

[Federal Register: February 9, 1994]

-----  
DEPARTMENT OF COMMERCE

50 CFR Part 676

[Docket No. 940103-4003; I.D. 122893B] RIN 0648-AD19

Limited Access Management of Fisheries off Alaska, Determinations and Appeals

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

ACTION: Proposed rule; request for comments.

-----  
SUMMARY: This document proposes procedures to govern appeals of initial administrative determinations under the Alaska fixed gear Pacific halibut and sablefish Individual Fishing Quota (IFQ) limited access program. This proposed rule sets forth: Who may appeal initial administrative determinations; the time period for submitting appeals; what must be included in appeals; procedures regarding acceptance of appeals; the authority of appellate officers; the process for disqualifying appellate officers; evidentiary procedures; the hearing process, including discretionary pre-hearing conferences; post-hearing decisions; and general procedures for appeals. The intended effect of this action is to set forth proposed procedures for appeals from initial administrative determinations made by NMFS management staff and decisions issued by appellate officers under the IFQ program.

DATES: Comments must be received at the following address no later than March 28, 1994.

ADDRESSES: Comments may be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, 709 W. 9th, room 453, Juneau, AK 99801 or P.O. Box 21668, Juneau, AK 99802, Attention: Lori J. Gravel. Copies of this proposed rule, and the final environmental impact statement/supplementary environmental impact statement (FEIS/ SEIS) for the halibut and sablefish IFQ programs, respectively, may be obtained from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510.

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

SUPPLEMENTARY INFORMATION:

Background

The IFQ program is a regulatory regime intended by the North Pacific Fishery Management Council (Council) to promote the **conservation** and management of halibut and sablefish resources, and to further the objectives of the Magnuson Fishery **Conservation** and Management Act (Magnuson Act) and the Northern Pacific Halibut Act (Halibut Act).

The Alaskan fisheries using fixed gear for Pacific halibut (*Hippoglossus stenolepis*) and sablefish (*Anoplopoma fimbria*) in the areas defined in 50 CFR 676.10 (b) and (c) will be managed through the IFQ program beginning in 1995. Further information on the program is contained in the preamble to the final regulations implementing the program (50 CFR part 676) (58 FR 59375, November 9, 1993).

This action proposes procedures for appeals under 50 CFR part 676. Appeals would be available from initial administrative determinations made by NMFS management staff and appellate officers' decisions. Final action on this proposed rule will be taken by NMFS after review and consideration of public comments.

Initial Administrative Determinations

Initial administrative determinations are the findings of NMFS staff on

eligibility for initial allocation, transfer and use of quota share (QS) and IFQ under the IFQ program. Initial administrative determinations become the final agency action within 90 days of its issuance unless appealed under the procedure described below.

Examples of initial administrative determinations that would be made by NMFS staff are: (1) Whether applicants have submitted sufficient documentation to demonstrate that they are qualified persons, or their successors-in-interest, as defined in 50 CFR 676.20(a)(1); (2) whether to grant initial QS allocations to applicants based on the documentation provided in applications; (3) whether documentation submitted with applications, or documentation requested by NMFS staff, supports the claims made on applications for initial QS allocations; (4) whether to grant initial QS allocations based on specific vessel categories and fishery statistical areas; and (5) other issues that might arise under 50 CFR part 676.

Prior to making initial administrative determinations, NMFS staff would be able to request additional information from applicants to support their applications. Applicants would be provided 90 days to respond to these requests. Requests for additional information would provide an opportunity for applicants to submit additional documentation for claims not consistent with data contained in NMFS files. Requests for additional information could not in themselves be the subject of an administrative appeal. Appealable determinations would not be made until: (1) An applicant has responded to the request by providing additional information within the time period; (2) an applicant has waived the right to respond to the request for additional information, and instead has requested that a determination be made on the application in its current form; or (3) an applicant has not responded within the applicable time period.

#### Appeals

Persons, as defined in 50 CFR 676.11, whose interests are directly and adversely affected by initial administrative determinations made by NMFS staff or by decisions issued by appellate officers would be able to appeal those determinations or decisions. The proposed rule would establish a 2-tier appeals process (i.e., appeal of an initial administrative determination to the appellate officer and appeal of an appellate officer's decision to the Regional Director). This process would provide applicants with a reasonable opportunity to be heard concerning agency actions.

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

Addresses of record would be established from the addresses used by persons on their first correspondence to NMFS, Restricted Access Management, Juneau, AK. For most persons, this first correspondence would be their request for an application for QS allocation. Any changes to the address of record should be promptly provided to NMFS in writing. The burden to notify NMFS of address changes would be on the IFQ program applicant because the applicant is in the best position to have knowledge of such changes. Supplying address changes ensures that NMFS would have an accurate and current address for correspondence.

Eligibility to appeal would begin on either the date initial determinations were made by NMFS staff or on the date decisions were issued by appellate officers. Appeals would have to be filed with NMFS within 90 days of the date an initial administrative determination was made, or within 45 days of the date an appellate officer's decision was issued.

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

In addition to the written statement of appeal, an appellant may request, in writing, a hearing on one or more issues material to the appeal. A request for a hearing would have to be accompanied by a concise statement: (1) Raising a genuine and substantial issue of adjudicative fact for resolution; and (2) listing available and specifically identified reliable evidence upon which the factual issue can be resolved. A hearing would not be held on issues of policy or law, or upon the basis of mere allegations, denials, or general descriptions of positions and contentions.

The appellant could, and would be encouraged to, supply evidence supporting the statement of appeal and request for a hearing. By timely submitting a complete appeal, and by providing sufficient supporting evidence, the appellate officer could make a decision in the appellant's favor without further proceedings. Alternatively, the appellate officer could deny the appeal as unfounded, a decision that would be appealable to the Regional Director. Finally, the appellate officer could decide to order a hearing to aid in the disposition of one or more of the issues presented on appeal.

#### Hearings

Written or oral hearings would be held at the appellate officer's discretion to resolve genuine and substantial issues of adjudicative fact, if such hearings would be useful to resolve those issues. The decision of whether to hold a written or oral hearing would be solely within the appellate officer's discretion and could not be appealed to the Regional Director.

The appellate officer could order a written hearing on a determination that the issues presented in an appeal could be resolved by allowing the appellant an opportunity to respond through written submissions. The written hearing process would be the preferred method of resolving issues unless the appellate officer determined that an oral hearing is necessary. The appellate officer might decide to order an oral hearing on one or more issues after beginning the written hearing process.

On ordering a written hearing, the appellate officer would provide the appellant with notice that a written hearing has been ordered, provide the appellant with a statement of issues to be determined, and provide the appellant with 30 days to file a written response, which might include affidavits from the appellant or other witnesses. The statement of issues would provide the appellant with information concerning the issues to be determined at hearing by the appellate officer. This statement would help to focus the appellant on pertinent, rather than extraneous, issues. The appellate officer might, at his/her sole discretion, extend the 30-day filing period for the written response if the appellant shows good cause for failing to meet the deadline. This extension would be provided only in cases in which the appellant could not respond within the time period. The success of the IFQ program depends on the timely disposition of all appeals. Extensions for an unjustified failure to meet filing deadlines would not be allowed.

The appellate officer would order an oral hearing on a determination that an oral hearing is necessary to resolve one or more issues presented in the appeal. As explained above, the decision to order either an oral or written hearing lies solely within the appellate officer's discretion. On ordering an oral hearing, the appellate officer would provide the appellant with notice that an oral hearing has been ordered, provide the appellant with a statement of issues to be determined by the hearing process, and provide the appellant with notice, at least 30 days in advance, of the place, date, and time of the oral hearing. Hearings would be held in Juneau at the prescribed date and time, unless the appellate officer determines, based upon good cause shown, that a different place, date, or time would better serve the interests of justice. As explained above, routine delays would not be allowed, and the ordering of continuances, like extensions, would be solely within the appellate officer's discretion.

The proposed rule would allow appellate officers to order pre-hearing conferences. The pre-hearing conference could be used to simplify the issues, obtain stipulations and admissions of facts, and discuss the possibility of settlement without further proceedings. Simplifying the issues would increase the efficiency of the hearing process by ensuring that the appellant's time and effort are not wasted on extraneous issues. Stipulations, which are conditions that are specified and agreed on in advance, and admissions of fact, which are admissions that certain facts are not in dispute and do not need to be proved, would assist in streamlining the hearing process. Settlements could be beneficial to all parties concerned, allowing for the resolution of some issues without the time and cost that would be associated with using the entire hearing process. The formal rules of evidence would not apply.

The appellate officer would have authority to conduct hearings in an orderly manner, including the powers specifically listed in proposed Sec. 676.25(i). In addition, NMFS is considering whether the appellate officers have the legal authority to (1) issue subpoenas to compel testimony and the production of documentary evidence, and (2) take depositions and cause depositions to be taken. Although these additional powers are not specifically enumerated in proposed Sec. 676.25(i), NMFS nevertheless requests public comment on the authority for, and advisability of, granting appellate officers these powers.

To provide for the integrity of the process, appellate officers would withdraw from an appeal at any time they deem themselves disqualified. This could occur because of financial connection to the case, ex parte communications, or some other personal bias. In addition, appellants would be able to request withdrawal of the appellate officer. An appellate officer might withdraw upon the appellant's motion if it was entered prior to the issuance of a decision and the appellant demonstrated personal bias or other basis for disqualification. If the appellate officer denies the motion to withdraw, he/she would have to do so on the record.

At the conclusion of the hearing, whether oral or written, the appellate officer would close the record and issue a decision. The proposed rule would require that the appellate officer's decision be based solely on the record of the proceedings, ensuring that the appellant would have the opportunity to review all information that was used in the decision-making process. This requirement would also establish a record for review on appeal.

Appeal to the Regional Director

An appellant whose interests are directly and adversely affected by an appellate officer's decision would have an opportunity to appeal that decision

to the Regional Director. A written appeal to the Regional Director would have to be filed within 45 days of the issuance of the appellate officer's decision. If the appellate officer's decision was not appealed within this 45-day period, that decision would become effective upon the expiration of the time period and would be considered a final agency action. A 45-day period is proposed because it is long enough to provide the appellant with reasonable time to prepare an adequate appeal to the Regional Director, but not be too long as to unduly delay the appeals process. An appeal to the Regional Director would have to clearly and concisely state the reasons why the appellate officer's decision has a direct and adverse effect on the appellant, or other party, and should be modified, reversed, or remanded.

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

#### Classification

This proposed rule is designed to implement the appeals portion of the IFQ program, a program intended by the Council to promote the **conservation** and management of the halibut and sablefish resources, and to further the objectives of the Magnuson Act and the Halibut Act. This proposed rule is consistent with the national standards, other provisions of the Magnuson Act, the Halibut Act, and other applicable laws.

A regulatory flexibility analysis was prepared for the IFQ program, describing the effects of this program on small entities. This analysis was contained in the FEIS for the IFQ program. The Secretary of Commerce concluded that the IFQ program would have a significant economic impact on a substantial number of small entities based on this analysis. Any effect of this proposed rule, which implements the appeals process for the IFQ program, was included in this prior analysis.

This proposed rule contains a collection of information requirement subject to the Paperwork Reduction Act of 1980. The estimated response time for the collection of information required to file an appeal to a QS application is 4 hours. The collection of information has been approved by the Office of Management and Budget, OMB control numbers 0648-0272 (IFQs for Pacific Halibut and Sablefish in the Alaska Fisheries) and 0648-0269 (Western Alaska CDQ Program).

This rule is not subject to review under E.O. 12866. List of Subjects in 50 CFR Part 676

Fisheries; Reporting and recordkeeping requirements.

Dated: February 3, 1994. Nancy Foster, Deputy Assistant Administrator for

Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 676 is proposed to be amended as follows: PART 676--LIMITED ACCESS MANAGEMENT OF FEDERAL FISHERIES IN AND OFF Alaska

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

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

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

Sec. 676.25 Determinations and appeals.

(a) General. The following section describes the procedure for appealing initial administrative determinations and appellate officers' decisions made under 50 CFR part 676.

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

(c) Submission of Appeals. Appeals must be in writing and must be submitted in original form to NMFS, P.O. Box 21668, Juneau, AK 99802; or to NMFS, 709 W 9th, room 413, Juneau, AK 99801. Appeals transmitted by electronic means will not be accepted.

(d) Time Periods for Appeals and Date of Filing.

(1) Appeals must be filed within the following time periods:

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

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

(2) The time periods within which appeals must be filed begin to run on the date of issuance of the initial administrative determination or appellate officer's decision that gives rise to the appeal. Saturdays, Sundays, and Federal holidays will not be included in computing such time periods, which conclude at the close of business of the final enumerated day, except that when such time periods conclude on a Saturday, Sunday, or Federal holiday, such periods will be extended to the close of business on the next business day.

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

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

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

(f) Statement of Reasons for Appeals from Initial Determinations.

Applicants must timely submit a full written statement in support of the appeal, including a concise statement of the reasons why the initial administrative determination has a direct and adverse effect on the applicant and should be reversed or modified. If the applicant requests a hearing on any

issue presented in the appeal, such request for hearing must be accompanied by a concise written statement raising genuine and substantial issues of adjudicative fact for resolution and a list of available and specifically identified reliable evidence upon which the factual issues can be resolved. The appellate officer will limit his/her review to the issues stated in the appeal; all issues not set out in the appeal will be waived.

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

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

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

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

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

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

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

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

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

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

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

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

(1) Administer oaths;

(2) Call and question witnesses; and

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

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

(k) Appellate Officer Decisions. The appellate officer will close the record and issue a decision after he/she determines that there is sufficient information on the record of the proceedings and all procedural requirements have been met. The decision must be based solely on the record of the proceedings. Appellate officers' decisions will become effective 45 days after the date the decision is issued, unless appellant files a timely appeal to the Regional Director in accordance with paragraph (o) (1) and (2) of this

section, or the Regional Director orders review of the appellate officer's decision in accordance with paragraph (o)(4) of this section.

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

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

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

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

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

(m) Written Hearing.

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

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

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

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

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

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

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

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

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

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

(iii) Close the record.

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

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

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

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

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

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

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

(iii) Provide the appellant with notice, at least 30 days in advance, of the place, date, and time of the oral hearing. Oral hearings will be held in Juneau at the prescribed date and time, unless the appellate officer



determines, based upon good cause shown, that a different place, date, or time will better serve the interests of justice. A continuance of the oral hearing may be ordered at the sole discretion of the appellate officer if the appellant shows good cause for the continuance.

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

- (i) The simplification of issues;
- (ii) The possibility of obtaining stipulations, admissions of facts, and agreements to the introduction of documents;
- (iii) The possibility of settlement or other means to facilitate resolution of the case; and
- (iv) Such other matters as may aid in the disposition of the proceedings.

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

(5) At the beginning of the oral hearing, the appellate officer may first seek to obtain stipulations as to material facts and the issues involved and may state any other issues on which he/she may wish to have evidence presented. Issues to be resolved at the hearing will be limited to those identified by the appellate officer as provided in paragraph (g)(3) of this section. The appellant will then be given an opportunity to present his/her case.

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

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

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

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

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

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

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

(4) Within 45 days of the date the appellate officer's decision is issued, the Regional Director may, at his/her own discretion, order review of any

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

[FR Doc. 94-2871 Filed 2-8-94; 8:45 am] BILLING CODE 3510-22-P