

documentation on vessels built after 1984, written verification from a qualified marine surveyor or the builder, or the vessel's construction plans. A copy of the length overall verification must accompany an application for a Federal multispecies permit issued under § 651.4.

\* \* \* \* \*

9. Section 651.23(c) is revised to read as follows:

**§ 651.23 Minimum fish size.**

\* \* \* \* \*

(c) The minimum size applies to whole fish or to any part of a fish while possessed on board a vessel, except as provided in paragraph (d) of this section, and to whole fish only, after landing. Fish or parts of fish must have skin on while possessed on board a vessel and at the time of landing in order to meet minimum size requirements. "Skin on" means the entire portion of the skin normally attached to the portion of the fish or fish parts possessed.

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**50 CFR Part 676**

[Docket No. 950123023-5023-01; I.D. 010995E]

RIN 0648-AH38

**Limited Access Management of Federal Fisheries In and Off of Alaska; Determinations and Appeals**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This interim final rule amends the regulations implementing the determinations and appeals procedures for limited access management of Federal fisheries in and off of Alaska and amends regulations implementing the individual fishing quota (IFQ) limited access program with respect to establishment of quota share (QS) pools for each IFQ regulatory area. The changes made to the determinations and appeals procedures reduce the current two-stage appeals procedure to a single-step process, and reduce the length of time periods for certain appeals-related actions. The changes made to the establishment of QS pools allow for the addition of catch history that is in dispute and being appealed. These changes are necessary to avoid

excessive delays in deciding appeals and to allow the timely issuance of IFQ resulting from disputed catch history that was successfully appealed. The intended effect of this action is to shorten the appeals process while providing reasonable time for applicants to file, and to provide IFQ resulting from disputed catch history to persons who may have an appeal successfully resolved after the IFQ calculation date.

**DATES:** Interim rule effective January 30, 1995. Comments must be received at the following address no later than March 6, 1995.

**ADDRESSES:** Comments on the interim final rule may be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, 709 West 9th Street, Juneau, AK 99801, or P.O. Box 21668, Juneau, AK 99802-1668, Attn: Lori J. Gravel. Copies of the regulatory impact review prepared for this action may be obtained also from this address.

**FOR FURTHER INFORMATION CONTACT:** John Lepore, 907-586-7228.

**SUPPLEMENTARY INFORMATION:**

**Background**

The IFQ program is a regulatory regime developed by the North Pacific Fishery Management Council to promote the conservation and management of Pacific halibut (*Hippoglossus stenolepis*) and sablefish (*Anoplopoma fimbria*) fixed gear fisheries in the Gulf of Alaska and the Bering Sea and Aleutian Islands Area under Federal jurisdiction. Further information about the IFQ program is contained in the preamble to the final implementing regulations published November 9, 1993 (58 FR 59375). The commercial harvesting of halibut and sablefish under the IFQ program is scheduled to begin in the spring of 1995. The IFQ program is implemented by regulations at 50 CFR part 676.

The IFQ implementing regulations provide for the assignment of QS to qualified persons. The amount of QS assigned directly reflects a qualified person's verified catch history during specified years. The allocation of IFQ represents a privilege to harvest a specified amount of halibut or sablefish during one fishing year. The amount of IFQ allocated to any person by area is calculated annually on January 31 generally as the product of the total allowable catch available for harvest by fixed gear and the persons's QS divided by the QS pool for the area (50 CFR 676.20(f)). The QS pool for an area is the sum of all QS in that area for a species (50 CFR 676.20(b)).

**Changes to the Determinations and Appeals Procedures**

Final rules implementing the appeals procedure for limited access fisheries management of Federal fisheries in and off of Alaska became effective July 1, 1994 (59 FR 28281, June 1, 1994). A detailed explanation of the procedure for appealing initial administrative determinations appears in the preamble of the notice of proposed rulemaking published February 9, 1994 (59 FR 5979). Three changes to the final rules have been identified by NMFS as necessary to improve the efficiency of the appeals process. These changes:

1. Eliminate applicants' right to appeal an appellate officer's decision to the NMFS Director, Alaska Region (Regional Director), but retain the Regional Director's discretionary authority to renew, modify, reverse or remand any such decision;
2. Reduce the time period for filing an appeal of an initial administrative determination from 90 Federal business days to 60 calendar days after the date the determination was made; and
3. Reduce the time period before an appellate officer's decision becomes effective from 45 Federal business days to 30 calendar days after the date the decision is issued, unless, prior to that time, the Regional Director alters or modifies the decision, issues an order staying the effectiveness of the decision pending review, or accelerates the effectiveness date.

Subject to later revision based on public comments received, these actions are necessary to avoid excessively delayed appeals decisions. It is now apparent that the timely resolution of appeals to the Regional Director will not be possible. The changes discussed above will facilitate a more timely appeals process. The original time periods were excessively long in view of the number of appeals that are now expected, and resolving these appeals more expeditiously will benefit the fishermen involved. The majority of the initial administrative decisions to deny QS are due to be issued before January 31, 1995, the date of the required calculation of IFQ for the 1995 fishing season.

The first change is the elimination of the right to appeal an appellate officer's decision to the Regional Director. The Regional Director's discretionary authority to review and modify, reverse, or remand any appellate officer's decision is retained. This effectively changes the original two-stage appeals procedure into a single-step process. The original procedure provided an applicant a first-stage opportunity to

appeal an initial administrative determination to an appellate officer, and a second-stage opportunity to appeal the appellate officer's decision to the Regional Director. This regulatory amendment eliminates the second stage appeal; however, the Regional Director will routinely review appellate officers' decisions, and may reverse, modify, or remand these decisions for further consideration. If the appellate officer's decision is modified or reversed, the Regional Director will issue a written decision explaining the reasons for this action. The appellate officer's decision, unless acted on by the Regional Director, will be the final agency action for purposes of judicial review 30 days after issuance.

The second change is a substantial reduction of the time period within which an appellant may file an appeal. The purpose of this change is to expedite the appeals process, as explained above. The time period within which an appellant may file a written appeal of an initial administrative determination is changed from 90 Federal business days to 60 calendar days after the date the determination is made. This change effectively reduces the appeal filing opportunity from about 4 months to about 2 months. Saturdays, Sundays, and Federal holidays would be counted as part of the 60-day time period unless the last day of the 60-day period falls on a Saturday, Sunday, or Federal holiday. In this event, the period is extended to the close of business on the next business day.

The original appeals filing period of 90 days, not including weekends and holidays, was intended to provide an appellant with a liberal period within which to prepare an appeal. NOAA has determined that this period is unnecessarily long and would exacerbate expected delay in the resolution of appeals. Resolution of disputes involving more than one applicant but possibly the same vessel or catch data could be facilitated by resolving related appeals at the same time. Without this change, one person could file a prompt appeal while another could delay filing for up to 4 months, thereby preventing the prompt issuance of disputed IFQ. A 60-day period, including weekends and holidays except on the last day of the period, would provide appellants with adequate time to prepare and file appeals, and would benefit all affected parties by accelerating the appeals process.

The third change is a shortening of the period of delayed effectiveness of an appellate officer's decision from 45

Federal business days to 30 calendar days. The purpose of this change also is to speed achievement of final agency action on appeals. A 30-calendar-day period is adequate for the Regional Director to review an appellate officer's decision and take any action deemed necessary, such as a stay. Unless acted on by the Regional Director, an appellate officer's decision will be the final agency action subject to judicial review at the end of the 30-calendar-day delayed effectiveness period.

#### **Changes to the Establishment of Quota Share Pools**

Regulations pertaining to the calculation of QS and the QS pool for an area and regulations for appealing initial administrative determinations made regarding those calculations are found at 50 CFR 676.20 and 676.25, respectively. This action changes § 676.20(d)(3) to establish a reserve within the QS pool of each IFQ regulatory area; otherwise, contested catch history would not have been included in the QS pool. Any person who does not have QS included in the QS pool on January 31 of any year will not be allocated IFQ for that year and will not be able to participate in the IFQ fisheries in that year.

A problem of particular concern in the initial year of the IFQ program is that numerous appeals involve multiple parties. There may be disputes, for example, over who owned or leased a vessel that made qualified landings but not over the amount of those landings. Resolution of such appeals during the 1995 IFQ fishing season for halibut and sablefish would not allow the prevailing party to receive IFQ and use it during the season.

To correct this problem a QS pool reserve is established for catch history that would otherwise be withheld from the QS pool due to the pendency, at the time IFQ is determined, of an appeal involving contested catch history, vessel ownership or vessel lease data by two or more QS applicants. NMFS will set aside QS in the reserve pool for eventual award to specific appellants, and will include this QS in the total QS pool for purposes of determining the amount of IFQ to be assigned to each holder of QS.

This action addresses the problem that appeals, which involve multi-party contests over verified fish landings during the base period, could unjustly result in failure to allocate IFQ for the 1995 fishing season to applicants having made timely and sufficient application for participation in the IFQ Program. This procedure (i.e., placing contested QS in a reserve) is for use only in situations in which the eligibility for

qualifying pounds has been established but the appropriate party to be issued the QS, and the resulting IFQ, is pending decision.

Appeals may involve disputes between the appellant and NMFS over the amount of catch history that should be counted for purposes of calculating QS or may involve disputes between two or more persons over who should be assigned QS that results from catch history, vessel ownership, or lease history. Although any appeal would prevent NMFS from issuing contested QS, the agency could calculate the approximate amount of QS that would be added to the QS pool before an appeal involving two or more persons is resolved if the amount of catch history is not the issue being appealed but rather the issue is who should receive the QS that results from the catch history. In such cases, the undisputed catch history could be placed in a reserve as part of the QS pool for IFQ calculation purposes but no QS or IFQ would be assigned until after the agency determines the appropriate person or entity to receive the QS. The purpose of such a reserve is to provide for an immediate assignment of QS and IFQ upon final agency action on such multi-party appeals. This would allow the person receiving such IFQ to begin using it to harvest halibut or sablefish during the remainder of the IFQ fishing season following the decision. Alternatively, IFQ stemming from such disputed QS would not be issued until the year following final agency action.

#### **Waiver of Notice and Comment and Delayed Effectiveness Period**

This action must be made effective immediately for its benefits to be realized by the public. Pursuant to 5 U.S.C. 553(b)(B), a rule may be issued without prior notice and opportunity for public comment if providing such would be impracticable, unnecessary, or contrary to the public interest. Pursuant to 5 U.S.C. 553(d)(3), a rule may be made effective prior to 30 days after its issuance for good cause found and published with the rule.

As explained earlier, both the two-tiered appeals process and the excessively long period in which an appeal may be filed under the current system cause unnecessary delays. These delays are harmful to the public, because they delay the opportunity for a successful appellant to use any fishing privileges resulting from an appeal. Delaying promulgation of this rule to allow for prior notice and opportunity for public comment and delaying its effective date for 30 days would be contrary to the public interest in that the

delays sought to be reduced or eliminated by this action would continue to occur for initial administrative determinations of QS and initial determinations by appellate officers issued during notice-and-comment rulemaking, including any period of delayed effective date.

If this rule is immediately issued and made effective upon filing with the Office of the Federal Register, only those relatively few applicants for whom an initial administrative determination of QS has been made would be entitled to the previous 4-month time frame in which to file an appeal and only those very few appellants for whom an appellate officer has already issued a decision would be entitled to an appeal to the Regional Director. For all others the harmful delay to the public which this rule seeks to eliminate would be eliminated. Accordingly, for the reason set forth above, the Assistant Administrator finds good cause to dispense with prior notice and opportunity for public comment and to make the rule immediately effective upon filing with the Office of Federal Register.

Similarly, the establishment of QS pool reserves must be effective immediately. By regulation, the calculation to determine how much IFQ will be issued for the 1995 fishing season occurs on January 31, 1995. If QS is not in the pool as of this determination date, the resulting IFQ will not be issued. Providing QS pool reserves for contested QS will benefit successful appellants by allowing them to obtain IFQ that is calculated but not issued pending resolution of an appeal. Without this action, a successful appellant will have to wait until the following season to receive IFQ if the QS involved in the appeal is added to the QS pool after the determination date. As such, this rule must be effective on or before January 31, 1995, for successful appellants to fish during the 1995 season. Given the current time-frame, any delay in the effectiveness of this rule will nullify the benefit. Nullifying this benefit will be contrary to the public interest and thereby constitutes good cause for dispensing with prior notice and opportunity for public comment and for making the rule immediately effective.

**Classification**

A regulatory impact review/final regulatory flexibility analysis (RIR/FRFA) was prepared for the IFQ limited access program of which the original appeals and determinations are a part. The RIR/FRFA is contained in the Final Environmental Impact Statement for

Amendment 15 to the Fishery Management Plan (FMP) for the Groundfish Fisheries of the Bering Sea and Aleutian Islands Area, and for Amendment 20 to the FMP for Groundfish of the Gulf of Alaska. This document is available (see ADDRESSES).

This final rule makes minor revisions to the regulations affecting the filing of an appeal of an initial administrative determination. No new information is collected, but the period of time within which affected persons would have to submit information is decreased. The estimated response time for filing a written appeal under the IFQ program is 4 hours. This collection of information has been approved by the Office of Management and Budget, OMB control number 0648-0272 (regarding IFQs for Pacific halibut and sablefish).

This rule has been determined to be not significant for purposes of Executive Order 12866.

**List of Subjects in 50 CFR Part 676**

Fisheries, Reporting and recordkeeping requirements.

Dated: January 30, 1995.

**Nancy Foster,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 676 is amended to read as follows:

**PART 676—LIMITED ACCESS MANAGEMENT OF FEDERAL FISHERIES IN AND OFF OF ALASKA**

1. The authority citation for part 676 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.* and 1801 *et seq.*

2. In § 676.20, paragraph (d)(3) is revised and paragraph (e) is removed and reserved as follows:

**§ 676.20 Individual allocations.**

\* \* \* \* \*

(d) \* \* \*

(3) Catch history, vessel ownership, or lease data that cannot be verified by the Regional Director, following the procedure described in paragraph (d)(1) of this section, will not qualify for QS. An initial determination denying QS on the grounds that claimed catch history, vessel ownership or lease data were not verified may be appealed following the procedure described in § 676.25 of this part. Quota share reflecting catch history, vessel ownership, or lease data that are contested between two or more applicants, at least one of which is likely to qualify for QS when the dispute is resolved, will be assigned to a reserve that will be considered part of

the QS pool for the appropriate IFQ regulatory area. Any QS and IFQ that results from agency action resolving the dispute will be assigned to the prevailing applicant(s) pursuant to paragraphs (b), (c) and (f) of this section. If the assigned IFQ for the 1995 fishing season becomes moot by the passage of time needed to resolve the dispute, the assignment of QS and IFQ for subsequent fishing seasons will be unaffected.

(e) [Reserved]

\* \* \* \* \*

3. In § 676.25, paragraphs (a), (b), (d)(1), (d)(2), (g) introductory text, (g)(1), (g)(2), (k), (m)(4), (n)(8), and (o) are revised to read as follows:

**§ 676.25 Determinations and appeals.**

(a) *General.* This section describes the procedure for appealing initial administrative determinations made under this part.

(b) *Who may appeal.* Any person whose interest is directly and adversely affected by an initial administrative determination may file a written appeal. For purposes of this section, such persons will be referred to as "applicant" or "appellant".

\* \* \* \* \*

(d) *Time periods for appeals and date of filing.* (1) If an applicant appeals an initial administrative determination, the appeal must be filed not later than 60 days after the date the determination is issued.

(2) The time period within which an appeal may be filed begins to run on the date the initial administrative determination is issued. If the last day of the time period is a Saturday, Sunday, or Federal holiday, the time period will be extended to the close of business on the next business day.

\* \* \* \* \*

(g) *Decision Whether to Order a Hearing.* The appellate officer will review the applicant's appeal and request for hearing, and has discretion to proceed as follows:

(1) Deny the appeal;

(2) Issue a decision on the merits of the appeal if the record contains sufficient information on which to reach final judgment; or

\* \* \* \* \*

(k) *Appellate Officers' Decisions.* The appellate officer will close the record and issue a decision after determining that there is sufficient information to render a decision on the record of the proceedings and that all procedural requirements have been met. The decision must be based solely on the record of the proceedings. Except as provided in paragraph (o) of this

section, an appellate officer's decision takes effect 30 days after it is issued and upon taking effect is the final agency action for purposes of judicial review.

\* \* \* \* \*

(m) \* \* \*

(4) The appellate officer will close the record and issue a decision after determining that the information on the record is sufficient to render a decision.

(n) \* \* \*

(8) The appellate officer will close the record and issue a decision after determining that the information on the record is sufficient to render a decision.

(o) *Review by the Regional Director.*

An appellate officer's decision is subject to review by the Regional Director, as provided in this paragraph.

(1) The Regional Director may affirm, reverse, modify, or remand the appellate officer's decision before the 30-day effective date of the decision provided in paragraph (k) of this section. The Regional Director may take any of these actions on or after the 30-day effective date by issuing a stay of the decision before the 30-day effective date. An action taken under paragraph (o)(1) of this section takes effect immediately.

(2) The Regional Director must provide a written explanation why an appellate officer's decision has been reversed, modified, or remanded.

(3) The Regional Director must promptly notify the appellant(s) of any action taken under paragraph (o) of this section.

(4) The Regional Director's decision to affirm, reverse, or modify an appellate officer's decision is a final agency action for purposes of judicial review.

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