

## **Summary of Tribal Consultation Teleconference to Discuss Bering Sea Herring Bycatch Management August 21, 2020**

On Friday, August 21, 2020, the National Marine Fisheries Service, Alaska Region (NMFS) conducted a telephonic consultation with representatives of several Alaska Native tribal entities. This consultation follows a previous consultation held on July 26, 2020, on herring bycatch management in the Bering Sea and Aleutian Islands.

Following the July 26 consultation, the tribes submitted a series of written questions to NMFS requesting added clarification on specific topics. Those questions, with NMFS responses, are included herein as Attachment 1.

The August 21 consultation also introduced the topic of a petition by the At-Sea Processors Association that requested emergency action by NMFS to suspend a regulatory closure of the Bering Sea Winter Herring Savings Area to pollock fishing beginning September 1 (until the pollock season closure on November 1). A copy of that petition is included in this report as Attachment 2, and a copy of NMFS's response denying the petition is included as Attachment 3.

### **Participants in the Consultation**

#### **Tribal Entities**

- Aleut Community of St. Paul Island (Amos Philemonoff, President; represented by Dr. Lauren Divine)
- Chevak Traditional Council (Roy Atchak, First Chief; represented by Richard Slats, Esther Friday and Charlotte Nayagak)
- Chinik Eskimo Community (Irene Navarro, President; represented by Toby Anungazuk, Jr.)
- Native Village of Diomede (Samantha Ozenna, President; not present)
- The Native Village of Koyuk (Leo Charles, President; not present)
- Mary's Igloo Traditional Council (Lucy Oquilluk, President; not present)
- Nome Eskimo Community (Tiffany Martinson, Executive Director; not present)
- Solomon Traditional Council (Kirsten Timbers, President; not present)
- Native Village of St. Michael (Alice Fitka, President; represented by Kawerak)
- Teller Traditional Council (Janelle Menadelook, President; represented by Kawerak)
- Native Village of Tununak (Theodore Angaiak, President; not present)
- Native Village of Unalakleet IRA Council (represented by Frank Katchatag, President)
- Native Village of Wales (Anna Oxereok, President; represented by Kawerak)
- Native Village of White Mountain (Amos Brown Sr., President; represented by Kawerak)
- Association of Village Council Presidents (represented by Jennifer Hooper)
- Bristol Bay Native Association (represented by Cody Larson)
- Kawerak, Inc. (represented by Brenden Raymond-Yakoubian and Dr. Julie Raymond-Yakoubian)

- Native American Rights Fund (not present; written comments read, and attached as Attachment 3 to this report)

#### **NMFS Staff, Alaska Region**

Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries

Dr. Anne Marie Eich, Branch Chief, Ecosystem Branch

Mary Furuness, Branch Chief, Inseason Management

Alicia M. Miller, Branch Chief, Catch Shares Branch

Kurt Iverson, Fishery Management Specialist

#### **NMFS Staff, Alaska Fisheries Science Center**

Dr. Bob Foy, Director, Alaska Fisheries Science Center

#### **NOAA General Counsel**

Molly Watson, Deputy Alaska Section Chief

Joe McCabe, Advisor National Marine Fisheries Service (NMFS) staff

**Facilitators:** Julie Raymond-Yakoubian (Kawerak) and Glenn Merrill (NMFS)

### Consultation Report Notes

As noted above, the consultation was facilitated by Dr. Julie Raymond-Yakoubian (Kawerak) and Mr. Glenn Merrill (NMFS).

Following introductions, and a discussion of meeting logistics, Mr. Richard Slats provided the invocation, and Mr. Toby Anungazuk provided the Lands and Waters Acknowledgment:

*The Bering Sea region is the contemporary home to dozens of Tribes, many of whom are on this call. As we enter into this consultation meeting today, and work towards strengthening our collective relationships, it is important that we also acknowledge the waters and lands that we will be discussing. The Bering Sea, its islands, and its coastline are the traditional homelands and waters of the Yup'ik, Inupiaq, Unangan, and St. Lawrence Yupik Peoples. The Bering Sea is a living sea; it provides many of our traditional foods and supports our cultural traditions, it has influenced our languages, our spirituality, and our very beings. The Bering Sea is a graveyard for our ancestors, the source of our well-being, and is our home.*

*We acknowledge and honor the sea, as well as the knowledge of our Peoples and communities, and their ancestral and contemporary stewardship of Bering Sea. We welcome all of you who are not from our Bering Sea to do the same.*

Dr. Raymond-Yakoubian began the conversation by offering several comments. The number of tribes and persons participating in this meeting is not indicative of the amount of interest and concern regarding this issue. This is a very busy time of year for Alaska Native communities, and everyone's activities are further influenced by the presence of the COVID-19 disease. For example, many Tribal buildings are closed due to immediate concerns for health and safety, many Tribal Coordinators are not working (or not working full-time) because of this, and it is now more difficult to get in touch with people. She also mentioned that tribal members expressed some dissatisfaction with the previous tribal consultation in July and with NMFS's written responses to the questions sent to the agency by Tribes.

Mr. Glenn Merrill thanked Dr. Raymond-Yakoubian for noting the considerations about participation in this consultation. He said the agency staff understand the challenges of meeting at this busy time of year, particularly with the added complexities of the pandemic. He also indicated that NMFS hopes to address some of the remaining issues raised in the last consultation and to move forward.

Overview - 9:20 a.m.

Dr. Raymond-Yakoubian asked the tribal participants to outline their goals for this consultation.

Mr. Richard Slats said that Chevak Native Village is a Federally-recognized tribe. Currently, the Chevak Tribe's main concern is with the opening of the Herring Savings Areas (HSAs). He indicated that herring is a protected species and is an integral part of the food chain. The Chevak Tribe wants to emphasize that tribal consultation should be an initial part of the process. Not consulting with tribes, and reporting and consulting with others outside tribal government is not consistent with various federal and state Executive Orders that call for the agencies to consult with the tribes on a government-to-government basis. He indicated that a lack of tribal participation is a lack of consultation. Tribes may not be aware of these teleconferences; the relatively low number of participants reflects the lack of notice, not a lack of interest. Additionally, people in rural communities are currently occupied and preparing for a harsh winter that is coming.

Dr. Divine said she supports the previous comments. She indicated she looks forward to getting into the specifics of how decisions are made and how the data informed the decision-making. These specifics are still lacking. Conversations and the questions from the last consultation have not answered, and it is still unclear how NMFS decided to open Summer Herring Savings Area 2 (HSA 2). She asked how the justifications for HSA 2 relate to a new emergency rule request from the trawl fleet to open the Winter Herring Savings Area (Winter HSA). This new request seems contradictory to the previous justification for opening HSA 2. She reiterated that she is looking forward to examining the data and for information on the steps and data for the decision making process regarding the emergency rule request.

Mr. Anungazuk confirmed that a lot of rural people are currently busy, and they are still gathering berries at this time. He said that July was cooler this year and that berries are

ripening later than normal. There is great uncertainty about the food supply in the stores in villages and whether the amount of food will be sufficient. Commercial fishing is still going on; however, fish are smaller this year, and smaller fish means more catch is needed. Things have changed so much in recent years that it's hard to predict what future seasons (the fall season) will be like, and there is deep concern about maintaining winter food supplies.

Dr. Raymond-Yakoubian said she also supported the previous comments. She said she hoped to understand the new Winter HSA petition and how NMFS is going to handle it. She would also like to discuss the previous herring action and the NMFS responses to the Tribe's questions; to clarify and dig into the details of some of those responses. She hopes to come to some consensus about how to move forward with NMFS on tribal consultations in the future.

Mr. Cody Larson said he would like the group to recognize Bristol Bay area tribes. These tribes have been informed of this meeting.

Mr. Merrill offered thanks for the perspective of the tribes on these issues. He indicated that NMFS staff have been reflecting on the previous consultation in preparation for this one. The agency is hoping to get a better understanding of the values and perspectives of the tribes, which has been difficult to include during the heat and fast pace of inseason management decisions, particularly now during the conditions of the pandemic when communications are often challenging.

Mr. Merrill said NMFS appreciates the passion and concern raised in the previous consultation. This consultation and the previous one are helpful to gain perspective on the current request for emergency action in the Winter HSA. Considering perspectives – with the challenge of communication – we should consider the people in the middle of it and what may be lost is the challenges of the people involved. The inseason management process, which may not have been adequately conveyed last time, is the process we used to make inseason management decisions. How we make inseason management decisions is often fast paced and considers a lot of complicated data. It becomes easy as managers to rely on those data or sources that we traditionally rely on. There is an opportunity for us to consider and better understand different perspectives. During the year, NMFS makes hundreds of inseason decisions, and we manage to the numbers. It's more than just the numbers and specific amounts of catch though. What was reflected in our last consultation is the different perspectives, and we hope to understand more about those differing perspectives. We recognize that, while our inseason management team is not perfect, it involves staff trying to do their best and engage in this process thoughtfully. Our opportunity today is to share that perspective and work toward our common goal to manage our resources as best we can.

Dr. Raymond-Yakoubian asked for additional discussion on other types of inseason management actions that NMFS typically takes; this would help the group understand the types of things that commonly occur in the agency's fast-paced decision making. In terms of tribal consultation in general, she indicated that if tribes have a solid and established relationship with an agency, then when fast paced decisions occur, Tribes and the agency can more quickly

and better handle those fast paced actions; so ensuring that there is existing agency/ tribal relationship is important. She expressed that the tribes want to see this ongoing relationship developed so that they can be part of the agency decisions.

Herring Bycatch - 10:00 a.m.

Mr. Merrill then provided an update of herring bycatch. He began by pointing out there are different ways to look at the available information, but also noted a caveat that predictions are difficult to make in fishing, and that things can change rapidly. Some of NMFS's expectations about bycatch may be different than what actually occurs, due to many factors that are difficult to predict.

Mr. Merrill provided an overview of the regulations that establish an overall herring bycatch limit and trigger closures in specific areas at specific times if the limit is reached in a particular fishery. For the first time in some 30 years, herring bycatch this year triggered closures in all three HSAs, and the limits were reached early in the 2020 season, relative to other years. Along with the regulatory closures in the HSAs, NMFS has additional inseason authority to open specific areas if it is deemed appropriate in order to meet other conservation and management objectives. In this case, NMFS had to consider the potential impact of the HSA 2 closure on herring, and also the potential impact on other bycatch (salmon) and on potential impacts to the pollock fishery.

Mr. Merrill explained that this year under the herring bycatch regulations, HSA 2 could have been closed for a 6-week period from July 1 to August 15; therefore, by this date the area would have re-opened. NMFS has continued to track herring bycatch in the HSA 2 and other areas, and managers continue to talk with the pollock fleet throughout this period. In the meantime, the fleet has taken actions to avoid herring bycatch. In general, so far this B season, there has been less herring observed on the grounds this year compared to last year. At the moment, based on the rates of bycatch in the pollock fishery, and taking into consideration the remaining harvest of pollock, it is possible that by the end of the year the total herring bycatch could be about 3,639 metric tons (mt). The regulatory bycatch limit is 1% of the estimated herring biomass. This biomass estimate is provided by the Alaska Department of Fish and Game and for 2020 is 253,207 metric tons (mt). Therefore, based on NMFS's projections of expected bycatch, the end of year bycatch may be approximately 1.5% of the total herring biomass.

Dr. Divine asked for information about the amount of Chinook bycatch during HSA 2 opening.

Mr. Merrill indicated that in the NMFS written comments to tribal questions, the agency had provided overall salmon bycatch inside and outside HSA 2, and had provided website links to salmon bycatch reports.

Dr. Divine clarified her question: that the information NMFS provided were averages and for 2019, but NMFS did not include specifics for the July 1- August 15 period in 2020; therefore, what was the Chinook bycatch for that particular period? Ms. Mary Furuness offered to

perform a data query to provide that information. Ms. Furuness asked that this request be noted in the consultation report as a helpful reminder.

NMFS is providing this information in this report. This information was not presented during this Tribal Consultation.

From July 1 to August 15, 2020 – the dates of the HSA 2

Chinook salmon in the Bering Sea pollock fishery

Total: 750 Chinook salmon

Inside HSA 2: 169 Chinook salmon

Outside HSA 2: 581 Chinook salmon

Non-Chinook salmon in the Bering Sea pollock fishery

Total: 62,027 non-Chinook salmon

Inside HSA 2: 19,152 non-Chinook salmon

Outside HSA 2: 42,875 non-Chinook salmon

Dr. Divine thanked Ms. Furuness and indicated these figures would help supply the information used to grapple with potentially opening the Winter HSA, and that she would like a better understanding of the regulatory triggers for doing it. She stated that the impact on herring and salmon and other species were considered in combination with the economic considerations of the pollock fishery; this is what the agency used to consider the action taken, by anticipating what was left to catch in the pollock fishery, combined with estimates of bycatch. If there are fewer herring on the fishing grounds now, but the extremely high abundance that led to the inseason action is still present, then she asked how those realities will now be considered and applied to the upcoming Winter HSA agency decision. She expressed there is uncertainty in the bycatch numbers looking back at historical catch, and it appears like it could be a 50/50 consideration of opening the HSA, or not understanding the impact, based on the bycatch information provided by NMFS. Dr. Divine indicated there was a lot of uncertainty in the data, along with the economic considerations that informed the inseason action, including that it was necessary to prevent the underharvest of the pollock TAC. She questioned how the inseason action for HSA 2 was the least restrictive option or whether NMFS could have waited to see how the pollock B season went.

Mr. Merrill asked the group whether we should continue to address the HSA 2 based on the other topics on the agenda.

Dr. Divine responded that with respect to HSA 2, there appears to have been questions about other options that could have occurred? She asked for clarification on what is considered as an emergency when other options may have been available. She indicated that ultimately there may be a fundamental disagreement as to what constitutes an emergency.

Mr. Merrill provided a general note about inseason management: that it is often referred to as an art. That does not imply that NMFS doesn't use the data – the agency does rely on the data available – but that inseason decisions often involve a complicated suite of issues that managers try to balance at once. The challenge with these types of decisions is how much to weigh one type of data versus another type. It is often difficult to determine how much weight to provide one particular data point at one moment in time, and in fact the decision making is usually a constant evaluation of a large number of variables. In this case, NMFS relied on the fact that when the agency opened up HSA 2, there was a lot of concern about salmon bycatch outside of HSA 2, combined with the ability of the fleet to harvest its allowable catch based on prior years' performance of fishing outside the HSA 2. If the fleet continued to fish with low harvest rates of pollock, it would require the boats to fish later in the autumn when salmon bycatch rates often increase. Mr. Merrill noted that the rate of pollock catch is relatively low this year, and that NMFS is mandated to manage for optimum yield in the BSAI, which includes the pollock total allowable catch (TAC). The complicated sets of considerations that must be balanced is the "art" of managers. Glenn further noted that one of the challenges is being very precise in terms of data and that there may be a perception that there is other information out there but instead it is more of a balance of factors that is often very complicated.

Dr. Divine stated that Mr. Merrill's explanation does get at the question about how data is weighted at any given point in time. Tribes want clarity on how those data and impacts on bycatch, catch, optimum yield, and past years' uncertainty, including if the pollock fleet continued to fish later and resulted in higher salmon bycatch, were weighted and considered in the decision to forego tribal consultation and the public comment period before the decision made. She asked for more information about how that weighting led to the decision to open the HSA 2.

Mr. Merrill answered that one factor NMFS can rely on is what the agency knows about where the pollock catch is at the present time. NMFS had several discussions about the catch rate of pollock in the fishery, and the effect of low harvest rates if that continued for the rest of the year. As an example, he posed several hypothetical questions: What would it mean if harvest rates remained really low and continued for the remainder of the year? What it would mean if there was some increase in harvest rates from what they currently are? How many more weeks for the fleet to fish if we assume certain harvest rates? What information do we have from past years about salmon and herring bycatch in certain areas? When the fleet fishes later in the year by several weeks, how much could those bycatch rates change? Mr. Merrill expressed there can be many different assumptions and scenarios – looking at a range of years, and different data, for example. Also, there's an understanding that if the fleet is not fishing in HSA 2, then there will be added trip time to the fishing fleet, which translates in a longer season length with increased costs. Further consideration could be given to observer data (spatial data), and what might this mean. Factors include the spatial distribution of the pollock fleet, where pollock are traditionally caught, and past years' data about catch and bycatch. All of these factors involve an evaluation of a series of different assumptions, and there is not one specific answer and no single way to blend the information. NMFS uses its understanding of what is happening at the

moment, and then projects that into the future to apply assumptions to pollock harvest and bycatch through various iterations.

Brenden Raymond-Yakoubian stated he was disappointed with the written responses provided by NMFS; one area that was confusing and disappointing was regarding how decisions are made. He understands and appreciates the added detail about the pieces of data, but indicated he doesn't understand the black box about how this data is weighted. It seems subjective and confusing. He asked if there is some tool that is used to make these decisions, or are these decisions based on the subjective expertise by individual people. He indicated there are other areas of concerns, including the wide range of data and inseason information used. He stated that the NMFS responses indicate that it is necessary for the agency to prevent under harvest of the pollock TAC; it seems that the pollock TAC was the priority. This is not a legal necessity. There is the authority to use inseason management to make sure pollock is harvested, but there are mandates to consider other types of information e.g. Local and Traditional Knowledge (LTK) which it does not appear were adequately considered. It is clear that pollock was the immovable object. He stated there has been discussion about balancing National Standards, but all of the Standards are equal, and the pollock TAC is not equal to OY, so it's not clear why part of one Standard, the pollock TAC, seems to have outweighed others?

Mr. Merrill acknowledged the comments are referring to the inseason management process and raise a number of questions about how NMFS approaches management. One of the things NMFS relies on is a series of factors, those factors are somewhat subjective, and professional judgement is used, based on understanding of the data and professional expertise based on many years of working with fisheries. Using the professional expertise of agency personnel who work with these fisheries, NMFS tries to appropriately respond to a range of factors that must be considered in our management decisions under the Magnuson-Stevens Act. Mr. Merrill cited page 3 of NMFS's written comments, which lists 8 factors that can be considered to make any inseason determination: fishing effort, catch rates, stock location, stock status, bycatch rates of PSC, examination of historical catch rates, economics of the fishery, and any other relevant factors. NMFS's response doesn't detail the exact blend of those factors and the specific weighting, but there was a lot of conversation about this action and how it could result in additional herring bycatch. The decision isn't just centered on pollock TAC. Mr. Merrill hopes it is clear that this isn't the only thing that managers consider. In the BSAI this year, 70% of OY is pollock and NMFS is supposed to take that into consideration with all the other factors, including bycatch. It is our responsibility to improve how we do our jobs and that may be a challenge here, but staff did a good job in this context with the fast pace of decision making. Mr. Merrill offered the question: based on what we see now, what do we think will happen in the future? Fortunately in Alaska, compared to other regions, we have an extensive data collection program on the vessels, and a strong working relationship with the fleet. NMFS's ability to get and communicate information quickly is an important factor in the agency decision making.

Mr. Anungazuk said he has talked with others who are gathering subsistence foods, and it all comes down to seeing changes in the last several years that people are very concerned about.



He mentioned the example of shore ice, where the ice edge is attached to the beach differently now than it was a few years ago. Usually, the ice is frozen to the beach, and now with warmer winters there is movement of the ice that affects the nearshore kelp beds that herring eggs are attached to. This movement of the ice at the beach is concerning because it scrapes off the kelp that is usually protected by the stationary ice. Mr. Anungazuk expects NMFS to gather more of this type of information about traditional knowledge, as this could impact the estimates of herring recruitment and hatching fish in the next few years.

Mr. Merrill asked the group for advice on how NMFS can improve consideration of traditional knowledge in the agency management process.

Dr. Raymond-Yakoubian responded by pointing to the kinds of information that our experts like Mr. Anungazuk have shared and are aware of - given the dramatic ecosystem changes that are being observed - doesn't NMFS think that you need to change how inseason management decisions are made? We are not operating in the same ecosystem as 2000, based on what we hear from traditional knowledge experts, and there have been rapid and dramatic changes. Regarding the decision making process for inseason management, there are very different perspectives on both sides. She said that the pollock industry not meeting its TAC is not an emergency. There are different values being applied to the ocean resources, species, and that impacts the resulting decision making. One important step is to acknowledge this difference, and to explore those different values. Dr. Raymond-Yakoubian said she understands that management decisions use the professional judgment and reliance on expertise of staff, but the public should be able to follow that process. She expressed that science is supposed to be transparent and replicable, and they should be able to follow the steps that were taken to get to that decision. The tribes have not been able to see those steps in the information provided by NMFS, and this process is not transparent. The agency has huge gaps in using social science and traditional knowledge to understand and analyze the non-economic impacts of the management decisions. Dr. Raymond-Yakoubian said the tribes have experts and elders on the telephone line and in the communities; they are the people who should be consulted with questions about the ecosystem. Tribes and Tribal organizations also have many members who have western-science education and training, and they are still not able to follow this decision process. She indicated this means NMFS is doing a poor job explaining its decision making. She reiterated that the means to reach a decision is not transparent.

Mr. Merrill said he appreciates this perspective. The agency is trying to acquire a better understanding of the perspectives and values and recognizes that this was a challenge in the previous conversations. This is often difficult, and we're often focused on the data and regulatory side of things, so we appreciate the comments and think this is helpful.

Regarding transparency for a specific inseason decision, Mr. Merrill said that most of the decisions NMFS makes are determining when to close an area or fisheries to prevent exceeding the allowable catch, or to prevent bycatch issues. NMFS has tried to structure the management system so that the limits and fisheries are all clear at the start of the year – there is a structured system to set limits and to monitor to stay within those limits. The HSA 2 issue was an unusual action

in terms of our inseason management authority. He indicated he appreciates comments on this action.

Dr. Raymond-Yakoubian said she hopes these conversations help us move forward and make the regulatory process more transparent.

August 14, 2020 Request for Emergency Action from the At-sea Processors Association to Suspend Closure of the Winter Herring Savings Area from September 1, 2020 until November 1

Mr. Merrill introduced the Winter HSA petition. This included an explanation of an emergency rule request under the Magnuson-Stevens Act and the factors to be considered, which are outlined by NMFS Policy Guidelines and include whether an emergency exists that results from recent, unforeseen events or recently discovered circumstances, whether the emergency presents serious conservation or management problems in the fishery, and whether the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. Mr. Merrill noted that the Winter HSA emergency rule petition was directed to the Secretary of Commerce, rather than the Council, and requested NMFS to relieve the Winter HSA effective September 1.

Dr. Raymond-Yakoubian indicated this petition appears to have the same justification as the HSA 2 action, which is primarily to allow the pollock fleet to more likely catch the pollock TAC.

Dr. Divine asked how this petition relates to the justification of HSA 2, and how the consideration for Chinook salmon bycatch is not relevant with this petition.

Mr. Merrill provided his understanding of the petition: it is a factor that if this area is closed, then it prevents harvest in one of the few areas of productive pollock fishing at this time. Based on the location of the closure relative to HSA 2, the closing of the Winter HSA is different. HSA 2 is the inshore fleet delivering shoreside. The nature of the fleets fishing is that they are not seeing the same issue with the potential impacts on salmon bycatch

Dr. Divine asked whether closing the Winter HSA is usually an annual event.

Mr. Merrill responded that the Winter HSA has been closed in the past, but not often – the last time the Winter HSA was closed was 2012. The herring bycatch limit is rarely reached and if is reached it is usually late in the season. The at-sea harvesting sector doesn't usually fish in the Summer HSA 1 and HSA 2.

Dr. Raymond-Yakoubian mentioned they had received a copy of this new petition last week and forwarded it to the tribes represented by Kawarak. She said she appreciates the information. She asked about NMFS's outreach to other tribal organizations.

Mr. Merrill said NMFS has not engaged with other tribal governments on the Winter HSA petition. He indicated that if there are other tribes that would like to be involved, he would be happy to do that. Given the geographic scope of the request, it appears this group would be good place to start.

Dr. Raymond-Yakoubian requested that any tribes that are not part of this consultation should receive outreach and notification about this. She indicated this is the agency's responsibility. She asked where this information has been provided to the public, outside of this conversation, and pointed out this is more about the consultation process that we are moving forward with. She also asked about the timeline for decision making on this request.

Mr. Merrill said that since NMFS had just received the petition recently, NMFS's internal process is still in the initial stages. NMFS talked to the petitioners about the timing of the request and the period of time it takes to consider it. If the agency were to move forward, the emergency rule wouldn't be implemented prior to September 1. Typically, NMFS evaluates the petition to see if it meets the emergency criteria, and it is not a requirement that we grant the request. This consultation is timely in the process for this petition.

Cody Larson stated that timeliness is everything, and having an opportunity to disseminate information and talk to tribal administrators takes time. Mr. Larson reiterated that the tribes want to see the agency initiate consultation with tribes.

Mr. Merrill offered to send a letter to all the tribal governments in the Bering Sea, Aleutian Islands, and Arctic, to provide notice about the Winter HSA petition and to invite an opportunity for more consultation.

Frank Katchatag spoke to the HSAs and the herring discussion overall with respect to the food chain and with all species in the ocean. However, the conversation has said nothing about beluga whales, which migrate many miles, along with seals, and herring is an important part of their diet.

Dr. Divine offered comments on the ecosystem effects on marine mammals, in particular female northern fur seals with nursing pups. Many of these seals will be migrating in the autumn, and foraging ecology and food web dynamics should be considered for the shelf between St Matthews and the Pribilofs and through Unimak Pass, Aleutian Islands. She asked Mr. Merrill to explain the petition's request and timing: given that the petition requests opening the area on September 1, would the Agency make a decision after September 1?

Mr. Merrill acknowledged that the request asks for NMFS to open the Winter HSA beginning September 1. If NMFS were to determine the petition meets the criteria and an emergency rule is warranted, the process of writing the rule and reviewing and publishing takes at a minimum of several weeks. If the request proceeds, at a minimum it would not be effective until approximately mid-September. He said that typical timing is at least a month to 6 weeks to get emergency regulations out.

Brenden Raymond-Yakoubian provided a clear statement: they do not want NMFS to open the Winter HSA. They do not want NMFS to grant this request. He asked to please continue to monitor and minimize all bycatch; however, the petition does not address an emergency. He indicated that the failure to harvest the pollock TAC in the most convenient way is not an emergency. This petition is the second one this year, and this is a warning shot – something is happening at the ecosystem level and we need to take a step back to evaluate our precautionary, scientific based management. Mr. Raymond-Yakoubian said that a precautionary approach should be used and that we don't have enough information to understand what is happening in the ocean. Making adjustments like this defeats the purpose of bycatch closures in the first place, which were developed through the normal North Pacific Fishery Management Council (Council) management process. He further stated that the petition request implies there are excess herring in the water, but this is not a good justification to then utilize herring as waste (bycatch). Additionally, it is not unforeseen if herring bycatch has already happened one other time this year. Mr. Raymond-Yakoubian stated that the NMFS information about herring bycatch being lower outside the HSA 2 warrants that this would require a full NEPA analysis because things have changed so much since 1990 and the implementation of Amendment 16a. Also, the request states that the fleet will be fishing at the end of the B season, into October, when bycatch is higher and this justification conflicts with earlier HSA 2 action.

Mr. Merrill asked to reference back to Mr. Katchatag's questions about beluga: he asked if this is this a concern about beluga prey, or is it a concern that the emergency request would have adverse impacts on beluga stocks?

Mr. Katchatag explained he referenced the interrelatedness of our food web. He mentioned the example of data about seal travel in the Bering Sea – that they travel across to Russia and back and that these animals prey on both herring and salmon. These species need to be considered in the decision making; for example, how this affects the different areas and also the sea mammals that locals harvest. He said these declines need to be pointed out.

Dr. Raymond-Yakoubian said that Mr. Katchatag's comments are related to Lauren's and Toby's comments about concerns for the species that prey on herring. She said an ecosystem approach to decision making needs to be used in decision making. She has heard talk about perspectives and values here and also at the North Pacific Fishery Management Council and other venues. She pointed out that fish is not just food to our communities; fish is also food for the soul, and they feeds the culture and language, they are kin, and other important factors. What they are not is garbage. There are detailed and complex relationships between communities and the marine animals and different parts of the ecosystem. Dr. Raymond-Yakoubian emphasized that fish is never garbage and is never wasted. To tribes, it is offensive that food is treated as a waste product.

Mr. Merrill expressed thanks and appreciation for Dr. Raymond-Yakoubian's explanation of these values and perspectives. He asked if there were other issues with respect to the Winter HSA emergency petition.

Mr. Anungazuk said that some people have asked for an explanation for what is done with the herring bycatch – is it ground up and dumped? Why is the bycatch not processed and given away?

Mr. Merrill said there are a couple ways this issue is addressed. First, NMFS tries to craft regulations that minimize bycatch to the extent practicable. He said there are different perspectives on this, but the goal is to try to avoid bycatch as much as possible. He stated there have been a lot of different rules in the past concerning this. Second, when bycatch does occur, there is a Prohibited Species Donation program (SeaShare), and it does provide an opportunity to keep the bycatch and utilize it as food. This program has been growing each year. Third, for some species, the size and quality of the fish doesn't allow it to be donated to the food bank program, which presents challenges. It also presents a challenge for fishery managers – if bycatch is allowed to be caught and delivered, it may incentivize people to not pay attention to bycatch as much, compared to rules that don't allow the fish to be landed. Still, it makes a lot of sense to provide the bycatch as food, but herring in the pollock fishery is not available for that kind of processing as food (the Prohibited Species Donation program).

Dr. Raymond-Yakoubian commented about bycatch: she said while the pollock fishery isn't seeking bycatch, it is NMFS' policy that it must be reduced. The outside perspective of imagining how a prediction of year-end bycatch estimate is made is difficult to visualize, particularly the prediction of 3,000 metric tons of herring, what that could possibly look like, and how much fish that is. It is extremely painful to think about how many people that by-caught food could feed and that the herring is not being used for intended purposes. She understands the issue of not wanting to incentivize bycatch, and in terms of SeaShare, those types of programs often put people in a Catch-22: the recipients don't want the bycatch to happen and are concerned about bycatch and ecosystem impacts, but at the same time they don't want the bycatch fish to be wasted. They would rather harvest the resource themselves and have it be available to the ecosystem. This can make it hard for people to accept the bycatch donations, and it's challenging for communities to participate because of where the fish comes from and what it represents.

Mr. Richard Slat's concurred with comments about the importance of the food chain and the reliance on the subsistence resources. Herring is a prohibited species, and changes are making it very difficult in rural Alaska; in particular, climate change is creating hardships in rural Alaska. He said there is a lot of uncertainty, and he feels that the inseason management decision to open HSA 2 appears to be a decision in favor of the pollock industry and for profit. He stated that there is no emergency, and that concerns about bycatch are consistent with past history of concern of wasting food that would otherwise be consumed. He said he appreciates the consultations, but has deep reservations about the Winter HSA action because of the fast approaching time before the September 1 target date. Subsistence use should be considered

before all other uses because these are trying times for subsistence users, and there is no end in sight.

Mr. Merrill said he appreciates the comments. He explained that although the request in the petition asks for relief beginning September 1, that is not a timeline NMFS considers feasible if rulemaking were to occur. There will be more time after September 1 to provide input on this request.

Dr. Divine stated she supports the previous comments and would like to echo that the request should not be considered an emergency – it is not justified. Dr. Divine noted that this industry group is not the same group that requested HSA 2 be opened. The emergency rule request relied heavily on the uncertainties and impacts of COVID-19. But, she pointed out that COVID-19 is impacting every fishery; for example, the CDQ fishery (longline halibut) and the local St. Paul processor (Trident) didn't open, so the halibut harvest was foregone. Dr. Divine indicated there are still things happening that could provide relief for the pandemic, such as federal relief programs. She has not heard about the results of opening HSA 2 and does not know if this impacted the pollock fleet's ability to catch their quota. She pointed out that if the pollock fleet is able to catch its quota then this is an exception to what is happening to all others this year who are impacted by COVID. She stated that they have heard over and over again that the uncertainty was unprecedented. She also raised concerns about unequitable weighting, and that they need a clear and full look at this and to exhaust every route, such as doing a complete NEPA analysis and extending tribal consultation to all Bering Seas tribes. She indicated we are still talking circles around a decision we think has already been made to benefit large industry and commerce over rural residents and rural communities who have cultural ties to the lands and water through subsistence use. We are in a delicate balance, and the art of management is only going to get harder. The precedent that is set now will impact future decisions and is going to continue to create challenges if commerce continues to trump the ecosystem.

Mr. Merrill stated that generally, for HSA 2, NMFS has observed lower pollock catch rates than in past years, and this continues to be a factor in the fleet operations. Currently, we are seeing somewhat higher catch rates than occurred earlier in the year; however, it is still possible that even with the HSA 2 action that the fleet will not achieve their allocation this year.

Dr. Divine asked about the context of this impact, and whether other fleets have been affected by COVID-19?

Mr. Merrill said the impacts have varied a lot, depending on the fishery and area. He mentioned two different, emergency rulemaking efforts for halibut IFQ. Despite these rule changes, it is too early to tell whether the fleet will be able to harvest its allocation in all areas – it is too early to tell, given fleet dynamics and markets – so COVID-19 impact on that fleet is still uncertain. The crab fishery did fully harvest its allocation but that fishery was affected differently, because the fishery had largely concluded before COVID-19 became an issue. He mentioned there is still quite a bit of time before the end of the year, so some fishing fleets might be pretty close to harvesting their full allocation, but for others, it is unclear.

Mr. Katchatag offered thanks to Mr. Merrill for his comments about minimizing bycatch because it could open a race to get bycatch. He indicated that coastal people who live off the coastline appreciate the comments about avoiding incentivizing a race for bycatch.

Mr. Merrill offered a summary of some of the issues that this consultation has covered: There is a concern about the Winter HSA emergency petition and potential impact of herring removals on the food chain; there are cultural impacts of herring and salmon bycatch, and in general with the NMFS fishery management process of fish and other resources such as fur seals and beluga whales; the description of the HSA 2 action doesn't meet criteria for an emergency; there is a need for precautionary management given the uncertainty with stock status and changing climate and ocean conditions; the petition to open the Winter HSA is not an unforeseen event, given the HSA 2 action; there is a concern for adequate analysis of potential impacts in the decision making process and given the HSA 2 action a bigger concern with herring bycatch in general; there are concerns about timeliness and process generally for tribal consultation; and the presentation of the Winter HSA action is timely for tribal participation and comment in the process.

Ms. Jennifer Hooper said she had three points she would like to emphasize. First, some people have already spoken this and she agrees that timing of this call is good, considering the second HSA request, but this should not be the complete consultation on this issue. There are many communities and tribes that have not received this information and had the time to understand it. Second, regarding salmon bycatch, Ms. Hooper indicated how large this concern is. A lot of tribal people were around in the mid 2000's when the Council process on salmon bycatch occurred, but currently, for the second year, the Chinook escapement in the Yukon River will not be met despite severe subsistence restrictions in the Alaska portion of the river. She is not sure what this will mean relative to the bilateral process for Yukon River management. The Chinook failure was compounded by extremely low fall returns of chum to the river, which were not even at half of the forecast. The whole river is closed to fishing. She indicated the Kuskokwim River fared better, but not without subsistence restrictions. Therefore, salmon is a very real concern with Western Alaska. Third, Ms. Hooper indicated that there is concern with the precedence of two HSA requests within 3 months and the message this sends to the fishing industry. Fishing is not a guaranteed business and there is lots of unpredictability; that does not mean that the formal management process that people know and understand should be subverted by submitting requests out of cycle and disrupting a person's time to respond to those requests. She reiterated that these requests will set a precedent, and that requests like this should not become the norm.

Mr. Merrill said he appreciates the comments, and said that unfortunately we have all been watching the challenges with salmon returns. He indicated that Ms. Hooper's perspective is helpful to keep in mind as we move forward. He said the emergency rule process and guidance determines that the measures are not adopted unless there are extraordinary circumstances. Moving forward on actions is something NMFS is very careful about and the precedence is important to keep in mind.

Mr. Larson indicated he appreciates the comments from Ms. Hooper about the status of salmon. In Bristol Bay, the new norm is something everyone needs to be aware of. For example, there is less data gathering on Chinook, so there are no longer escapement goals on several rivers: Egegik, Naknek, Alagnak, Kulukak, and Togiak. He asked: without escapement goals, how do we assess the new norm? The two rivers that do have monitoring – the Nushagak and Chignik – did not reach escapement goals this year. He suggested that we need to have an ecosystem wide perspective about the impacts of actions concerning prey species, especially lower value prey species such as sand lance, which have substantively lower caloric value in warm years. Mr. Larson also explained that it would be prudent to consider a range of averages: 10-year averages, 5-year averages, and 40-50 year averages, as well as generational averages. He explained that how you look at averages is important; for example, returns to Togiak are at the 10-year average, but are half of the numbers in the 1990s.

Dr. Divine read comments submitted by The Native American Rights Fund (NARF), who is not on the call, but sent written comments to share. The comments are included in this report as Attachment 4.

Communication with Tribes and Tribal Consultation in general - 11:00 a.m.

Dr. Raymond-Yakoubian shared several comments and thoughts about what tribal consultation should look like, and how it could be improved today and into the future. Her first point is that tribal consultation is not an issue-based relationship; rather, it is an ongoing relationship, with information sharing and trust-building, that is at times punctuated with issue-specific conversations about things such as herring bycatch. The ideal is to have an ongoing relationship. She indicated that the scope of consultation should apply to everything – that may appear to sound like too much, but tribes are stewards and use the entire marine ecosystem and are interested in everything the agency is doing that may have potential impacts. She expressed that this includes more than just Sustainable Fisheries, and encompasses the whole Agency. She said there is a need for a broader Alaska Region-wide approach to tribal consultation.

Dr. Raymond-Yakoubian continued by stating that how and when to consult should be both meaningful and ongoing, with the expectation that consultations should be done before a decision is made. She expressed frustration with the HSA 2 action because it was not possible to have meaningful input into the process since the consultation was after the decision had been made. The goal is to have timely consultations that precede the decision being made and done. The tribes expect an ongoing relationship with NMFS to cover all relevant activity and NMFS should contact tribes about all issues. She indicated this may sound like a big request, but it is feasible and doable when there is dedicated staff and an ongoing relationship. The NARF letter pointed out that tribal consultation should not require tribes to initiate the process; instead, whenever there is an activity that arises within the NMFS sphere, there should be consultation initiated by the Agency. When consultation should occur is prior to every Council meeting with Council staff present so that input can be included in the documents. This includes other



decisions outside of the Council process and all decisions such as emergency rule requests and including research activities. The tribes want to have meaningful and impactful input. This could be facilitated with dedicated agency staff such as a tribal liaison for the AKR.

Mr. Anungazuk stated that the biggest concern from people who don't commercial fish is that subsistence fishermen too often take the brunt of the conservation measures with food shortages, particularly when stocks are low, and that this situation should not happen in the first place.

Mr. Raymond-Yakoubian mentioned that in the NMFS responses to written tribal questions regarding general consultation issues, one question was deleted and NMFS did not provide a response. It was stated by NMFS in June that the Council is advisory and NMFS is the decision making body and how many times has Consultation resulted to a change in a decision by the Council? Mr. Raymond-Yakoubian said NMFS can answer now or later. The NPFMC process doesn't have an adequate integration with Tribal Consultation, and there is a feeling that the process often disenfranchises Tribes and doesn't adequately address Tribal concerns. Progress like what Dr. Raymond-Yakoubian suggested we can make on this would be good.

Dr. Divine addressed the Council's work with the tribes, and encouraged the Council to work more with them. The NMFS response to the tribes' written questions contained three bullet points, which included the Community outreach committee – but that is not a committee and it is no longer active at the Council. The Community Engagement Committee (CEC) is now active, but with a limited scope and may be disbanded unless there is support for continuing it. The tribes have provided comment to the Council and there has not been a response from the Council or NMFS. The Bering Sea FEP Local and Traditional Knowledge module was also used in limited scope and a limited ability to provide input into Council processes, and Dr. Divine stated that various Council bodies have sought to limit that work. She said there was a lot of negative feedback about engaging more in this particular Taskforce and the issues it would address. The Social Science Planning Team (SSPT) is identifying additional tribal gaps in data, but Dr. Divine stated that Council staff have said the SSPT was not formed to address Traditional and local knowledge and would instead like to see the CEC and Taskforce to deal with this. Dr. Divine said the SSPT is more focused on the non-economic social science, rather than community-focused social science. If NMFS supports tribal voices in the Council process, it would be helpful to hear that in Council meetings.

Mr. Larson suggested that it may help these inseason discussions by using the Eskimo Walrus Commission and Bristol Bay Whaling Commission as examples of agency collaboration. He noted these are not consultations with tribal governments, but they do use tribes and rural persons as knowledge-carriers to help managers with their decisions.

Mr. Merrill indicated these comments are a useful part of the agenda, to build on our recent experiences and plan for the future. We struggle with the "Small c" [*i.e. informal*] consultation about the exchange of information and the "C" formal consultation process. One thing that has been highlighted with the challenge of NMFS management is how the agency should gather and

process information and how that feeds into the decision making. Even with a lot of experience in the Council process, it is not always clear to us either.

Mr. Merrill apologized that we failed to answer a question that was submitted to the agency – this was not intentional. The question asked, how many times has tribal consultation resulted in management changes? He said this is a hard question to answer, not because tribal and LTK information isn't considered, but because the Council decisions are such an iterative process. For example, salmon bycatch in particular involved two major rulemakings, and tribal input was essential in those rulemakings. The awareness of the Council and the public of the tribal interest, and the importance of the tribal perspective, was a cornerstone of many of the Council concerns in that process. But how that input gets considered in the long, iterative Council process is hard to see explicitly, although it is there.

Mr. Merrill acknowledged Mr. Raymond-Yakoubian's examples of effective consultation. He said the agency can always benefit from learning from experience of others and with productive engagement. NMFS is interested to learn about how that process is undertaken. Specific to meetings before each Council meeting – we have relied on “Little c” consultations through our Council process and there are ways that we try to gather than information and there are specific issues such as salmon bycatch in the Bering Sea and others that are considerable concern to tribal governments with explicit outreach.

There are other issues that we have traditionally believed that are not such an interest to tribes and clarifying these types of issues would be helpful. Opportunities to address the less obvious concerns through ongoing conversations and to think broadly about how to continue to have both formal and informal consultation and share information.

Dr. Raymond-Yakoubian mentioned that we have reached the end of our allotted time for this consultation. She believes the tribes have a lot to say about what works and what does not work and is willing to share their collective experience about this. She suggested opportunities for a future meeting, and perhaps extending an invitation to active tribal liaisons from other agencies to share their experiences of what works as potential examples of how to move forward. She indicated that “Big C” and “Little C” is good description for the types of consultations and that liaisons are crucial in helping to determine what phase we are in. The liaisons are able to always be asking what the level of interest is on a given issue.

Dr. Divine thanked Mr. Merrill. She mentioned that Mr. Merrill's reading through the synopsis of high level tribal concerns was a great list, and thanked him for being attentive to the issues.

Ms. Hooper asked to add to where we're heading with the conversation and the comments shared. She emphasized where we're going is to develop a proactive process for tribes and the agency to move forward. These issues will not go away, it will grow. Look forward to more.

Mr. Anungazuk offered thanks for the consultation process. He said most of our people support sustainable commercial fishing, especially when they can participate in it. When fish stocks get

low, it will take a while to rebound, and that may include changes to fishing gear because of potential for harvesting other species. He also mentioned the habitat changes in the Arctic. In the 1960s and 70s we saw many different Bering Sea species washed up on the beach, so this is not necessarily a new thing that these fish are in the northern waters.

Mr. Katchatag expressed thanks to everyone on the call, and he appreciates Glenn's reaction and looks forward to more of these Tribal Consultation conversations.

Next Steps - 11:50 a.m.

Dr. Raymond-Yakoubian said the tribes would like to continue the conversation about tribal consultation in general. She suggested that perhaps there could be email discussion about moving forward from here.

Mr. Merrill agreed to communicate by email to continue with options for the processes and next steps. NMFS will also send a letter to tribal governments informing them of the Winter HSA petition. He indicated that the longer term issue is the tribal and agency process in general in a different timeline. He mentioned again that this is a difficult time of year, for example, Alaska school starts soon. He asked, how do we want to coordinate schedules in the future? He again said the agency appreciates the comments received and the perspectives shared today. Long conversations like this may be difficult to organize and can be tiring, but everyone recognizes that the interest level is there.

Attachment 1:  
Questions Submitted to NMFS Prior to the August, 2020 Consultation

**Some of the outstanding questions from Tribes, ANOs, and Tribal reps for NMFS  
in advance of Tribal Consultation meeting proposed for August 2020**

Overview

Some of the questions below were discussed during the first Tribal Consultation meeting dealing with herring bycatch on June 26, 2020. However, we either have follow up questions about them, want further clarification, or did not feel we received a sufficiently detailed or otherwise adequate response.

Additionally, we have included other questions below on a variety of topics (including but not exclusively related to herring bycatch) for which there wasn't enough time during the June 26 meeting.

For all questions, we would like specific replies and information, with supporting documentation and data where relevant.

We request that the response to these questions be provided in writing in advance of the meeting.

Regarding herring bycatch issue (e.g. NMFS use of inseason management authority, etc.)

- Which NOAA, NMFS, and Department of Commerce staff were involved in this proposed action, when, and in what ways? Was Assistant Administrator Chris Oliver involved, and in what way? If Mr. Oliver was involved, we request his participation at the upcoming Tribal Consultation meeting. Additionally, we would like to know who at NMFS and in the pollock industry were in communication regarding this issue, when, and what was discussed?

*Assistant Administrator Chris Oliver was not involved. Several NMFS Sustainable Fisheries (SF) and NOAA General Counsel (GC) staff were involved with the main participants Glenn Merrill and Mary Furuness in SF, and Molly Watson in NOAA GC.*

- NMFS knew herring bycatch in the pollock fishery was a potential problem starting at least in May of this year. Why did you not immediately initiate Tribal Consultation regarding this matter and proposed actions, so that such Consultation could have a meaningful impact on the decision-making for the action, as you are required to by EO 13175? And, why was your Tribal Consultation only upon 'request', and after-the-fact in terms of the decision-making? Does NMFS acknowledge that it failed in its obligations to conduct proper Consultation with Tribal representatives regarding this matter?

*We were not sure of the full impact of the HSA 2 closure on the pollock fleet, until NMFS examined the information that was provided by pollock fishing fleet and submitted in the Emergency Rule petition to the Council. The Emergency Rule is dated May 22, 2020 and posted on the Council meeting agenda on May 26, 2020. Although NMFS had herring bycatch information provided throughout the fishing season, NMFS did not specifically consider the potential impact of the HSA 2 closure on pollock or other bycatch species (i.e., salmon) until the Emergency Rule petition was received and reviewed. We scheduled a Tribal Consultation meeting based on a request received from Kawerak Inc. during the June Council meeting.*

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- What reasons and data does NMFS have supporting the view that salmon bycatch in the pollock fleet is higher outside of the HSAs?

*In the [Federal Register notice issuing the opening of HSA 2](#), NMFS did note that closing HSA 2 could force the pollock sectors and CDQ participants to areas with higher salmon bycatch. NMFS further explained that closing HSA 2 could extend fishing to the end of the season and compound pollock TAC and salmon bycatch concerns. Fishing later in the B season has been observed to increase the bycatch of other species including Chinook salmon. As analyzed in Amendment 110 to the FMP ([81 FR 37534](#), June 10, 2016), historical salmon PSC rates observed in pollock fishery indicate the closure of the HSA 2 will move these fisheries to areas with higher salmon bycatch and delay these fisheries to time periods of higher Chinook salmon abundance.*

*Here is the BSAI salmon bycatch by the pollock fleet outside and inside the HSA 2.*

<i>Year</i>	<i>Outside HSA2</i>	<i>Inside HSA2</i>
<i>2010</i>	<i>10,686</i>	<i>5,604</i>
<i>2011</i>	<i>72,716</i>	<i>100,781</i>
<i>2012</i>	<i>6,556</i>	<i>15,216</i>
<i>2013</i>	<i>45,581</i>	<i>59,479</i>
<i>2014</i>	<i>135,308</i>	<i>66,242</i>
<i>2015</i>	<i>85,888</i>	<i>108,951</i>
<i>2016</i>	<i>150,040</i>	<i>154,172</i>
<i>2017</i>	<i>287,670</i>	<i>160,332</i>
<i>2018</i>	<i>172,482</i>	<i>97,622</i>
<i>2019</i>	<i>170,864</i>	<i>129,357</i>
<i>Average</i>	<i>96,939</i>	<i>78,136</i>

*Post-publication errata note: actual averages are 113,779 for Outside HSA2, and 89,776 for Inside HSA2*

- What was the basis for your decision to open HSA 2, specifically? In the June 26 Consultation meeting, we heard vague discussions about challenges and balancing competing considerations, but no specific information about what the final determinant, specific analytical process, and most important criteria were. Does NMFS have, for example, some sort of evaluation/weighting instrument or tool which is used in making such decisions?

*As stated in the [Federal Register notice issuing the opening of HSA 2](#) - The inseason adjustment is based on the determination that it is necessary to prevent underharvest of the pollock TAC and that opening the HSA 2 for the AFA inshore sector, AFA mothership sector, and CDQ program is the least restrictive adjustment necessary to achieve the pollock TAC in the Bering Sea subarea of the BSAI. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this*

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*decision: (1) the current catch of pollock in the Bering Sea subarea of the BSAI, (2) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery, (3) the high historical prohibited species bycatch rates for Chinook and chum salmon observed in the pollock fishery, and (4) potential economic loss to these fisheries.*

*The four factors listed above relate to the factors and information outlined in regulation that NMFS may consider for any inseason action: All information relevant to one or more of the following factors may be considered in making the determinations required under [50 CFR 679.25(a)(2)]: (1) The effect of overall fishing effort within a statistical area; (2) Catch per unit of effort and rate of harvest; (3) Relative distribution and abundance of stocks of groundfish species and prohibited species within all or part of a statistical area; (4) Condition of a stock in all or part of a statistical area; (5) Inseason prohibited species bycatch rates observed in groundfish fisheries in all or part of a statistical area; (6) Historical prohibited species bycatch rates observed in groundfish fisheries in all or part of a statistical area; (7) Economic impacts on fishing businesses affected; or (8) Any other factor relevant to the conservation and management of groundfish species or any incidentally caught species that are designated as prohibited species or for which a PSC limit has been specified.*

*Generally, 50 CFR 679.25 outlines NMFS's inseason management authority and the process or analysis required. That regulation outlines the types of adjustments NMFS may make, the determinations required for those adjustments, and the information and data that may be considered.*

- How can NMFS assert that it is sustainably managing fisheries and following MSA principles if NMFS initiated this action without having a threshold in place for re-closing the HSA if certain bycatch numbers are reached (as NMFS indicated in the June 2020 Tribal Consultation meeting)?

*A consistent challenge for our inseason management process is determining the nature of the data being provided and anticipating possible trends in those data over time. For example, if NMFS established a specific rate, managing only on the rate of bycatch, we may not consider the amount of groundfish that was caught at that rate. During the June 26, 2020 Tribal Consultation, NMFS indicated that it would monitor herring bycatch rates as well as the total amount of herring bycatch in HSA 2.*

- Why didn't NMFS simply propose keeping the HSAs closed and monitoring Chinook bycatch during the subsequent pollock fishing seasons and then consider opening HSA 2 only if certain levels of Chinook bycatch were reached, instead of the action which NMFS took which was just to open the HSA 2?

*The HSA 2 was opened to prevent the underharvest of the pollock TAC since this is an area highly depended on by the catcher vessels and CDQ catcher/processor fleet to catch their pollock allocations. Opening the HSA 2 allows the fleet to access pollock grounds and prevents extending fishing later in the season when the Chinook salmon bycatch rates increase. This action is focused on the Chinook salmon PSC rates later in the season, and also the Chinook salmon PSC rates during July 1 to August 15.*

- The primary cause for NMFS taking this action has been noted as high herring bycatch in the pollock A season. However, NMFS' response to that was to intentionally increase herring bycatch by opening an HSA, rather than preventing more of it. How is that response consistent with good management of marine resources (especially given that NMFS has stated that it is not favoring one species over another, which seems to indicate NMFS would also agree that protecting salmon and herring is not an either/or proposition)?

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*NMFS is guided by the statutory and regulatory requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and reviewed the inseason action to open HAS 2 consistent with the National Standards contained in the Magnuson-Stevens Act. In this specific case, NMFS considered herring bycatch, bycatch of other species consistent with National Standard 9 as well as seeking to balance National Standards 1 and 6, since Bering Sea pollock is a large percentage of the 2020 BSAI groundfish optimum yield. Under existing regulations, the closure of HSA 2 limits fishing in a specific geographic area for a specific amount of time, but does not limit the overall amount of herring bycatch.*

- When this action was proposed, the Chinook bycatch limits from the pollock directed fleet were not yet close to being approached. Additionally, NMFS has stated that minimizing Chinook bycatch was a key part of the rationale for this proposed action. This suggests that the Chinook bycatch limits are too high. Will NMFS therefore be pushing for the NPFMC to lower Chinook bycatch limits? If so, when, and if not, why not?

*PSC limits are set at an upper limit of an acceptable bycatch amount; however, the regulations at 50 CFR 679.21(a)(2)(i) require that the operator of each vessel engaged in directed fishing for groundfish in the GOA or BSAI must minimize its catch of prohibited species. Therefore, PSC is always to be minimized at any amount regardless of the PSC limit.*

*In addition to the overall Chinook salmon PSC limit, Amendment 110 for salmon bycatch by the pollock fleet also established lower limits under the Chinook salmon bycatch performance standards. A key component of Amendment 110 is a provision that seeks to minimize Chinook salmon at all levels of abundance by establishing this performance standard and providing the fishery with the tools and ability to adapt their fishing operations rapidly in order to minimize bycatch. If the total annual Chinook salmon bycatch by the members of a sector participating in an approved salmon Incentive Plan Agreement is greater than that sector's annual threshold amount of Chinook salmon in any three of seven consecutive years, that sector will receive an allocation of Chinook salmon under the lower amount of the 47,591 PSC limit in all future years, except in low Chinook salmon abundance years when that sector will receive an allocation under the 33,318 Chinook salmon PSC limit. The annual threshold amounts and PSC are reported here:*

*Bering Sea American Fisheries Act Pollock Fishery Salmon Performance Standard (Threshold) Report  
2011 - present*

*These threshold amounts incentivize the pollock fleet to keep their Chinook salmon PSC much lower than the Chinook salmon PSC limit.*

- Why did NMFS prioritize an 'authority' to ensure the prosecution of the pollock TAC over its legal obligations to minimize bycatch of both herring and salmon (National Standard 9), to consider the social and sustainability impacts of its actions (National Standards 1 and 8), to consider traditional knowledge (National Standard 2), and to conduct Tribal Consultation in a meaningful way (EO 13175)? CFR 679.25 grants NMFS the authority to use its in-season authority to prevent underharvest of the pollock TAC, but this does not appear to be a legal mandate or requisite. However, NMFS is required to conduct meaningful Tribal Consultation (NMFS did not), prevent overfishing and minimize bycatch of both pollock and herring (NMFS is not doing so with this action), and take into account the best scientific information available including TK and social science (NMFS did not). How can NMFS state that they are basing this decision on the best scientific information available (BSIA) when NMFS did

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not examine TK, subsistence data, or social science analyses thereof in crafting this proposal (as is required e.g. by National Standard 2)?

*As noted earlier, NMFS did consider the statutory and regulatory provisions that apply to the National Standards in its inseason action. NMFS did consider information available at the time including subsistence data. We have been working to improve our consideration and understanding of traditional knowledge and social science considerations in our management actions. Ideally, our Tribal Consultation process can help to provide additional tools and information for NMFS to consider traditional knowledge and social science in our management process. The [Supplemental Information for the BSAI Herring Inseason Adjustment](#) describes additional information that was reviewed, including subsistence.*

- Subsistence concerns were a significant part of the reason Amendment 16A was initially enacted. However, it appears no consideration was given to subsistence communities and concerns when NMFS developed the current proposed action. They are not mentioned in the pertinent documents related to the decision; there is no discussion of Traditional Knowledge or subsistence data; only recently did NMFS staff reach out to a subsistence expert at ADF&G; and, NMFS did not conduct Tribal Consultation in advance of proposing and moving forward with its action. Furthermore, four items which the Alaska Region Administrator considered for this action were noted in the Rule posted in the Federal Register, but none of them include impacts to subsistence or subsistence communities, or using best available scientific information as pertains to TK, local knowledge, social science, or other disciplines. Our question: How (and when, and where in the documentation) did you adequately consider potential effects to subsistence users and activities, as well as the broader ecosystem? Additionally, as it appears they were not considered, please also explain why that was the case, and how this is consistent with good management and science.

*The previous response describes the information considered in this inseason action. The Federal Register notice for the inseason action does include the specific information that NMFS is regulatory required to consider. Throughout our management process, NMFS and the North Pacific Fishery Management Council (Council) are working to better understand the range of information that can affect our management decisions. NMFS engages in efforts to improve our understanding of issues through Tribal Consultation, the Council's Community Engagement Committee, the Council's Ecosystem Committee, as well as independent research that NMFS supports or pursues. We welcome suggestions on how to continue to improve our understanding of these issues.*

- Following on the above two questions, why did NMFS not have any questions for Tribal representative participants during the June 2020 Tribal Consultation meeting regarding TK about herring and information about herring in the context of subsistence?

*NMFS does have questions about what herring fisheries are important to the Tribes including subsistence and the commercial herring fishery.*

- It does not appear that information about changing ice conditions, age classes, recruitment, and impacts to marine mammals were considered in the decision to open HSA 2. Were they, and where is that documentation and analysis? (Please note, for example, that the Amendment 16A EA discusses age class impacts and harvest.)

*NMFS relied on a range of information in making this inseason management decision. In the 2004 Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement (PSEIS) NMFS*



## Attachment 1:

### Questions Submitted to NMFS Prior to the August, 2020 Consultation

*specifically evaluated the effects of removing closed areas and re-opening all three of the HSAs, and NMFS determined that any direct and indirect effects on herring (including mortality, reproductive success, prey availability, and habitat) would not be expected to have a significant impact on the herring resource, particularly in light of the State's management of herring. In this case, NMFS opened one of the HSAs such that any direct and indirect effects would be even more insignificant than the effects of removing all three HSAs as analyzed in the 2004 PSEIS. NMFS has previously considered the effects of this inseason adjustment, and based on those analyses and the data presented here, NMFS anticipated that opening the HSA 2 likely would not result in any conservation concerns for the Bering Sea herring stock. The 2015 Supplemental Information Report for the PSEIS reviewed the conclusions reached in 2004. We appreciate receiving additional information regarding ice conditions, marine mammals, or other factors that NMFS should consider in its management decisions.*

- Given the challenges with herring, what are NMFS 'plans for observing and monitoring this situation for salmon bycatch? (Especially given that there were low/slow runs and high river die-offs due to temperatures last year.) What conservation measures is NMFS enacting to protect salmon?

*NMFS is monitoring salmon bycatch throughout the fishing year and provides regular updates on salmon bycatch throughout the year as shown in the reports described in the following response. We regularly advise the Council on the status of salmon bycatch for consideration in their management recommendations. We actively monitor the pollock fishery to ensure that the fishery is managed consistent with our regulations, specifically the provisions of Amendment 110 that seeks to minimize salmon bycatch at all levels of abundance.*

- How did NMFS address public comment received at the June NPFMC meeting and in response to the Federal Register notice? Seven public comments were posted to the Federal Register notice; please provide any written documentation regarding NMFS 'addressing of these comments.

*NMFS is working on responding to these comments and will make them available as soon as possible.*

- We would like NMFS 'monitoring information regarding herring bycatch in, and outside of, HSA2, and salmon bycatch. Additionally, we would like to receive this information in an ongoing fashion through the remainder of the year.

*This herring and salmon information is updated weekly (usually on Thursday). This first link includes estimates of herring PSC inside and outside of the HSA 2 during the 2020 and 2019 B season by week. Fisheries Outlook: Weekly groundfish fishery summary for the BSAI and GOA*

- [2020 \(TXT\)](#)

*Also, there are several weekly catch reports available on the [website](#). These reports show the bycatch as established under different management programs and at different levels of detail.*

- AFA and CDQ BSAI Pollock Fisheries - Chinook Salmon PSC - annual
  - [2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013](#)
- AFA and CDQ BSAI Pollock Fisheries - Chinook Salmon PSC - seasonal
  - [2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013](#)
- Bering Sea American Fisheries Act Pollock Fishery Salmon Performance Standard (Threshold) Report
  - [2011 - present](#)

Attachment 1:  
Questions Submitted to NMFS Prior to the August, 2020 Consultation

- *BSAI Chinook Salmon Mortality Estimates*
  - *1991 - present*
- *BSAI Non-Chinook Salmon Mortality Estimates*
  - *1991 - present*
- *Bycatch Rates - by week and vessel*
  - *Explanation: 2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013 (CSVs)*
- *Chinook and non-Chinook PSC - by gear, area, target, week, processing sector*
  - *2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013 (CSVs)*
- *Salmon, Halibut Mortality, Herring, Crab - CDQ only*
  - *2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013*
- *Salmon, Halibut Mortality, Herring, Crab with CDQ*
  - *2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013*
- *Salmon, Halibut Mortality, Herring, Crab without CDQ*
  - *2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013*

Regarding Tribal Consultation in general (including as pertains to the NPFMC)

- Do you acknowledge that you are obligated to have an ongoing and meaningful relationship with Tribes and Tribal representatives as pertains to Tribal Consultation?

*Executive Order 13175 requires federal agencies to have an accountable process to ensure meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications. Both DOC and NOAA have policies and procedures that implement Executive Order 13175. The DOC Tribal Consultation and Coordination Policy establishes the manner in which the Department of Commerce works with Tribes on a government-to-government basis to address issues concerning Tribal self-government, Tribal trust resources, and Tribal treaty and other rights. The NOAA Handbook on NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations is intended to improve NOAA's management of its relations and cooperative activities with Indian Tribes and their governments. The NOAA Handbook also is intended to provide for meaningful and timely input from Tribes into the Federal decision-making process on policy matters having substantial direct effects on Tribes. NMFS Alaska Region SFD recognizes the value and importance of these policies and the purposes they are meant to serve, mainly to facilitate an ongoing government-to-government relationship with Tribes.*

- Do you acknowledge that you are required to inform Tribes and Tribal representatives, and to initiate Consultation with them, on issues which may impact Tribes (as well as conducting Consultation on matters when Tribes and Tribal representatives initiate with a Consultation request)?

*NMFS acknowledges that the NOAA Handbook indicates that NMFS will offer government-to-government consultation when either requested by a Tribe or when NMFS anticipates that a proposed policy or initiative may have tribal implications. A government-to-government consultation process is a formal means of communication between NOAA and the government of a Federally-recognized Tribe, and is understood by both NOAA and that Tribe to be a government-to-government meeting. NMFS Alaska Region SFD will strive to engage in this formal government-to-government consultation with Tribes.*

## Attachment 1:

### Questions Submitted to NMFS Prior to the August, 2020 Consultation

*Additionally, while government-to-government consultation is a formally structured meeting, NMFS recognizes that other forms of communication among NMFS employees and tribal officials, employees, consultants, and representatives are important elements of our ongoing relationship with any Tribe. NMFS Alaska Region SFD endeavors to maintain ongoing communications with Tribes as a regular part of the government-to-government relationship, and would invite any recommendations from Tribal governments for how to improve our ongoing communications and coordination with Tribes.*

- It was stated by NMFS during the June 26, 2020 Tribal Consultation that the NPFMC is advisory and that NMFS is the decision-making management entity. How many times, and specifically in what cases and ways, has NOAA/NMFS/Department of Commerce overridden a decision/proposal/advice/action from the NPFMC?

*NMFS works closely with the Council during its development FMP and regulatory amendments to avoid situations where the Secretary of Commerce would need to disapprove an action by the Council. Our successful working relationship is one of the reasons that NMFS has not needed to disapprove or partially disapprove a Council FMP amendment in the last 10 years. The Magnuson-Stevens Act requires the Council to develop an FMP for each fishery under its authority that requires conservation and management, and to amend those plans as necessary. In addition, the Magnuson-Stevens Act requires the Council to develop recommendations about regulations necessary to implement the FMPs.*

*NMFS's role is to review the Council's recommended FMPs, amendments to FMPs, and regulations to determine if they are consistent with all applicable Federal laws and regulations. NMFS may disapprove or partially approve an FMP or FMP amendment only if it is inconsistent with a particular Federal law (see section 304(a)(3) of the Magnuson-Stevens Act). Therefore, although NMFS on behalf of the Secretary of Commerce makes the final decision about approval of FMPs or FMP amendments and the regulations to implement the FMPs, the important policy decisions generally are made by the Council.*

- NOAA General Counsel stated during the June 26, 2020 Tribal Consultation that NMFS encourages the Council to work with Tribes. Please provide documentation showing that is and has been the case, e.g. memos, emails, records of testimony at the Council, etc.

*NMFS has supported the Council's development in this area. At the October 2019 NPFMC Community Engagement Committee (CEC) meeting, we provided an overview of the Tribal Consultation Process and recognized several opportunities to improve:*

- *Working with the Council and the Community Outreach Committee to identify specific needs and priorities for outreach, communication, and improved analyses.*
  - *The potential of the Bering Sea Fishery Ecosystem Plan Action Team on Local Knowledge/Traditional Knowledge/Subsistence to identify issues and priorities, and to provide recommendations.*
  - *The Social Sciences Planning Team has identified information and data about Tribes as a category for further examination in the data gaps analysis*
- Why is NMFS Tribal Consultation not integrated with the NPFMC process as it should be in order for Tribal Consultation to have a meaningful impact on the NPFMC-related decision-making process? What proposals do you have to fix this?

Attachment 1:  
Questions Submitted to NMFS Prior to the August, 2020 Consultation

*It is the policy of the Department of Commerce and NOAA that federal agencies like NMFS, and not fishery management councils, are responsible for engaging in government-to-government consultations with Alaska Native Tribes on fisheries management actions that have tribal implications. NMFS Alaska Region follows the policy of the Department of Commerce and NOAA. However, NMFS recognizes that the NPFMC has undertaken a variety of efforts to improve coordination and outreach, such as the Community Outreach Committee and the Bering Sea Fishery Ecosystem Plan Action Team on Local Knowledge/Traditional Knowledge/Subsistence. NMFS recognizes that there may be ways to build on the NPFMC's efforts and further improve coordination with tribes and tribal governments in the NPFMC process. NMFS welcomes any input and suggestions from Tribal governments, in particular, whether there are specific issues/areas for Tribes that the current NPFMC process fails to address.*

- Is NMFS ready and willing to engage with Tribal representatives to construct and enact a meaningful Tribal Consultation policy and relationship, including one that encompasses all of NMFS 'activities (rather than just SFD) and also includes the NPFMC process?

*As noted above, NMFS is subject to the DOC Tribal Consultation and Coordination Policy and the NOAA Handbook on NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporation. The NOAA Handbook does provide a detailed overview of Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations. NMFS is willing to consider whether to develop additional documents for the Alaska Region, however, any recommendations or thoughts on gaps or areas for improvement could help inform what guidance might be needed in addition to both the DOC Tribal Consultation and Coordination Policy and the NOAA Handbook.*

- We have been requesting a Tribal Liaison position at NMFS for a long time. It was previously stated that there is no available funding for this. The proposed AFSC Tribal Liaison RFQ is not sufficient for its task, which itself is significantly narrower in scope than all of NMFS. (This has also been communicated to AFSC in detail.) In advance of our August 2020 Consultation meeting and discussions of an improved Tribal Consultation process, please give consideration to this deficit which greatly hampers NMFS 'ability to meet its Consultation obligations.

*During the Tribal Consultation report to the CEC in October 2019, NMFS communicated that it is a challenge for NMFS to balance tribal consultation requirements, expectations, and analytical needs with other priorities and requirements for staff and budget resources. NMFS Alaska Region staff do have long-standing and effective working relationships with numerous Tribal Governments through our co-management agreements. We welcome suggestions on how to improve our Tribal Consultation process under existing staffing conditions, and how additional staffing would aid in that effort.*

Attachment 2:  
Petition to Suspend Closure of the Winter Herring Savings Area

The Honorable Wilbur Ross  
Secretary  
U.S. Department of Commerce  
1401 Constitution Ave NW  
Washington, DC 20230  
**Via Email:** [TheSec@doc.gov](mailto:TheSec@doc.gov)

Dr. Neil Jacobs  
Undersecretary of Commerce for Oceans  
and Atmosphere  
U.S. Department of Commerce  
1401 Constitution Avenue NW  
Washington, DC 20230  
**Via Email:** [neil.jacobs@noaa.gov](mailto:neil.jacobs@noaa.gov)

Mr. Chris Oliver  
Assistant Administrator for Fisheries  
National Oceanic and Atmospheric Administration  
U.S. Department of Commerce  
1315 East-West Highway  
Silver Spring, MD 20910  
**Via Email:** [chris.w.oliver@noaa.gov](mailto:chris.w.oliver@noaa.gov)

Dr. James W. Balsiger  
Alaska Regional Administrator  
National Marine Fisheries Service  
P.O. Box 21668  
Juneau, AK 99802  
**Via Email:** [jim.balsiger@noaa.gov](mailto:jim.balsiger@noaa.gov)

August 14, 2020

**Re: Request for Emergency Action to Suspend Closure of the Winter Herring Savings Area**

Dear Secretary Ross, Administrator Jacobs, Assistant Administrator Oliver and Regional Administrator Balsiger:

The At-sea Processors Association (APA) represents companies that participate in the Bering Sea pollock fishery. On behalf of those members and vessels delivering to pollock motherhips, we are writing to petition for emergency action to suspend the September 1, 2020 closure of the Winter Herring Savings Area until November 1, 2020, the date on which directed fishing for pollock closes by regulation.

Regulations promulgating federal management of herring PSC in BSAI groundfish fisheries are contained in Amendment 16a (effective 1991) to the BSAI Groundfish Fishery Management Plan (FMP). This amendment was designed to address management of herring (and other PSC species) in domestic trawl fisheries by establishing limits for Pacific herring taken as bycatch. The annual PSC limit is set at 1% of the annual biomass of Eastern Bering Sea herring and is apportioned among the various trawl fisheries. Attainment of any apportionment triggers closure of Herring Savings Areas to that fishery. Further, Amendment 16a states that the Regional Director may promulgate an in-season closure of an area (up to 60 days) to reduce PSC rates.

In April 2020, the midwater trawl pollock fishery reached its allocated limit (2,299 mt) of herring PSC. As a result, the following Herring Savings Areas closures will be triggered for the 2020 pollock B season and the 2021 pollock A season:

- 1. Winter Savings Area – The part of the Bering Sea subarea that is between 58° and 60° N latitude and between 172° and 175° W longitude from September 1 through March 1 of the succeeding year.*

APA believes that closing the Winter Herring Savings Area (11,100 nm<sup>2</sup> of the Eastern Bering Sea shelf) on September 1 will create an emergency situation for the offshore pollock fishery during the 2020 B season by forcing the fleet onto potentially less productive fishing grounds and into higher herring bycatch areas; and will result in the fishery failing to achieve Optimum

## Attachment 2: Petition to Suspend Closure of the Winter Herring Savings Area

Yield (OY). We submit that the pending emergency satisfies all three standards that are detailed in the NMFS Policy Guidelines for the Use of Emergency Rules.

### **Standard for Emergency Relief**

Section 305(c) of the MSA allows the Secretary of Commerce to promulgate emergency regulations when the Secretary finds that an emergency exists involving any fishery. NMFS policy guidance states:

#### **I. An Emergency Exists If a Situation Results From Recent, Unforeseen Events or Recently Discovered Circumstances**

Three situations contribute to and comprise the emergency currently facing the offshore pollock fleet.

##### 2020 A Season Herring Bycatch

The temporary rule to open the Summer Herring Savings Area 2, which was promulgated to prevent the under-harvest of the pollock total allowable catch (TAC) in the BSAI, [stated the following](#):

*The 2020 herring bycatch allowance of 2,299 mt specified for the trawl midwater pollock fishery in the BSAI has been reached. Prior to 2020, the PSC limit had not been reached in the pollock A season, and since 2010 has only been reached in the pollock B season once. NMFS recently became aware of concerns that the pollock sectors would not be able to respond to the **unexpected conditions presented in 2020** [emphasis added].*

Herring bycatch in the 2020 A season pollock fishery was unprecedented in both the timing of the catch and the overlap with traditional pollock fishing grounds. Herring bycatch in the 2020 A season pollock fishery was more than four times greater than during any recent A season and dramatically exceeded annual catches of herring in the directed pollock fishery in every year since 1991 (Figure 1). This occurred despite any change in the normal distribution (spatial and temporal) of A season pollock fishing and inconsistent with the traditional migratory patterns of herring as identified in the [Amendment 16a Environmental Assessment \(EA\)](#)<sup>1</sup>. Amendment 16a outlines research concluding that herring consistently migrate to wintering areas northwest of the Pribilof Islands (identified as the Winter Herring Savings Area). As such, it was unexpected and unforeseen to encounter herring in large quantities during the winter pollock fishery near the Pribilof Islands well outside of the documented spatial and temporal corridors. During the 2020 pollock A season, herring abundance and associated bycatch rates were at unprecedented and unforeseen levels in this area. This increase in herring PSC is not due to any change in fishing behavior or pollock distributions (Figure 2) and occurred despite avoidance efforts from the fleet. The subsequent closure of the Winter Herring Savings Area as a result of unprecedented A season bycatch will force the fleet away from currently productive pollock fishing grounds with low herring bycatch and requires emergency action.

<sup>1</sup> See Figure 4.3 on page 31 (sourced from Weststad and Barton 1981).



## Attachment 2: Petition to Suspend Closure of the Winter Herring Savings Area

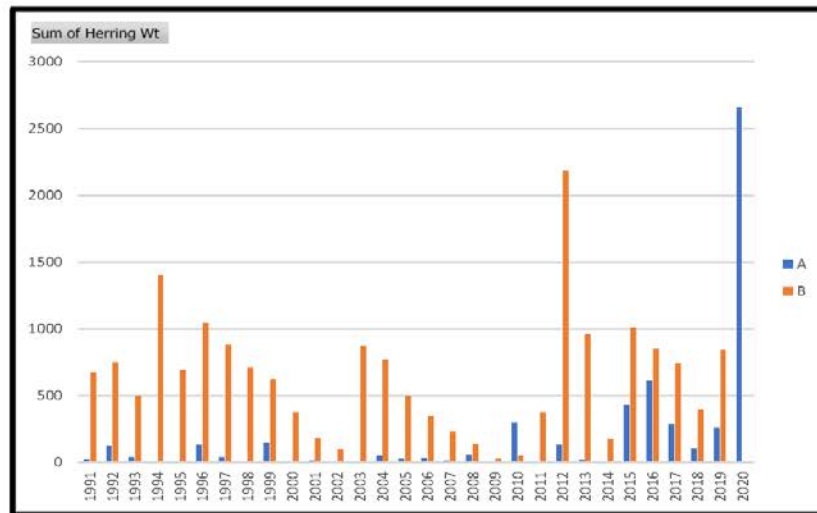


Figure 1. Herring catch in tons by season in the directed pollock fishery based on NORPAC observer data (from J. Ianelli through 2019, Sea State data for 2020). Prior to 2011, catcher vessels were not required to have 100% observer coverage therefore 15% of the catch of herring catch in the pollock fishery is not included prior to 2011. Source: SeaState, Inc.

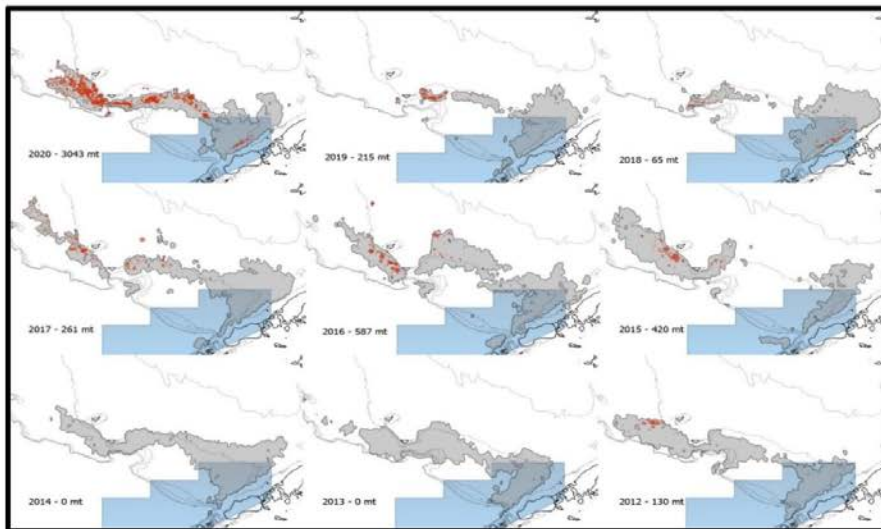


Figure 2. Pollock A season fishing footprint (gray shading) overlaid with herring bycatch (red circles) for 2012-2020 A season pollock fisheries. Size of circles indicates amount of herring bycatch per haul. Hauls with < 100 kg herring omitted in all cases as hauls with trace amounts of herring can be very numerous (>1000) but have not summed to more than 32 mt of herring in this dataset. Source: SeaState, Inc.

## Attachment 2: Petition to Suspend Closure of the Winter Herring Savings Area

### 2020 B Season Fishery Performance

Pollock Catch Per Unit Effort (CPUE) in the 2020 B season has been 22% below the 10-year average (Table 1) and unexpected given the current estimated pollock stock size. The distribution of pollock has been patchy across all of the traditional B season pollock fishing grounds to the northwest, while the Catcher Vessel Operational Area (CVOA) remains closed to directed fishing by the catcher processor fleet during the B season. The catcher processor harvest is currently 26,000 metric tons behind the comparable 2019 harvest level, and in 2019 fishing operations extended through the end of October (Figure 3). The pending closure of the Winter Herring Savings Area will jeopardize the ability of the offshore fleet to achieve OY.

*Table 1. Catcher Processor Pollock Catch Per Unit Effort (tons of pollock/trawl hours) during the B season dates of June 10-August 12. Source: Seastate, Inc.*

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Average
<b>CPUE Pollock (MT/hr)</b>	27.364	20.074	27.068	34.432	25.651	29.627	32.707	34.273	31.621	25.946	21.986	<b>28.119</b>



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Petition to Suspend Closure of the Winter Herring Savings Area

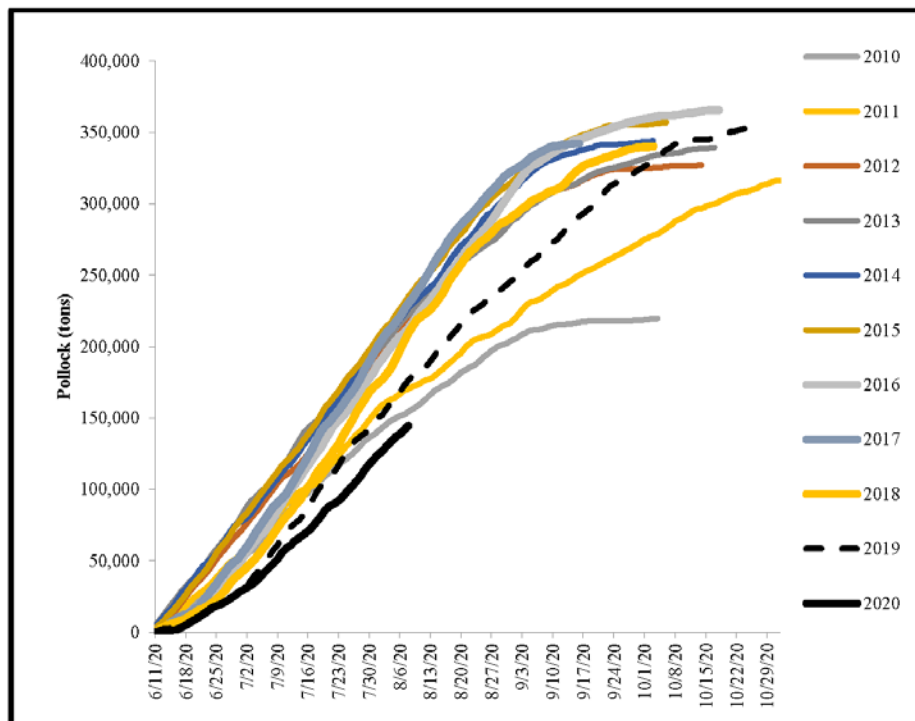


Figure 3. Historical (2010-2020) cumulative B season pollock catch for the Catcher Processor fleet only (catch updated through August 9, 2020). Source: SeaState, Inc.

#### COVID-19

The true impact of COVID-19 on the fleet's ability to achieve fishery targets of optimum yield and minimize bycatch to the extent practicable have only recently been discovered by the fleet and is still unfolding. Unexpected challenges of COVID-19 related to timing and scale of fishing and processing capacity have contributed to the worst B season fishery performance (season to date) of the last decade (Figure 3) and should not be underestimated. Multiple APA vessels were delayed from beginning B season operations until mid-July and some vessels have been absent from the fishery for up to one month to facilitate mandated quarantine, isolation and testing protocols, thereby causing significant lost fishing time in our fleet. This lost fishing time puts the fleet at high risk of not achieving optimum yield. The pending closure of the Winter Herring Savings Area would compound the negative impacts already facing the fleet, by forcing the fleet to fish in areas that have potentially higher herring bycatch, lower CPUE, and more dispersed pollock aggregations.

The cumulative and compounding impact of changes in herring spatial/temporal distribution, low CPUE, and lost fishing time due to COVID-19 represent unforeseen, unexpected and recently discovered circumstances that directly risk the fleet's ability to achieve optimum yield and

## Attachment 2: Petition to Suspend Closure of the Winter Herring Savings Area

minimize bycatch to the extent practicable. Keeping the Winter Herring Savings Area open will support the fleet's ability to achieve optimum yield by maintaining access to productive fishing grounds and allow fleet-wide movement away from herring and other bycatch species.

### II. An Emergency Exists If a Situation Presents Serious Conservation or Management Problems in the Fishery

#### Herring Bycatch Rates Higher Outside of Winter Herring Savings Area in 2020

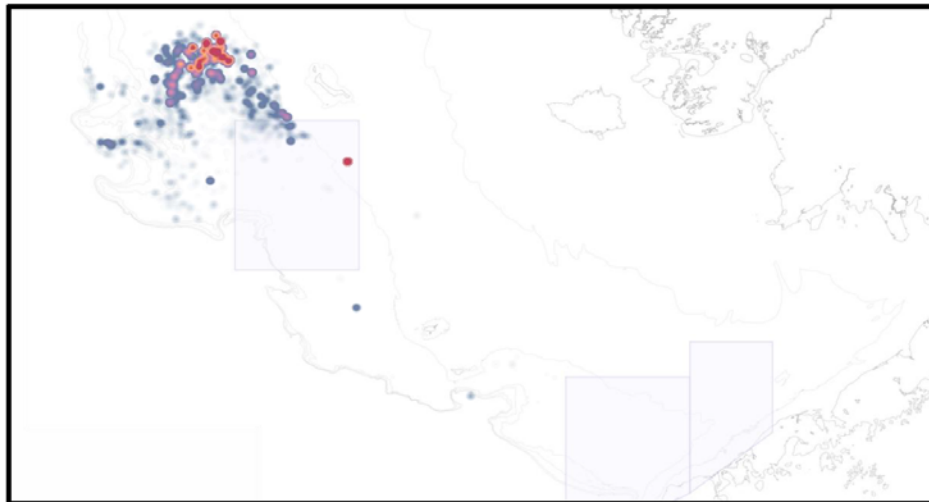
In 2020, the catcher processor fleet bycatch rate of herring has been *seven times higher outside of all Herring Savings Areas than it has been inside of the Winter Herring Savings Area*. The herring bycatch rates experienced by the catcher processor fleet since 2008 both inside and outside of the Herring Savings Areas are shown in Table 2. The data show that closure of the Winter Herring Savings Area would very likely force the fleet into areas of higher herring bycatch, an extremely perverse management outcome.

*Table 2. Herring bycatch rates (kg/ton) experienced by catcher processors both inside and outside of the Herring Savings Areas (Yellow highlighted boxes indicate area was closed to directed pollock fishing, Gray shading indicates areas and times herring bycatch rates were highest each year). Source: Seastate, Inc.*

Year	Outside Open	Summer Savings Area I		Summer Savings Area II		Winter Savings Area	
		Closed (June 15-July 1)	Open	Closed (July 1-August 15)	Open	Closed (September 1-March 1)	Open
2008	0.361		0.000		0.001	0.542	0.021
2009	0.007		0.000		0.000	0.000	0.002
2010	1.129		0.003		0.000	0.526	0.002
2011	0.239	0.000	0.000	0.002	0.085	7.120	0.060
2012	1.900		0.000	0.042	0.001		0.125
2013	1.899		0.000	0.004	0.000	0.014	0.045
2014	0.005		0.000	1.271	0.069	0.003	0.005
2015	0.830		0.000	0.209	0.002	0.005	0.014
2016	1.004	0.004	0.022	2.282	0.030		0.006
2017	0.657	0.052	0.000	0.085	0.011	0.000	0.349
2018	0.165		0.005	0.000	0.031	0.052	0.005
2019	0.510		0.000		0.068	0.012	0.003
2020	7.235		0.001		1.009		0.992

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The herring management measures implemented in the 1990s intended to reduce herring bycatch, that were based on foreign trawl observer data from 1983-1988, have failed to address the spatial and temporal distribution of herring interactions recently observed in the domestic catcher processor fleet. Excluding vessels from the Winter Herring Savings Area will likely increase herring bycatch. Figure 4 shows clearly that during the months of September and October, when the Winter Herring Savings Area would close to directed pollock fishing, herring bycatch rates by the catcher processor fleet have historically been higher outside of the Winter Herring Savings Area than inside. Figure 5 below demonstrates how poorly the Winter Herring Savings Area would have functioned in reducing herring bycatch during the B season. Just seven hauls have had herring catch greater than one ton since 2008 inside the Winter Herring Savings Area, while the majority of herring bycatch (tows greater than five tons of herring) have largely occurred outside of the Winter Herring Savings Area.



*Figure 4. Herring bycatch rates (kg/t of pollock) for the CP's from 2008-2019 during the months of September and October each year. Source: SeaState, Inc.*

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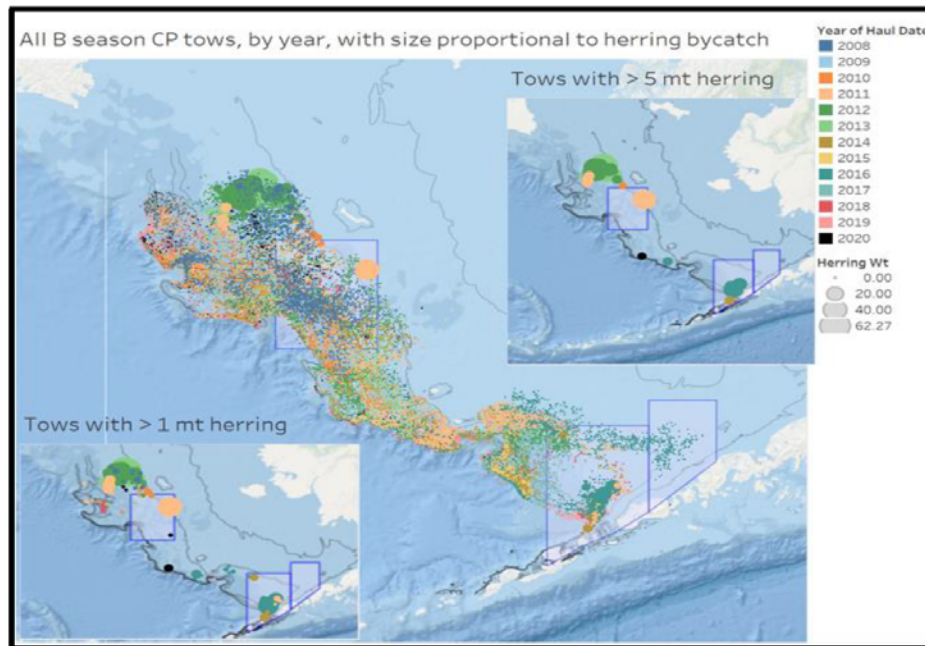


Figure 5. Catcher Processor B season hauls and herring catch weight per haul. Source: SeaState, Inc.

Unintended Management Outcomes for Other PSC Species

Due to lost fishing time from unexpected COVID-19 circumstances and low pollock catch rate to date, current projections estimate the catcher processor fleet will require all of the remaining days in the B season to harvest the full TAC. The loss of 11,100 nm<sup>2</sup> of fishing grounds on the Eastern Bering Sea shelf starting September 1, combined with fixed closures already in place for the offshore catcher processor fleet and poor CPUE, is anticipated to result in the fleet failing to achieve OY. Figure 6 illustrates the catcher processor fishing footprint (2010-2020) and three large existing closures (Catcher Vessel Operational Area, Pribilof Habitat Conservation Area and Spectacled Eider Wintering Unit). Figure 6 also illustrates the B Season Chinook Conservation Areas, which under the rules of the Catcher Processor Incentive Plan Agreement (CP IPA) could also close an additional 1,295 square miles along the outermost shelf. All vessels participating in the CP IPA are prohibited from fishing in these areas from October 15 to the end of the season during years when the September Chinook bycatch rate exceeds 0.015 Chinook per ton of pollock catch. Furthermore, the pollock fleet is striving to avoid both chum and Chinook salmon via weekly rolling hot-spot closures that further constrain the fleet's ability to move. Given the near certainty of the fleet remaining on the grounds through the end of October and the documented higher Chinook bycatch rates later in the season, absent emergency action by the Secretary the combination of the herring and Chinook salmon fixed closed areas could result in perverse and unintended management outcomes for all Prohibited Species Catch (PSC) species.

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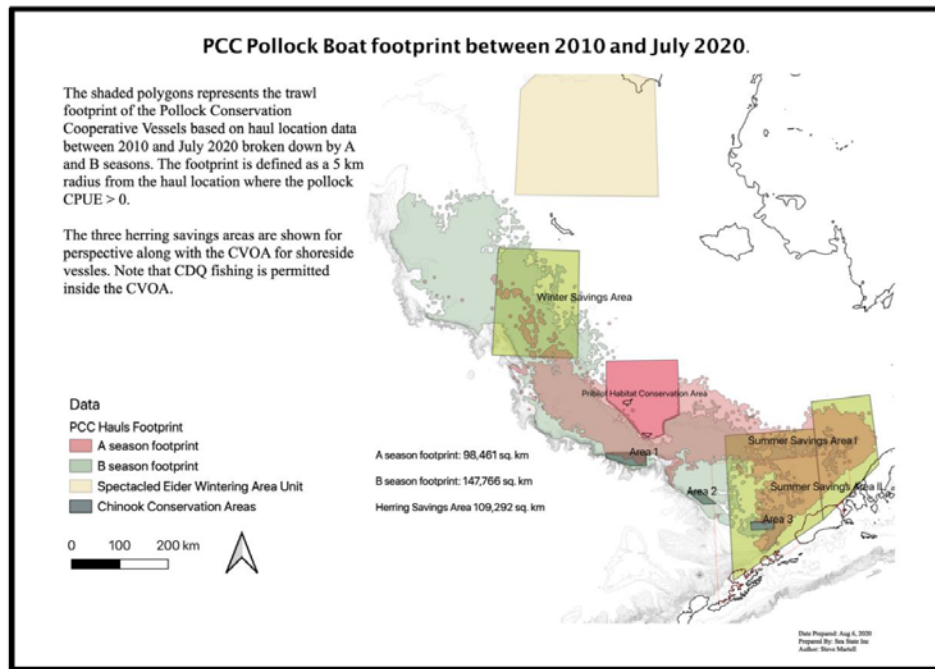


Figure 6. Catcher Processor Fleet fishing footprint by season overlayed with existing closures.  
Source: SeaState, Inc.

#### Chinook Salmon PSC Priority

Section 7.3.5 of the Amendment 91 Final EIS (published December 2009) states the following regarding the impacts to Pacific herring from establishing Chinook salmon PSC limits:

*Changes in the pollock fishery resulting from Alternatives 2 through 5 are not expected to change typical levels of herring bycatch. Thus, the alternatives would likely not change the pollock fishery in a manner that would increase bycatch of herring to the extent that bycatch would impact abundance of these species.*

It is clear that the assumptions and conclusions reached in the Chinook salmon PSC analysis regarding the impacts on herring bycatch did not anticipate the increase in herring PSC due to high herring abundance seen in the 2020 pollock A season. During the 2020 pollock A season, vessels fishing east of St. George avoided productive pollock fishing grounds altogether due to repeat “lightning strike” (greater than 10 mt per haul) encounters of herring PSC. The fleet moved west of the Pribilofs along the shelf break. Vessels explored deeper waters (out to 90 fathoms) but found unsustainable bycatch rates of Chinook salmon, which forced them back into the band of higher herring bycatch in shallower waters.

## Attachment 2: Petition to Suspend Closure of the Winter Herring Savings Area

The situation from the A season is a cautionary lesson for the remainder of the 2020 B season should the Winter Herring Savings Area remain closed. Due to regulations implemented under Amendment 91 for the pollock fishery, Chinook salmon hard caps mean that on the grounds decisions (Chinook avoidance, movement, etc.) in response to encounters of Chinook salmon take priority over all other bycatch species. If the Winter Herring Savings Area closes, it is anticipated the fleet will face a similar situation of avoiding spatially dispersed, and prioritized bycatch species, yet be constrained in their ability to move to new and cleaner fishing grounds. The fleet having areas to move to is an essential tool to effectively mitigate bycatch, and a foundational element of the CP IPA. Closure of the Winter Herring Savings Area greatly compromises this tool by taking a vast area of productive and important fishing grounds away from the fleet. Currently, the fleet operating in the Winter Herring Savings Area is finding more productive and cleaner pollock fishing inside the area compared to outside the area.

### **III. An Emergency Exists If a Situation Can Be Addressed Through Emergency Regulations for Which the Immediate Benefits Outweigh the Value of Normal Rulemaking**

The midwater trawl pollock fishery reached its annual herring PSC limit in April 2020. The normal Council and Magnuson-Stevens Act rule-making process for addressing wholesale changes to herring PSC management is not available in time for the 2020 pollock B season (June 10 start date) and under the existing regulations the Winter Herring Savings Area would close on September 1.

#### No Negative Impact on Herring Stocks

The At-sea Processors Association recognizes that Pacific herring is an important subsistence food resource in the Eastern Bering Sea region, supports a commercial state-waters fishery, and provides forage for commercially important groundfish species, seabirds, marine mammals, and salmon. This request for emergency action will not negatively impact the Eastern Bering Sea herring biomass, as the historical data shows higher herring bycatch has occurred outside the Winter Herring Savings Area than inside during B season pollock fishing. Given the higher herring rates outside the Winter Herring Savings Area, this request is anticipated to result in lower overall herring bycatch rates compared to the area closing.

The commercial harvest of Eastern Bering Sea herring stocks has declined in recent years, however the Amendment 16a analysis expected the Bering Sea directed herring fisheries to be fully utilized. For 2020, the Togiak herring fishery closed with less than half of the Togiak seine and gillnet allocations harvested, leaving more than 19,400 tons of exploitable herring left in the water. As such, the amount of pollock fishing effort inside the Winter Herring Savings Area is not anticipated to result in any conservation concerns for the stock. Pacific herring are not currently overfished or experiencing overfishing.

#### **Economic Justification for Emergency Action**

The BSAI pollock fishery accounts for approximately 30% of all U.S. seafood harvested annually generating incomes for thousands of family wage jobs. The closure of the Winter



## Attachment 2: Petition to Suspend Closure of the Winter Herring Savings Area

Herring Savings Area on September 1 could result in failure of the fishery to achieve OY and thereby risk loss of income for many of the jobs the pollock fishery supports. Emergency action is justified in this situation to prevent a significant direct economic loss and to preserve economic benefits for the pollock fishery participants, local communities and the State of Alaska.

The BSAI pollock fishery is also critically important in narrowing our nation's sizable seafood trade deficit. A significant majority of U.S. pollock is exported. The U.S. Customs Districts for Anchorage and Seattle report seafood exports that account for approximately 70% of total national export value, with pollock a major component of those Alaska and Pacific Northwest exports. A failure to fully harvest the B season TAC would hamper this key driver of U.S. seafood export production and further exacerbate the national seafood trade deficit.

### **Duration of Emergency Rule Request**

We are requesting an emergency rule that will open the Winter Herring Savings Area for an additional two months in 2020, without an extension. That will be sufficient to address the immediate need and will provide the Council and stakeholders with time to consider regulatory and non-regulatory approaches to address herring bycatch management through the normal Council and MSA rulemaking process.

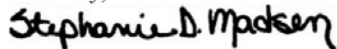
### **Commitment to Herring Bycatch Reduction**

The At-sea Processors Association is committed to working with the National Marine Fisheries Service and the State of Alaska to minimize the bycatch of herring for the remainder of the B season. Catcher Processor cooperative managers will adopt move-on and bycatch avoidance rules when fishing in the Winter Herring Savings Area identical to those used by the current pollock catcher vessels inside the Summer Herring Savings Area II. Those rules state that any vessel experiencing a bycatch rate greater than 0.05 kg/mt (herring/pollock) in any given haul will be required to move a minimum distance to a new location and ensuring best practices in the subsequent haul (e.g., test tow, use of net cameras) to reduce the herring bycatch rate before making another haul. The goal is to maintain herring bycatch rates at or below levels experienced in the absence of a Winter Herring Savings Area closure.

APA and the pollock mothership sector respectfully ask the Secretary of Commerce to alleviate the limitations and associated negative impacts from closure of the Winter Herring Savings Area by temporarily suspending the pending September 1, 2020 closure of the Winter Herring Savings Area until after the commencement of the 2020 B season pollock fishery on November 1, 2020.

Thank you for your time and consideration of this request for emergency action.

Sincerely,



Stephanie Madsen, Executive Director  
At-sea Processors Association



Attachment 2:  
Petition to Suspend Closure of the Winter Herring Savings Area

Cc:

Simon Kineen, Chair, North Pacific Fishery Council

Doug Vincent-Lang, Commissioner Alaska Department of Fish and Game

Rachel Baker, Deputy Commissioner Alaska Department of Fish and Game

Glenn Merrill, Alaska Assistant Regional Administrator, National Marine Fisheries Service

Attachment 3:  
NOOA Fisheries' Response to  
Petition to Suspend Closure of the Winter Herring Savings Area



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
1315 East-West Highway  
Silver Spring, Maryland 20910

September 11, 2020

Ms. Stephanie Madsen  
At-Sea Processors Association  
P.O. Box 32817  
Juneau, Alaska 99803

Dear Ms. Madsen:

Thank you for your August 14, 2020, letter on behalf of the At-Sea Processors Association (APA) members and vessels delivering to pollock motherships. Your letter petitioned Secretary Ross for an emergency rule that would suspend the September 1, 2020 pollock directed fishing closure of the Winter Herring Savings Area (see Figure 4 to 50 CFR part 679) until November 1, 2020, the date on which pollock directed fishing closes by regulation for 2020 (see 50 CFR 679.23(e)(2)).

We analyzed your request pursuant to NOAA Fisheries' Policy Guidelines for the Use of Emergency Rules (NMFS Policy Procedure 01-101-07) that define three criteria that must be met to determine that an emergency exists.

The phrase "an emergency exists involving any fishery" is defined as a situation that:

- (1) Results from recent, unforeseen events or recently discovered circumstances; and
- (2) Presents serious conservation or management problems in the fishery; and
- (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.

Our analysis concludes that the petition does not meet all of these criteria. We reviewed the information presented in your petition, recent and anticipated harvest patterns in the Bering Sea pollock fishery for the remainder of 2020, and the likelihood that available pollock would remain unharvested during the 2020 fishing season. We have concluded that emergency regulations likely would not address the concerns raised in the petition given the fishing opportunities outside of the Winter Herring Savings Area, the length of the fishing season, and the anticipated rates of pollock harvest. During twelve of the twenty weeks of the 2020 B season, the APA members and vessels delivering to pollock motherships have harvested only 18 percent of their total pollock harvest inside the Winter Herring Savings Area.

Further, the APA participants and vessels delivering to pollock motherships have amounts of herring prohibited species catch that are lower during the 2020 B season than during the 2020 A



Attachment 4:  
Comments Submitted by the Native American Rights Fund

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August 20, 2020

The Native American Rights Fund provides these comments regarding this now second proposal for “emergency action.” Importantly, NARF is a 501(c)(3) nonprofit, and therefore these comments are not part of any record on tribal consultation.

When the first emergency action was accepted in June, many of our tribal clients feared this would lead to similar actions by other companies hoping to short cut established Council processes. As we can see, our clients were correct and NMFS’s willingness to bend the rules—as well as stretch the definition of emergency—has opened the door for abuse of Council processes and created serious problems that must now be addressed. We have two general comments with regard to the legality of these actions.

First, there can be no doubt that NMFS did not comply with its own tribal consultation process as set forth on NOAA’s website (<https://www.fisheries.noaa.gov/alaska/consultations/tribal-consultations-alaska>). There is no provision in this policy for bypassing consultation in an emergency. Here, however, no such process was initiated and instead a call was held after the decision to set forth *post hoc* rationalizations of the action. None of these excuse the agency’s failure to follow its own policies. Moreover, we note as well that it is inappropriate to suggest that consultation should be initiated by the Tribes. The agency is the entity with full access to information and the burden to notify and consult with the Tribes. That was not done and now leaves the agency vulnerable to legal action. This vulnerability increases if the agency continues to approve these “emergency” actions and creates a pattern.

Furthermore, it has not escaped us that the Council claims it has no duty to consult with Tribes and instead directs them to NMFS. NMFS, in turn, disavows responsibility and points back to the Council as the decision-maker. Therefore, the Tribes are being directed to an agency that is not, in practice, responsible for the decisions triggering consultation. This circular reasoning is untenable.

Finally, we have reviewed that letter by the At-sea Processors Association dated August 14, 2020 and the written responses provided by NMFS on August 18, 2020. The documents make clear that that “emergency” is being defined as failure to reach optimum yield. This is not an emergency. The pandemic has created economic losses all over the globe. There is no legal mandate or entitlement to reach optimum yield, and to classify this as an emergency would be a further perversion of established Council rules and protocol. We urge the Council to quit contorting itself and its rules and to return to its established processes. Thank you for the opportunity to provide comments.