The Design and Use of Limited Access Privilege Programs

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Enforcement Conclusions

The above is a brief summary of the basics of the design and operation of an enforcement program for a LAP managed fishery. Clear communication with NOAA Fisheries during the Council's construction of the LAP plan will help to ensure that the peculiarities of the fishery which might affect enforcement are known to NMFS and that the nuances of enforcement that might affect compliance in a particular fishery are known to Council members.

While the simple diagram in Figure 6 provides a picture of what must be done in a LAP monitoring program, the details can be very complex. Also, there is likely a non-linear relation between the complexity and the costs of implementation and operation of a system, and also its ability to actually get the job done. The best plan is the one that gets the job done (where success is defined as meeting the demands of the MSA and accomplishing the management objectives of the plan) in the most efficient manner, not the one that simply has the lowest enforcement costs. If there are two ways to achieve a management objective, however, then choose the one that costs less to implement and enforce if all else is equal.

As Councils develop multiple LAP programs there may be economies of scale in implementing LAP enforcement programs. The personnel and the system that are used to implement one can often, with only moderate cost increases, handle more. This is only true, of course, if the designs of the actual LAP programs are similar. Therefore, it makes good sense, both from the participant's point of view, and from an implementation perspective, to minimize the differences between different LAP programs to the greatest extent possible.

Costs for enforcement activities are recoverable under Section 303A(e), but the MSA places a cap on recovery at 3-percent of the ex vessel value of fish harvested. While the costs of enforcing the Alaska Halibut/Sablefish program are under that cap, this will not necessarily be the case for all future LAP programs, especially those with smaller TACs and lower market prices. The objective to design an efficient enforcement program holds regardless of the 3-percent cap, but it is especially compelling where a proposed LAP approach pushes enforcement costs above the cap. In times of limited appropriated funding, it may be difficult to the find the necessary funds to bridge the gap, and therefore other LAP design alternatives may need to be considered.

2. Cost Recovery

The MSA mandates that all LAP programs have a cost recovery program. Both the Secretary and the Councils are given specific tasks. The Secretary is directed by Section 304(d)(2)(A) to collect a fee that will be used to cover certain specified costs:

> (2)(A) Notwithstanding paragraph (1), the Secretary is authorized and shall collect a fee to recover the actual costs directly related to the management, data collection, and enforcement of any—

(i) limited access privilege program; and

(ii) community development quota program that allocates a percentage of the total allowable catch of a fishery to such program.

(B) Such fee shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program, and shall be collected at either the time of the landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested.

(C)(i) Fees collected under this paragraph shall be in addition to any other fees charged under this Act and shall be deposited in the Limited Access System Administration Fund established under section 305(h)(5)(B).

(ii) Upon application by a State, the Secretary shall transfer to such State up to 33 percent of any fee collected pursuant to subparagraph (A) under a community development quota program and deposited in the Limited Access System Administration Fund in order to reimburse such State for actual costs directly incurred in the management and enforcement of such program.

Currently, cost recovery is occurring in the halibut/sablefish, crab rationalization, and red snapper IFQ programs (see the Appendix 1 spotlights on these programs). Cost recovery is not yet in place for wreckfish and the surf clam/ocean quahog IFQ programs. Given the mandate concerning the necessity and type of cost recovery program, Councils do not face any substantive design choice questions here as they do with other aspects of LAP program design: cost recovery must be implemented. However, knowledge of the theory and the operation of cost recovery programs is useful background for overall LAP program development.

With respect to the role of the Councils in developing LAP programs, the MSA states in Sections 303A(e) :

(e) COST RECOVERY.—In establishing a limited access privilege program, a Council shall—

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 304(d)(2), for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities.

The object of the fee program is to cover at least part of the costs of management (recall the 3-percent cap on cost recovery imposed by the MSA). The Councils are given the task of developing the methodology and means to assess the costs that are directly related to and in support of the program. But what exactly does that mean? While specific guidelines may be developed in a future cost-recovery rulemaking, some general principles can be described right now.

Incremental Costs

The relevant costs to recover are the incremental costs, i.e., those costs that would not have been incurred but for the IFQ program (NMFS, 2003). Conceptually, measuring these costs involves a "with and without" comparison, i.e., What is the cost of running the management program for the specified fishery under the *status quo* regime, and what is the cost of running the management program under the LAP program? The difference is the incremental costs attributable to implementing the LAP program. The two justifications for limiting recoverable costs to incremental costs are:

(1) Since the issue is to find the funds to cover the costs of adding LAP programs, then the real problem is to cover incremental costs.
(2) To minimize the disincentives for Councils and their constituents as they consider replacing non-LAP programs with LAPs, it makes sense to have participants in LAP programs only pay for the costs that are added because of the LAP program itself. For example, stock assessment costs will be required no matter what type of program is used. Given the current law, it is not possible to have participants in non-LAP programs pay for stock assessments. Therefore, having participants in LAP programs pay for stock assessment while non-LAP participants don't pay would be unfair and prejudice the Council's and industry's preference of LAPs as a management option.

The incremental cost issue was examined in a recent GAO study on cost recovery. (GAO, 2005). GAO pointed out that "actual costs" could alternatively be interpreted as the full costs of managing the fishery under consideration: every dollar that is spent on managing the fishery should be counted. In its response NOAA indicated that the current methodology of defining recoverable costs as those that are directly attributable to the implementation of an IFQ program was the correct interpretation of the MSA. The GAO did not go so far as to suggest that full costs should be recovered. Rather, they said that if Congress wanted full costs to be recovered, it should clarify the cost recovery fee provision of the Act to call for full costs to be recovered. The MSA reauthorization passed by Congress in December 2006 made no such change.

Interestingly, the Administration's MSA reauthorization bill provided additional cost recovery provisions for Congress to consider. The bill included a proposal for cost recovery in non-LAP fisheries, added science activities as a recoverable cost, and raised the potential cost recovery rate to 15 percent. Congress did not adopt any of these provisions, providing additional evidence that the existing cost recovery authorities and practices were sufficient.

The reason for a with-without comparison rather than a before-after comparison is to keep all other factors equal. This becomes tricky for any currently unmanaged fisheries. Here the baseline to use as a reference for the cost comparison is the estimated cost of basic data collection and analysis, management and enforcement under a traditional non-LAP method for that fishery. This means that if the *status quo* management system is incomplete or insufficient to meet current objectives and just happens to be adjusted

concurrent with the introduction of the LAP program, the costs of satisfying the insufficiency should not be attributable to the LAP program. For example, a newly managed fishery would need some form of a stock assessment regardless of whether the management strategy was a LAP or non-LAP approach. The stock assessment cost would not be a recoverable cost in this case. Another example is the general recognition that observers are necessary in a multi-species fishery managed with a non-LAP program. However, consider the case where observers were not part of the initial management program and a decision was subsequently made to require observers. Even though the decision to introduce observer might coincide with the start of a LAP program, the observer costs would not necessarily be eligible for cost recovery unless they were directly related to and in support of the LAP program. The determinations of what costs are recoverable will be extremely important to the industry and the agency, and regulatory guidance may be necessary to promote consistency and equity.

Measurement of Costs

The actual measurement of the incremental costs that are directly related to operating a LAP program can be quite difficult. The costs are generated by NOAA Fisheries programs and these data need to be shared with the Councils.. Experience with the existing LAP cost-recovery programs and the attributes of the larger operational systems in which they operate are worth exploring. The following discusses some of the issues related to LAP cost recovery as guidance and for possible adoption by other programs as Councils design new LAP programs.

The longest-standing U.S. LAP cost recovery protocol is the one that has been established in the NMFS Alaska Region for the halibut/sablefish IFQ program. Here the administrative staff have instituted an automated process whereby the time spent by employees on different categories of work are recorded and tabulated. The direct program cost categories include labor, rent/utilities/overhead, travel, printing, contracts, supplies, equipment, and other expenses. The Alaska Region is set up to capture time allocation information of all personnel who work on management or enforcement of any IFQ program. These costs are collected from various NMFS offices (Sustainable Fisheries Division, Restricted Access Management Program, Office of Law Enforcement, Office of Management and Information, and Office of Administrative Appeals).

In addition, costs from collaborators in Alaska's IFQ management program are tallied as well (including NOAA's Office of General Counsel, the International Pacific Halibut Commission, Pacific States Marine Fisheries Commission, Alaska Department of Public Safety and the Alaska Department of Fish and Game). These costs are added to the NMFS costs that are documented to be attributable to IFQ operations. The actual procedure is more complicated than this simple explanation. However, since there are procedures that will account for the measurement of the appropriate costs within the existing NOAA financial management system, it may not be necessary for the Councils to develop a process on their own.

All LAP programs will also likely require an infrastructure in addition to cost recovery that includes the administrative information systems needed to manage quota catch accounting, permit issuance, transfers of both permanent quota share and annual quota amounts. As more LAP programs around the country come online in the next few years, NMFS wants to minimize unnecessary redundancy in LAP infrastructure and seek economies of scale. Currently the Alaska Region has made the most significant investment in the infrastructure needed to operate LAP programs and has the most experience, having spent spent millions of dollars on these systems since the mid-1990s. They have created efficient web-based landings reporting system in conjunction with the State of Alaska and have well-documented procedures and systems to monitor and manage the administrative side of their LAP programs. The Southeast Region's red snapper IFQ program that began in January 2007 was able to adopt many ideas and procedures already in use in Alaska. Thus, even with the diversity of regional LAP programs likely to be designed in the future, there will be many opportunities to share common infrastructure components.

Promoting common infrastructure capabilities to support LAP management will be desirable for several reasons. (Note this is not referring to the Council program design elements, as no single LAP program exists that will satisfy every FMP requirement. Rather, it is the administrative and management infrastructure components common to all LAPs that can benefit from open and flexible designs.) For example:

1. Since planning and development costs leading up to a LAP are not cost recoverable, lack of appropriations for independent infrastructure development could constrain adoption of LAP strategies. Thus, an agency-wide capability may be more cost effective and result in more LAP programs than otherwise possible. Rather than duplicating LAP operational system design and implementation FMP by FMP, designing flexible systems for re-use by multiple LAP programs would be less costly. Taking advantage of economies of scale will allow more LAPs to come on-line should they be selected as the preferred alternative by Councils. Moreover, several preliminary estimates for operational costs of potential LAP programs have exceeded the 3-percent cap, some by as much as 300 percent. Thus, efficient design and shared use of existing infrastructure by multiple LAPs would help close this gap.

2. An agency-wide infrastructure capability will help regions implement a new LAP more quickly by taking advantage of a robust, well-designed, secure system that can be deployed much faster than individual new, ground-up development. Framework LAP programs that have received OMB regulatory, data quality and information collection approvals and are part of programmatic LAP Environmental Impact Statements may be possible and their use may expedite the approval timeline.

3. The risk of significant problems in LAP implementation due to a failed system development effort or deployment of a flawed system will be greatly reduced. Training and system support functions can also be distributed reducing single point of failure vulnerabilities. Separate regional systems developed in isolation could result in redundant and incompatible systems that would be contrary to agency and administration policies on

program efficiency and effectiveness. For example, a LAP is defined as a permit in the MSA, and all permits must comport with NMFS policy establishing a common national permits system. A common LAP infrastructure also would help establish and meet a set of consistent objectives for permit customer service, security, and compliance with other applicable laws and regulations.

Were Councils to consider designing LAP systems in a coordinated manner at the outset, more effective use of limited funds to satisfy infrastructure needs would result in more Councils having LAPs as a viable management option. This would require extensive collaboration among management partners within a region such as the coordination of the design of LAP programs for different species or fisheries within a FMP or among one or more Councils' FMPs. Collaboration and planning by NMFS and the Councils across regions to design compatible infrastructure systems for different FMPs could similarly result in cost effective LAP programs that enhance attainment of multiple Council or ecosystem-based objectives for management.

Computation of Cost Recovery Fee

Given the language in the law, the determination of the fee is a straightforward calculation. With the 3-percent cap on the amount that can be collected, the determination of the percentage fee can be expressed as follows. Let DPC be the direct program costs measured using the process described above. Let P equal the average landings price over the season, and TAC equal the total allowable catch. The product of P times TAC is the value of the harvest. The percentage fee is then:

$$\%Fee = 100*DPC/[P*TAC] \text{ or 3-percent whichever is lower}$$

In the Halibut/Sablefish program, the fee has always been less than the cap of 3-percent. However, preliminary calculations concerning other likely LAP candidate fisheries suggest that this will not always be the case. The Gulf of Mexico Red Snapper IFQ program, the Gulf of Mexico Reef Fish program, and the Central Gulf of Alaska Rockfish Pilot Program when fully implemented are expected to have management costs greater than the 3-percent that can be recovered.

As discussed in Section 2, Councils do have an option to use a portion of the funds collected in the mandated cost recovery program to create a loan program to assist certain entities purchase LAPs (this is not required but an option). In the Alaska Crab Rationalization Program (See 50 CFR 680.44), the Council had the unique authority for this fishery to propose an adjustment to the fee formula to at least partially compensate for funds directed to a Limited Access Privilege Purchase Program. Let L represent the percent of fees the Council can choose to allocate to the loan program, where according to the law, L can vary from 0 to 0.25. The adjusted formula would be:

$$\%Fee = 100*DPC/\{[P*TAC]*[1-L]\} \text{ or 3-percent whichever is lower.}$$

In the normal case where L is equal to .25, this is equivalent to multiplying the basic equation by 1.33. Ignoring the 3-percent cap for the moment, this means that if 25 percent of everything that is collected is given to the loan fund, there will still be enough collected to cover the direct program costs. Of course the cap does remain, and so this will only work when the basic calculated fee is less than 3-percent.

The Councils may also want to evaluate the process chosen to collect the fees since it can have important implications for the business operations of the participants. Councils may wish to include certain specifications in the plan after considering the convenience and cash flow needs of participants and the existing procedures fishermen use for selling and getting paid for their fish. For example, if settlements are received monthly and not at the conclusion of each trip, it will likely be necessary to schedule fee payments accordingly (See for example the differences in cost recovery in the IFQs for red snapper and the halibut sablefish in Appendix 1).

The timing of fee collection is also important with respect to enforceability. Having a program where the fees are withheld by the fish buyer will likely be more convenient for the participant and may also result in a higher compliance rate.

This raises another issue with respect to the timing of fee collections. The fee can not be determined until the average price is set or at least approximated. It may be necessary to let the fishery go for several months without collecting fees to get an estimate of P, which could then be used for the rest of the year. At the end of the year it may be necessary to make adjustments. Whatever process is ultimately chosen must be sensitive to the business practices of the fisheries being managed, and they vary considerably around the country.

3. *Monitoring and Data Collection*

As introduced in the discussion of enforcement, the effective management of LAP programs requires development and implementation of a highly accurate, timely, and well-documented catch accounting system. These systems provide information that go beyond just enforcement needs. Although the system could theoretically be a manual reporting mechanism, it is almost certain that monitoring and collecting sufficient data for managing a LAP program will require an electronic reporting system. The MSA specifies in 303A(c)(1)(H) that a LAP program must include the use of observers or an electronic monitoring system.

> (c) REQUIREMENTS FOR LIMITED ACCESS PRIVILEGES.—
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> (1) IN GENERAL.—Any limited access privilege program to harvest fish submitted by a Council or approved by the Secretary under this section shall—
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> (H) include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems;