

[Federal Register: June 1, 1994]

DEPARTMENT OF COMMERCE
50 CFR Part 676

[Docket No. 940103-4154; I.D. 122893B]
RIN 0648-AG21

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: Final rule.

SUMMARY: NMFS issues this final rule to implement the determinations
and appeals procedures for the limited access management of Federal
fisheries in and off of Alaska. This action is necessary to establish
who may appeal initial administrative determinations; establish what
must be included in appeals; establish procedures regarding acceptance
of appeals; establish the authority of, and a procedure for
disqualifying, appellate officers; establish evidentiary procedures and
the hearing process; establish procedures for post-hearing decisions;
and establish appeals procedures to the Director, Alaska Region, NMFS
(Regional Director). The intended effect of this action is to provide
an orderly process for appeals from initial administrative
determinations made by NMFS management staff and from decisions issued
by appellate officers under the Individual Fishing Quota (IFQ) program.

EFFECTIVE DATE: July 1, 1994.

ADDRESSES: Copies of this action, and the final environmental impact
statement/supplementary environmental impact statement (FEIS/SEIS) for
halibut and sablefish IFQ programs, respectively, may be obtained from
the North Pacific Fishery Management Council (Council), P.O. Box
103136, Anchorage, AK 99510.

Appeals must be mailed to NMFS, Restricted Access Management, P.O.
Box 21668, Juneau, AK 99802-1668, or delivered to NMFS, Federal

Building, Fourth Floor, 709 West 9th Street, Juneau, AK 99801.

FOR FURTHER INFORMATION CONTACT: John Lepore, Fisheries Regulations Specialist, Alaska Region, NMFS, at 907-586-7228.

Supplementary Information:

Background

This action implements the determinations and appeals process for the IFQ program, a regulatory regime intended by the Council to promote the conservation and management of halibut and sablefish resources, and to further the objectives of the Magnuson Fishery Conservation and Management Act (Magnuson Act) and the Northern Pacific Halibut Act (Halibut Act).

Beginning in 1995, the Alaskan fisheries using fixed gear for Pacific halibut (*Hippoglossus stenolepis*) and sablefish (*Anoplopoma fimbria*) in the areas defined in 50 CFR 676.10(b) and (c) will be managed in accordance with the IFQ regulations codified at 50 CFR part 676. Further information on the implementation of this program, and the rationale in support of it, is contained in the preamble to the final rule establishing the IFQ limited access program published on November 9, 1993 (58 FR 59375).

This action provides procedures for appeals for determinations under 50 CFR part 676. Persons may appeal initial administrative determinations made by NMFS management staff and appellate officers' decisions. These two levels of appeal will provide any person whose interests are directly and adversely affected by a determination or decision, a reasonable opportunity to present objections and be heard.

The proposed rule for this action was published on February 9, 1994 (59 FR 5979), and the public comment period ended on March 28, 1994. No public comment was received on the proposed rule.

Initial Administrative Determinations

Initial administrative determinations are the findings of NMFS staff on eligibility for, and the transfer and use of, quota share (QS) and IFQ under the IFQ program. Initial administrative determinations are made after evaluating all evidence provided by applicants, comparing that evidence with the data on the official record, and making a determination based on that comparison. Initial administrative determinations become final agency actions within 90 days unless appealed under the procedure described below.

Examples of initial administrative determinations are: (1) Whether

applicants have submitted sufficient documentation to demonstrate they are qualified persons, or their successors-in-interest, as defined in 50 CFR 676.20(a)(1); (2) whether to grant initial QS allocations based on the documentation provided in applications; (3) whether documentation submitted with applications, or documentation requested by NMFS staff, support the claims made for initial QS allocations; and (4) whether to grant initial QS allocations based on specific vessel categories and fishery statistical areas.

NMFS staff may request additional documentation from applicants to support their applications. Applicants will have 90 days to respond to these requests. Requests for additional documentation provide applicants with an opportunity to submit additional documentation for claims not consistent with data contained in NMFS files. Requests for additional documentation cannot be the subject of administrative appeals. Appealable determinations will not occur until: (1) Applicants respond to the request by providing additional information within the time period; (2) applicants waive the right to respond to the request for additional evidence, and instead request that a determination be made on the application in its current form; or (3) applicants do not respond within the time period.

Appeals

Persons whose interests are directly and adversely affected by initial administrative determinations or appellate officers' decisions can appeal those determinations or decisions. This action provides a two-tier appeals process (i.e., appeal of an initial administrative determination to an appellate officer and appeal of an appellate officer's decision to the Regional Director). This process provides applicants with a reasonable opportunity to be heard concerning agency actions.

Appeals must be in writing. The writing requirement protects the applicant (now appellant) by providing a written record of the issues appealed and ensuring that the appeal becomes part of the record. Appeals must also be in original form; NMFS will not accept appeals sent by electronic transmission (telefacsimile). Appeals may be either mailed or personally delivered to NMFS. Appeals submitted by mail may be sent certified, return receipt requested, to provide the appellant with evidence of mailing the appeal in case it becomes lost or destroyed.

Addresses of record will be established from the addresses used by persons on their first correspondence (see ADDRESSES). For most persons, this first correspondence will be their request for an application for QS allocation. Any changes to the address of record

must be promptly provided to NMFS in writing. Notification of address changes to NMFS is the responsibility of the applicants, since they are in the best position to have knowledge of such changes. Supplying address changes ensures that NMFS has an accurate and current address for correspondence.

Eligibility to appeal begins on either the date initial determinations are made or on the date decisions are issued. Appeals must be filed with NMFS within 90 days of the date an initial administrative determination is made or within 45 days of the date an appellate officer's decision is issued.

Appellants are required to submit a full written statement in support of the appeal, including a concise statement of the reasons why the initial administrative determination has a direct and adverse effect on the appellant and should be reversed or modified. The appellate officer may request additional information from the appellant to resolve the appeal. Appeals merely challenging the IFQ regulations will not be accepted.

In addition to the written statement of appeal, an appellant may request, in writing, a hearing on one or more issues material to the appeal. A request for a hearing must be accompanied by a concise statement raising a genuine and substantial issue of adjudicative fact for resolution and listing available and specifically identified reliable evidence upon which the factual issue can be resolved. A hearing will not be held on issues of policy or law, or upon the basis of mere allegations, denials, or general descriptions of positions and contentions.

The appellant could, and is encouraged to, supply evidence supporting the statement of appeal and request for a hearing. Providing a complete and timely appeal with sufficient evidence increases the potential that the appellate officer can make a decision in the appellant's favor without further proceedings. If the appeal is incomplete, untimely, or not sufficiently supported, the appellate officer will deny the appeal, a decision that can be appealed to the Regional Director.

Hearings

Written or oral hearings can be held to resolve genuine and substantial issues of adjudicative fact. The decision of whether to hold a written or oral hearing will be solely within the appellate officer's discretion and cannot be appealed to the Regional Director.

The appellate officer can order written hearings on a determination that the issues presented in an appeal are resolvable by allowing the appellant an opportunity to respond through written submissions. The

written hearing process is the preferred method of resolving issues, unless the appellate officer determines that an oral hearing is necessary. The appellate officer can decide to order an oral hearing on one or more issues after beginning the written hearing process.

On ordering a written hearing, the appellate officer will provide the appellant with notice that a written hearing is ordered, provide the appellant with a statement of issues to be determined, and provide the appellant with 30 days to file a written response. The written response can include affidavits from the appellant or other witnesses. The statement of issues will provide the appellant with information concerning the issues to be determined by the appellate officer. This statement will help focus the appellant on pertinent, rather than extraneous, issues.

The appellate officer will order an oral hearing on a determination that an oral hearing would be necessary to resolve one or more issues presented in the appeal. On ordering an oral hearing, the appellate officer will provide the appellant with notice that an oral hearing is ordered, provide the appellant with a statement of issues to be determined by the hearing process, and provide the appellant with notice, at least 30 days in advance, of the place, date, and time of the oral hearing. Hearings will be held in Juneau, AK at the prescribed date and time, unless the appellate officer determines, based upon good cause shown, that a different place, date, or time would better serve the interests of justice. The appellate officer will have authority to conduct hearings in an orderly manner as described in Sec. 676.25(i).

This action also allows appellate officers to order pre-hearing conferences. The pre-hearing conference can be used to simplify the issues, obtain stipulations and admissions of facts, and discuss the possibility of settlement without further proceedings. The formal rules of evidence will not apply.

Appellate officers will withdraw from an appeal at any time they deem themselves disqualified. This may occur because of financial connection to the case, ex parte communications, or some other personal bias. In addition, appellants can request withdrawal of the appellate officer. An appellate officer may withdraw upon the appellant's motion if made prior to the issuance of a decision and the appellant demonstrates personal bias or other basis for disqualification. An appellate officer's denial of a motion to withdraw will be part of the record.

At the conclusion of the hearing, whether oral or written, the appellate officer will close the record and issue a decision. The appellate officer's decision will be based solely on the record of the proceedings. This ensures that the appellant will have the opportunity

to review all information used in the decision-making process. This requirement also establishes a record for review on appeal to the Regional Director.

Appeal to the Regional Director

An appellant whose interests are directly and adversely affected by an appellate officer's decision will have an opportunity to appeal that decision to the Regional Director. A written appeal to the Regional Director must be filed within 45 days of the issuance of the appellate officer's decision. If the appellate officer's decision is not appealed within this 45-day period, it becomes effective and is considered a final agency action. An appeal to the Regional Director must clearly and concisely state the reasons why the appellate officer's decision has a direct and adverse effect on the appellant and why it should be modified, reversed, or remanded.

The Regional Director will resolve the appeal based solely on the record. Another hearing at this stage of the process is unnecessary, because all evidence and testimony for the proper disposition of issues should have been presented to the appellate officer and will be in the record. The appellate officer's decision will be affirmed by either the Regional Director's denying the appeal or the Regional Director's preparing an order affirming the appellate officer's decision. The Regional Director can deny appeals that were submitted beyond the 45-day period or appeals that did not articulate sufficient basis to modify, remand, or reverse the appellate officer's decision. The Regional Director can also order that an appellate officer's decision be modified or reversed, or remanded to an appellate officer for further proceedings consistent with the Regional Director's decision. In all cases, the Regional Director will issue a written decision explaining the reasons for the determination. Unless a remand is ordered, a decision by the Regional Director is a final agency action subject to judicial review.

Classification

A regulatory impact review/final regulatory flexibility analysis (RIR/FRFA) was prepared for the IFQ limited access program for which these determinations and appeals regulations are a part. 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, the document that contains the RIR/FRFA, is available (see ADDRESSES).

This final rule contains a collection of information requirement subject to the Paperwork Reduction Act. The estimated response time for the collection of information required to file an appeal to a QS application is 4 hours. The collection of information has been approved by the Office of Management and Budget, OMB control numbers 0648-0272 (IFQs for Pacific halibut and Sablefish in the Alaska Fisheries) and 0648-0269 (Western Alaska **CDQ** Program).

This final rule has been determined to be not significant for purposes of Equal Opportunity 12866.

List of Subjects in 50 CFR Part 676

Fisheries, Reporting and recordkeeping requirements.

Dated: May 25, 1994.

Charles Karnella,
Acting Program Management Officer, National Marine Fisheries Service.

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

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

1. The authority citation for 50 CFR part 676 continues to read as follows:

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

2. In Sec. 676.25, the text is added to read as follows:

Sec. 676.25 Determinations and appeals.

(a) General. This section describes the procedure for appealing initial administrative determinations and appellate officers' decisions made under this part.

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

(c) Submission of appeals. Appeals must be in writing and must be submitted in original form to NMFS, P.O. Box 21668, Juneau, AK 99802; or to NMFS, 709 W. 9th, Room 413, Juneau, AK 99801. Appeals transmitted

by electronic means will not be accepted.

(d) Time periods for appeals and date of filing. (1) Appeals must be filed within the following time periods:

(i) Appeals from initial administrative determinations must be filed within 90 days of the date the determination was made; and

(ii) Appeals from appellate officers' decisions must be filed within 45 days of the date the decision was issued.

(2) The time periods within which appeals must be filed begin to run on the date of issuance of the initial administrative determination or appellate officer's decision that gives rise to the appeal.

Saturdays, Sundays, and Federal holidays will not be included in computing such time periods, which conclude at the close of business of the final enumerated day, except that when such time periods conclude on a Saturday, Sunday, or Federal holiday, such periods will be extended to the close of business on the next business day.

(3) For purposes of this section, the date of filing is the date the appeal is received by NMFS.

(4) All other time periods established under this section will be computed in a manner consistent with the provisions of paragraphs (d)(2) and (3) of this section.

(e) Address of record. NMFS will establish as the address of record the address used by the applicant in initial correspondence to NMFS, Restricted Access Management, after the application period has begun. Notices of all actions affecting the applicant after establishing an address of record will be mailed to that address unless the applicant provides NMFS, in writing, with any changes to that address. NMFS bears no responsibility if a notice is sent to the address of record and is not received because the applicant's actual address has changed without notification to NMFS.

(f) Statement of reasons for appeals from initial determinations. Applicants must timely submit a full written statement in support of the appeal, including a concise statement of the reasons why the initial administrative determination has a direct and adverse effect on the applicant and should be reversed or modified. If the applicant requests a hearing on any issue presented in the appeal, such request for hearing must be accompanied by a concise written statement raising genuine and substantial issues of adjudicative fact for resolution and a list of available and specifically identified reliable evidence upon which the factual issues can be resolved. The appellate officer will limit his/her review to the issues stated in the appeal; all issues not set out in the appeal will be waived.

(g) Decision Whether to Order a Hearing. The appellate officer will review the applicant's appeal and request for hearing and, at his/her

sole discretion, proceed as follows:

(1) Deny the appeal. A decision to deny the appeal may be appealed to the Regional Director as provided in paragraph (o) of this section;

(2) Issue a decision on the merits of the appeal if the record contains sufficient information on which to reach final judgment. A decision on the merits of the appeal may be appealed to the Regional Director as provided in paragraph (o) of this section; or

(3) Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following:

(i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law;

(ii) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be ordered on the basis of mere allegations or denials or general descriptions of positions and contentions;

(iii) The evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate; and

(iv) Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.

(h) Types of Hearings. If the appellate officer determines that a hearing should be held to resolve one or more genuine and substantial issues of adjudicative fact, he/she may order:

(1) A written hearing, as provided in paragraph (m) of this section; or

(2) An oral hearing, as provided in paragraph (n) of this section.

(i) Authority of the Appellate Officer. The appellate officer is vested with general authority to conduct all hearings in an orderly manner, including the authority to:

(1) Administer oaths;

(2) Call and question witnesses; and

(3) Issue a written decision based on the record.

(j) Evidence. All evidence that is relevant, material, reliable, and probative may be included in the record. Formal rules of evidence do not apply to hearings conducted under this section.

(k) Appellate Officers' Decisions. The appellate officer will close the record and issue a decision after he/she determines that there is sufficient information on the record of the proceedings and all

procedural requirements have been met. The decision must be based solely on the record of the proceedings. Appellate officers' decisions will become effective 45 days after the date the decision is issued, unless appellant files a timely appeal to the Regional Director in accordance with paragraphs (o)(1) and (2) of this section, or the Regional Director orders review of the appellate officer's decision in accordance with paragraph (o)(4) of this section.

(1) Disqualification of an Appellate Officer. (1) The appellate officer will withdraw from an appeal at any time he/she deems himself/herself disqualified.

(2) The appellate officer may withdraw from an appeal on an appellant's motion if:

(i) The motion is entered prior to the appellate officer's issuance of a decision; and

(ii) The appellant demonstrates that the appellate officer has a personal bias or any other basis for disqualification.

(3) If the appellate officer denies a motion to withdraw, he/she will so rule on the record.

(m) Written Hearing. (1) An appellate officer may order a written hearing under paragraph (h)(1) of this section if he/she:

(i) Orders a hearing as provided in paragraph (g)(3) of this section; and

(ii) Determines that the issues to be resolved at hearing can be resolved by allowing the appellant to present written materials to support his/her position.

(2) After ordering a written hearing, the appellate officer will:

(i) Provide the appellant with notice that a written hearing has been ordered;

(ii) Provide the appellant with a statement of issues to be determined at hearing; and

(iii) Provide the appellant with 30 days to file a written response. The appellant may also provide documentary evidence to support his/her position. The period to file a written response may be extended at the sole discretion of the appellate officer if the appellant shows good cause for the extension.

(3) The appellate officer may, after reviewing the appellant's written response and documentary evidence:

(i) Order that an oral hearing be held, as provided in paragraph (h)(2) of this section, to resolve issues that can not be resolved through the written hearing process;

(ii) Request supplementary evidence from the appellant before closing the record; or

(iii) Close the record.

(4) The appellate officer will close the record and issue a decision after he/she determines there is sufficient information on the record. This decision will be considered final for purposes of appeal to the Regional Director as provided in paragraph (o) of this section.

(n) Oral hearing. (1) The appellate officer may order an oral hearing under paragraphs (h)(2) and (m)(3)(i) of this section if he/she:

(i) Orders a hearing as provided in paragraph (g)(3) of this section; and

(ii) Determines that the issues to be resolved at hearing can best be resolved through the oral hearing process.

(2) After ordering an oral hearing, the appellate officer will:

(i) Provide the appellant with notice that an oral hearing has been ordered;

(ii) Provide the appellant with a statement of issues to be determined at hearing; and

(iii) Provide the appellant with notice, at least 30 days in advance, of the place, date, and time of the oral hearing. Oral hearings will be held in Juneau, AK at the prescribed date and time, unless the appellate officer determines, based upon good cause shown, that a different place, date, or time will better serve the interests of justice. A continuance of the oral hearing may be ordered at the sole discretion of the appellate officer if the appellant shows good cause for the continuance.

(3) The appellate officer may, either at his/her own discretion or on the motion of the appellant, order a pre-hearing conference, either in person or telephonically, to consider:

(i) The simplification of issues;

(ii) The possibility of obtaining stipulations, admissions of facts, and agreements to the introduction of documents;

(iii) The possibility of settlement or other means to facilitate resolution of the case; and

(iv) Such other matters as may aid in the disposition of the proceedings.

(4) The appellate officer must provide the appellant with notice of a pre-hearing conference, if one is ordered, at least 30 days in advance of the conference. All action taken at the pre-hearing conference will be made part of the record.

(5) At the beginning of the oral hearing, the appellate officer may first seek to obtain stipulations as to material facts and the issues involved and may state any other issues on which he/she may wish to have evidence presented. Issues to be resolved at the hearing will be limited to those identified by the appellate officer as provided in

paragraph (g)(3) of this section. The appellant will then be given an opportunity to present his/her case.

(6) During the oral hearing, the appellant has the right to present reliable and material oral or documentary evidence and to conduct such cross-examination as may be required in the interests of justice.

(7) After the conclusion of the oral hearing the appellant may be given time by the appellate officer to submit any supplementary information that may assist in the resolution of the case.

(8) The appellate officer will close the record and issue a decision on the appeal after he/she determines there is sufficient information on the record. This decision will be considered final for purposes of appeal to the Regional Director as provided in paragraph (o) of this section.

(o) Appeals to the Regional Director. An appellant may appeal an appellate officer's decision to the Regional Director. All such appeals must be filed with the Regional Director within the time period established in paragraph (d)(1)(ii) of this section.

(1) An appeal to the Regional Director of an appellate officer's decision must be accompanied by a full written statement in support of the appeal, including a concise statement of the reasons why the appellate officer's decision has a direct and adverse effect on the appellant and should be modified, reversed, or remanded.

(2) The Regional Director may order a review of the appellate officer's decision and may issue a decision on review that modifies or reverses the appellate officer's decision, or remands that decision to the appellate officer for further proceedings consistent with the decision on review. The Regional Director's decision will be based solely on the record as developed by the appellate officer.

(3) If the Regional Director denies the appeal, the appellate officer's decision is affirmed, and the action is a final agency action subject to judicial review under 5 U.S.C. 704.

(4) Within 45 days of the date the appellate officer's decision is issued, the Regional Director may, at his/her own discretion, order review of any appellate officer's decision. If the Regional Director orders review of an appellate officer's decision, the Regional Director must notify the appellant and prepare an order that affirms, modifies, reverses, or remands the decision to the appellate officer for further proceedings consistent with the decision on review. If the appellate officer's decision is modified or reversed, the Regional Director must issue a written decision explaining the reasons for his/her determination. Unless a remand is ordered, the Regional Director's decision is a final agency action subject to judicial review under 5 U.S.C. 704.

[FR Doc. 94-13222 Filed 5-31-94; 8:45 am]

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