

specifications were set. In addition, the survey for this species is done only every 3 years. Therefore, the Council and NMFS decided it was best to use the newest data for the adoption of the 2002 ABC and OY in order, rather than use 4-year-old data from the prior survey. The preliminary indication from survey data was that the biomass had declined in recent years and the ABC and OY recommended for 2002 would be substantially lower than those for 2001. Therefore, for resource conservation purposes, it was particularly important to use the most recent data. Finally, since the major fishery for whiting does not start until April 1, there was time to delay the adoption of the new ABC and OY, until the new information was available in March. Last year's whiting specifications were carried over in the interim for 2002 and were announced in a final rule published on March 7, 2002 (67 FR 10490). In the final rule, it was explained that the specification would be adjusted following the Council's March meeting and announced in the **Federal Register** as an emergency rule. This action has been publicized widely through the Council process. It will not go through prior notice and opportunity for public comment as doing so would be impracticable and contrary to the public interest. It is impracticable and contrary to the public interest because NMFS needs to take immediate action to ensure that the whiting fishery stays within its overall harvest allocation (which is substantially lower than the harvest allocation for 2001) while allowing the various sectors of the fishery the opportunity to fully harvest their sector's allocations. To delay the rule beyond the start of the fishery could result in some sector allocations being exceeded and possible early closures for other sectors as a result of excessive harvest in the early season.

The reasons described above, pursuant to 5 U.S.C. 553(d)(3), constitute good cause to waive the 30-day delay in effectiveness, so that this emergency rule may become effective before the fishery begins on April 1, 2002.

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

NMFS issued Biological Opinions (BOs) under the Endangered Species Act on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999, pertaining to the effects of the groundfish fishery on chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia

River, upper Willamette River, Sacramento River winter, Central Valley, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal, Oregon coastal), chum salmon (Hood Canal, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south-central California, northern California, and southern California). NMFS has concluded that implementation of the FMP for the Pacific Coast groundfish fishery is not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS has re-initiated consultation on the Pacific whiting fishery associated with the (whiting BO) issued on December 15, 1999. During the 2000 whiting season, the whiting fisheries exceeded the chinook bycatch amount specified in the whiting BO's incidental take statement's incidental take estimates, 11,000 fish, by approximately 500 fish. In the 2001 whiting season, however, the whiting fishery's chinook bycatch was well below the 11,000 fish incidental take estimates. The re-initiation will focus primarily on additional actions that the whiting fisheries would take to reduce chinook interception, such as time/area management. NMFS is gathering data from the 2001 whiting fisheries and expects that the re-initiated whiting BO will be completed by April 2002. During the reinitiation, fishing under the FMP is within the scope of the December 15, 1999, whiting BO, so long as the annual incidental take of chinook stays under the 11,000 fish bycatch limit.

This emergency rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior public comment.

Dated: April 10, 2002.

**William T. Hogarth,**

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 010914227-2063-02; I.D. 080201E]

RIN 0648-AM40

#### Fisheries of the Exclusive Economic Zone Off Alaska; License Limitation Program for Groundfish of the Bering Sea and Aleutian Islands Area

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to implement Amendment 67 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area. This action is necessary to stabilize fully utilized Pacific cod resources harvested with hook-and-line and pot gears in the Bering Sea and Aleutian Islands Area (BSAI). This will be accomplished by issuing endorsements for exclusive participation in the hook-and-line and pot gear BSAI Pacific cod fisheries by long-time participants. This final rule also adds a new definition for directed fishing for Community Development Quota (CDQ) fisheries and clarifies discard provisions for the individual fishing quota (IFQ) and CDQ fisheries. The intended effect of this action is to conserve and manage the Pacific cod resources in the BSAI in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

**DATES:** Effective May 15, 2002, except for § 679.4(k)(9)(i), which will be effective on January 1, 2003.

**ADDRESSES:** Copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) and the Final Regulatory Flexibility Analysis (FRFA) are available from the Alaska Region, NMFS, P.O. Box 21668, Juneau, AK, 99802, Attn: Lori Gravel-Durall, or Room 413-1 on the fourth floor of the Federal Building, 709 West 9th Street, Juneau, AK.

**FOR FURTHER INFORMATION CONTACT:** Jay Ginter, 907-586-7228 or email at [jay.ginter@noaa.gov](mailto:jay.ginter@noaa.gov).

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fisheries in the exclusive economic zone in the BSAI off Alaska under the Fishery Management

Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP). The North Pacific Fishery Management Council (Council) prepared the FMP under the authority of the Magnuson-Stevens Act. Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600 and 679.

#### Background of Amendment 67

Amendment 67 to the FMP was recommended by the Council in April 2000 to address the concern that fishermen who have made significant long-term investments and have long catch histories in the hook-and-line or pot gear BSAI Pacific cod fisheries needed protection from fishermen who have no or limited history in those fisheries. This concern increased after implementation of Amendment 64 to the FMP, which divided a portion of the BSAI Pacific cod total allowable catch (TAC) among the hook-and-line and pot gear sectors (i.e., catcher vessels and catcher/processors). The specific provisions of that action can be found in the final rule implementing Amendment 64 (65 FR 51553, August 24, 2000).

Amendment 67 is a continuation of the License Limitation Program (LLP). The LLP was recommended by the Council and approved and implemented by NMFS to address concerns of excess fishing capacity in the groundfish and crab fisheries off Alaska. More information on the purpose and objectives of the LLP can be found in the final rule implementing the original provisions of the LLP (63 FR 52642, October 1, 1998).

A proposed rule to implement Amendment 67 was published in the **Federal Register** with a 45-day public comment period (66 FR 49908, October 1, 2001). NMFS received 9 letters of comment on the proposed rule which are summarized and responded to in the *Response to Comments*, below.

Amendment 67 establishes Pacific cod species endorsements and the qualifications for those endorsements. A Pacific cod endorsement, specific to the non-trawl gear used by the vessel, must be specified on a person's LLP groundfish license for that person to participate in the hook-and-line or pot gear BSAI Pacific cod fisheries. The following provides summary information on general and specific eligibility requirements for Pacific cod endorsements and will be the Small Entity Compliance Guide for purposes of the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act). More information on the eligibility

requirements, including the rationale for specific provisions, is in the proposed rule implementing Amendment 67 (66 FR 49908, October 1, 2001).

#### Small Entity Compliance Guide for Amendment 67

##### General Information on Eligibility

1. All qualifying amounts are in round weight.

2. Pacific cod that was harvested for the commercial bait fishery and properly documented will be applied toward the qualifying amount.

3. Pacific cod harvested for personal use bait will not be applied toward the qualifying amount.

4. Pacific cod harvested in the Bering Sea Subarea or the Aleutian Islands Subarea will be applied toward the qualifying amount. However, a license holder will be authorized to participate only in an area for which he or she has an area endorsement.

5. Pacific cod that was caught and discarded will not be applied toward the qualifying amount.

##### Specific Information on Eligibility

1. To receive a hook-and-line gear Pacific cod endorsement for use on a catcher/processor, a license holder must have:

A. An LLP groundfish license with a catcher/processor designation;

B. Harvested at least 270 metric tons (mt) round weight of Pacific cod with hook-and-line gear in the directed commercial BSAI Pacific cod fishery in any one of the years 1996, 1997, 1998, or 1999; and

C. Harvested the qualifying amount on the vessel that was used as the basis of eligibility for the license holder's LLP groundfish license.

2. To receive a pot gear Pacific cod endorsement for use on a catcher/processor, a license holder must have:

A. An LLP groundfish license with a catcher/processor designation;

B. Harvested at least 300,000 pounds (lb) (136 mt) round weight of Pacific cod with pot gear in the directed commercial BSAI Pacific cod fishery in each of any two of the years 1995, 1996, 1997, or 1998; and

C. Harvested the qualifying amount on the vessel that was used as the basis of eligibility for the license holder's LLP groundfish license.

3. To receive a hook-and-line gear Pacific cod endorsement for use on a catcher vessel, a license holder must have:

A. An LLP groundfish license with a catcher vessel designation;

B. Harvested at least 7.5 mt round weight of Pacific cod with hook-and-

line gear or jig gear in the directed commercial BSAI Pacific cod fishery in any one of the years 1995, 1996, 1997, 1998, or 1999; and

C. Harvested the qualifying amount on the vessel that was used as the basis of eligibility for the license holder's LLP groundfish license.

4. To receive a pot gear Pacific cod endorsement for use on a catcher vessel, a license holder must have:

A. An LLP groundfish license with a catcher vessel designation;

B. Harvested at least 100,000 lb (45 mt) round weight of Pacific cod with pot gear or jig gear in the directed commercial BSAI Pacific cod fishery in each of any two of the years 1995, 1996, 1997, 1998, or 1999; and

C. Harvested the qualifying amount on the vessel that was used as the basis of eligibility for the license holder's LLP groundfish license.

##### Exemptions to the Pacific Cod Endorsement

Except as provided here, a license holder would need to have a Pacific cod endorsement on his or her LLP groundfish license to conduct directed fishing for Pacific cod in the BSAI with hook-and-line gear or pot gear, including Pacific cod harvested for the commercial bait fishery. Furthermore, the license holder would have to use the specific non-trawl gear designated with the Pacific cod endorsement.

1. Catcher vessels less than 60 ft (18.3 mt) length overall (LOA) are exempted from the requirement to have a Pacific cod endorsement.

2. Vessels exempted from the requirements of the LLP (see § 679.4(k)(2)) are exempted from the requirement to have a Pacific cod endorsement.

3. Vessels harvesting Pacific cod for personal use bait are exempted from the requirement to have a Pacific cod endorsement.

##### Other Provisions—Combining Catch Histories

A license holder can combine the catch history of a vessel that sank with the catch history of a replacement vessel to meet eligibility requirements if:

1. The vessel that sank was used as the basis of eligibility for the original LLP groundfish license;

2. That vessel sank after January 1, 1995; and

3. The sunken vessel was replaced with a vessel by December 31 of the year that was two years after the vessel sank.

This is the only exception to the single catch history (i.e., a catch history earned on one vessel) requirement for eligibility.

### Unavoidable Circumstances

A license holder can receive a Pacific cod endorsement, even if he or she does not meet the eligibility requirements, if that license holder was prevented from meeting the eligibility requirements by unavoidable circumstances. To qualify for a Pacific cod endorsement under the unavoidable circumstances provision a license holder must demonstrate that:

1. But for the unavoidable circumstances, he or she could have made sufficient landings to meet the requirements for a particular Pacific cod endorsement from the vessel that was the basis for eligibility for his or her LLP groundfish license;

2. He or she had the specific intent to use that vessel to conduct directed fishing for Pacific cod in the BSAI during the relevant time period and that the vessel had the capability to have made harvests sufficient to meet the eligibility requirements;

3. His or her specific intent was thwarted by circumstances that were unavoidable, unique to the person or vessel, unforeseen, and reasonably unforeseeable;

4. He or she took all reasonable steps to overcome the circumstances; and

5. He or she harvested any amount of Pacific cod in the BSAI with non-trawl gear after the vessel that was used as the basis of eligibility for the license holder's groundfish license was prevented from participating by the unavoidable circumstances but before April 16, 2000.

### Species Endorsements in the CDQ Fisheries

The Council recommended that the provisions of Amendment 67 apply to the CDQ fisheries. This means that vessels not authorized to harvest Pacific cod under the LLP will be prohibited from directed fishing for Pacific cod CDQ. However, because NMFS regulations do not currently define directed fishing for Pacific cod in the CDQ fisheries, a new definition and other changes are provided to give effect to the Council's recommendation.

Through the CDQ program, NMFS allocates 10 percent of pollock and 7.5 percent of the BSAI groundfish, prohibited species, halibut, and crab total allowable catch (TAC) to 65 eligible Western Alaska communities. The CDQ groups to which the TAC is allocated are expected to manage their allocations of CDQ and Prohibited Species Quota to account for bycatch as well as target catch. The CDQ groups are prohibited from exceeding any of their CDQ allocations, which prevents continued fishing for one groundfish

species once the quota of another groundfish or halibut bycatch species is reached.

In the non-CDQ fisheries, NMFS defines directed fisheries based on the amount of retained catch of a given species relative to the amount of other groundfish species on board the vessel. When a TAC amount for a species is approached, NMFS closes directed fishing for that species but allows fishing to continue in other fisheries in which the species is taken incidentally.

Thus, in contrast to the non-CDQ fisheries, NMFS has traditionally not needed to define directed fishing within the CDQ program and current regulations prohibit the use of CDQ catch as a basis for calculating the maximum retainable bycatch (MRB). These regulations were implemented because directed fishing closures did not apply to the CDQ fisheries. Further, because there are no provisions for regulatory discard, vessels engaged in CDQ fisheries are often required to retain all catch.

Implementing Amendment 67 requires that the existing regulations be amended as follows: First, revise the definition of directed fishing in § 679.2 to remove specific reference to the CDQ fisheries. This reference was appropriate when the only directed fishery defined under the CDQ Program was pollock. However, under this final rule, directed fishing for Pacific cod in the CDQ fisheries would be defined following the same procedure as the non-CDQ fisheries. Second, allow the use of CDQ species as basis species for calculating retainable amounts of other CDQ species. This revision is necessary to determine whether a vessel is directed fishing for Pacific cod in the CDQ fisheries and, therefore, would be required to have a species endorsement. Third, allow regulatory discards of Pacific cod by vessels that do not have a Pacific cod species endorsement. This revision is necessary so that vessel operators who do not have a Pacific cod species endorsement can comply with the MRB amounts of Pacific cod.

This action also clarifies the existing CDQ regulations by specifically allowing the regulatory discard of sablefish when their retention is prohibited by other regulations.

### Changes From the Proposed Rule

1. New paragraphs (F) and (G) are added at § 679.4(k)(9)(iii). These paragraphs clarify eligibility requirements specified in the preamble to the proposed rule and recommended by the Council in April 2000. Paragraph (F) provides that only harvests made from the vessel that was used as the

basis of eligibility for the license holder's LLP groundfish license will count toward eligibility amounts. This provision was recommended by the Council to ensure that a person would not use more than one vessel's fishing history to qualify for a Pacific cod endorsement, except under the combination of landings provision at § 679.4(k)(9)(v)(A). Paragraph (G) provides that, except as specified at § 679.4(k)(9)(iii)(D), only harvests made in the directed fishery for Pacific cod will count toward eligibility amounts. This provision is consistent with FMP amendment language provided by the Council and approved by NMFS.

2. Language at § 679.4(k)(9)(v)(B)(4) regarding hardship provisions is revised in response to concerns in a comment (see Response to Comments). Accordingly, any amount of BSAI Pacific cod harvested on a replacement vessel after the vessel that was used as the basis of eligibility for a person's groundfish license was prevented from participating but before April 16, 2000, will be sufficient to meet the requirement for a landing. A person will not be required to demonstrate that a landing was made during the endorsement period to be considered eligible for a Pacific cod endorsement under the unavoidable circumstances provision.

3. Language at § 679.7 and § 679.20 is revised because the new requirements for the CDQ Program under Amendment 67 that were in the proposed rule were impacted by an emergency interim rule that provided management measures to protect Steller sea lions (67 FR 956, January 8, 2002):

A. The revision of § 679.7(d)(16) supersedes the suspension of this paragraph published in the emergency interim rule (67 FR 956, January 8, 2002). No changes were made to the language in paragraph (d)(16) as proposed. This final rule merely replaces the suspended paragraph (d)(16) with an effective paragraph (d)(16);

B. The revision of § 679.7(d)(23) supersedes the suspension of this paragraph published in the emergency interim rule at 67 FR 956, January 8, 2002. Language in paragraph (d)(23) was revised to specifically indicate the regulatory provision that would prevent retention of sablefish. Also, this final rule replaces the suspended paragraph (d)(23) with an effective paragraph (d)(23);

C. Section 679.7(d)(26) is deleted. This paragraph was added by the emergency interim rule (67 FR 956, January 8, 2002), to replace the suspended paragraph (d)(16). However,

with the revision of § 679.7(d)(16) in this final rule, paragraph (d)(26) is no longer necessary;

D. The revision of § 679.20(f)(2) supersedes the suspension of this paragraph published in the emergency interim rule at 67 FR 956, January 8, 2002. No changes were made to the language in paragraph (f)(2) as proposed. This final rule merely replaces the suspended paragraph (f)(2) with an effective paragraph (f)(2);

E. The proposed revision to § 679.20(f)(3) is not implemented by this final rule. This proposed revision, which revised how directed fishing would be determined under the CDQ Program, is not implemented because it would conflict with management measures designed to protect Steller sea lions and implemented by the emergency interim rule at 67 FR 956, January 8, 2002; and

F. Section 679.20(f)(4) is removed. This paragraph was added by the emergency interim rule at 67 FR 956, January 8, 2002, to replace the suspended paragraph (f)(2). However, with the revision of § 679.20(f)(2) in this final rule, paragraph (f)(4) is no longer necessary.

4. Language at § 679.7(f)(8) is revised to clarify the discard requirements pursuant to the IFQ Program now that Pacific cod endorsements are necessary on a person's LLP groundfish license and a person's Federal Fishery Permit to harvest Pacific cod in a directed fishery. Currently, IFQ fishermen are prohibited from discarding Pacific cod caught when IFQ halibut or IFQ sablefish are on board. The revision of § 679.7(f)(8) will specify that IFQ fishermen will need to comply with Pacific cod endorsement requirements for the LLP when retaining Pacific cod above the retainable amounts authorized for the BSAI as specified in Table 11 of this part and Pacific cod endorsement requirements for Steller sea lion management measures when retaining Pacific cod above the retainable amounts authorized for the BSAI as specified in Table 11 of this part and above the retainable amount authorized for the GOA as specified in Table 10 of this part.

5. Language at § 679.32(c)(1)(i), (c)(2)(i)(A), (c)(2)(ii)(A), and (f)(4) is revised to clarify retention and discard requirements for participants in the CDQ Program now that directed fishing requirements apply to the CDQ Program. These revisions specify the paragraphs or subparts to which a person must refer to comply with retention or discard requirements.

### Response to Comments

NMFS received a total of 23 letters on the decision to approve, disapprove, or partially approve Amendment 67 and the proposed rule implementing Amendment 67. Of the 14 letters on the decision to approve, disapprove, or partially approve Amendment 67, 7 were for approval, 4 were for partial approval, and 3 were for disapproval of Amendment 67. Of the 9 letters on the proposed rule, 4 were in support, 4 suggested changes, and 1 was opposed to implementation of Amendment 67 as proposed.

NMFS policy prevents partial approval of fishery management plan amendments that establish a limited access system, because such an action would be tantamount to NMFS developing a limited access system without that system first being approved by a majority of the voting members of the appropriate fishery management council, an action prohibited by 16 U.S.C. 1854(c)(3) (Sec. 304(c)(3) of the Magnuson-Stevens Act). Therefore, the 4 letters that were received on Amendment 67 that recommended partial approval were considered letters for disapproval.

The letters that recommended partial approval and disapproval of Amendment 67 (7 letters), or that were opposed to or suggested changes to the proposed rule implementing Amendment 67 (5 letters), had comments in five main areas of concern: (1) General comments, (2) comments on the national standards at 16 U.S.C. 1851(a) (Sec. 301(a) of the Magnuson-Stevens Act), (3) comments on the analytical requirements of the National Environmental Policy Act, (4) comments on the analytical requirements of the Regulatory Flexibility Act and E.O. 12866, and (5) comments on the hardship and "grandfather" provisions. These comments are organized into those five topic areas for response by NMFS.

### General Comments

*Comment 1:* Approval of Amendment 67 was based on inaccurate information. Examples cited were: (1) Use of the 1998 Stock Assessment and Fishery Evaluation Report (SAFE); (2) overstating the number of potential participants and thereby overstating the magnitude of the problem; and (3) deciding on an alternative while other analytical documents were being developed.

*Response:* NMFS disagrees that inaccurate information was used for approval of Amendment 67. First, the EA/RIR/IRFA for Amendment 67 was

before the Council for initial review in April 1999. The 1998 SAFE Report was the most recent biological document available during the development of the EA/RIR/IRFA. The data presented in the EA/RIR/IRFA from the 1998 SAFE Report included information about the Eastern Bering Sea Pacific cod biomass and recruitment from 1978 through 1999; BSAI allowable biological catch (ABC), total allowable catch (TAC), and actual catch from 1980 through 1999; and projected biomass and ABC for Pacific cod age 3+ in the BSAI from 2000 through 2002. The Council was able to consider general trends and projections of the relevant Pacific cod biological data for over a 20-year time period. Amendment 67, as explained in the Problem Statement for the EA/RIR/IRFA, was recommended as an action because the Pacific cod resource in the BSAI was fully utilized. Concerns about declining ABC and TAC for Pacific cod was one of several reasons to consider action; other reasons included increased market value of cod products and increased competition from participants from other fisheries.

Second, the Council's consideration of the approximately 365 catcher vessels that appeared to qualify for a non-trawl gear designation did not overstate the problem. (Note: the exact number of catcher vessels with a non-trawl gear designation was not available at the time of Council consideration because the gear designation requirement was not effective until January 1, 2000). Without the Pacific cod endorsement requirement of Amendment 67, all of the approximately 365 vessels have the potential to participate in the BSAI Pacific cod hook-and-line and pot gear fisheries. The number of vessels suggested by one comment as a more accurate number to consider, 119 vessels, was the highest number of catcher vessels that participated in the BSAI Pacific cod fishery using pot gear. This occurred in 1995. The comment further indicated that recency requirements implemented in 2000 would make the vessel number of 119 more accurate than 365. This is not the case. Recency requirements that were implemented in 2000 only affected a person's LLP crab species license; the number of LLP groundfish licenses were not reduced by recency requirements. Therefore, the approximately 365 vessels was the appropriate number to use when considering potential impacts of the no action alternative.

Third, the Council was cognizant that other actions and analyses were ongoing when it made its recommendation for Amendment 67. The Council and NMFS, when deciding whether to

approve, disapprove, or partially disapprove the Council's recommendation, must use the best scientific information available. The guidelines to the national standards at § 300.315(b) states that "[t]he fact that scientific information concerning a fishery is incomplete does not prevent the preparation and implementation of an FMP." Further, paragraph (b)(2) of § 300.315 states:

FMPs must take into account the best scientific information available at the time of preparation. Between initial drafting of an FMP and its submission for final review, new information often becomes available. This information should be incorporated into the final FMP where practicable; but it is unnecessary to start the FMP process over again, unless the information indicates that drastic changes have occurred in the fishery that might require revision of the management objectives or measures.

As indicated in this provision, the Council is not required to obtain perfect information before making a recommendation, nor is it prevented from making a recommendation until better information is available. If that were the case, the Council could rarely act. The Council is in the best position to determine whether the absence of information, or new information, provides a basis for a revision of management objectives or measures. Although this provision refers only to FMPs, NMFS believes it is reasonable to apply the same considerations to FMP amendments.

*Comment 2:* The comment period for approval, disapproval, or partial approval of Amendment 67 ended prior to the ending of the comment period for the proposed rule to implement Amendment 67. This means that a person could have provided a comment to the proposed rule that would have not been considered for the decision to approve, disapprove, or partially approve Amendment 67.

*Response:* The comment period to approve, disapprove, or partially approve FMP amendments, and the comment period for a proposed rule to implement an FMP amendment can run concurrently. However, the two comment periods have different purposes. The 60-day comment period for Amendment 67 (see Notice of Availability of Amendment 67, 66 FR 42833, Aug. 15, 2001) was intended to allow the public to comment on whether Amendment 67 should be approved, disapproved, or partially approved. The 45-day comment period for the proposed rule implementing Amendment 67 (see Proposed Rule Implementing Amendment 67, 66 FR 49908, Oct. 1, 2001) was intended to

allow the public to comment on how NMFS planned to implement Amendment 67, if Amendment 67 was approved. The comment periods provided for Amendment 67 and the proposed rule to implement Amendment 67 are consistent with the requirements of the Magnuson-Stevens Act and the Administrative Procedure Act.

*Comment 3:* Amendment 67 made a disproportionate allocation to vessels that also qualified to fish for pollock under the American Fisheries Act (AFA).

*Response:* The EA/RIR/IRFA included an analysis of the dependence of fishermen on the BSAI Pacific cod fishery. These alternatives were evaluated based on the requirements set forth at 16 U.S.C. 1853(b)(6) for limited access systems, including the capability for vessels to be used in other fisheries. Persons that met the eligibility criteria the Council chose to represent dependence on the fishery received a Pacific cod endorsement, notwithstanding other permits that person may have held. It is noteworthy that vessels use trawl gear to fish for pollock, a different gear than can be used with a Pacific cod endorsement, i.e., hook-and-line gear or pot gear. Furthermore, the comment only asserted that a disproportionate allocation went to vessels that also qualify to fish pollock under the AFA and did not provide any data to verify that assertion.

*Comment 4:* Amendment 67 would have negative economic impacts on CDQ groups that depend on vessels to harvest their allocation of Pacific cod if those vessels do not receive Pacific cod endorsements.

*Response:* The Council evaluated the impacts of implementing Pacific cod endorsements on all small entities, including CDQ groups, and determined that the recommended alternative best addressed the problem statement for this action. The EA/RIR/IRFA at section 4.5.4 (page 88) states:

The current License Limitation Program does not treat CDQ vessels any differently than non-CDQ vessels. A CDQ vessel must have an LLP license to fish groundfish in the BS and/or AI using fixed gear. The Council has indicated that CDQ vessels will not be exempted from the proposed Pacific cod endorsements; those CDQ vessels harvesting BSAI Pacific cod with fixed gear will need to hold a Pacific cod endorsement in addition to their LLP area endorsement to fish either CDQ Pacific cod or Pacific cod from the directed fixed gear fishery.

### Comments on the National Standards in the Magnuson-Stevens Act

*Comment 1:* None of the alternatives considered in the EA/RIR/IRFA has an impact under national standard 1, the prevention of overfishing. Thus, the prevention of overfishing provides no rationale for the proposed action.

*Response:* The national standards are statutory principles that must be followed when developing a proposed action (see § 600.305(a)(3)) but they are not necessarily the rationale or objective of a proposed action. In other words, a proposed action does not have to be based on national standards to be valid; instead it must state a management objective that is consistent with all the national standards to be valid. For example, Amendment 67 was proposed to establish management measures that would limit the entry of persons who have not participated in, or who have not participated at a level that constituted significant dependence on, the BSAI Pacific cod hook-and-line and pot gear fisheries. The objective of Amendment 67 is to conserve Pacific cod resources through the reduction of overcapitalization, which leads to waste and inefficiencies in the use of resources.

*Comment 2:* All of the alternatives to Amendment 67 that NMFS considered, including the status quo, used the same information. National standard 2 requires that management measures are to be based upon the best scientific information available. Use of best available information, therefore, does not establish a preferred alternative, and thus provides no rationale for Amendment 67. Furthermore, NMFS did not use the best scientific information available.

*Response:* As explained in *Response 1* to Comments on the National Standards in the Magnuson-Stevens Act, national standards are statutory principles that must be adhered to when developing management measures, but they do not necessarily provide a rationale for management measures. NMFS agrees that the same data were used when comparing the various alternatives. This methodology ensures a fair and objective weighting of all alternatives given the data available.

NMFS disagrees with the comment that the best scientific information available was not used in developing Amendment 67. See *Response 1* to General Comments for further discussion regarding the use of best scientific information available to make management decisions.

*Comment 3:* None of the alternatives under consideration has an impact

under national standard 3. In other words, improved management under national standard 3 provides no rationale for approving Amendment 67.

*Response:* Currently, the Pacific cod stock is managed as a unit throughout its range, i.e., ABCs and TACs are developed for the Bering Sea and Aleutian Islands Management Area. Amendment 67 does not affect that management. As for national standard 3 not providing a rationale for Amendment 67, see *Response 1* to Comments on the National Standards in the Magnuson-Stevens Act.

*Comment 4:* There is no support for the assertion of the fact in the EA/RIR/IRFA that the number of vessels expected to qualify under any of the alternatives should not allow an individual or entity to acquire an excessive share of the fixed gear cod fishery in the BSAI; therefore Amendment 67 does not comply with national standard 4.

*Response:* The License Limitation Program, of which Amendment 67 is a part, limits the number of groundfish licenses that any one person can hold to 10 licenses (see § 679.7(i)(1)(i)). A person is defined at § 679.2 as “any individual (whether or not a citizen of the United States), any corporation, partnership, association, or other entity (whether or not organized, or existing under the laws of any state), and any Federal, state, local, or foreign government or any entity of any such aforementioned governments.” (Note: the definition of person was revised after the determination was made on Amendment 67; however, the definition of person included individuals, corporations, partnerships, and other entities before its revision). It was this limit and definition that was the basis for the determination that an excessive share of fishing privileges would not be acquired.

*Comment 5:* The standards used to determine eligibility for a Pacific cod permit were not fair and equitable, in violation of national standard 4, because different requirements were used for different methods of catching Pacific cod.

*Response:* The Council, when developing the eligibility criteria for Pacific cod endorsements, considered the historical practices in, and dependence on, the BSAI Pacific cod hook-and-line and pot gear fisheries, along with present participation patterns. Table 3.1 of the EA/RIR/IRFA (pg. 42) provided information on participation patterns in the BSAI Pacific cod hook-and-line and pot gear fisheries. Numbers of vessels that participated and the percentage of the

Pacific cod TAC harvested by those vessels were provided by gear and processing capability sectors from 1992 through 1999. The Council reviewed the distribution of catch (section 3.1.2 of the EA/RIR/IRFA) and vessel participation patterns (tables 3.3 through 3.8 of the EA/RIR/IRFA) and compared these data to determine the minimum and maximum numbers of participants among the various sectors. This comparison also helped illustrate the impact different eligibility periods would have on the number of eligible persons.

Cost data were not available to the Council, so it used harvest thresholds and average gross revenues as a proxy for traditional methods to determine the economics of the fishery. Various harvest thresholds were reviewed and a comparison was made on how many vessels achieved these different harvest thresholds (tables E.1 through E.4 of the EA/RIR/IRFA for pot vessels and tables 4.2, 4.3, 4.5, and 4.6 of the EA/RIR/IRFA for hook-and-line vessels). The Council, by comparing the change in the number of vessels as the level of harvest thresholds were increased, was able to surmise that certain levels of harvest thresholds correlated with consistent participation. Consistent participation, the Council determined, was a factor to consider for economic dependence. In other words, a person who had economic dependence on a fishery would have most likely participated more than one year.

The Council then compared average revenues of vessels per sector (section 4.2.2 of the EA/RIR/IRFA). This information allowed the Council to determine the potential decreases to average revenues for vessels at different levels of harvest thresholds for each sector, i.e., the more vessels participating, the less each vessel would make on average. Each sector (catcher vessels using hook-and-line gear, catcher vessels using pot gear, catcher/processor vessels using hook-and-line gear, and catcher/processor vessels using pot gear) was considered separately because changes in the qualifying years and minimum harvest thresholds had different impacts on different sectors. The Council, through Amendment 67, was trying to achieve a level of participation that reflected historical participation patterns for each of the sectors.

The Council used all of this information for each sector to determine what eligibility requirements best reflected its understanding of the historical fishing practices and dependence of the BSAI Pacific cod hook-and-line and pot gear fisheries.

The Council compared changes in average revenues based on changes in the number of eligible persons and used harvest levels and consistency of participation over time as a proxy for economic dependence. Eligibility requirements for each sector were chosen so that continued participation for economically dependent vessels was assured.

For some sectors, such as catcher/processor vessels using hook-and-line gear, varying the years of participation and the harvest thresholds had little impact on the number of qualifying vessels. This indicated to the Council that catcher/processor vessels using hook-and-line gear, as a sector, had a long and consistent history. This was an important consideration when the Council chose its eligibility requirements for this sector. On the other hand, catcher vessels using pot gear had significant variance depending on which years and harvest thresholds were used. This indicated to the Council that catcher vessels using pot gear, when considered as a sector, did not have a long and consistent history. Therefore, for this sector, the Council chose eligibility criteria that would decrease the number of participants. This decrease was intended to ensure that vessels in the sector that had historical and consistent participation based on the Council’s analysis of the available data would be allowed to continue to participate at a level that reflected what the Council determined to be economic dependence.

*Comment 6:* Amendment 67 is predominately an economic allocation, in violation of national standard 5.

*Response:* National standard 5 provides that “[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose.” Amendment 67, as a limited access action, is designed to limit units of effort in the BSAI Pacific cod hook-and-line and pot gear fisheries. The purpose of this limitation is to conserve Pacific cod resources through the reduction of overcapitalization, which leads to waste and inefficiencies in the use of resources. This purpose is accomplished partly through the mechanism of allocation. A secondary effect is the improvement of net economic return to persons who are eligible to participate. Although national standard 5 prohibits a measure that has economic allocation as its sole purpose, it does not prohibit actions that result in an economic allocation.

A limited access system, by design, limits participation in the affected fishery. Marginal participants and future potential participants often are precluded from the limited access fishery, making most limited access systems an economic allocation between those that are found eligible and those that are not. However, the purposes of Amendment 67, and the LLP, go beyond mere economic allocation. As stated above, the LLP was designed to provide stability in the fishing industry—through limits on capitalization and capacity—while the Council took action to further rationalize the fisheries under its authority.

Overcapitalization, excess harvest capacity, and economic waste in a fishery are economic inefficiencies. The LLP and Amendment 67 were designed as steps toward reducing those inefficiencies while enhancing the ability for NMFS to manage the fishery to achieve optimum yield. Therefore, although economic allocation is one of the results of Amendment 67, it is not its sole purpose.

*Comment 7:* Amendment 67 does not comport with national standard 6 because it does not allow fishermen to respond to contingencies and variations in stocks and efforts and excludes on purely economic grounds many fishermen who are thereby forced to rely more on overfished crab stocks.

*Response:* The comment misinterprets the meaning of national standard 6. National standard 6 provides that “[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.” The guidelines to national standard 6 at § 600.335(b) provide that “[e]ach fishery exhibits unique uncertainties. The phrase “conservation and management” implies the wise use of fishery resources through a management regime that includes protection against these uncertainties.” National standard 6 is not intended to require that management measures provide a means for fishermen to respond to contingencies and variations, but is intended to require that management measures ensure that variations and contingencies in fisheries, fishery resources, and catches do not cause conservation problems.

Review of the descriptions of variations and contingencies and examples to guard against those variations and contingencies found in § 600.335 indicate that the resource, and not the resource users, is the primary concern of national standard 6.

*Comment 8:* Amendment 67 fails to meet the legal requirements of national standard 7 because the preferred alternative is not compared to the status quo.

*Response:* Throughout the EA/RIR/IRFA the preferred alternative with its several options for each sector is compared to the status quo alternative. Ex-vessel revenue values are compared with expected revenues under the preferred alternative for each sector, and average gross revenues per vessel are provided for each alternative.

The EA/RIR/IRFA does not contain qualitative cost/benefit analysis. The authors cite the unavailability of cost data for the harvesting and processing sectors as the reason for its absence. However, guidelines for national standard 7 at § 600.340(d) provide that “[i]f quantitative estimates are not possible, qualitative estimates will suffice.”

*Comment 9:* The EA/RIR/IRFA discussion in section 6.1 does not adequately analyze the impacts of Amendment 67 on fishing communities in violation of national standard 8.

*Response:* Section 6.1 of the EA/RIR/IRFA summarizes information provided in chapter 3 of the EA/RIR/IRFA. The following data were used to make determinations on Amendment 67 and evaluate potential impacts: (1) Harvest levels by vessels in each sector; (2) price and revenues resulting from that harvest; (3) locations of deliveries for processing (catcher vessels) or first wholesale (catcher/processor vessels); and (4) home port of vessels engaged in the BSAI Pacific cod hook-and-line and pot gear fisheries. The analysts indicated in the EA/RIR/IRFA that certain data could not be provided in detail due to confidentiality restrictions. However, the data provided were summarized qualitatively for the Council. This provided the Council with information on the relative importance of the Pacific cod fisheries on fishing communities.

In general, the socioeconomic impacts of Amendment 67 are more considerable to the individual operation than to fishing communities because the value of Pacific cod harvested with hook-and-line and pot gear in the BSAI is small in comparison to the value of other groundfish and crab species harvested. Also, although some operations will be eliminated from the hook-and-line and pot gear BSAI Pacific cod fisheries, these eliminations are dispersed and do not unduly impact particular communities over others.

Many of the coastal communities in Alaska and the Pacific Northwest participate in the crab and the

groundfish fisheries as fishing vessel ports and as home to fisheries processors and fisheries support businesses. By protecting long-term participants, Amendment 67 also protects the fishing communities that are home ports, processing centers, and the location of support businesses for these long-term participants.

*Comment 10:* National standard 9 provides that “[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.” The EA/RIR/IRFA provides no support or rationale for Amendment 67 based on this national standard.

*Response:* Bycatch information is provided in section 3.6 of the EA/RIR/IRFA. The specific gears in the BSAI Pacific cod hook-and-line and pot gear fisheries have different bycatch rates for different species. For example, hook-and-line gear takes more halibut as bycatch than pot gear. The converse is true for crab, with pot gear taking more than hook-and-line gear. The analysis concludes that bycatch rates are low overall in the Pacific cod hook-and-line and pot gear fisheries compared to other fisheries and that such rates will only improve with further reductions in the “race for fish” through limited access measures. The “race for fish” is a term used to describe what occurs when too many vessels are fishing for a limited resource. Amendment 67 is a limited access system designed to reduce vessel numbers so that the “race for fish” is reduced or eliminated. Also, national standard 9 is not the rationale for Amendment 67. See *Response 1* to “Comments on the National Standards in the Magnuson-Stevens Act” for a discussion on the objectives of Amendment 67 and the purposes of the national standards.

*Comment 11:* The EA/RIR/IRFA provides no support or rationale for Amendment 67 under national standard 10, which provides that “[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea.”

*Response:* National standard 10 is not the rationale for Amendment 67. See *Response 1* to Comments on the “National Standards in the Magnuson-Stevens Act” for a discussion on the objectives of Amendment 67 and the purposes of the national standards. However, to the extent that Amendment 67 reduces the “race for fish” through limited access measures, it satisfies the objectives set by national standard 10.

This is illustrated through the review of Senator Murray’s statement on behalf



of national standard 10 (Cong. Rec., Sept. 18, 1996 at S10818):

[T]his race for fish creates serious considerations in many fisheries. Under this race, fishers feel compelled to keep fishing even when the weather or conditions of the vessel or health of the captain or crew would suggest otherwise. Unless fishery management plans provide opportunities and incentives for fishers to sit out storms and return to port for repairs or medical attention, lives will continue to be lost.

### Comments on National Environmental Policy Act (NEPA) Compliance

*Comment 1:* The Council should have prepared an Environmental Impact Statement (EIS) for Amendment 67.

*Response:* An EIS must be prepared for major Federal actions that would result in a significant impact on the human environment. For some Federal actions, an agency moves directly to an EIS. Alternatively, a method to determine whether a Federal action meets the level of significance necessary to require an EIS is through the development and review of an Environmental Assessment (EA). An EA must include a brief discussion of the need for the proposal, the alternative considered, the environmental impacts of the proposed action and the alternatives, and a list of document preparers. Based on an analysis of the relevant considerations in the EA, a determination is made whether an EIS must be prepared, or if a finding of no significant impact (FONSI) can be issued.

A FONSI was issued for Amendment 67. The FONSI was based on the following determinations: (1) Amendment 67 would not change the TAC for Pacific cod, i.e., no changes to the impact on Pacific cod stocks; (2) Amendment 67 would not change the relative amounts of Pacific cod that would be harvested by the hook-and-line and pot gear sectors (gear allocations), resulting in no net gain in bycatch amounts, i.e., no changes to the impact on other groundfish and crab stocks; (3) Amendment 67 would not change overall location of the fishery, i.e., no increase in habitat impacts; and (4) Amendment 67 would not change the overall effort on, or the total catch of, any species, i.e., no changes in the biodiversity of the affected ecosystem. Based on those determinations, NMFS concluded that a FONSI, rather than development of an EIS, was appropriate.

The EA portion of the EA/RIR/IRFA also included an analysis of endangered and threatened species pursuant to the Endangered Species Act and potential impacts to marine mammals pursuant to the Marine Mammal Protection Act.

*Comment 2:* The EA/RIR/IRFA did not consider indirect effects of Amendment 67 or the cumulative effects that would result from the incremental impact of Amendment 67 when added to past, present, and reasonably foreseeable future actions.

*Response:* Direct effects are effects caused by the alternatives and occur at the same time and place as an alternative. For example, the reduction in participants and impacts on Pacific cod stocks are direct effects of the preferred alternative for Amendment 67 because they directly result from the action taken. Indirect effects are reasonably foreseeable effects caused by the alternatives, but that occur later in time or that are further removed from an alternative. For example, bycatch impacts are indirect effects of the preferred alternative for Amendment 67 because they are further removed, i.e., indirectly result, from the action taken. Cumulative effects are effects that contribute to incremental impacts to the human environment when added to the effects of past, present, and reasonably foreseeable future actions. For example, impacts to essential fish habitat (EFH) are cumulative effects because they must be considered along with other actions that affect the same area because of the overlapping nature of EFH for different fish species. All of the examples were evaluated in the EA/RIR/IRFA for Amendment 67.

### Comments on Regulatory Flexibility Act (RFA) and Executive Order 12866 Compliance

*Comment 1:* The impacts of Amendment 67 were not analyzed pursuant to the Regulatory Flexibility Act.

*Response:* Section 6.3 of the EA/RIR/IRFA is the Initial Regulatory Flexibility Analysis (IRFA). Section 6.3 outlines the issues that an IRFA is required to address and proceeds to address those issues. This includes the estimated number of affected entities that are considered small entities for this action (355 catcher vessels, 67 catcher/processors, 5 shore-based processors, 6 communities where shore-based processors are located, and most of the communities where vessels are home-ported). Also included are the measures taken to reduce the impacts on small entities (excluding catcher vessels less than 60 ft (18.3 m) LOA from the requirement to have a Pacific cod endorsement and allowing catcher vessels of any length to use Pacific cod caught with jig gear for eligibility amounts). In section 6.3.9 of the EA/RIR/IRFA the IRFA concludes that:

Most persons recently participating in the fishery impacted by the proposed rule are small entities, as this term is defined under the RFA. The ownership, affiliation, and contractual characteristics of vessels operating in the fishery have not been analyzed to determine if they are independently owned and operated or linked to a larger parent company. Furthermore, because NMFS cannot quantify the exact number of small entities that may be affected by this action, or quantify the magnitude of those potential effects, NMFS cannot make a definitive finding regarding the economic impact of this rule. However, because the proposed action(s) would result in "freezing" the fleet sizes to those that have participated in the recent past, impacts would be expected to be minimal relative to the *No Action* alternative. Again, this assumes that vessels would participate in the fisheries they have in the past. Estimates of such a potential change in the absence of a limited entry program cannot be made, though indications are that given the current status of the opilio stocks, the number of pot vessels participating in the cod fishery would increase. In that case, a number of small entities could be adversely impacted by losing access to the BSAI cod fishery, though the magnitude of that impact cannot be determined. The adverse impacts to those vessels would be offset by other small entities not having their share of the cod harvest eroded by new entrants into the fishery. The measures discussed above as part of the preferred alternative are intended to protect small entities within the fishery, and to allow for new entry and flexibility in the <60' pot and longline catcher vessel fleets.

As the foregoing indicates, the impacts of Amendment 67 were analyzed pursuant to the RFA given the data available to NMFS.

*Comment 2:* A reasoned determination that the benefits of Amendment 67 justify its costs was not performed pursuant to Executive Order 12866.

*Response:* Section 4.0 of the EA/RIR/IRFA is the Regulatory Impact Review (RIR), which responds in part to the analytical requirements of Executive Order 12866. The RIR provides details on the BSAI Pacific cod fisheries, including current fleet, description of the alternatives, impact of the alternatives on the current fleet sector by sector (vessels projected to qualify under the various options), average first wholesale revenues for catcher/processor vessels, average ex-vessel values for catcher vessels, other fishing opportunities, and the relationship between the alternatives and the Improved Retention/Improved Utilization Program. Further information to respond to the analytical requirements of Executive Order 12866 can be found in section 3.0, Historical Fixed Gear Pacific Cod Fishery



Information, and in section 5.0, Council's Preferred Alternative.

These three sections, along with the rest of the EA/RIR/IRFA, were used to determine that the costs associated with Amendment 67 were justified by the benefits.

#### **Comment on the Hardship and "Grandfather" Provisions**

*Comment:* The hardship provision in the proposed rule implementing Amendment 67 is inconsistent with Council intent and other license limitation hardship provisions and a further exemption to the eligibility requirements should be provided notwithstanding the Council's motion (*i.e.*, a "grandfather" provision for purchased vessels).

*Response:* NMFS disagrees that the hardship provision in the proposed rule was inconsistent with Council intent and other hardship provisions under the LLP. *The North Pacific Fishery Management Council News and Notes*, April 2000 (April 2000 Newsletter), contained the Council's action on Amendment 67. The following is taken directly from that document under the heading "Other Issues."

*Grandfather provisions:* The Council voted not to include the grandfather provision for catcher processor vessels that were purchased between July 1, 1997, and December 31, 1998. The Council approved the Advisory Panel recommendation that vessels that sank after January 1, 1995, would be allowed to combine the catch history of the vessel that sank with the history of the replacement vessel, as long as: (1) The sunken vessel was LLP qualified, (2) A sunken vessel is replaced with a qualified replacement vessel within the normal time allowed by the IRS, and (3) Owner of the replacement vessel after combining catch histories must meet the qualifying criteria for that gear sector. (Emphasis in the original).

There is no further discussion of this decision in the April 2000 Newsletter. However, the Council did discuss both "grandfather" provisions at length during its deliberations and, as indicated above, voted to adopt the second "grandfather" provision (*i.e.*, for sunken vessels) and not the first "grandfather" provision (*i.e.*, for purchased vessels). A fundamental difference is apparent between these two provisions. The "grandfather" provision recommended by the Council allows a person to combine the history of one vessel with the history of another vessel to meet the qualifying criteria if special circumstances exist (*i.e.*, a vessel sank and was replaced). However, the person must meet the qualifying criteria to receive a Pacific cod endorsement. On the other hand, the "grandfather" provision reviewed by the Council but

not recommended for approval would have totally exempted a vessel from the qualifying criteria.

The Council also recommended a hardship provision that was designed to assist applicants to achieve eligibility if they were prevented from meeting all the eligibility requirements by circumstances beyond their control. However, a person must demonstrate that they intended to participate during the eligibility period at a level sufficient to meet the eligibility criteria. The commonality between the recommended "grandfather" provision and the hardship provision is the importance of the eligibility criteria. To benefit from these provisions, a person would have to have met, or intended to meet, the eligibility criteria to be found eligible. The "grandfather" provision that the Council reviewed and did not recommend had no such requirement; a person would be found eligible based on "reliance" and "investment."

Although the Council and NMFS are sensitive to investment-backed expectations, the Council is not under an obligation to provide for eligibility based on economic decisions. The Council reviewed the various proposals and decided to recommend exemptions that required a connection to the eligibility criteria.

Finally, the comment requested that NMFS modify the hardship provision in this action to conform in substance with previous hardship provisions. NMFS, when crafting the language for the hardship provision in this action, was careful to try to maintain the Council's intent without making the language of the provision awkward. The April 2000 Newsletter contained the following statement as the last requirement for consideration under the hardship provision:

Any amount of BSAI Pacific cod was harvested on the vessel in the BSAI *during the recency period* for that vessel type and that such harvest of Pacific cod occurred after the vessel was prevented from participating by the unavoidable circumstance *but before April 16, 2000*. (Emphasis added).

NMFS looked at the phrases "during the recency period" and "but before April 16, 2000." Seemingly, these statements reflect two consistent requirements. However, all recency periods end either on December 31, 1998, or December 31, 1999. Therefore, a person who meets the first requirement (*i.e.*, harvesting any amount of BSAI Pacific cod during the recency period) automatically meets the second requirement (*i.e.*, harvesting any amount of BSAI Pacific cod before April 16, 2000). However, the converse is not true. A person could harvest Pacific cod

before April 16, 2000, but not meet the first requirement.

This result indicated to NMFS that including the requirement "but before April 16, 2000," was not only unnecessary but confusing. During the proposed rule stage, NMFS eliminated the phrase "but before April 16, 2000" because it was internally inconsistent. However, NMFS realizes that multiple interpretations can be derived from the same language. Therefore, in response to a letter that specifically requested that the phrase "but before April 16, 2000" be given effect and because the Council's use of both phrases created an ambiguity, NMFS will construe that ambiguity in favor of potential applicants. The new language in this final rule will reflect that any amount of Pacific cod harvested on the vessel in the BSAI after the vessel was prevented from participating but before April 16, 2000, will be sufficient to meet that requirement. A person will not be required to demonstrate that a landing was made during the endorsement period to be considered for eligibility under the unavoidable circumstances provision.

#### **Classification**

The Council prepared an environmental assessment for Amendment 67 that analyzes the impacts on the environment as a result of this action. The assessment indicated that the individual and cumulative impacts of this action would not significantly affect the quality of the human environment and a finding of no significant impact (FONSI) was signed.

An FRFA was prepared that describes the impacts this action may have on small entities. The analysis concluded that most persons who participate in the hook-and-line and pot gear BSAI Pacific cod fisheries are small entities, as this term is defined under the RFA. Implementation of Amendment 67 will limit fleet size by requiring a person to demonstrate that he or she achieved a specific level of participation in the past to be eligible for continued participation in the future. Impacts on participants who do not meet this criterion are expected to be minimal because their participation was below the level determined by the Council to be significant based on the available data. However, the Council considered two alternatives to counteract the adverse impacts to nominal or new participants who are small entities. These alternatives were: (1) The exemption of catcher vessels less than 60 ft (18.3 m) LOA from the requirement to have a Pacific cod endorsement; and (2) the ability to use jig gear landings and

commercial bait landings to meet the eligibility requirements for specific Pacific cod endorsements. The Council decided to adopt both alternatives to mitigate the adverse impacts to small entities to the greatest extent possible and still meet its goal to rationalize the BSAI Pacific cod longline and pot gear fisheries. Finally, NMFS cannot quantify the exact number of small entities that may be affected by this action, or quantify the exact magnitude of those potential effects. One comment was received regarding the analysis performed under the RFA. This comment was addressed in this rule (see Comment 1 under Comments on Regulatory Flexibility Act (RFA) and Executive Order 12866 Compliance) and summarized in the FRFA.

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

**List of Subjects in 50 CFR Part 679**

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: April 5, 2002.

**John Oliver,**

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR part 679 is amended to read as follows:

**PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA**

1. The authority citation for part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; Title II of Division C, Pub. L. 105-277; Sec. 3027, Pub. L. 106-31; 113 Stat. 57; 16 U.S.C. 1540(f); and Sec. 209, Pub. L. 106-554.

2. In § 679.2, the definition of “Directed fishing” is revised by removing paragraph (5) (Note: This removal supersedes the suspension of this paragraph published in the emergency interim rule at 67 FR 956, January 8, 2002).

3. In § 679.4, paragraph (k)(1)(i) is revised and paragraph (k)(9) is added to read as follows:

**§ 679.4 Permits.**

\* \* \* \* \*

(k) \* \* \*

(1) \* \* \*

(i) In addition to the permit and licensing requirements of this part, and except as provided in paragraph (k)(2) of this section, each vessel within the GOA or the BSAI must have an LLP groundfish license on board at all times it is engaged in fishing activities defined in § 679.2 as directed fishing for license limitation groundfish. This groundfish

license, issued by NMFS to a qualified person, authorizes a license holder to deploy a vessel to conduct directed fishing for license limitation groundfish only in accordance with the specific area and species endorsements, the vessel and gear designations, and the MLOA specified on the license.

\* \* \* \* \*

(9) *Pacific cod endorsements*—(i) *General.* In addition to other requirements of this part, and unless specifically exempted in paragraph (k)(9)(iv) of this section, a license holder must have a Pacific cod endorsement on his or her groundfish license to conduct directed fishing for Pacific cod with hook-and-line or pot gear in the BSAI. A license holder can only use the specific non-trawl gear(s) indicated on his or her license to conduct directed fishing for Pacific cod in the BSAI.

(ii) *Eligibility requirements for a Pacific cod endorsement.* This table provides eligibility requirements for Pacific cod endorsements on an LLP groundfish license:

If a license holder's license has a . . .	And the license holder harvested Pacific cod in the BSAI with . . .	Then the license holder must demonstrate that he or she harvested at least . . .	In . . .	To receive a Pacific cod endorsement that authorizes harvest with . . .
(A) Catcher vessel designation.	Hook-and-line gear or jig gear	7.5 mt of Pacific cod in the BSAI.	In any one of the years 1995, 1996, 1997, 1998, or 1999.	Hook-and-line gear.
(B) Catcher vessel designation.	Pot gear or jig gear	100,000 lb of Pacific cod in the BSAI.	In each of any two of the years 1995, 1996, 1997, 1998, or 1999.	Pot gear.
(C) Catcher/processor vessel designation.	Hook-and-line gear	270 mt of Pacific cod in the BSAI.	In any one of the years 1996, 1997, 1998, or 1999.	Hook-and-line gear.
(D) Catcher/processor vessel designation.	Pot gear	300,000 lb of Pacific cod in the BSAI.	In each of any two of the years 1995, 1996, 1997, or 1998.	Pot gear.

(iii) *Explanations for Pacific cod endorsements.* (A) All eligibility amounts in the table at paragraph (k)(9)(ii) of this section will be determined based on round weight equivalents.

(B) Discards will not count toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section.

(C) Pacific cod harvested for personal bait use will not count toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section.

(D) A legal landing of Pacific cod in the BSAI for commercial bait will count

toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section.

(E) Harvests within the BSAI will count toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section; however, a license holder will only be able to harvest Pacific cod in the specific areas in the BSAI for which he or she has an area endorsement.

(F) Harvests within the BSAI will count toward eligibility amounts in the table at paragraph (k)(9)(ii) of this section only if those harvests were made from the vessel that was used as the

basis of eligibility for the license holder's LLP groundfish license.

(G) Except as provided in paragraph 679.4(k)(iii)(D), only harvests of BSAI Pacific cod in the directed fishery will count toward eligibility amounts.

(iv) *Exemptions to Pacific cod endorsements.* (A) Any vessel exempted from the License Limitation Program at paragraph (k)(2) of this section.

(B) Any catcher vessel less than 60 ft (18.3 m) LOA.

(C) Any catch of Pacific cod for personal use bait.

(v) *Combination of landings and hardship provision.* Notwithstanding the eligibility requirements in paragraph (k)(9)(ii) of this section, a license holder may be eligible for a Pacific cod endorsement by meeting the following criteria.

(A) *Combination of landings.* A license holder may combine the landings of a sunken vessel and the landings of a vessel obtained to replace a sunken vessel to satisfy the eligibility amounts in the table at paragraph (k)(9)(ii) of this section only if he or she meets the requirements in paragraphs (k)(9)(v)(A)(1)–(4) of this section. No other combination of landings will satisfy the eligibility amounts in the table at paragraph (k)(9)(ii) of this section.

(1) The sunken vessel was used as the basis of eligibility for the license holder's groundfish license;

(2) The sunken vessel sank after January 1, 1995;

(3) The vessel obtained to replace the sunken vessel was obtained by December 31 of the year 2 years after the sunken vessel sank; and

(4) The length of the vessel obtained to replace the sunken vessel does not exceed the MLOA specified on the license holder's groundfish license.

(B) *Hardship provision.* A license holder may be eligible for a Pacific cod endorsement because of unavoidable circumstances if he or she meets the requirements in paragraphs (k)(9)(v)(B)(1)–(4) of this section. For purposes of this hardship provision, the term license holder includes the person whose landings were used to meet the eligibility requirements for the license holder's groundfish license, if not the same person.

(1) The license holder at the time of the unavoidable circumstance held a specific intent to conduct directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing

requirements in the table at paragraph (k)(9)(ii) of this section but that this intent was thwarted by a circumstance that was:

(i) Unavoidable;

(ii) Unique to the license holder, or unique to the vessel that was used as the basis of eligibility for the license holder's groundfish license; and

(iii) Unforeseen and reasonably unforeseeable to the license holder.

(2) The circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) actually occurred;

(3) The license holder took all reasonable steps to overcome the circumstance that prevented the license holder from conducting directed fishing for BSAI Pacific cod in a manner sufficient to meet the landing requirements in paragraph (k)(9)(ii) of this section; and

(4) Any amount of Pacific cod was harvested in the BSAI aboard the vessel that was used as the basis of eligibility for the license holder's groundfish license after the vessel was prevented from participating by the unavoidable circumstance but before April 16, 2000.

4. In § 679.7, paragraph (d)(26) is removed and paragraphs (d)(11), (d)(16), (d)(23), and (f)(8) are revised to read as follows (Note: Revisions to paragraphs (d)(16) and (d)(23) and deletion of paragraph (d)(26) supersede the suspension of paragraphs (d)(16) and (d)(23) and the addition of paragraph (d)(26) published in the emergency interim rule at 67 FR 956, January 8, 2002):

**§ 679.7 Prohibitions.**

\* \* \* \* \*

(d) \* \* \*

(11) For the operator of a catcher vessel using trawl gear or any vessel less

than 60 ft (18.3 m) LOA that is groundfish CDQ fishing as defined at § 679.2, discard any groundfish CDQ species or salmon PSQ before it is delivered to an eligible processor listed on an approved CDP unless discard of the groundfish CDQ is required under other provisions or, in waters within the State of Alaska, discard is required by laws of the State of Alaska.

\* \* \* \* \*

(16) Use any groundfish CDQ species as a basis species for calculating retainable amounts of non-CDQ species under § 679.20.

\* \* \* \* \*

(23) For any person on a vessel using fixed gear that is fishing for a CDQ group with an allocation of fixed gear sablefish CDQ, discard sablefish harvested with fixed gear unless retention of sablefish is not authorized under 50 CFR 679.23(e)(4)(ii) or, in waters within the State of Alaska, discard is required by laws of the State of Alaska.

\* \* \* \* \*

(f) \* \* \*

(8) Discard:

(i) In the GOA:

(A) Rockfish that are taken when IFQ halibut or IFQ sablefish are on board unless rockfish are required to be discarded under subpart B of this part.

(B) Pacific cod that are taken when IFQ halibut or IFQ sablefish are on board unless Pacific cod are required to be discarded under subpart B of this part, or Pacific cod are not authorized to be retained under subpart A of this part.

(ii) In the BSAI:

(A) Rockfish that are taken when IFQ halibut or IFQ sablefish are on board unless rockfish are required to be discarded under subpart B of this part.

(B) Pacific cod that are taken when IFQ halibut or IFQ sablefish are on board according to the following table:

If the vessel operator . . .	Then . . .
(1) has an LLP groundfish license with a Pacific cod endorsement that meets the requirements of § 679.4(k)(9).	Pacific cod must not be discarded unless Pacific cod are required to be discarded under subpart B of this part, or Pacific cod are not authorized to be retained under subpart A of this part.
(2) does not have an LLP groundfish license with a Pacific cod endorsement that meets the requirements of § 679.4(k)(9).	Pacific code must not be discarded up to the retainable amount specified in Table 11 of this part unless Pacific cod are required to be discarded under subpart B of this part, or Pacific cod are not authorized to be retained under subpart A of this part.

(iii) In the waters within the State of Alaska:

(A) Rockfish that are taken when IFQ halibut or IFQ sablefish are on board unless rockfish are required to be discarded by the laws of the State of Alaska.

(B) Pacific cod that are taken when IFQ halibut or IFQ sablefish are on board unless Pacific cod are required to be discarded by the laws of the State of Alaska.

5. In § 679.20, paragraph (f)(4) is removed and paragraph (f)(2) is revised

to read as follows (Note: Revision of paragraphs (f)(2) and removal of paragraph (f)(4) supersede the suspension of paragraph (f)(2) and the addition of paragraph (f)(4) published in the emergency interim rule at 67 FR 956, January 8, 2002):

**§ 679.20 General limitations.**

\* \* \* \* \*

(f) \* \* \*

(2) *Retainable amounts.* Except as provided in Table 10 to this part, arrowtooth flounder, or any groundfish species for which directed fishing is closed may not be used to calculate retainable amounts of other groundfish species. CDQ species may only be used to calculate retainable amounts of other CDQ species.

\* \* \* \* \*

6. In § 679.32, the first sentence of paragraph (c)(1)(i), and paragraphs (c)(2)(i)(A), (c)(2)(ii)(A) and (f)(4) are revised to read as follows:

**§ 679.32 Groundfish and halibut CDQ catch monitoring.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Operators of catcher vessels less than 60 ft (18.3 m) LOA must retain all groundfish CDQ, halibut CDQ, and salmon PSQ until it is delivered to a processor that meets the requirements of paragraph (c)(3) or (c)(4) of this section unless retention of groundfish CDQ species is not authorized under § 679.4 of this part, discard of the groundfish

CDQ species is required under subpart B of this part, or, in waters within the State of Alaska, discard is required by laws of the State of Alaska. \* \* \*

\* \* \* \* \*

(2) \* \* \*

(i) \* \* \*

(A) Retain all CDQ species and salmon PSQ until they are delivered to a processor that meets the requirements of paragraph (c)(3) or (c)(4) of this section unless retention of groundfish CDQ species is not authorized under § 679.4 of this part, discard of the groundfish CDQ species is required under subpart B of this part, or, in waters within the State of Alaska, discard is required by laws of the State of Alaska;

\* \* \* \* \*

(ii) \* \* \*

(A) *Option 1: Retain all CDQ species.* Retain all CDQ species until they are delivered to a processor that meets the requirements of paragraph (c)(3) or (c)(4) of this section unless retention of groundfish CDQ species is not authorized under § 679.4 of this part, discard of the groundfish CDQ or PSQ species is required under subpart B of this part, or, in waters within the State

of Alaska, discard is required by laws of the State of Alaska. Have all of the halibut PSQ counted by the CDQ observer and sampled for length or average weight; or

\* \* \* \* \*

(f) \* \* \*

(4) *Groundfish CDQ retention requirements.* Operators of vessels less than 60 ft (18.3 m) LOA are not required to retain and deliver groundfish CDQ species while halibut CDQ fishing, unless required to do so elsewhere in this part. Operators of vessels equal to or greater than 60 ft (18.3 m) LOA are required to comply with all groundfish CDQ and PSQ catch accounting requirements in paragraphs (b) through (d) of this section, including the retention of all groundfish CDQ, if option 1 under § 679.32(c)(2)(ii) is selected in the CDP. CDQ species must be discarded when required by other provisions in subpart B of this part or, in waters within the State of Alaska, when discard is required by laws of the State of Alaska.

\* \* \* \* \*

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