

ENVIRONMENTAL ASSESSMENT

AND

REGULATORY IMPACT REVIEW/FINAL REGULATORY FLEXIBILITY ANALYSIS

Addition of the City of Akutan to the List of Communities Eligible to Participate in the Community Development Quota Programs (CDQ), and the Rescission of the CDQ Regulations that Allow Scale Weight to be Used for Estimating Total Weight in the Pollock CDQ Fisheries.

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EXECUTIVE SUMMARY

This regulatory amendment is in three parts. First, it would add the City of Akutan to the list of western Alaska communities eligible to participate in the pollock and halibut/sablefish (H/S) Community Development Quota (CDQ) programs. Since the implementation of the pollock CDQ program in 1992, and the H/S CDQ program in 1995, Akutan has been excluded from CDQ participation because it was determined that Akutan did not meet one of the four eligibility criteria. This exclusion was based on erroneous assumptions, therefore, the North Pacific fishery Management Council (NPFMC) has recommended to NMFS that Akutan be added to the list of eligible communities.

Second, this regulatory amendment would temporarily rescind a provision in the pollock CDQ regulations that allows at-sea scale weights to be used for estimating total weight in the pollock CDQ fisheries. This action is necessary because, through fishing trials in 1995, NMFS determined NMFS must first promulgate regulations that stipulate the procedure for verifying an acceptable standard of accuracy before at-sea scales can provide acceptable estimates of pollock total weight. NMFS intends to promulgate such regulations in the future.

Third, this regulatory amendment prohibits the crews of catcher vessels in the pollock CDQ fisheries from filling fish holding bins above the level of the viewing port. When this occurs, it becomes impossible for the NMFS-certified observer to see the marked increments on the inside of the bins and to estimate total catch. However, the pollock CDQ regulations do not prohibit filling fish holding bins above the level of the viewing port. Therefore, NMFS proposes to amend the pollock CDQ regulations by adding language at §675.27(h)(2)(ii)(A)(6) that prohibits such activity.

1.0 Introduction

This document is the draft Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) for a regulatory amendment that is proposed to amend the regulations at 50 CFR part 675, Groundfish of the Bering Sea and Aleutian Islands Area; and at 50 CFR part 676, Limited Access Management of Federal Fisheries in and off Alaska. This regulatory amendment is proposed under authority of the Magnuson Fishery Conservation and Management Act of 1975, P. L. 94-265, 16 U.S.C. 1801.

The proposed action addresses the petition by the City of Akutan to the NPFMC to be allowed to participate in the CDQ programs, and NMFS' temporary rescission of regulations that allow the use of scales for estimating total weight in the pollock CDQ fisheries.

1.1 Management Background

The groundfish fisheries in the Exclusive Economic Zone (3 to 200 miles offshore) of the Bering Sea and Aleutian Islands are managed under the Fishery Management Plan (FMP) for the Groundfish Fisheries of the Bering Sea and Aleutian Islands area (BSAI). The FMP was developed by the Council under the Magnuson Fishery Conservation and Management Act (Magnuson Act). The BSAI FMP was approved by NMFS and became effective in 1982.

The Northern Pacific Halibut Act of 1982 (NPHA), P.L. 97-176, 16 U.S.C. 773 c (c) authorizes the regional fishery management councils having authority for the geographic area concerned to develop regulations governing the Pacific halibut catch in U.S. waters which are in addition to, but not in conflict with, regulations of the International Pacific Halibut Commission. The halibut CDQ program is implemented by Federal regulations under 50 CFR part 676, Limited Access Management of Fisheries off Alaska under authority of the Magnuson Fishery Conservation and Management Act of 1975, P. L. 94-265, 16 U.S.C. 1801 et seq.

The National Environmental Policy Act (NEPA), Executive Order (E.O.) 12866, and the Regulatory Flexibility Act (RFA) require a description of the purpose and need for the proposed action as well as a description of alternative actions which may address the problem. Section 2 contains information on the biological and environmental impacts of the alternatives as required by NEPA. Impacts on endangered species and marine mammals are addressed in this section. Section 3 contains a Regulatory Impact Review (RIR) which addresses the requirements of both E.O. 12866 and the RFA that economic impacts of the alternatives be considered.

1.2 Purpose and Need for Action

Alternative 1, Option 1: Status quo.
Option 2: Status quo.
Option 3: Status quo.

Alternative 2: Option 1: Allow Akutan to participate in the CDQ programs.
Option 2: Rescind approval for the use of scales in the pollock CDQ fishery.
Option 3: Prohibit vessels from overfilling bins.

CDQ Eligibility for Akutan. The pollock and H/S CDQ programs apportion designated percentages of the annual fixed gear total allowable catch (TAC) for pollock, Pacific halibut, and sablefish to a CDQ reserve for each of these three CDQ species. The goals and purpose of the CDQ program are to allocate fish from each CDQ reserve to eligible western Alaska communities to provide the means for starting or supporting commercial seafood activities that will result in ongoing, regionally based, commercial seafood or related businesses.

The pollock CDQ regulations and the H/S CDQ regulations (§ 675.27(d)(2) and § 676.24(f)(2), respectively), list four criteria for determining the eligibility of western Alaska communities to participate in the CDQ programs. In 1992, NMFS determined that the community of Akutan met the first three criteria but did not meet the fourth criterion. The fourth criterion states that: "the community must not have previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, except if the community can show that benefits from an approved community development plan (CDP) would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision."

Akutan has been excluded from CDQ participation because of the large Trident groundfish processing plant located within Akutan's city limits. It has become apparent in the last several years, that although Akutan has a processing plant, the community itself gains little benefit, and the NPFMC, at its

September 1995, meeting, recommended to NMFS that Akutan be added to the list of CDQ-eligible communities.

The NPFMC took this action because evidence was put forward showing that Akutan does not violate the fourth eligibility criterion. The substance of the fourth criterion stipulates that “the community must not have previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI.” This has in fact, not happened. There is little interaction between the community of Akutan and the processing plant due to the nature of the processing plant’s operations. The processing plant is physically separate from the community of Akutan, and the plant uses their own catcher vessels to supply the plant with raw fish product. The processing plant was built to support the large capacity, heavily capitalized fleet, and cannot usually accept deliveries from the community’s small skiff fleet. Since there is little or no local market for the skiff fleet’s fish and the processing plant cannot accommodate skiff deliveries, the community of Akutan does not have access to groundfish processing facilities that would support the community’s groundfish participation.

In addition to a lack of groundfish processing capability, the community of Akutan has also not developed harvesting capability. The skiff fleet’s vessels are too small and unsafe to participate effectively and there is no small boat harbor for moorage. Allowing Akutan to participate in the CDQ programs would give the community the ability to develop the groundfish harvesting fleet and a boat harbor that would enable the community to make deliveries to the existing Trident groundfish processing plant or to develop alternative groundfish processing facilities.

Estimation of Total Catch Using Scale Weight. NMFS published a proposed rule on December 27, 1993 (58 FR 68386), and a final rule on May 16, 1994 (59 FR 25346), that required the total weight of at-sea pollock CDQ harvests to be estimated by either volumetric measurements or by scale weight measurements (§ 675.27(h)(2)(ii)(A) and (B)). NMFS proposes to temporarily rescind the CDQ regulations that allow total weight estimation by scale weight measurements until NMFS can publish regulations specifying a procedure for ensuring that the at-sea scale weight is capable of estimating total weight to a verifiable standard of accuracy.

Currently, the regulations do not contain guidelines for ensuring that at-sea scales estimate total weight to a verifiable standard of accuracy. The regulations state only that the scale must estimate catch weight to at least 95 percent accuracy at all times. NMFS conducted at-sea testing of conveyor-belt scales on two pollock catcher-processor vessels in the BSAI in 1995. The testing consisted of placing a sample of fish of known weight across the scales, and the tests showed that the accuracy varied widely, and that it was not possible to ensure that the scales estimated total weight to a 95 percent accuracy standard. NMFS intends to develop regulations specifying a procedure for testing the scales for accuracy, along with a procedure for adjusting the scale so that total weight is estimated to a verifiable standard of accuracy. Once such a procedure is promulgated through regulations, scale weight estimations of total catch will again be allowed. Until such regulations are promulgated, NMFS would rescind § 675.27(h)(2)(ii)(B).

Prohibit Vessels from Overfilling Bins. NMFS has become aware that the crews of some catcher vessels have been filling fish holding bins above the level of the viewing port in the pollock CDQ fisheries. When this happens, it becomes impossible for the NMFS certified observer to see the marked increments on the inside of the bins and to estimate total catch. However, the pollock CDQ regulations do not prohibit filling fish holding bins above the level of the viewing port. Therefore, NMFS proposes to

amend the pollock CDQ regulations by adding language at §675.27(h)(2)(ii)(A)(6) that prohibits such activity.

2.0 NEPA REQUIREMENTS/ENVIRONMENTAL IMPACTS OF THE ALTERNATIVES

An environmental assessment (EA) is required by NEPA to determine whether the action considered will result in a significant impact on the human environment. If the action is determined not to be significant based on an analysis of relevant considerations, the EA and resulting finding of no significant impact (FONSI) would be the final environmental documents required by NEPA. An environmental impact study (EIS) must be prepared if the proposed action may cause a significant impact on the quality of the human environment.

An EA must include a brief discussion of the need for the proposal, the alternatives considered, the environmental impacts of the proposed action and the alternatives, and a list of document preparers. The purpose and alternatives are discussed in Sections 1.1 and 3, and the list of preparers is in Section 6. This section contains the discussion of the environmental impacts of the alternatives including impacts on species listed as threatened and endangered under the Endangered Species Act (ESA).

The environmental impacts generally associated with fishery management actions are effects resulting from: (1) overharvest of fish stocks which might involve changes in predator-prey relationships among invertebrates and vertebrates, including marine mammals and birds; (2) physical changes as a direct result of fishing practices affecting the sea bed; and (3) nutrient changes due to fish processing and discarding fish wastes into the sea.

2.1 Environmental Impacts of the Alternatives

No biological or environmental changes will occur by adopting either of the alternatives or options. Both alternatives and options have no biological impact.

2.2 Impacts on Endangered, Threatened or Candidate Species

Endangered and threatened species under the ESA that may be present in the GOA and BSAI include:

Endangered

| | |
|----------------------------|-------------------------------|
| Northern right whale | <i>Balaena glacialis</i> |
| Sei whale | <i>Balaenoptera borealis</i> |
| Blue whale | <i>Balaenoptera musculus</i> |
| Fin whale | <i>Balaenoptera physalus</i> |
| Humpback whale | <i>Megaptera novaeangliae</i> |
| Sperm whale | <i>Physeter macrocephalus</i> |
| Snake River sockeye salmon | <i>Oncorhynchus nerka</i> |
| Short-tailed albatross | <i>Diomedea albatrus</i> |

Threatened

| | |
|--|---------------------------------|
| Steller sea lion | <i>Eumetopias jubatus</i> |
| Snake R. spring and summer chinook salmon | <i>Oncorhynchus tshawytscha</i> |
| Snake R. fall chinook salmon | <i>Oncorhynchus tshawytscha</i> |
| Spectacled eider | <i>Somateria fischeri</i> |

The status of the ESA section 7 consultations required to assess the impact of the groundfish fisheries on endangered, threatened, or candidate species is updated annually.

None of the alternatives are expected to have a significant impact on endangered, threatened, or candidate species.

2.3 Impacts on Marine Mammals

Marine mammals not listed under the Endangered Species Act that may be present in the GOA and BSAI include cetaceans, [minke whale (*Balaenoptera acutorostrata*), killer whale (*Orcinus orca*), Dall's porpoise (*Phocoenoides dalli*), harbor porpoise (*Phocoena phocoena*), Pacific white-sided dolphin (*Lagenorhynchus obliquidens*), and the beaked whales (e.g., *Berardius bairdii* and *Mesoplodon spp.*)] as well as pinnipeds [northern fur seals (*Callorhinus ursinus*), and Pacific harbor seals (*Phoca vitulina*)] and the sea otter (*Enhydra lutris*).

None of the alternatives are expected to have a significant impact on marine mammals.

2.4 Coastal Zone Management Act

Each of the alternatives would be conducted in a manner consistent, to the maximum extent practicable, with the Alaska Coastal Zone Management Program within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972 and its implementing regulations.

2.5 Finding of No Significant Impact

None of the alternatives is likely to significantly affect the quality of the human environment; preparation of an environmental impact statement for selection of any of the alternatives as the proposed action would not be required by Section 102(2)(C) of the National Environmental Policy Act or its implementing regulations.

Date:

3.0 REGULATORY IMPACT REVIEW

The RIR provides information about the economic and sociological impacts of the alternatives including identification of the individuals or groups that may be affected by the action, the nature of these impacts, quantification of the economic impacts if possible, and discussion of the trade-offs between qualitative and quantitative benefits and costs.

An RIR is required by NMFS for all regulatory actions or for significant Department of Commerce or NOAA policy changes that are of significant public interest. The RIR: (1) provides a comprehensive review of the level and incidence of impacts associated with a proposed or final regulatory action; (2) provides a review of the problems and policy objectives prompting the regulatory proposals and an evaluation of the major alternatives that could be used to solve the problems; and (3) ensures that the regulatory agency systematically and comprehensively considers all available alternatives so that the public welfare can be enhanced in the most efficient and cost effective way.

E.O. 12866, "Regulatory Planning and Review," was signed on September 30, 1993, and established guidelines for promulgating new regulations and reviewing existing regulations. While the order covers a variety of regulatory policy considerations, the benefits and costs of regulatory actions are a prominent concern. Section 1 of the order describes the regulatory philosophy and principles that are to guide agency development of regulations. The regulatory philosophy stresses that, in deciding whether and how to regulate, agencies should assess all costs and benefits of all regulatory alternatives. In choosing among regulatory approaches, the philosophy is to choose those approaches including potential

economic, environmental, public health and safety, and other advantages; distributive impacts; and equity that maximize net benefit to the nation.

The regulatory principles in E.O. 12866 emphasize careful identification of the problem to be addressed. The agency is to identify and assess alternatives to direct regulation, including economic incentives, such as user fees or marketable permits, to encourage the desired behavior. When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. Each agency shall assess both the costs and benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and the consequences of, the intended regulation.

An RIR is required for all regulatory actions that either implement a new FMP or significantly amend an existing FMP. The RIR is part of the process of preparing and reviewing FMPs and provides a comprehensive review of the changes in net economic benefits to society associated with proposed regulatory actions. The analysis also provides a review of the problems and policy objectives prompting the regulatory proposals and an evaluation of the major alternatives that could be used to solve the problem. The purpose of the analysis is to ensure that the regulatory agency systematically and comprehensively considers all available alternatives so that the public welfare can be enhanced in the most efficient and cost-effective way. The RIR addresses many of the items in the regulatory philosophy and principles of E.O. 12866.

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant.” A “significant regulatory action” is one that is likely to:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

A regulatory program is “economically significant” if it is likely to result in the effects described in item (1) above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be “economically significant.”

3.1 Management Action Alternatives

Alternatives included in this analysis are:

Alternative 1, Option 1: Status quo. Under Alternative 1, Option 1, the community of Akutan would continue to be excluded from participation in the CDQ program. This would have the effect of excluding a community from the CDQ program that should be allowed to participate according to the criteria for eligible CDQ communities in the CDQ regulations.

Alternative 1, Option 2: Status quo. Under Alternative 1, Option 2, at-sea scales would continue to be acceptable to NMFS as a method of estimating total catch of pollock in the pollock CDQ fisheries. This would have the effect of allowing a catch estimation method to continue to be used when it is known that such catch estimation does not have an acceptable standard of accuracy.

Alternative 1, Option 3: Status quo. Under alternative 1, Option 3, catcher vessels would continue to be allowed to overfill fish holding bins above the level of the viewing port. This decreases the accuracy of the catch estimates in the pollock CDQ fisheries.

Alternative 2, Option 1: Allow Akutan to participate in the CDQ programs. Alternative 2, Option 1 would allow the community of Akutan to participate in the CDQ programs. Akutan would likely become a member of the Aleutian Pribilof Island Community Development Association (APICDA), which is the CDQ group that contains all of the CDQ communities in the Aleutian Island chain. APICDA has endorsed the addition of Akutan, and a representative from Akutan has been a non-voting member of APICDA's board of directors since the implementation of the pollock CDQ program in 1992.

APICDA currently has five communities, and the addition of Akutan would make a total of six. The addition of Akutan would slightly decrease the pollock CDQ funds available to each of the five original APICDA communities, but would not adversely affect the communities economy in a material way, and is therefore not a significant regulatory action.

Alternative 2, Option 2: Rescind approval for the use of scales in the pollock CDQ fishery. When NMFS implemented regulations in 1994 allowing either volumetric or scale weight methods for estimating total catch, NMFS did not envision the problems that would occur using scale weights for estimating total catch which were brought to light during NMFS' 1995 scale weight testing in the BSAI pollock CDQ fisheries. Before the scale weight regulations were published, at-sea scales had never been used on board catcher/processor vessels for estimating total weight of pollock. NMFS believes that it is necessary to temporarily rescind the CDQ regulations that allow the use of scales until new regulatory procedures are implemented that ensure scale weight estimates conform to an acceptable standard of accuracy.

In 1995, only 2 of the 18 catcher/processor vessels participating in the pollock CDQ fisheries used scale weight to estimate total catch. If the use of scales was rescinded, these two vessels could revert back to using volumetric methods. Therefore, this option would not adversely affect the pollock catcher/processor industry sector in a material way and is not a significant regulatory action.

Alternative 1, Option 3: Prohibit filling fish holding bins above the level of the viewing port. This prohibition would allow NMFS to obtain more accurate estimates of fish catch, and would only occasionally affect several CDQ vessels. Therefore, this option is not a significant regulatory action.

3.2 Identification of the Individuals or Groups That May Be Affected by the Proposed Action

Alternative 2, Option 1: Akutan would be positively affected by the proposed action, because the CDQ program would contribute directly to the development of that community's economy. In the context of E.O. 12866, none of the other five APICDA CDQ communities would be greatly impacted by Akutan's inclusion because, although any CDQ resources dedicated to Akutan would come from the other five APICDA communities, the amount of CDQ resources taken from any one of the five CDQ communities would be considered small for the purposes of E.O. 12866.

Alternative 2, Option 2: In 1995, two catcher/processor pollock vessels installed conveyor-belt scales for weighing total catch of pollock in the CDQ fisheries on a trial basis. These vessels used the scales for some, but not all CDQ catch estimation in 1995. In total for 1995, 18 different vessels participated in the pollock CDQ fisheries. If this proposed action was approved by NMFS, the two vessels that have installed scales would have the volumetric system available to them for estimating the total weight of the pollock. This proposed ban on using scales would be a temporary measure until NMFS puts new regulations in place that ensure scale weight estimations are accurate within certain standards.

Alternative 2, Option 3. NMFS estimates that the crews of at least two CDQ vessels have filled the fish bins above the level of the viewing port. This proposed action would prohibit the crews of these vessels from filling their fish bins higher than the level of the viewing port.

3.3 Administrative, Enforcement, and Information Costs

No significant additional administrative, enforcement, or information costs are expected either under the status quo (Alternative 1) or from the proposed actions (Alternative 2).

4.0 INITIAL REGULATORY FLEXIBILITY ANALYSIS

The objective of the RFA is to require consideration of the capacity of those affected by regulations to bear the direct and indirect costs of regulation. If an action will have a significant impact on a substantial number of small entities, an Initial Regulatory Flexibility Analysis (IRFA) must be prepared to identify the need for the action, alternatives, potential costs and benefits of the action, the distribution of these impacts, and a determination of net benefits.

NMFS has defined all fish harvesting businesses that are independently owned and operated, not dominant in their field of operation, with annual receipts not in excess of \$2 million as small businesses. In addition, seafood processors with 500 employees or less, wholesale industry members with 100 members or less, not-for-profit enterprises, and government jurisdictions with a population of 50,000 or less are considered small entities. A "substantial number" of small entities would generally be 20 percent of the total universe of small entities affected by the regulation. A regulation would have a "significant impact" on these small entities if it resulted in a reduction in annual gross revenues by more than 5 percent, annual compliance costs that increased total costs of production by more than 5 percent, or compliance costs of small entities that are at least 10 percent higher than compliance costs as a percent of sales for large entities.

If an action is determined to affect a substantial number of small entities, the analysis must include:

(1) description and estimate of the number of small entities and total number of entities in a particular affected sector, and total number of small entities affected; and

(2) analysis of economic impact on small entities, including direct and indirect compliance costs, burden of completing paperwork, or record keeping requirements, effect on the competitive position of small entities, effect on the small entity's cash flow and liquidity, and ability of small entities to remain in the market.

4.1 Economic Impact on Small Entities

Allow Akutan to participate in the CDQ programs. Each of APICDA's communities is a government entity with a population of less than 50,000, and would be considered a "small entity." APICDA currently has five CDQ communities, and the addition of Akutan would make a total of six. The addition of Akutan would affect all of APICDA's five communities, therefore affecting a "substantial number" of small entities as defined by the RFA.

The addition of Akutan could decrease the CDQ funds available to each of the five original APICDA communities because any funds that might be allocated to Akutan would be taken from the funds that, at the present time, are available only to the five communities eligible for funds under APICDA. The initial allocation of funds between the six communities has not been made, and a more precise analysis of the impact is not possible at this time. It does seem reasonable, however, to assume that Akutan will get some support and in this way will take funds from one or more of the five original communities, but it would be pure speculation to assume a specific allocation. Although it is theoretically possible for Akutan to receive a very small allocation, which could result in a smaller than five percent decrease for each of the original five communities, it is also possible, and probably more likely, for the reallocation to result in a decrease in each community's gross revenue of more than five percent. In this case, the addition of Akutan would have a "significant Impact" on these small entities. The economic impact on other communities is not a factor to be considered in determining whether a particular community is eligible under the CDQ program. Accordingly, there are no practical alternatives that would be available or that could be considered to reduce or minimize the economic impact on other communities if Akutan is added to the list of CDQ communities. Other aspects of this proposed rule are not expected to have a significant economic impact on a substantial number of small entities.

Rescind approval for the use of scales in the pollock CDQ fishery. Catcher/processor vessels are not considered small entities. Therefore, this option would have no effect for the purposes of the RFA.

Prohibit filling fish holding bins above the level of the viewing port. Catcher/processor vessels are not considered small entities. Therefore, this option would have no effect for the purposes of the RFA.

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