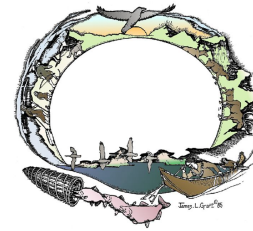




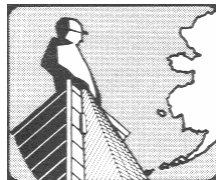
Association of Village
Council Presidents



Kawerak, Inc.



Tanana Chiefs Conference



Bering Sea Fishermen's Association



YUKON RIVER DRAINAGE FISHERIES ASSOCIATION

March 7, 2016

Alaska Region NMFS
P.O. Box 21668
Juneau, AK 99802-1668

Re: Salmon Bycatch Management in the Bering Sea Pollock Fishery; Notice of Availability of FMP Amendment 110 and Proposed Regulations; Docket ID NOAA-NMFS-2015-0081

Dear Mr. Merrill:

We are submitting these comments on behalf of the Association of Village Council Presidents (AVCP), Bering Sea Fishermen's Association (BSFA), Kawerak Inc., Tanana Chiefs Conference (TCC) and the Yukon River Drainage Fisheries Association (YRDLFA), collectively representing 118 communities in the Arctic-Yukon-Kuskokwim region. AVCP is an ANCSA regional non-profit and tribal consortium of the 56 tribes of the Yukon-Kuskokwim Delta region. BSFA is a non-profit fisheries association serving the needs of Western Alaska commercial and subsistence fishermen. Kawerak is an ANCSA regional non-profit and the tribal consortium in the Bering Strait region of Alaska, representing 20 federally recognized tribes. Tanana Chiefs Conference (TCC) is an ANCSA regional non-profit and tribal consortium of the 42 villages of Interior Alaska in the Yukon and Kuskokwim watersheds. YRDLFA is an association of commercial and subsistence fishers on the Yukon River.

The region we represent is home to some of the world's most magnificent salmon resources, and these salmon form the basis of our food security, cultures and economies. These same salmon—

Chinook salmon in particular—are experiencing a crisis of epic proportions. Our communities are suffering greatly as a critical source of food, economy and culture has all but disappeared. The loss of Chinook salmon runs touches every aspect of the fabric of our communities and cultures as we continue to sacrifice the little subsistence opportunity that remains to give our precious Chinook salmon stocks a chance at rebuilding. Reducing salmon bycatch in the Bering Sea pollock fishery is critical to the future and rebuilding of these historic runs. **We support Amendment 110 and the proposed regulations to implement this Amendment as an important step in further reducing salmon bycatch in the pollock fishery.** Driving bycatch continuously lower, with an ultimate goal of zero, is essential. We support this Amendment in the belief that these changes will continue to drive bycatch down, however, constant vigilance is required to ensure that the hard caps on bycatch are never actually met.

1. The Status of Western Alaska Chinook Salmon Stocks

The additional measures in Amendment 110 to reduce salmon bycatch in the Bering Sea pollock fishery are urgently needed because of the dire status of Chinook salmon stocks in Western Alaska. Generally, subsistence fisheries have been severely restricted for years throughout the region. In 2014, the situation reached a new low: “subsistence fishing for Chinook salmon was closed or restricted by reduced fishing time and/or gear restrictions from Kuskokwim Bay to northern Norton Sound.”¹ On both the Yukon River and Eastern Norton Sound, subsistence was completely closed. The Kuskokwim River was almost completely closed.² Despite severe restrictions in 2013, very few escapement goals were met in the region that year. In 2014, escapement goals were met in part of the region, but only with the closures of subsistence and commercial fisheries.³ On the Yukon River, Canadian escapement goals have only been met in 4 of the last 10 years.

Restrictions and subsistence closures in Western Alaska must be understood in context. In 2012, 77% of the subsistence Chinook salmon harvests occurred in the Yukon, Kuskokwim and Norton Sound-Port Clarence region.⁴ Since 1994, over 50% of the subsistence harvest of Chinook salmon has occurred in the Kuskokwim area.⁵ Western Alaska is thus highly dependent upon Chinook salmon subsistence harvests, and the region is responsible for the vast majority of the subsistence harvest of Chinook salmon in the state of Alaska.

Chinook salmon is clearly a critically important species by the numbers. It is also important for a number of reasons far beyond a number. Chinook salmon are the first species of salmon to arrive in the summer, and hold an important place culturally and spiritually. Subsistence fishing is a critical community and family activity. The declines in Chinook salmon have resulted in vacant fish camps

¹ North Pacific Fishery Management Council and National Marine Fisheries Service, Public Review Draft, *Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis, Bering Sea Chinook and Chum Salmon Bycatch Management Measures* 105 (Mar. 2014) [hereinafter *EA/RIR/IRFA*].

² *Id.*

³ *Id.* at 106.

⁴ *Id.* at 114.

⁵ *Id.* at 116.

up and down the rivers and this important source of culture and intergenerational knowledge transfer is being lost as we speak.

Yet, subsistence needs for this critically important species of Chinook salmon have not been met for years, with the situation worse each year than it was the preceding year. On the Yukon River, Amounts Necessary for Subsistence (ANS) set by the Alaska Board of Fisheries have not been met for the last seven years.⁶ On the Kuskokwim, ANS has not been met for the past five years.⁷ On the Yukon River, preliminary estimates indicate that the 2013 subsistence harvest was only 12,568 Chinook salmon, compared to an average annual harvest of about 55,000 fish.⁸ In 2014, preliminary data estimates subsistence harvest of Chinook salmon on the Yukon River was 3,400 Chinook salmon.⁹ It is important to note that 855 of those fish were Chinook salmon caught in ADF&G test fisheries and given away to subsistence users.¹⁰ The few Chinook which were harvested were caught in chum salmon fisheries which were opened at the end of the season after 90% of the Chinook salmon run had passed.¹¹

The declining Chinook salmon stocks have also impacted commercial fisheries, creating an economic crisis. No directed commercial fishery for Chinook salmon has been allowed on the Yukon since 2007. The impacts from commercial fisheries can clearly be seen in terms of income – in the Kusilvak census district (which includes the lower Yukon and Kuskokwim) Chinook salmon fisheries provided 90-100% of the salmon revenue prior to 2006. Since 2011, it has been 0%.¹²

In 2015, much of the AYK region experienced slightly improved Chinook salmon returns. However, because of the low run forecasts and the continuing need to rebuild the runs by ensuring that escapements are met, closures and/or significant fishery restrictions were again imposed on the coastal and in-river subsistence, commercial and sport users. Most Chinook salmon producing systems in Norton Sound saw improved spawning escapements, but commercial fisheries for Chinook salmon were closed (as they have been since 2005), sport fisheries in subdistricts 4-6 were closed to retention, and significant restrictions were placed on the subsistence users. In the Yukon and Kuskokwim rivers, escapements also improved and on the Yukon the negotiated border passage goal into Canada was met. Meeting escapement goals in 2015 once again meant major sacrifices for in-river users, as subsistence harvests were severely restricted. For both the Kuskokwim and Yukon, the subsistence harvests were once again still far below the minimum established by the State of Alaska as “amounts necessary for subsistence.”

⁶ See Fig. 23, EA/RIR/IRFA, *supra* note 1, at 121.

⁷ See Fig. 24, *Id.*

⁸ *Id.*

⁹ Stephanie Schmidt, Alaska Department of Fish and Game, Report to the Eastern and Western Interior Federal Subsistence Regional Advisory Councils, Transcript at 181 (Mar. 4, 2015), *available at* <http://www.doi.gov/subsistence/library/transcripts/upload/Region-6-Region-9-04-Mar-15.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² EA/RIR/IRFA, *supra* note 1, at 232.

The declines in Chinook salmon have had and continue to have broad negative impacts – on subsistence and commercial fisheries, on our community members' nutrition, on the tradition of fish camps, and on the very social fabric of these communities.

2. Amendment 110 is Needed to Reduce Bycatch and Comply with NMFS's legal obligations

As detailed above, Western Alaska Chinook stocks are at all-time lows. The causes of the decline are unclear, and fisheries managers are left to manage that which they can control to rebuild the stock. Sources of in-river mortality have already been reduced to the maximum extent possible. In times of low abundance, it is critical that bycatch in the pollock fishery is reduced as well to provide for rebuilding. Rebuilding is not a new concept to this Council. In fact, if Western Alaska salmon were a federally managed species, a rebuilding plan would be in place and bycatch reductions would have been required long ago. According to the analysis, "Chinook salmon stocks in western Alaska continue to fail to meet escapement goals, and consequently all sources of mortality must be reduced. This is similar to reducing all known sources of mortality when a fish or crab stock under federal management is declared overfished and subject to a rebuilding plan."¹³ According to the most recent genetic stock identification, over 65% of the Chinook salmon caught as bycatch in the Bering Sea are of Western Alaska origin.¹⁴ Thus bycatch has a direct impact on Chinook salmon and must be reduced to aid in rebuilding.

The National Marine Fisheries Service (NMFS) is also obligated to reduce bycatch under National Standard 9 of the Magnuson Stevens Act, which requires that NMFS minimize bycatch to the extent practicable. The current cap levels do not meet this obligation and are simply too high to adequately protect salmon and meet the obligations of National Standard 9.

While reducing bycatch of any species is important, reducing bycatch of salmon is particularly so. As a keystone species for the ecosystem and for subsistence users, saving salmon is not just about dollars, jobs or protein. Subsistence users, most of whom are members of federally-recognized tribes, depend on Chinook salmon for their sustenance, cultures and economies, as described above. The United States government has a trust responsibility to ensure the health and welfare of the tribal members of the Alaska Native Villages in this region.¹⁵ The management decision to allow the pollock fishery to discard 60,000 Chinook as bycatch while the subsistence harvest is closed violates the trust responsibility of the federal government to ensure Alaska Native subsistence needs are met. The Department of Commerce acknowledges the federal fiduciary relationship with Alaska Natives through its Administrative Order 218-8 and Tribal Consultation and Coordination Policy. Our groups consulted with NMFS several times during the North Pacific Fishery Management Council (the Council) process which led to the development of this Amendment and Proposed rule. We appreciated these meetings, and urge NMFS to continue to take our comments into consideration under the formal consultation process.

¹³ EA/RIR/IRFA, *supra* note 1, at 18.

¹⁴ *Id.* at 110.

¹⁵ *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F. 2nd 1162, 1169 n. 10 (9th Cir. 1982).

In addition, NMFS and the Council are also bound by international law to reduce salmon bycatch. Under the terms of the Yukon River Salmon Agreement, an annex of the Pacific Salmon Treaty, the U.S. agreed to “increase the in-river run of Yukon River origin salmon by reducing marine catches and by-catches of Yukon River salmon. They shall further identify, quantify and undertake efforts to reduce these catches and by-catches.”¹⁶ The treaty also commits the U.S. to meet escapement goals, allowing sufficient Chinook salmon to reach Canada each year. Amendment 91, which allows for bycatch levels of 60,000 Chinook salmon in some years, and 47,591 Chinook salmon in all years, does not represent a “reduction” in bycatch from historical levels. The bycatch of Yukon River Chinook salmon also contributes to repeated failures to meet the United States’ treaty obligation via the mandated escapement goals. This not only violates the obligations of the United States under the treaty, but places the entire burden of meeting the treaty obligation on the backs of in-river subsistence and commercial fishers.

3. Support for Amendment 110/Proposed Rule as a Step Towards Greater Bycatch Reduction

a. Reducing the Performance Standard and Prohibited Species Catch (PSC) Limit

Our groups have been engaged for more than twenty years in the development of salmon bycatch reduction measures with the Council, NMFS and the pollock industry. To date, management action has largely been driven by crisis – either a spike in the bycatch, a decline in Chinook salmon stocks, or both. We have consistently advocated for a bycatch cap which will adequately protect the Western Alaska Chinook salmon stocks on which our communities depend. The cap and performance standard originally set under Amendment 91 were set at a time when Yukon River Chinook salmon runs were struggling, but before the widespread Chinook salmon declines and severe subsistence restrictions and closures were realized. Even at that time, an astoundingly broad number of managers and groups recommended the Council adopt an overall cap at half the level of the cap which the Council ultimately selected. In fact, the Federal Subsistence Board, the Yukon River Panel, the Alaska Federation of Natives, numerous Federal Subsistence Regional Advisory Councils, our groups and many tribes and individuals all recommended a cap in the 30,000-32,500 range.

Six years later, the horrific declines in Chinook salmon which were just starting at the time Amendment 91 was adopted have been realized, and the reality of complete subsistence closures has become the norm on many of our rivers. The component of Amendment 110 and the proposed rule which would reduce the performance standard and PSC limit in years of low Chinook salmon abundance in Western Alaska is thus a key component of this action, and one which we support. The overall caps set in Amendment 91 were set far too high to ensure a healthy future for our salmon runs. Given the significant changes in the stock status of Western Alaska Chinook salmon since these caps were set, the current cap numbers are particularly egregious. We see the mechanism to lower these limits in times of low abundance as the minimum step NMFS can and must take at this time to fulfill your numerous legal responsibilities described above to reduce the allowable salmon bycatch in the pollock fishery. This proposed rule does not lower the

¹⁶ Pacific Salmon Treaty, Annex IV Chapter 8 (27)(Yukon River Salmon Agreement)(2002).

performance standard or cap permanently. It merely puts a system in place under which in times of extremely low Chinook salmon abundance across three of the major river systems in Western Alaska, these caps would be lowered. Under the triggers in the proposed rule, this lower cap would only have been in effect in 2000 and from 2010 to 2014.¹⁷ This encompasses the years in which escapements have not been met and subsistence has been severely restricted – the worst of the worst. Taking action now to lower the caps in these years of extremely low abundance is a critical step to ensure that bycatch is reduced in the years when every source of mortality must be reduced.

Lowering both the performance standard and the overall cap, as the proposed rule does, is important. Based on our understanding of the incentive plan structure, lowering the performance standard would lower the the bycatch “target” for the pollock industry. Lowering the performance standard will, we expect, serve to ensure that bycatch remains below this number. However, under the structure of Amendment 91, the pollock fleet can fish up to the overall cap in any two out of seven years *without consequence*. That means it currently remains possible and perfectly legal for the pollock fishery to catch up to 60,000 Chinook salmon. This level of bycatch would be absolutely devastating at the current levels of Chinook salmon abundance. It would be equally devastating to the rebuilding of the run to have this level of bycatch occur just when it is starting to recover. Therefore, reducing the overall cap is essential as well. While we support the proposed reduction, we do continue to believe that a greater reduction in the overall cap is necessary to adequately protect Western Alaska Chinook salmon runs.

Beyond the necessity based on salmon recovery alone to reduce the hard cap, it is also important to reduce the performance standard and hard cap together. Reducing the performance standard without a comparable reduction in the hard cap creates a situation where the incentive to remain under the performance standard is greatly reduced, as vessels have much more to gain by exceeding the performance standard: “An increased gap between the performance standard threshold and hard cap would encourage vessels to be more likely to risk exceeding the lower level in those years and if so revise the IPA for the resulting hard cap of their portion of the 47,591, and/or respond slowly to the need to operate under the lower performance standard as the hard cap would not be imposed until the third of 7 years.”¹⁸ The analysis refers to the benefits of a larger gap between the performance standard and overall cap (e.g. lowering the performance standard but not the cap) as providing an “insurance policy” or “buffer.”¹⁹ This concept completely ignores the context of this action – which is to create a salmon bycatch management program which is appropriate to the circumstance of lower Chinook abundance. There are no buffers or insurance policies for in-river users, and if Chinook salmon should return to higher abundances, any surpluses must first go to rebuilding the run and to meeting subsistence needs. Creating a buffer or insurance policy for the pollock fishery simply assures that the pollock fishery continues to be first in-line for any returning Chinook salmon, granting it an inequitable priority above that of the recovery of the resource and

¹⁷ EA/RIR/IRFA, *supra* note 1, at 63.

¹⁸ EA/RIR/IRFA, *supra* note 1, at 184.

¹⁹ *See id.* at 176, 177.

of subsistence users. Prioritizing bycatch usage in this manner is counter to the law, and to basic principles of equity. We therefore support the proposed rule which lowers both the overall cap and the performance standard.

The reductions in the hard cap in the proposed rule still provides broad opportunity for the pollock fishery to prosecute their fisheries. Looking at the years since Amendment 91 was in place (2011-2014), the lower hard cap of 45,000 would not have been reached in any year.²⁰ In fact, the last time this hard cap would have been reached was 2007.²¹ The 33,318 performance standard number has also not been exceeded since 2007.²² This means that even these lower hard cap and performance standards will not result in economic loss to the pollock fishery.

Overall, when Chinook salmon stocks are at a level of low abundance, as they currently are, it is critical that all sources of mortality are reduced. In-river harvests are reduced as Chinook salmon returns decrease, and at present this means there are very little or no Chinook salmon harvests allowed on many Western Alaska rivers. Bycatch in the pollock fishery must be lowered at these times as well. The current system in which subsistence fisheries can be completely closed in-river while bycatch limits are unchanged is not only inequitable, but seems to violate the “subsistence first” provisions of the Alaska National Interest Land Claims Act (ANILCA) in spirit if not in law. Reducing the hard cap and performance standard as proposed is a critical step towards righting this imbalance.

b. Incorporate Chum Salmon Avoidance into the Incentive Plan Agreements (IPAs)

The proposed rule includes requirements to integrate Chum salmon bycatch measures with Chinook salmon bycatch measures by incorporating them into the IPAs. We support these measures. By integrating chum salmon bycatch measures with Chinook salmon bycatch measures this provides a mechanism for ensuring that chum salmon bycatch reduction measures do not inadvertently increase Chinook salmon bycatch. With declines in Chinook salmon, chum salmon are important for both subsistence and commercial fisheries, and are all that many Western Alaska communities have had an opportunity to harvest in recent years. Therefore it is essential that we have strong chum bycatch reduction measures in place. The proposed rule sets out minimum requirements for what must be included in a chum salmon IPA and numerous explanations of how the IPA will meet the goals set out by the Council/NMFS. Accountability and transparency in this industry-run program are critical, and maintaining explicit requirements and reporting will help to ensure that the goals for the program are met. With the rolling hot spot program as the primary management measure for chum salmon bycatch reduction, it is important that the public is provided adequate information to monitor the functioning of this program. We also support maintaining the chum salmon savings area, as in the proposed rule, to serve as a backstop for vessels that opt-out of the IPAs.

²⁰ EA/RIR/IRFA, *supra* note 1, at 166.

²¹ National Marine Fisheries Service, BSAI Chinook Salmon Mortality Estimates 1991-present (Feb. 25, 2016) available at https://alaskafisheries.noaa.gov/sites/default/files/reports/chinook_salmon_mortality2016.pdf

²² *Id.*

c. Other Measures to Reduce Chinook Salmon Bycatch

The proposed rule contains a number of other measures designed to reduce Chinook salmon bycatch. This includes modifications to the IPAs such as requiring excluder use, requiring a rolling hot spot program that is in place throughout the year, and measures to avoid late-season (October) spikes in bycatch.²³ We see these as useful tools to fine-tune the IPAs to mandate greater bycatch reduction. The structure of the current bycatch management program for the pollock fishery depends to a high degree on the IPAs to reduce bycatch, with the caps functioning merely as an upper limit. Particularly since the overall hard cap remains high, it is important that the IPAs are designed to use every tool possible to reduce salmon bycatch. Including these additional requirements in the proposed rule is critical. Including the specific requirements for these additional measures in the IPA is important both as a matter of transparency and to set clear standards for what must be included in the IPAs.

4. Conclusion

Western Alaska Chinook salmon stocks have reached devastatingly low levels in recent years. While 2015 showed a hopeful uptick in returns, we have a long ways to go to rebuild our Chinook salmon runs. Maintaining strong chum salmon runs is always critical, and even more so in these times of Chinook salmon shortages. Amendment 110 and the proposed rule represent an important step in NMFS' ongoing work to reduce and minimize salmon bycatch in the pollock fishery. We support this proposed rule. At the same time, we urge the agency and the industry to continue to work towards greater bycatch reduction, with an ultimate goal of zero bycatch.

The structure put forward in Amendment 91, and confirmed here in Amendment 110 present a unique management regime which combines a command and control approach through bycatch caps with an industry-run adaptive management approach through the IPAs. The Council has continued to support this approach with the promise that the IPAs will reduce bycatch at all levels of salmon and pollock abundance. As this new management approach continues to be tested, NMFS must remain vigilant to ensure that these promises are met. The promise of the IPAs to keep bycatch below the cap and performance standard levels is critically important, as Chinook salmon bycatch at the level of the overall cap at this point in the rebuilding cycle would be devastating. We are alarmed to see that to date, bycatch this year is significantly above that at the same time last year (7,297 Chinook salmon in 2016; 5,799 Chinook salmon in 2015)²⁴, and we will continue to keep a watchful eye on the bycatch level, and expect NMFS and the Council to do the same.

Reducing salmon bycatch in the Bering Sea pollock fishery is critical to the future and rebuilding of these historic runs. We thank NMFS and the Council for continuing to develop management measures to reduce salmon bycatch. We support Amendment 110 and the proposed regulations to implement this Amendment as an important step in this process. We look forward to continuing to work with you on these important efforts.

²³ 81 Fed. Reg. 5687 (Feb. 3, 2016).

²⁴ NMFS In-Season Fisheries Outlook (Feb. 25, 2016) *available at* <https://alaskafisheries.noaa.gov/sites/default/files/reports/outlook.txt>.

Sincerely,



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Art Nelson, Executive Director
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