AFA pollock allocations. This allocation rewards bad actors for their historically high bycatch rates. This concern for awarding bad actors was noted in our scoping comments as something to be specifically avoided within Chinook salmon bycatch management measures.

C. Incentive Plan Agreements (IPAs)

The preferred alternative provides for a higher cap level *if* an industry incentive program is developed which meets a specific set of criteria. These industry incentive programs, however, are not analyzed in the DEIS nor is the purported ability of these incentive programs to reduce salmon bycatch at all levels of abundance analyzed. Under the National Environmental Policy Act (NEPA), the purpose of an EIS is to "provide a full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[20] Without presenting the full alternatives in the DEIS neither the public nor decision makers can assess their impacts on the environment. If industry incentive plans are to be considered, and selection of a higher hard cap is selected based on performance under the incentive programs, NEPA requires that they be analyzed as alternatives within the EIS. Without an analysis of the IPAs, there is no justification for allowing a higher cap if IPAs are in place. The agency argues that the IPAs need not be analyzed because it is the cap levels themselves which are being analyzed.[21] One must then assume that the Council has effectively chosen a 60,000 hard cap. Assuming arguendo that this is the case, the Council's rhetoric does not match its action. Time and again in deliberations and in follow-up to the public, Council members have stressed that this is not really a 60,000 hard cap because of the IPAs and the performance standard. If the IPAs are truly insignificant enough such that they need not be analyzed in the EIS, they also cannot be justification for the Council's two-scenario approach. The Council cannot have it both ways, and the FEIS does not analyze the key component of the IPAs which was relied upon to justify the preferred alternative in the first place.

The lack of analysis of the IPAs in the FEIS is made worse by the structure of the plan approval process. Several IPAs were presented by industry on the record when the Council took final action on this item and formed part of the justification for selection of the preferred alternative. However, under the preferred alternative's structure, there is no guarantee that the industry incentive programs upon which they made their decision will be the same plans which are ultimately submitted to NMFS, nor that they are equally effective. In fact, at a recent industry presentation, the offshore sector presented an IPA which was completely different than that

[20] 40 CFR § 1502.1 (2005).
[21] *See* FEIS at 531.

presented to the Council in April. This IPA consisted merely of a modified Rolling Hot Spot system, which does not differ greatly from the status quo.

Under the preferred alternative, there is no opportunity for a substantive review of the IPAs by either NMFS or the Council. While NMFS does review the IPAs, the NMFS review is largely an administrative one:

> NMFS would not judge the adequacy of the incentives described or whether these incentive measures would, in fact, successfully provide the incentives intended by the Council. Judgments about the efficacy of outcomes of the proposed incentive program would be subjective and the regulations would not provide a legal basis for NMFS to disapprove the proposed IPA because it did not believe that the proposed measures would work as intended.[22]

Under this review process, only the Council is addressing the efficacy of the incentive programs, yet the incentive programs submitted to NMFS may not be the same programs submitted to the Council. In effect, no one, including the public, NMFS and the Council, has the opportunity to assess the efficacy of the final incentive programs submitted to NMFS.

Furthermore, the IPA requirements contained in the Council's final action do not specify the specific types of incentives which must be contained in the plans: "…the ICA requirements only specify the end result of what the Council wants the industry to achieve and does not specify how the industry must reach these goals."[23] The requirements for the IPAs are not specific, but are performance based.[24] However, no analysis of expected performance is conducted by NMFS in approving the plans: "If a proposed IPA contains all of the required information, met the participation requirements, and it generally described an incentive program that is designed to accomplish the Council's goals, NMFS would approve the IPA."[25] The Council's annual review will be the "primary venue" for determining whether the IPAs are meeting the Council's objectives. However, the Council has no authority to approve or deny the IPAs, and an FMP amendment would have to be initiated to change the requirements.[26]

[22] FEIS at 104.
[23] *Id.* at 89.
[24] *Id.* at 105.
[25] *Id.* at 104.
[26] *Id.* at 105.

II. Range of Years Included in the Analysis

The impact of Chinook salmon bycatch measures and forgone pollock revenue is based on a historical analysis using bycatch data from 2003 to 2007. We recognize that changes in catch accounting make this time period the most "consistent and uniform" for analytical purposes,[27] however, these years represent the highest 5-year average bycatch in recent history, and include the all time high bycatch year. This choice of years makes the revenue at risk numbers artificially high because the low bycatch years – which predominate over the long term – are not presented. The choice of years is particularly egregious given the Council's preferred alternative. The 60,000 cap level has only been exceeded in three of the past eighteen years. All three of the years occurred during the time period analyzed in the EIS. This presents a fatally skewed analysis of the impacts of this cap. If the time period was expanded, the years of 2005, 2006 and 2007 would still be the only years above the cap level. To present only five years, including these three outliers, presents an unrepresentative view of the impacts of the caps. For instance, in 2003, when bycatch was 46,691 which is close to the long-term average, the preferred alternative 60,000 hard cap did not result in any reduction in bycatch.[28] To accurately characterize the impacts, and the revenue at risk, the analysis should include a broader range of years which better represents historical bycatch patterns.

III. Adult Equivalent (AEQ) Model

We appreciate the great efforts undertaken to develop an AEQ model for this impact analysis. We also appreciate the caveats which have been added to the analysis regarding the uncertainty surrounding these estimates, and the inaccuracy of expanding these results beyond the limitations of the data (as in the comments on the DEIS submitted by Dr. Ruggerone, Comment 39).[29] However, we reiterate our concerns noted in our comments on the DEIS regarding the AEQ model and the underlying genetics utilized in the AEQ model.

In the FEIS, the agency recognized that the stock composition estimates contained a high degree of uncertainty: "AEQ estimation to river of origin was used in the EIS to estimate the relative changes under various cap scenarios. These estimates are also uncertain and that uncertainty increases with further extrapolations historically and to finer resolutions. Therefore, judgments with respect to detailed impacts were avoided, especially in cases where it would require interpretations beyond the extent of the data."[30] However, AEQ estimates are included at the level of specific river systems (as in Tables 5-51, 5-52, 5-53, 5-54, 5-55 and 5-56) in the FEIS.[31] Even with the associated caveats, inclusion of these numbers implies their usefulness, and makes them part of the available information for decision-making. This provides decision-makers and the public with an inaccurate base of information on which to base their decisions, and to weigh the costs and benefits of reducing Chinook salmon bycatch. This is particularly problematic in the case of upper

[27] *Id,* at 152.
[28] *Id.* at 335.
[29] *See* FEIS at 552-553.
[30] *Id.*
[31] *Id.* at 349-354.

Yukon Chinook salmon. Given the importance of these stocks for treaty obligations, we cannot assume that the stock compositions from the spatially and temporally limited samples analyzed by Seeb et. al. are indicative of the overall presence of these stocks in the bycatch. Yet, information is presented on the specific number of upper Yukon Chinook salmon which will be "saved" under the various alternatives.

IV. Environmental Justice;

The subsistence section in the FEIS has been improved, and additional information is included about the importance of Chinook salmon in subsistence diets and for rural communities. However, the FEIS still does not adequately analyze the environmental justice implications of the action. Reducing salmon bycatch is of vital importance to the primarily Native Alaskan communities who depend on salmon for their sustenance and their livelihoods. Increased salmon bycatch places a disproportionately high burden on these communities because of the central importance of this resource to Native Alaskan communities. Under Executive Order 12898, federal agencies are required to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions."[32]

The DEIS does identify the impacted minority populations. It is inadequate, however, in assessing the disproportionate impacts placed on these populations. While some qualitative information is provided about the importance of Chinook salmon to Western Alaskan populations, there is a great disparity between the amount of information presented regarding the risks to Western Alaska communities and the specific numbers presented for "Revenue at risk" for the pollock fishery. While we appreciate that some of this is due to the "priceless" nature of Chinook salmon to subsistence communities, it is heightened by the revenue at risk methodology which presents a "worst case scenario"[33] for the pollock fishery. In this analysis, the revenue at risk numbers present the cost to the pollock fishery under the various hard caps with no change in behavior. It is reasonable to assume, however, that under a management system which includes a hard cap, participants in the pollock fishery will adapt their fishing practices to avoid hitting the hard cap. This is acknowledged in the FEIS[34] and the idea that the fleet can change its behavior to reduce bycatch is in fact the premise of the preferred alternative. The presentation of the revenue at risk numbers as quantified numbers presents information which overestimates the costs to industry, while failing to fully develop the benefits for Western Alaska communities. The environmental justice assessment which relies on these analyses is insufficient.

[32] Executive Order 12898 (February 11, 1994) § 1-101.
[33] FEIS at 577.
[34] *See Id.*; *see also* RIR at 209.

V. Conclusion

Thank you for your consideration of these comments. Similar issues are discussed in comments submitted today by the Association of Village Council Presidents (AVCP). We agree with and incorporate those comments. We also incorporate our comments submitted on the DEIS, and those submitted on the DEIS and/or FEIS by Trustees for Alaska for AVCP, Oceana, World Wildlife Fund, the Yukon River Panel, Bering Sea Fishermen's Association, Kawerak, Tanana Chiefs Conference and the Alaska Marine Conservation Council. Given the current state of our Yukon River Chinook salmon stocks, we again request the implementation of management measures which will immediately and adequately reduce Chinook salmon bycatch in the Bering Sea pollock fishery, including a hard cap of no more than 32,500 Chinook salmon.

Sincerely,

Rebecca Robbins Gisclair
Policy Director