

Raymond J. Watson, *Chairman*
Myron P. Naneng, Sr., *President*

Association of Village Council Presidents

Office of Administration
P.O. Box 219 ● Bethel, AK 99559
Phone: (907) 543-7300 ● Fax: (907) 543-3369



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Sent by email and facsimile

Robert D. Mecum, Acting Administrator
Alaska Region, NMFS
NOAA
P.O. Box 21668
Juneau, AK 99802
Fax: (907) 586-7557
Email: salmonbycatcheis@noaa.gov

Re: Bering Sea Chinook Salmon Bycatch Management Final Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis

Dear Mr. Mecum:

The Association of Village Council Presidents (AVCP) appreciates the opportunity to comment on the Final Environmental Impact Statement (FEIS) on salmon bycatch management measures in the Bering Sea management area. AVCP is a tribal consortium representing 56 federally recognized Alaska Native villages in Western Alaska, many of which are located on the Yukon River and along the Bering Sea Coast. Chinook salmon is an essential subsistence resource and also provide for a small scale commercial fishery which for many is the only means of income. The excessively high bycatch allowed under the North Pacific Fisheries Management Council's (NPFMC) preferred alternative is completely unacceptable as it leaves our salmon stocks at significant risk and fails to protect our rights to subsistence and commercial fish. The Council's action, favoring one of the world's richest commercial fisheries over one of the world's oldest indigenous subsistence fisheries, is a prime example of power and money winning out in government and bureaucracy over fairness and justice.

AVCP hereby incorporates herein all the comments in the administrative record throughout the Council process, including comments to this FEIS, by AVCP and all others registering opposition to the Council's preferred action, either in writing or orally, including but not limited to comments submitted by Kawerak, Tanana Chiefs Conference, BSFA, YRDF, Oceana, the World Wildlife Fund, the Alaska Marine Conservation Council, all Tribes and Alaska

Native representatives and organizations, all ANILCA Federal Regional Advisory Councils and State of Alaska Fish and Game Advisory Committees, the Yukon River Panel, all scientific and environmental organizations, the U.S. Department of State, the U.S. Fish and Wildlife Service and the Federal Subsistence Board.

AVCP also makes the following additional points:

1. The Council violated applicable law in allowing at least two Council members to vote on the preferred action despite significant conflicts of interest.

Evidence was presented at the NPFMC meeting during which final action was taken that at least two Council members had a significant conflict of interest that put into question their ethical and legal ability to vote on the issue of regulating the Pollock industry to achieve reductions in Chinook bycatch. In response to this issue, these two Council members, employed by the Pollock industry, submitted letters denying the conflict which should have only heightened the scrutiny, but instead resulted in a ruling allowing them to vote on the final Council Action. Allowing these Council members to vote violated applicable law and renders the Council's action illegal.

2. The rights of Alaska Native Tribe's to aboriginal title in the waters off Alaska are violated by the Council's actions.

Alaskan Tribal aboriginal title and rights to the waters in the areas off of Alaska are unsettled. *People of the Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989). The Pollock industry and the NPFMC is in violation of these tribal rights to exclusive use and occupancy of these waters, especially to the extent that the Pollock industry is taking Chinook salmon and other subsistence resources, or effecting the conservation or opportunity to take subsistence resources, in these areas of unsettled aboriginal title.

3. The Council's Action is in violation of Title VIII of ANILCA in that it fails to provide an opportunity for subsistence uses of Chinook salmon.

4. The Council's action is a violation of the legally enforceable trust responsibility that the United States owes to Alaska Natives and their tribes to protect their opportunity to continue their subsistence way of life.

5. The Preferred Alternative Does Not Minimize Bycatch to the Extent Practicable, as Required by National Standard 9 of the Magnuson Stevens Act.

Although the EIS acknowledges that NMFS has an obligation, pursuant to the Magnuson Stevens Act, to minimize bycatch, 16 U.S.C. § 1853(a)(11), § 1851(a)(9), the Council's selection of Alternative 5 as the preferred alternative

does not meet that mandate. The historical bycatch levels demonstrate that a lower number, such as the 32,500 hard cap that AVCP and other groups have advocated for the Council and NMFS to adopt, is practicable and balances the competing interests of salmon-dependent communities far more equitably than the preferred alternative. Furthermore, given the other legal obligations relevant to this decision and the lack of information available to support the Council's and NMFS' analysis, it is even more critical that the Council and NMFS adopt a precautionary approach and select an alternative with a lower cap.

First, the record establishes that a lower bycatch cap is practicable. As was argued in comments regarding the draft EIS/RIR for Bering Sea Chinook salmon bycatch, alternative 5 would only reduce bycatch levels in years with the highest Chinook bycatch. According to the chart on page 159 of the final EIS, bycatch in many years is below 32,500 Chinook, or would require only a small reduction to meet that cap. The level established in alternative 5, by contrast, is above the historical average. Therefore, in many years, the pollock fleet could meet, or come close to meeting, its TAC while still achieving reduced bycatch levels. Establishing a cap that is above the historical average does nothing to minimize bycatch in accordance with the requirements of the Magnuson Stevens Act.

This mandate to reduce bycatch to the maximum extent practicable is particularly critical in the current context for Bering Sea Chinook. Regulations under the Magnuson Stevens Act provide that, in taking action to reduce bycatch, the Council and NMFS must also take into account changes in the distribution of benefits and costs, among other factors, the obligations imposed by the other National Standards, and other applicable laws. In this case, there are a number of relevant circumstances, including National Standard 8, the recent disaster declaration for Yukon Chinook salmon, ANILCA, the Pacific Salmon Treaty, and the Endangered Species Act, all of which weigh in favor of establishing a lower cap for Chinook bycatch. *See* 50 C.F.R. § 600.350.

First, National Standard 8 requires the Council and NMFS to take into account the importance of fishery resources to fishing communities. *See* 50 C.F.R. § 600.345. This includes all of the western Alaska communities that depend on Chinook, both as a subsistence resource and for commercial fishing. As the EIS 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 returns on these communities is devastating. In fact, the Secretary of Commerce recently took the step of declaring the Yukon Chinook fishery a disaster. 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). 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 fishery on the Yukon in 2009. Similarly, there have been significant restrictions on subsistence harvest because of low Chinook returns. While reductions in salmon bycatch in the pollock fishery would not entirely repair the damaged Chinook 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 fishery and the significant restrictions on subsistence communities that rely on Chinook for a major part of their diets, the impact of reducing bycatch on the pollock fishery is minor. *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).

In addition, the Council and NMFS must consider other applicable laws in meeting their obligations under National Standard 9. *See* 50 C.F.R. § 600.350(d)(3)(iii). At least three obligations should provide guidance in setting a bycatch cap here: ANILCA, the Pacific Salmon Treaty, and the ESA. As the EIS acknowledges, *see* FEIS at 23, ANILCA provides for a subsistence priority in Alaska. 16 U.S.C. § 3114. 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 Pacific Salmon Treaty requires the U.S. to meet escapement goals, allowing sufficient Chinook to reach Canada each year. Those goals have not been met in recent years. Finally, as the EIS recognizes, *see* FEIS section 5.2.8, salmon stocks from the Pacific Northwest that are listed under the Endangered Species Act 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 are caught each year. The effects of Chinook 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 bycatch cap.

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. *See* 50 C.F.R. § 600.350(d)(3)(iii), (d)(1). The EIS acknowledges that information about Chinook stocks—where they come from, where they are likely to be during the pollock season, and other vital information is lacking. That information is necessary to understanding and mitigating the effects of the action and better avoiding 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 bycatch.

6. The National Environmental Policy Act Requires the Council and NMFS to Obtain Information Necessary for an Informed Decision.

The EIS recognizes, and many groups commenting on the draft EIS/RIR have pointed out, that there are significant gaps in the information available regarding Chinook bycatch, yet the Council and NMFS have not made efforts to obtain that information. While we appreciate the efforts of the Council and NMFS to take action to reduce bycatch even without that information and are encouraged to see that NMFS and the Council plan to do further research, we urge the Council and NMFS to prioritize Chinook research, as required by NEPA, and to adopt a more conservative bycatch limit while it conducts the necessary studies to obtain that information. Without further information, it is not possible to make an informed decision or to fully analyze the effects of the action.

“[T]he very purpose of NEPA’s requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.” *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982). The starting point of any analysis of an activity’s impacts under NEPA is the collection and description of baseline data about the environment in which the activity is to occur, because, “without establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988); *see also Am. Rivers v. F.E.R.C.*, 201 F.3d 1186, 1195 n.15 (9th Cir. 2000); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1163 (N.D. Cal. 2006) (baseline is the “heart of the EIS” and must “be accurate and complete”). An agency is not only required to identify missing information, but must also obtain that information or explain why it cannot obtain that information. *See* 40 C.F.R. § 1502.22(a); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1249 (9th Cir. 1984) (“section 1502.22 clearly contemplates original research if necessary”).

In this case, information is lacking with respect to: which Chinook stocks are among those caught as bycatch in the pollock fishery, where Chinook are headed, when Chinook are likely to be in any area during the pollock season, what has changed in fishing practices, why bycatch is higher in some years than in others, and how many Lower 48 ESA listed species are among the Chinook caught as bycatch, among other things. Without any of this critical information, the Council, NMFS, and the public are left guessing what the effects of the action will be and whether there are better ways to minimize bycatch. There is a lack of baseline information about fish stocks and fishing practices, and that is compounded by a lack of information about what measures the incentive plan agreements will implement to achieve bycatch reductions. Thus, to meet its

NEPA obligations, the Council and NMFS must do the research to gather that information, and, in the meantime, should adopt a conservative bycatch limit to protect the many communities dependent on Chinook.

Thank you for your serious consideration of AVCP's comments and concerns.

Sincerely,
ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS
Raymond J. Watson, Chairman

Myron P. Naneng, Sr., President