

# North Pacific Fishery Management Council

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Mr. Alan Risenhoover, NOAA Fisheries  
1315 East-west Highway, Room 14743  
Silver Spring, MD 20910

Dear Mr. Risenhoover:

In October, 2015 your office released the document “Draft Guidance for Reviews of Catch Share Programs (CSPs)”, and requested comments by November 20. Based upon requests from the regional fishery management Councils, you agreed to extend that deadline in order to accommodate discussion of the draft guidance at our upcoming meeting of the Council Coordination Committee (CCC), occurring in late February 2016, and you requested us to provide initial comments to you by January 29, 2016. The Council meets in early February 2016, so additional comments may be forthcoming prior to our CCC meeting. Please consider these our initial comments on the draft guidance. While we appreciate the desire for some national consistency in how limited access privilege program (LAPP) and CSP reviews are conducted, the guidance as drafted goes far beyond the letter, or apparent intent, of any MSA requirements for LAPP program review, and appears to also go far beyond anything necessary to comply with NOAA’s own catch share policy. I have attempted to articulate our concerns within the following major categories:

Statutory/regulatory requirements for program reviews: Necessary provisions for development of LAPPs are specifically contained within the Magnuson-Stevens Act (MSA), including a statutory requirement for review of such programs (section 303A). The specific MSA language refers to program review “by the Council and Secretary”, so it is somewhat unclear whose responsibility it ultimately is to conduct these reviews. In any case, and to our knowledge, there are no statutory or regulatory requirements for review of non-LAPP CSPs. While a Council may choose to periodically review non-LAPP CSPs, there is no requirement to do so. LAPPs are a specific form of CSP, but CSPs most often are not LAPPs, and are typically far simpler management tools than LAPPs, and should not automatically be subject to the same level of review as LAPPs.

One-size fits all approach: While some national consistency is desirable for such program reviews, there is significant variation across programs nationally, and even significant variation of LAPPs or CSPs within regions. For example, LAPPs (or CSPs) in the North Pacific vary widely in their program design across different fisheries, and the type and quality of data available for analysis. Therefore, there must be considerable flexibility in how these programs reviews are conducted. A number of the recommendations in the guidance document are indeed appropriate for major LAPPs, but are far beyond what is necessary for an informed review of a relatively simple allocation of a target species among gear types, for example.

CCC Workgroup on allocation reviews: Beginning in 2013, the CCC established a Workgroup to coordinate with NOAA Fisheries in the development of ‘guidance’ documents for review of all ‘allocations’ established by the Council. The CCC questioned the necessity (as well as the legal obligation) for the agency to require explicit review of all allocations established through the Councils, but agreed to work with the agency to develop a process for such reviews, including specific elements of such reviews. These were finalized and adopted at our June 2015 CCC meeting. While we understand that ‘allocations’ are typically only one aspect (albeit a major aspect) of LAPPs, and must be reviewed in some context per the requirements of section 303A, it is unclear how the product developed by the CCC Workgroup juxtaposes with the proposed requirements in the draft guidance developed by NOAA. This is a particularly significant concern, given that your draft guidance purports to apply to both LAPP and non-LAPP programs which, again, is beyond any explicit or implicit requirements of the MSA. The relationships between LAPPs, CSPs, and ‘allocations’ should be more clearly defined, and any guidance for review of these programs should be tailored to the relative complexity of such programs, with consideration of the actual legal requirements for such program reviews.

Reasonableness test: You will recall that the CCC allocation Workgroup was established specifically because of our concerns that the allocation review process would result in an unnecessarily complex level of analysis, as opposed to a reasonable level of analysis based on the specific program under review. Your draft guidance suggests a level of analytical complexity that is not only far beyond any requirements which apply to the original development of the programs for which a review would be conducted (i.e., far beyond any EIS or other analysis prepared for the original program), but which is practically impossible. A number of LAPP programs in the North Pacific were developed by the Council with program review elements specifically identified. While some of the recommendations in the draft guidance are consistent with those basic review elements, many of them go far beyond what is necessary, or even useful, for a program review. The design elements of the specific program in question typically lead to the identification of the most appropriate and relevant review elements.

Applying this practical perspective, the North Pacific Council has successfully developed reviews for a number of major LAPP programs, including Bering Sea and Aleutian Islands Crab Rationalization; Amendment 80 Allocations and Cooperatives; Gulf of Alaska Rockfish Trawl program; and, a report to Congress on the implementation of the American Fisheries Act (AFA). With this same practical approach, as informed by ongoing constituent input and in coordination with our NMFS Regional Office, the Council has been able to develop workplans for additional program reviews being conducted in 2016, which focus on the issues and questions most appropriate to the program review. Reviews being developed in 2016 include AFA program review; sablefish/halibut IFQ program review; BSAI crab rationalization (second review); and, American Fisheries Act program review.

The draft guidance recommends that the review documents adopt a similar structure as with creating NEPA documents/plan amendments, and therefore contain all of the statutory and regulatory requirements for such. However, these program reviews are not NEPA documents, are not subject to review under NEPA, and are not subject to review per the requirements of various other applicable laws such as the Regulatory Flexibility Act, EO 12866, the Endangered Species Act, National Standards, etc. These reviews are not actions to be submitted for Secretarial review and approval and should not be conveniently subjected to the same analytical requirements.

Regarding the scope of the review, the draft guidance contains potentially conflicting statements. While recognizing that the review should only look at the effects of the (CSP) that was implemented, rather than various alternative CSPs, the draft guidance goes on to imply a much broader analysis of components or sectors of the fishery not covered by the program (page 6), and the statement (on page 10) that “...*net benefits to the Nation should be maximized under the program relative to any alternative CSPs or variants to the existing program*”. This statement implies that any review must look at any and all possible program

permutations, and therefore represents a completely open-ended (and impossible) scope of work for any program review. Net benefits to the Nation are extremely difficult to quantify for a clearly specified program design, much less for a hypothetical comparison of infinitely possible, undefined program designs.

The draft guidance goes on to specify a number of standardized approaches, metrics, and performance indicators that should be utilized by the analysts conducting the review. While some of these may be useful and appropriate to the fishery in question, it should remain up to the analytical team to determine the best information and methods to conduct the program review, based on the specifics of the fishery, with input from affected stakeholders, and with the guidance and input of the Council's Scientific and Statistical Committee (SSC).

Regarding socio-economic aspects of the review, the draft guidance "*strongly recommends that the review assess the effects on historical participants who were previously but are no longer involved in the fishery....an analysis of why (they) no longer participate in the fishery.....and a 'satisfaction survey' to assess current and historical participants' satisfaction with the program...*". On page 14 a similar suggestion is made for an additional 'customer satisfaction survey' to discern participants' views on reporting requirements. Such a recommendation may well represent an interesting academic exercise, but is well beyond anything practicably possible, and unlikely to be marginally informative in any case. NMFS researchers and independent academic experts have conducted several surveys that attempt to assess perspectives on various aspects of North Pacific LAPPs (or CSPs), and all have struggled with methodological challenges of proper survey design and potential bias in responses. Our SSC continues to raise concerns about these survey instruments and their potential applicability for policy making.

Language on page 11 of the draft guidance recognizes the analytical complexity associated with review of allocations, and suggests that, because it will require considerable time and resources, these kind of detailed analyses be conducted separately from the other components of the review, and incorporated by reference. On page 12 and 13 a similar suggestion is made with reference to analyzing changes in market power from use or ownership caps (likely a PhD dissertation in itself). These suggestions represent a distinction without a difference, as the same overall staff resources would be necessary to complete the review, but they do clearly underscore the overall time and resources which would be required to perform a review consistent with the draft guidance.

Review Teams: The draft guidance speaks to the formation and composition of a 'review team', suggesting that such team be composed of persons who were involved in the original development of the program. This makes sense to the extent possible, but given the timelines associated with the review requirements (i.e., 5 to 7 years after implementation), this may be practically challenging. The Council works very closely with our NMFS Regional Office, and all of our major management programs (LAPPs and otherwise) are the result of analytical teams consisting of the appropriate mix of Council and NMFS staff (including Enforcement, Science Center, and General Counsel representation on the 'Action Planning Teams'), per the elements of our Regional Operating Agreements (ROAs). Likewise, the personnel identified for a particular program review are best identified through the existing working relationships between the Council and NMFS Regional office, again based on the elements of our ROAs.

Timing and interim reviews: Building on the comments above, the draft guidance not only proposes an unnecessarily complex and detailed standard for review, it also would require 'annual or biennial' reports, in addition to the statutorily required program reviews. This is neither necessary nor particularly useful, is certainly in excess of any legal requirements, and the net effect would be a state of continuous analytical review. There are at least half a dozen programs in the North Pacific which would qualify as either LAPPs or CSPs, and the continuous review efforts suggested by the draft guidance would have a crippling effect on the Council and NMFS's collective ability to address other, critical management issues in the North

Pacific. We would literally have to devote virtually all available staff time to program reviews which appear to go far beyond anything intended by Congress in section 303A of the MSA.

Barring any review requirements contained within section 303A, and barring any requirements implied by the draft guidance, the Council process is in and of itself a form of continuous program review. Our adaptive management approach is continuously monitoring, evaluating, and amending its programs. Most of our LAPPs (or CSPs) are the subject of ongoing review, analysis, and adjustment through the process of external input from program participants or others with a vested interest in program performance. Many of these adjustments (amendments) are focused on specific program elements, but often include analysis of broader program components. This allows the Council to focus on specific, appropriate program adjustments without devoting limited staff resources to unnecessary analytical exercises.

For example, the Council specifically developed a series of reviews for the BSAI crab rationalization program at 18 month, 36 month, and five year intervals when the program was originally designed. The Council designed these reviews based on the perceived need for specific reviews, prior to the 2007 MSA requirements for LAPP reviews. Since our groundfish license limitation program was implemented in 2000, the Council has submitted 12 amendments to refine and modify that program. All of these amendments have included a general review of the program with a more refined assessment of the policy and regulatory issues for the proposed change, and consideration of possible alternatives. These types of regular program adjustments, coupled with the formal review every 5/7 years, should be more than adequate for the purposes intended by Congress.

Review and ‘approval’ process: The draft guidance proposes a ‘sign-off’ process, whereby the Council, Regional Office, Science Center, Enforcement, and General Counsel would all have to ‘approve’ the program review before it is considered final, similar to the process for review and approval of management actions submitted for Secretarial review and approval. As noted above, these program reviews are not ‘NEPA documents’, nor do they constitute actions to be submitted by the Council for Secretarial review and approval. It is therefore inappropriate to require a sign-off process for program reviews. Although a possible response to this concern is that this is “only a guidance document”, our experience is that “guidelines” are often treated by NOAA Fisheries and NOAA GC as having the force of law. If this sign-off process remains in the guidance we have little doubt it will be made to occur.

We question the necessity, and the legal basis, for such an onerous review and approval process of program reviews. Further, the guidance refers to “recommendations” contained within the review. It is unlikely that full agreement could be found on such recommendations within the review team (presumably, recommendations for program changes), and it is questionable whether a review should include such recommendations; i.e., a review should inform program managers and the decision-making body of the Council as to potential program adjustments.

In summary, our initial reaction is that this draft guidance goes far beyond what is necessary for a robust program review, has several provisions which would be practically impossible to achieve (thereby setting us up for failure), and would be unnecessarily crippling to the Council and NMFS Regions’ collective ability to address numerous other, high priority management issues. Again, based on the provisions of the draft guidance, we would very likely have all available resources devoted to review of previously adopted management programs and would have little or no resources available to proactively address numerous management issues which are of extreme importance to both the Council and NOAA Fisheries. A few examples include: comprehensive observer program and EM development; bycatch of prohibited species like halibut, salmon, and crab; further development of overall Ecosystem-Based Fisheries Management (EBFM); development of a Fishery Ecosystem Plan for the Bering Sea; involvement in developing Arctic issues; initiatives to coordinate halibut management with the IPHC; and, development of a catch share program (CSP) to manage bycatch and rationalize Gulf of Alaska trawl fisheries, to name a few.

We strongly suggest that this draft guidance be thoroughly discussed at the CCC level before going any further, and hopefully we can work cooperatively with the agency to develop guidance that is reasonable and appropriate. It may also be appropriate to engage input from the Scientific and Statistical Committees of the eight regional Councils prior to finalizing any program review guidance, in order to further groundtruth both the necessary level of analysis for informed program review, and the practicality of the analytical approaches recommended in the guidance.

Sincerely,

A handwritten signature in blue ink that reads "Chris Oliver". The signature is fluid and cursive, with the first name "Chris" being more prominent than the last name "Oliver".

Chris Oliver  
Executive Director

CC: Kelly Denit  
Mike Travis  
Eileen Sobeck  
Jim Balsiger  
Glenn Merrill  
Regional Fishery Management Councils