

Secretarial Review Draft

REGULATORY IMPACT REVIEW/ FINAL REGULATORY FLEXIBILITY ANALYSIS

For a proposed Regulatory Amendment to
Implement **Amendment 90** to the Fishery Management Plan for
Bering Sea and Aleutian Islands Groundfish

A PROVISION
ALLOWING POST-DELIVERY TRANSFER OF AMENDMENT 80 SHARES TO
AMENDMENT 80 COOPERATIVES

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Executive Summary

This action would allow Amendment 80 vessels to engage in post-delivery transfers of their respective shares, to cover catch overages. Presented below is the problem statement for this action.

Post-Delivery Transfers

Participants in the Amendment 80 cooperative program are permitted to join cooperatives that receive annual allocations of cooperative quota, which provide exclusive privileges to catch specific amounts of Atka mackerel, AI Pacific ocean perch, flathead sole, Pacific cod, rock sole, and yellowfin sole; and halibut, Zone 1 red king crab, C. opilio, Zone 1 C. bairdi, and Zone 2 C. bairdi prohibited species catch. Any harvest in excess of a cooperative's quota allocation is a regulatory violation, punishable by confiscation of catch and other penalties. Since all catch is counted against cooperative quota, the uncertainty of catch quantities and composition creates potential for overages. A provision allowing for post-delivery transfer of cooperative quota to cover overages could reduce the number of violations, allowing for more complete harvest of allocations, and reduce enforcement costs without increasing the risk of overharvest of allocations.

Description of Alternatives

In February 2008, the Council selected Alternative 2 (unlimited post-harvest transfers) as its preferred alternative. The Council was also considering a second action, rollovers of Amendment 80 limited access allocations to Amendment 80 cooperatives, but the Council elected to take no action on this item. As a result, any analysis that addressed the second action was removed from this amendment package.

The Council has identified three alternatives for the post-delivery transfer action. Alternative 1 is the status quo, under which no post-delivery transfers are permitted. Any overage at the time of landing is considered a violation, subject to a potential enforcement action. Under Alternative 2 (preferred), post-delivery transfers of shares are permitted and would be relatively unlimited (i.e., the number of post-delivery transfers a person may receive, and their size, are not limited). However, post-delivery transfers are limited to being used to cover overages. All post-delivery transfers will be permitted at any time, until the fishing season ends (December 31st). Under Alternative 3, moderate limits would be placed on post-delivery transfers. As under Alternative 2, post-delivery transfers are allowed exclusively to cover overages. However, under Alternative 3, transfers are limited to five transfers of each species allocation. Any post-delivery transfer of retainable species is limited to 100 metric tons of catch quota on a species basis. Each transfer of halibut PSC is limited to 15,000 pounds. Transfers of red king crab PSC are limited to 3,000 animals, per transfer. Each transfer of *C. bairdi* PSC (each zone) is limited to 10,000 animals. Finally, transfers of *C. opilio* PSC are limited to 35,000 animals, per transfer. All post-delivery transfers will be permitted after a week-ending date, for a period of 30 days.

Effects of Alternatives

Alternative 1 – No post-delivery transfers (status quo)

Under the status quo alternative, as each cooperative approaches attainment of its allocation, it is likely that some risk of overage will arise, unless a decision is made to leave a small amount of unharvested allocation, as a buffer. End of year consolidation will be driven, in part, by the requirement that a vessel not begin a fishing trip without quota of all species. Once a cooperative has fully harvested its allocation

of a species, the only means of gaining value from its remaining shares of other species will be through transfers. The inter-cooperative agreement should contribute to coordination of end of the season consolidation. Allocations will likely be consolidated in one or two cooperatives with one or two vessels in those cooperatives making ‘sweep up’ trips to complete the season’s harvests. The extent to which this consolidation helps participants avoid overages is not known. If a participant chooses to operate a vessel in the fishery, it is likely that it will prioritize harvest of its own allocation. Whether a participant avoids an overage could depend on foresight to recognize the risk of overharvest and possibly accept lower revenues from a transfer, instead of harvesting its own allocation.

Although consolidation of allocations in one or two cooperatives can be used to avoid overages, it is likely that a few overages could occur prior to the end of the season. Since each cooperative is limited by 15 species allocations, it is possible that unexpected catches could put a cooperative over its allocation.

Alternative 2 – Unlimited post-delivery transfers (preferred alternative)

Despite the absence of limits, the provision is likely to be used in a limited way. Participants are only likely to rely on the post-delivery transfer provision for unintended small overages. The number of overages at the time of landing could be slightly higher than under the status quo, if participants gain confidence that they will be able to cover the overage with a transfer. Overages not covered with a transfer and subject to penalty should be fewer than under the status quo, since the provision will allow participants to address some overharvest with transfers.

Prices for post-delivery transfers will likely be negotiated to be greater than prevailing lease rates, but less than the expected penalty on the overage. Small overages are typically subject to minor penalties and forfeiture of the overage. One would expect that the price of quota to cover an overage would be relatively close to the estimated cost of the penalty, plus the ex vessel value of the forfeiture, for post-delivery transfers of small amounts of quota. Transfers to cover relatively large overages could result in substantially higher costs than the estimated cost of the penalty and forfeited catch value. Persons responsible for unintended, large overages are likely to be in a relatively weak negotiating position, when faced with a substantial penalty for the overage.

Overall, Amendment 80 participants are likely to realize minor production efficiency gains under this alternative. It is unlikely that participants will have excessive overages through unreasonable reliance on the post-delivery transfers, given that transactions costs will be incurred with each transfer. Some members of cooperatives, however, may be more likely to attempt to fully harvest their allocations, if they know that a post-delivery transfer could be used to cover a minor overage. Members of a cooperative are likely to benefit from a reduction in the number of overage violations, through post-delivery transfers.

Alternative 3 – Moderately limited post-delivery transfers

The provisions, and thus effects, of Alternative 3 are very similar to Alternative 2, but Alternative 3 would impose a few additional restrictions on post-delivery transfers. Under Alternative 3, each post-delivery transfer of allocated Amendment 80 species would be limited to 100 mt for each species. In addition, each post-delivery transfer of PSC would be strictly limited: halibut PSC limit is 15,000 pounds, red king crab PSC limited is 3,000 animals, *C. bairdi* PSC limit is 10,000 animals for each zone, and *C. opilio* PSC limit is 35,000 animals. These amounts are believed to be sufficient to cover an unintentional overage, arising from a single tow. In some instances, it is possible (although unlikely) that an overage arising from a single tow could exceed one of these amounts. The limits, however, could reduce the effectiveness of the post-transfer provision’s use as a means to coordinate harvesting activity that cannot be completed in a timely manner.

The thresholds could be effective in deterring unreasonable reliance on the post-delivery transfers as a

means of covering an excessive overage, although the occurrence of such behavior is regarded as limited. Participants are likely to realize that the cost of covering an overage will rise with the magnitude of the overage. Sellers of quota, who realize that the potential penalty facing a person with a substantial overage will be punitive, are likely to exploit that position, offering shares for a premium price. In addition, covering a large overage is more likely to be complicated by the need to involve the selling cooperative's associated processor, increasing transaction costs and the total price paid for the transfer.

This alternative would also limit each cooperative to five post-delivery transfers per each species allocation. This limit would allow the cooperative to incur up to five independent overages for an allocation. Although it is possible that a cooperative could have multiple overages of an allocation, it is unlikely that the limit of five post-delivery transfers would be constraining. Since only three cooperatives could form under the program, the potential for repeated overages of an allocation by a cooperative is somewhat limited. In addition, a cooperative facing the limit is likely to contract for transfers large enough in magnitude prior to fishing, to avoid exceeding the limit of five post-delivery transfers for the allocation.

Under this alternative, post-delivery transfers would need to be completed within 30 days after the weekending date of the landing with the overage. The limit on post-delivery transfers is unlikely to constrain effectiveness of the provision. The added complexity of arranging, tracking, monitoring, and enforcing the provisions of Alternative 3, when compared to the simpler structure under Alternative 2, would be anticipated to increase costs for all parties to the transfer (i.e., receiving entity, transferring entity, NMFS RAM Division, NOAA OLE).

Directly Regulated Small Entities

There are a total of 28 Amendment 80 catcher processor vessels that qualify to join a cooperative(s). All are associated with entities with annual gross receipts over the \$4 million threshold, all are members of a cooperative, and/or individually had gross annual receipts over \$4 million. Therefore, all of the directly regulated operations would be considered large entities. Nonetheless, a decision was made to prepare an initial and a final regulatory flexibility analysis, rather than certifying this action.

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1 Introduction

The groundfish fisheries in the Exclusive Economic Zone (3 to 200 miles offshore) of the Bering Sea and Aleutian Islands off Alaska are managed under the Bering Sea/Aleutian Islands Groundfish Fishery Management Plan (BSAI FMP), as developed by the North Pacific Fisheries Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The FMP was approved by the Secretary of Commerce (Secretary) and became effective in 1982.

This document is a Regulatory Impact Review/Final Regulatory Flexibility Analysis (RIR/FRFA) for proposed Amendment 90 to the BSAI FMP. There are two actions under consideration in this amendment package. The first action would allow Amendment 80 vessels to engage in post-delivery transfer of their respective shares to cover catch overages. Amendment 80 established a share-based management program for non-AFA trawl catcher processors in the Bering Sea and Aleutian Islands. Under the program, cooperatives would receive allocations of six Bering Sea and Aleutian Islands (BSAI) groundfish species (Atka mackerel, Aleutian Islands (AI) Pacific ocean perch, flathead sole, Pacific cod¹, rock sole, and yellowfin sole). Since three separate management areas are established for both Atka mackerel and Pacific ocean perch, each cooperative will receive a total of ten allocations. In addition to these species allocations, five allocations of prohibited species catch (PSC) will be made under Amendment 80 (halibut, Zone 1 red king crab, *C. opilio*, Zone 1 *C. bairdi*, and Zone 2 *C. bairdi*). So, each cooperative is likely to receive fifteen separate allocations under the program. These annual allocations are binding (i.e., without provision to cover any overage or compensate for any underage). The proposed action would allow Amendment 80 vessels to transfer shares, post-delivery, to cover catch overages and prevent violations. In February 2008, the Council selected Alternative 2 as the preferred alternative, allowing unlimited post-delivery transfers of shares for qualifying vessels.

The second action that was under consideration by the Council was rollovers from the Amendment 80 limited access sector (i.e., Amendment 80 qualified vessels that do not join an Amendment 80 cooperative), to the Amendment 80 cooperatives. In February 2008, the Council elected to take no further action on rollovers of projected unharvested amount of Amendment 80 species and PSC from the Amendment 80 limited access fishery to the Amendment 80 cooperatives. In accordance with the Council's decision on rollovers, this analysis only addresses post-delivery transfers of Amendment 80 shares to cover catch overages.

This document contains a Regulatory Impact Review (Section 2) and a Final Regulatory Flexibility Analysis (Section 3) of a suite of alternatives to allow post-delivery transfers of cooperative allocations. Section 4 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.

Given the amendment package addresses allocative issues for the Amendment 80 sector, the document is expected to meet the requirements of CEQ regulations at 40 CFR Part 1500-1508 and NOAA Administrative Order NAO 216-6 for categorical exclusion from detailed environmental review. The proposed actions are not expected to affect the overall amount of groundfish taken in the BSAI by the Amendment 80 sector.

¹ Amendment 80 conditioned the inclusion of Pacific cod in the cooperative program on receipt of an allocation of Pacific cod by the sector. Since the sector will receive that allocation under Amendment 85, (which will be implemented simultaneously with Amendment 80), Pacific cod will be included in the cooperative program from the outset.

This document relies on, and includes by reference, information contained in the BSAI Amendment 80 Regulatory Impact Review/Environmental Assessment/Initial Regulatory Flexibility Analysis (NMFS/NPFMC, 2007).

2 Regulatory Impact Review

This chapter provides an economic analysis of the action, addressing the requirements of Presidential Executive Order 12866 (E.O. 12866), which requires a cost and benefit analysis of Federal regulatory actions.

The requirements of E.O. 12866 (58 FR 51735; October 4, 1993) are summarized in the following statement from the order:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

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

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

2.1 Purpose and need statement

This amendment package addresses post-delivery transfers for Amendment 80 cooperatives. Presented below is the Purpose and Need Statement associated with this action.

Participants in the Amendment 80 cooperative program are permitted to join cooperatives that receive annual allocations of cooperative quota, which provide exclusive privileges to catch specific amounts of Atka mackerel, AI Pacific ocean perch, flathead sole, Pacific cod, rock sole, and yellowfin sole and halibut, Zone 1 red king crab, C. opilio, Zone 1 C. bairdi, and Zone 2 C. bairdi prohibited species catch. Any harvest in excess of a cooperative’s quota allocation is a regulatory violation, punishable by confiscation of catch and other penalties. Since all catch is counted against cooperative quota, the uncertainty of catch quantities and composition creates potential for overages. A provision allowing for post-delivery transfer of cooperative quota to

cover overages could reduce the number of violations, allowing for more complete harvest of allocations, and reduce enforcement costs without increasing the risk of overharvest of allocations.

2.2 Description of alternatives

In February 2008, the Council selected unlimited post-harvest transfers (Alternative 2) as its preferred alternative. Presented below is a description of the alternatives.

The Council has identified three alternatives for the post-delivery transfer action. Alternative 1 is the status quo, under which no post-delivery transfers are permitted. Any overage at the time of landing is considered a violation subject to a potential enforcement action. Under Alternative 2 (preferred), post-delivery transfers of shares are permitted and would be relatively unlimited (i.e., the number of post-delivery transfers a person may receive and their size are not limited). Post-delivery transfers are limited to being used to cover overages. All post-delivery transfers will be permitted at any time until the fishing season ends (December 31st). Under Alternative 3, moderate limits are placed on post-delivery transfers. As under Alternative 2, post-delivery transfers are allowed exclusively to cover overages. However, under Alternative 3, transfers are limited to five transfers of each species allocation. Any post-delivery transfer of retainable species is limited to 100 metric tons of catch quota on a species basis. Each transfer of halibut PSC is limited to 15,000 pounds. Transfers of red king crab PSC are limited to 3,000 animals, per transfer. Each transfer of *C. bairdi* PSC (each zone) is limited to 10,000 animals. Finally, transfers of *C. opilio* PSC are limited to 35,000 animals, per transfer. All post-delivery transfers will be permitted after a weekending date, for a period of 30 days. Below are the alternatives under consideration by the Council for post-delivery transfers in the Amendment 80 cooperative fisheries. Table 2-1 summarizes the differences between the various alternatives under consideration.

Table 2-1. Summary of Amendment 80 cooperative post-delivery transfer alternatives.

Element	Alternative 1 (status quo)	Alternative 2 (unlimited)	Alternative 3 (moderately limited)
Purpose	No post-delivery transfers permitted	Only for overages	Only for overages
Maximum amount of transfer allocated retainable species		none	100 metric tons
Maximum amount of transfer - halibut PSC			15,000 pounds
Maximum amount of transfer - red king crab PSC			3,000 animals
Maximum amount of transfer - <i>bairdi</i> PSC (either zone)			10,000 animals
Maximum amount of transfer - <i>opilio</i> PSC			35,000 animals
Maximum number of transfers		none	five per species
Time limit		Prior to the season end (Dec. 31st)	Within 30 days of the weekending date

2.3 Existing conditions

This section describes the relevant existing conditions in the different Amendment 80 fisheries. The section begins with a brief description of the management of the fisheries under the program, followed by descriptions of the Amendment 80 sector in the Amendment 80 fisheries, including only information relevant to this action.

2.3.1 Management of the fisheries

The Amendment 80 program allocates a specific portion of six non-pollock groundfish species among trawl fishery sectors. These six BSAI species include AI Pacific ocean perch (POP), Atka mackerel, flathead sole, Pacific cod, rock sole, and yellowfin sole. These species are allocated between the Amendment 80 sector and all other BSAI trawl fishery participants also called the BSAI trawl limited access sector. These other trawl fishery participants include AFA catcher processors, AFA catcher vessels, and non-AFA catcher vessels. Amendment 80 vessels are non-AFA trawl catcher/processor vessels that, under statute and implementing regulations, may be used to fish in the Amendment 80 sector.

Each year, the Amendment 80 program will allocate an amount of Amendment 80 species available for harvest, called the initial total allowable catch (ITAC), and crab and halibut PSC to the Amendment 80 sector and the BSAI trawl limited access sector. Allocations made to one sector are not subject to harvest by participants in other fishery sectors, except for rollovers from the trawl limited access sector (i.e., non-Amendment 80 qualified trawl vessels) to the Amendment 80 cooperatives. If during the fishing year, NMFS determines that a reallocation of a portion of the ITAC of ICA of an Amendment 80 species assigned to the BSAI trawl limited access sector to Amendment 80 cooperatives is appropriate, then NMFS will issue a revised catch quota permit to reallocate that amount of Amendment 80 species to each Amendment 80 cooperative.

The ITAC represents the amount of TAC for each Amendment 80 species that is available for harvest, after allocations to the CDQ Program and the incidental catch allowance (ICA) have been subtracted from the TAC. The ICA is set aside for the incidental harvest of an Amendment 80 species, while vessels are targeting other groundfish species in non-trawl fisheries and in the BSAI trawl limited access sector fisheries. The Amendment 80 program will also allocate crab and halibut PSC to the Amendment 80 sector and to BSAI trawl limited access sectors to accommodate PSC use by these sectors, based on past PSC use.

The Amendment 80 program assigns quota share for Amendment 80 species based on catch by Amendment 80 vessels. Once the Amendment 80 quota share is assigned to the Amendment 80 vessel, it cannot be divided or transferred separately from the Amendment 80 vessel. If the Amendment 80 quota share is assigned to the License Limitation Program (LLP) license, originally issued for that Amendment 80 vessel, it cannot be transferred separately from that LLP license.

Persons that receive Amendment 80 quota share can join a cooperative to receive an exclusive harvest privilege for a portion of the ITAC. Amendment 80 quota share holders can form a cooperative with other Amendment 80 quota share holders on an annual basis. A cooperative will receive an amount of cooperative quota equivalent to the proportion of quota share held by all of the members of the cooperative combined, relative to the total of all holders quota share. Each Amendment 80 cooperative will also receive an annual cooperative quota with an exclusive limit on the amount of crab and halibut PSC the cooperative may use while harvesting in the BSAI. This crab and halibut PSC cooperative quota will be assigned to a cooperative proportional to the sum of Amendment 80 quota shares held by the

members. These annual allocations are, at present, binding (i.e., without provision to cover any overage or compensate for any underage.)

Amendment 80 quota share holders that do not join an Amendment 80 cooperative can participate in the Amendment 80 limited access fishery. The Amendment 80 program will assign to the Amendment 80 limited access fishery the amount of the Amendment 80 sector's allocation of Amendment 80 species ITAC and crab and halibut PSC that remain after allocation to all of the Amendment 80 cooperatives. Participants fishing in the Amendment 80 limited access fishery will continue to compete with each other for a share of the common pool. NMFS would manage openings and closing of the Amendment 80 limited access fishery, much as it currently manages the existing fisheries. NMFS would open directed fishing for an Amendment 80 species only if there were sufficient ITAC assigned to the Amendment 80 limited access fishery. In addition, halibut PSC and crab PSC assigned to the Amendment 80 limited access fishery would continue to be apportioned among target fishery categories, and halibut PSC would continue to be based on seasonal apportionments as established in §679.21. Assuming target groundfish TAC is unharvested in the limited access fishery, when the Amendment 80 limited access fishery fully utilize its halibut PSC apportioned to a target fishery category, that target fishery would be closed to fishing for the Amendment 80 limited access group. When, again assuming TAC remains, all of the halibut PSC apportioned to the Amendment 80 limited access group has been fully utilized, the group will be prohibited from trawling for the remainder of the year in the BSAI. When the Amendment 80 limited access fishery fully utilizes its crab PSC, the group would be prohibited from trawling in the crab savings area applicable to the exhausted crab PSC, but the group may continue to trawl in other BSAI areas, so long as open access TAC remains available.

2.3.2 Description of BSAI Amendment 80 fisheries

In the BSAI, the rock sole, flathead sole, yellowfin sole, Atka mackerel, and AI POP fisheries are almost exclusively prosecuted by the non-AFA trawl catcher processor sector. Vessels participating in these fisheries generally fish for rock sole during the roe season until the first seasonal halibut bycatch cap is reached. After the rock sole roe fishery closes, these vessels shifted to several different targets; notably Atka mackerel, yellowfin sole, and Pacific cod. The directed Atka mackerel fishery is a bottom trawl fishery that occurs on the continental shelf in the Eastern Bering Sea (EBS) and in the passes between the islands of the central and western Aleutians. Table 2-2 and Table 2-3 provide harvest data for the Amendment 80 vessels in the BSAI flathead sole, rock sole, Pacific cod, yellowfin sole, Atka mackerel, and AI POP fisheries from 2003 through 2006.

Allocation percentage for the Amendment 80 sector is 100 percent of rock sole and flathead sole. For yellowfin sole, the allocation percent is variable dependent upon the ITAC level. The yellowfin sole allocation percentages associated with ITAC level are presented below:

<u>ITAC</u>	<u>Allocation</u>
≤ 87,500	93%
> 87,500 ≤ 95,000	87.5%
> 95,000 ≤ 102,500	82%
> 102,500 ≤ 110,000	76.5%
> 110,000 ≤ 117,500	71%
> 117,500 ≤ 125,000	65.5%
> 125,000	60%

For Atka mackerel and AI POP, the allocation will phase in the final allocation percentages over a period of years. For Atka mackerel, that period would be four years, and for AI POP, it would be two years. The allocation percentages for Atka mackerel would start in 2008 at 98 percent for areas 541/BS and area 542 and then be reduced 2 percent every year for four years, culminating at a 90 percent allocation in 2012. For area 543, the Amendment 80 sector would be allocated 100 percent of the Atka mackerel starting in 2008. For AI POP in areas 541 and 542, the allocation would start at 95 percent in 2008 and decrease to 90 percent in 2009. For area 543, the allocation to the sector would be 98 percent starting in 2008. Table 2-4 provides the annual apportionment of Amendment 80 species ITAC between the Amendment 80 sector and BSAI trawl limited access sector (except yellowfin sole).

The most recent descriptions of the BSAI groundfish fisheries are located in the *Stock Assessment and Fishery Evaluation Report for the Groundfish Resources of the Bering Sea/Aleutian Islands Regions* (NPFMC 2006). Please see this document for further details on the groundfish fisheries in the BSAI.

Table 2-2. Catch history for the Amendment 80 vessels in the BSAI flathead sole, Pacific cod, rock sole, and yellowfin sole fisheries from 2003 to 2006.

Year	Species	Catch (in metric tons)	Number of Vessels
2003	Flathead sole	11,518	22
	Pacific cod	29,727	22
	Rock sole	32,286	22
	Yellowfin sole	68,819	22
2004	Flathead sole	14,195	23
	Pacific cod	37,983	23
	Rock sole	43,910	23
	Yellowfin sole	63,292	23
2005	Flathead sole	12,143	22
	Pacific cod	30,552	22
	Rock sole	33,187	22
	Yellowfin sole	79,273	22
2006	Flathead sole	13,705	22
	Pacific cod	29,351	22
	Rock sole	31,015	22
	Yellowfin sole	78,285	22

Table 2-3. Catch history for the Amendment 80 vessels in the BSAI Atka mackerel and AI POP fisheries from 2003 to 2006.

Year	Species	Subarea	Catch (in metric tons)	Number of Vessels
2003	Atka mackerel	541	5,600	13
		542	25,391	11
		543	17,880	8
	AI POP	541	3,724	12
		542	2,961	10
		543	6,028	8

Year	Species	Subarea	Catch (in metric tons)	Number of Vessels
2004	Atka mackerel	541	2,850	13
		542	27,909	11
		543	18,075	9
	AI POP	541	2,335	13
		542	2,965	10
		543	5,149	9
2005	Atka mackerel	541	3,340	12
		542	32,611	10
		543	18,307	10
	AI POP	541	2,210	12
		542	2,065	10
		543	4,411	10
2006	Atka mackerel	541	3,738	13
		542	37,027	11
		543	13,540	10
	AI POP	541	2,810	14
		542	3,047	12
		543	5,148	10

Table 2-4. Annual apportionment of Amendment 80 species ITAC between the Amendment 80 and BSAI trawl limited access sector (except yellowfin sole)

Fishery	Management Area	Year	Percentage of ITAC allocated to the Amendment 80 sector	Percentage of ITAC allocated to the BSAI trawl limited access sector
Atka mackerel	543	All years	100	0
	542	2008	98	2
		2009	96	4
		2010	94	6
		2011	92	8
		2012 and all future years	90	10
	541/EBS	2008	98	2
		2009	96	4
		2010	94	6
		2011	92	8
2012 and all future years		90	10	
AI POP	543	All years	98	2
	542	2008	95	5
		2009 and all future years	90	10
	541	2008	95	5
		2009 and all future years	90	10
Pacific cod	BSAI	All years	13.4	N/A
Rock sole	BSAI	All years	100	0
Flathead sole	BSAI	All years	100	0

2.3.3 Prohibited species

Allocated to the Amendment 80 sector are halibut, red king crab, *C. opilio*, Zone 1 *C. bairdi*, and Zone 2 *C. bairdi* PSC. Halibut PSC and crab PSC limits would be allocated to the Amendment 80 sector for use while targeting their allocations of groundfish and any other non-allocated BSAI groundfish. Halibut PSC² apportionment to the Amendment 80 sector in 2008 will be 2,525 mt. The following years through 2012, the apportionment of halibut PSC to the Amendment 80 sector will be reduced by 50 mt each year. In 2012 and subsequent years, the allocation of halibut PSC to the Amendment 80 sector would remain at 2,325 mt, unless changed by the Council in the future. Like halibut PSC, the crab PSC limited to the Amendment 80 sector is reduced to 80 percent of the initial allocation. This reduction would be phased in gradually at 5 percent per year starting in 2009 and ending in 2012. Crab PSC allowance would be allocated to the Amendment 80 sector for use while targeting their allocation of groundfish and any other non-allocated BSAI groundfish. PSC allowance allocated to the Amendment 80 sector will be further divided between the cooperatives and the non-cooperative pool. Table 2-5 provides PSC from 2003 to 2006 by the Amendment 80 sector for halibut, red king crab, *C. opilio*, Zone 1 *C. bairdi*, and Zone 2 *C. bairdi*. Note that PSC is prohibited from being retained, so all PSC is considered regulatory discards.

For further details on the management of BSAI PSC, see Chapter 3 of the Final Programmatic Supplemental Environmental Impact Statement (NMFS 2004b).

Table 2-5. Crab PSC and halibut PSC by Amendment 80 vessels

Year	Halibut		<i>C. opilio</i>		Red king crab		<i>C. bairdi</i> Zone 1		<i>C. bairdi</i> Zone 2	
	Mortality (metric tons)	Number of vessels	Mortality (number of animals)	Number of vessels	Mortality (number of animals)	Number of vessels	Mortality (number of animals)	Number of vessels	Mortality (number of animals)	Number of vessels
2003	2,802	22	667,746	22	91,796	22	309,948	20	578,358	22
2004	2,773	23	1,777,850	23	83,684	23	204,372	23	368,194	23
2005	2,733	22	3,171,816	22	111,773	22	202,824	21	432,408	22
2006	2,597	22	880,106	22	101,645	22	213,847	22	515,324	22

2.3.4 Description of the Non-AFA trawl Catcher Processor sector

The Amendment 80 sector is the most diverse of the processing sectors in the BSAI, and the only sector that consistently targets a significant amount of flatfish. However, the flatfish market is characterized as having significant constraints. The rock sole market, for example, prefers females with roe over smaller males and non-roo bearing females. Similarly, large yellowfin sole and flathead sole are preferred over smaller fish of the same species. There are few economic incentives to keep small fish because they fill limited hold space with product that is largely unprofitable. Unlike larger catcher processors and shore-plants, the Amendment 80 vessels are generally constrained from processing fish-meal. Because of size constraints, the vessels that comprise the Amendment 80 sector have fewer options for processing products (i.e., they are, by-in-large, limited to heading and gutting, or freezing whole fish) and, therefore, are typically more likely to discard small, less valuable fish.

² Halibut PSC is expressed as units of “mortality”, which is set as a fraction of halibut bycatch, and varies by gear type and fishery. In the Amendment 80 EA/RIR/IRFA dated July 20, 2007, the halibut bycatch rate from 2002-2004 was 0.0015 for Atka mackerel, 0.0121 for flathead sole, 0.0174 for rock sole, 0.0069 for rockfish, 0.0074 for yellowfin sole, and 0.0142 for Pacific cod.

The Amendment 80 fleet consists of a relatively wide variety of vessels that range from 103 ft to 295 ft in length. As would be expected, the smaller vessels are relatively less productive than the larger vessels. From 1995-2005, the smaller vessels generated approximately 13 percent of catch. However, the smaller vessels accounted for roughly 19 percent of the total discards in the sector. Vessels less than 125 ft discarded 46 percent of their catch over the eleven year period, while vessels over 125 ft discarded 30 percent. Industry sources indicate that the smaller vessels are unable to retain as many fish as larger vessels, because of limitations in hold size and processing space.

The following information on employment for the Amendment 80 sector is from the *Alaska Groundfish Fisheries Final Programmatic Supplemental Environmental Impact Statement* that was published on June 2004. The average crew size for an Amendment 80 vessel is about 34 persons, which is about one-third of the average employment on a surimi catcher processor, and less than half of the average crew of a fillet catcher processor. A typical crew might include a captain, a mate, two engineers (one each for the vessel and processing equipment), a cook/housekeeper, two to three crew members dedicated to the deck, a processing foreman and assistant, and about 25 processing workers. On some vessels two or three crew members may split their time between processing and deck work. Any variation in crew size usually is the result of a change in the number of processing workers employed. An annual average of 1,022 FTE positions were generated by this vessel class during the 1992-2001 period, and estimated yearly payments to labor average \$55 million.

2.3.5 Value of BSAI groundfish fisheries

Relative to first wholesale value, the Amendment 80 sector is more diversified across fisheries than other sectors. Two primary fisheries have historically contributed relatively equal shares of the first wholesale revenue for the Amendment 80 fleet. Of the Amendment 80 species, yellowfin sole at \$73 million, and Pacific cod at \$57 million, were two of the largest contributors to sector's gross revenue in 2006 (Table 2-6). Other fisheries which have historically contributed a significant share of the total first wholesale value for the head and gut fleet are rock sole and Atka mackerel.

Table 2-6 . Total production and first wholesale revenue (\$) by BSAI Amendment 80 target fishery for the Amendment 80 sector, 2003-2006

year	Species	Total Production (mt)	First Wholesale Revenue (\$)	Vessel Count
2003	Pacific cod	15,481	35,757,540	22
	Flathead sole	6,143	8,409,281	22
	Rock sole	10,077	16,857,624	22
	Yellowfin sole	39,443	38,138,876	21
	AI POP	5,889	7,342,403	14
	Atka mackerel	27,846	23,788,679	17
2004	Pacific cod	20,175	46,337,169	23
	Flathead sole	7,478	11,932,480	23
	Rock sole	15,538	28,975,138	23
	Yellowfin sole	38,730	38,747,700	22
	AI POP	4,485	6,954,906	16
	Atka mackerel	29,747	28,899,959	22

year	Species	Total Production (mt)	First Wholesale Revenue (\$)	Vessel Count
2005	Pacific cod	15,927	43,801,491	22
	Flathead sole	7,146	13,679,454	22
	Rock sole	12,977	27,173,369	22
	Yellowfin sole	52,221	69,132,577	22
	AI POP	4,071	9,940,121	21
	Atka mackerel	33,626	36,188,872	21
2006	Pacific cod	15,571	56,602,382	22
	Flathead sole	6,897	15,798,814	22
	Rock sole	13,890	30,584,579	22
	Yellowfin sole	50,938	72,685,321	22
	AI POP	5,163	14,586,815	21
	Atka mackerel	34,959	33,227,634	22

Source: NMFS

2.3.5.1 BSAI groundfish products and secondary processing activity

This section describes primary and secondary products produced in the BSAI groundfish fisheries. The discussion provides an aggregated perspective and does not examine production on a sector-by-sector basis. This section is based mainly on information provided in the document, *Alaska Groundfish Fisheries Final Programmatic Supplemental Environmental Impact Statement* (NMFS 2004b).

Primary Products

Groundfish harvested off Alaska are made into a wide range of primary, secondary, and ancillary products. In this analysis, primary product is defined as the product form after the initial stage of processing.¹ By this definition all products produced directly from raw fish are considered primary products. These products may be table-ready (i.e., final product), but more often they are “reprocessed” before they are sent to retail markets or foodservice establishments. Secondary processing is defined as any processing that occurs after the primary products have been transferred to a different facility. Secondary processing includes, for example, the production of kamaboko from surimi and the production of breaded fish sticks from fillets.

Table 2-7 shows the various primary products by weight, made from three of the BSAI groundfish categories of interest in the subject action, during the 1998-2003. A large percentage of flatfish are frozen whole, while a small percentage, primarily yellowfin sole, are made into kiriti, a steak-like product. Atka mackerel is primarily produced as a headed and gutted or frozen whole product. Most flatfish, by volume, are also headed and gutted, in some instances with the roe left intact, when present. It should be noted that comparing products by weight can be misleading. The price per pound for fillets is higher than for head-and-gut product, primarily because fillets require less secondary processing (i.e., engender more “value-added” by the initial processor).

¹ This definition of primary processing differs from definitions used by processors when they report production to NOAA Fisheries in Weekly Processor Reports. In weekly reports processors differentiate primary products, such as fillets or surimi, from ancillary products, such as roe and fish meal.

Table 2-7. Volume (1,000 mt) and value (millions of dollars) of selected BSAI groundfish products, by species and product type, 2003–2006

Product	2003		2004		2005		2006	
	Quantity (1,000 mt)	Value (millions of \$)	Quantity (1,000 mt)	Value (millions of \$)	Quantity (1,000 mt)	Value (millions of \$)	Quantity (1,000 mt)	Value (millions of \$)
Pacific cod								
Whole fish	4	5	2	3	2	3	1	2
Head & gut	72	178	91	216	82	238	72	255
Salted/split	-	-	-	-	-	-	1	4
Fillets	17	80	9	44	9	55	11	76
Other products	16	24	11	20	12	26	13	31
All products	110	287	113	283	105	321	98	368
Flatfish								
Whole fish	14	15	14	14	24	31	26	34
Head & gut	55	65	56	79	67	112	73	124
Kirimi	4	4	2	3	2	2	-	-
Fillets	1	4	1	3	0	2	1	4
Other products	1	1	1	2	1	2	2	2
All products	74	90	75	100	94	148	101	163
Atka mackerel								
Whole fish	7	4	5	3	1	1	3	2
Head & gut	21	20	25	26	33	36	33	31
All products	28	24	30	29	34	37	35	34

Source: NMFS

Overview of Secondary Processing Activities

During the period covered in this analysis (2003-2006) there were no major secondary processors of these species operating in Alaska. Groundfish harvested in Alaska is most often exported as headed and gutted, although some leaves as whole frozen fish, for example. How much remain in the U.S. and how much is shipped abroad for reprocessing before being re-imported in to domestic markets, or sole in third country markets, varies from year to year.

2.3.5.2 Product flows and markets for BSAI flatfish and rockfish species

The Amendment 80 sector currently produces, almost exclusively, high quality whole and head and gut products. Catch is typically processed quickly after it is brought on board, maintaining relatively high quality across the fleet. A large majority of the primary processed output of this fleet is shipped to Asia for reprocessing, while a small portion of the output remains in the U.S., going directly to domestic markets. Historically, much of the production that is bound for Asia consumption has been shipped to Japan and Korea. In recent years, however, China has played a more prominent role in the reprocessing of groundfish from the Amendment 80 sector. In particular, a large portion of the flatfish, Atka mackerel, and AI POP harvested from the BSAI is shipped to China, where it is reprocessed into finished products and then exported to final consumer markets around the world. In addition, some of the various groundfish species are reprocessed in Thailand and Vietnam. After reprocessing, production from the fisheries reaches a variety of markets, including the U.S., Europe, Japan, and other Asian countries.

In addition to these generalities, some greater definition of markets for specific species and products is discernable. While the general pattern of production for the fleet is similar across all species and products, a few specific markets exist for particular products of the sector. In flatfish markets, the size (grade) of the fish is extremely important to the product flow. In general, there are four or five grades of flatfish, with each grade having a specific market. Smaller grades (S and M) are shipped directly to Japan where the product is used in lunch boxes. Larger grades (L, 2L, & 3L) are typically first shipped to China for reprocessing before being shipped to the U.S. and European markets. A typical Amendment 80 vessel will often processed up to 10 species per trip (including incidental catch species), with four or five grades per species.

Other distinguishable markets have developed for rock sole with roe, Atka mackerel, and AI POP. The major market for rock sole with roe is Japan; most rock sole with roe is shipped frozen whole directly to Japan, where it is reprocessed. Most of this production remains in the Japanese consumer market. Rock sole without roe generally follows the same path as other flatfish. Atka mackerel is more popular in Japan and Korea than elsewhere; most of the fleet's production is exported to Japan or Korea for secondary processing and consumption. Nearly all of the AI POP harvested in the BSAI is exported to China, where it is reprocessed and then shipped to Japan for final consumption.

While these production trends can be discerned, on the whole, it is difficult to assess the distribution of the sector's production among consumer markets, as much of the reprocessed fish enters the world market. As a consequence, effects of production of the fleet on consumer markets are far reaching and difficult to estimate.

2.3.6 Management and enforcement

For those vessels that are members of an Amendment 80 cooperative, any Amendment 80 species caught by these vessels counts against the allocation of the cooperative. For Amendment 80 vessels that choose to fish in the Amendment 80 limited access fishery, their catch of Amendment 80 species counts against the allocation to the Amendment 80 limited access fishery. Once final weights have been determined, quota of the cooperative is assigned to the landing. Catch of all species is estimated using observer data. Any overage is noted and referred to NOAA Fisheries Office for Law Enforcement.³ Enforcement will then pursue the participant for any penalty.

Enforcement actions are typically a matter of relying on catch accounting records that show the violation. Violations are often apparent and not disputed since reliable records of offloads are generated at the time of landings. In most instances, minor overages will be subject to lesser penalties (typically forfeiture of the overage), with larger or repeat violations subject to greater penalties. Penalties, however, are fully within the discretion of NOAA General Counsel.

The Regional Administrator can reallocate a portion of the ITAC, or incidental catch allowance (ICA), of Amendment 80 species assigned to the BSAI trawl limited access sector that is projected to be unharvested to the Amendment 80 cooperatives. The Regional Administrator can also reallocate a

³ Processors are required by regulations to report any amounts of groundfish harvests or deliveries which they possess, which were taken or retained in violations of fisheries regulations. In the case of CPs, this amounts to "self-reporting" of violations. With 100 percent onboard observer coverage for all vessels > 125' LOA, and 30 percent coverage for vessels >60' but <125' LOA, there is believed to be a strong incentive to comply with these delivery reporting requirements.

portion of halibut and crab PSC assigned to the BSAI trawl limited access sector that is projected to be utilized to the Amendment 80 cooperatives.

2.4 Analysis of alternatives

In a share-based fishery, participants' catch is limited by annual quota holdings. During the fishery, participants estimate catch because they are attempting to limit catch to their available quota. Even if discards are permitted (such as the Amendment 80 fisheries), overages occur at times due to errors in catch estimates. If discards are not permitted, as is the case in the rockfish program, limiting catch to available quota is even more complicated. In a fishery that is multispecies (such as Amendment 80), additional dimensions are added. Catch must be coordinated across several species. Any limiting allocation will prevent the harvest of allocations of other species (Amendment 80 cooperatives).

In many share-based programs, some flexibility is built into the program structure to accommodate imprecision and uncertainty in catch. In the halibut and sablefish program, up to 10 percent of a person's annual IFQ allocation that is unharvested will be reissued in the following year. Conversely, overharvest of up to 10 percent of a person's remaining allocation on the last trip is permitted, with a deduction from the following year's allocation. These carryover provisions limit the need for precisely estimating or catching IFQ. No similar provisions exist for either underages or overages for Amendment 80 cooperatives.

Allowing post-delivery transfers among the Amendment 80 cooperatives could mitigate potential overages, reducing enforcement costs and providing for more precise TAC management. Yet, some caution is warranted in the development of a system of post-delivery transfers. Too liberal reliance on post-delivery transfers could exacerbate overages. In addition, the system of post-delivery transfers could complicate fishery management; and oversight of share management; and enforcement of sanctions against overages that are not covered by a transfer. For example, short windows to cover overages could complicate enforcement, if timing of transactions is disputed.

Post-delivery transfer provisions have been used to mitigate potential overages in several share-based management programs outside of the U.S. In Nova Scotia, post-delivery transfers are generally permitted for up to 45 days after a landing has occurred. At the season's end, the transfer period is extended to 2 months.⁴ Participants in British Columbia are permitted to cover overages with a post-delivery transfer for 30 days after the landing. In Iceland, fishermen are limited to 3 days after notice to cover an overage. Real-time monitoring, online catch accounting, and a system of electronic transfers make this brief period for post-delivery transfers possible. In New Zealand, post delivery transfers are permitted until the 15th day of the month following the landing. In addition, New Zealand's program includes a system of "deemed values," or scheduled charges for catch that is not covered by quota. These charges are refunded in the event a person receives a post-delivery transfer to cover the overage within 15 days of the season closing (see Sanchirico, et al., 2006). Each of these programs limits post-delivery transfers temporally, but does not limit the magnitude of transfers.

Any such program obviously carries with it benefits and costs. For example, allowing post-delivery transfers provides some economic and operational incentive to fish with less care and precision. Since, by

⁴ Nova Scotia uses share-based management programs for different gear types. Transfers across gear types are permitted only after the season closing. The rationale for permitting these cross-gear transfers is to prevent potential TAC overruns and to reduce the incentive to discard.

definition, it must be “presumed” that post-delivery shares will be obtained (i.e., obtainable), overages become less a moderating factor in fish behaviour. Unlike a program that mandates prior acquisition of transferred shares, in which instance availability of sufficient quota is assured, post-delivery transfers carry an inherent potential that excess catch amounts may be fully offset through reappportioning of shares (i.e., the total sector allocation may not be fully offset through reappportioning of shares (i.e., the total sector allocation may be exceeded). Even absent this worst-case outcome, post-delivery transfer of quota will impose transactions costs. Because small private markets are not frictionless, there will be numerous inefficiencies encountered, information acquisition costs, and gains and losses attributable to asymmetric information among market participants. With so few participants with the potential to engage in the market, the expected outcome will certainly depart from the pattern predicted in a classic competitive market. How different, and in what ways, this market will depart from the competitive model is an empirical question, but limitations (both economic and legal) on sharing proprietary information among independent cooperatives and companies could result in transactions costs that move the market well away from efficiency.

2.4.1 Effects on Amendment 80 cooperative participants

Alternative 1 – No post-delivery transfers (status quo)

Under the status quo alternative, all overages are subject to an enforcement action and penalty. No provision for post-delivery transfers to cover an overage is made. Enforcement actions and penalties are at the discretion of agency enforcement officers and attorneys.

Since implementation of the Amendment 80 cooperative provisions will start with the 2008 fishing year, it is difficult to predict the extent to which participants will commit violations by overharvest of allocations. As each cooperative approaches the end of its allocation, it is likely that some risk of overage will arise unless a decision is made to leave a small amount of unharvested allocation, as a buffer. End of year consolidation will be driven, in part, by the requirement that a vessel not begin a fishing trip without quota of all species. Once a cooperative has fully harvested its allocation of a species, the only means of gaining value from its remaining shares of other species will be through transfers. The inter-cooperative agreement should contribute to coordination of end of the season consolidation. Allocations will likely be consolidated in one or two cooperatives with one or two vessels in those cooperatives making ‘sweep up’ trips to complete the season’s harvests. The extent to which this consolidation helps participants avoid overages is not known. If a participant chooses to operate a vessel in the fishery, it is likely that it will prioritize harvest of its own allocation. Whether a participant avoids an overage could depend on foresight to recognize the risk of overharvest and possibly accept lower revenues from a transfer instead of harvesting its own allocation.

Although consolidation of allocations in one or two cooperatives can be used to avoid overages, it is likely that a few overages could occur prior to the end of the season. Since each cooperative is limited by 15 species allocations, it is possible that unexpected catches could put a cooperative over its allocation.

Alternative 2 – Unlimited post-delivery transfers (Council selected preferred alternative)

Alternative 2 would establish a system of almost unlimited post-delivery transfers to cover overages. Although the alternative allows liberal post-delivery transfers, it is possible that few transfers would be made. However, given that implementation will start during the 2008 fishing year, it is difficult to predict the extent to which participants will require post-delivery transfers to cover overages. The provision, however, could be very important to participants facing an enforcement action or penalty for an overage,

who are able to acquire shares to cover that overage.

Despite the absence of limits, the provision is likely to be used in a limited way. Participants are only likely to rely on the provision for unintended small overages. In most cases, these transfers could be to some extent prearranged through the inter-cooperative. The number of overages at the time of landing could be slightly higher than under the status quo, if participants gain confidence that they will be able to cover the overage with a prearranged transfer. Overage not covered with a transfer and subject to penalty should be fewer than under the status quo, since the provision will allow participants to address some overharvest with transfers.

Prices for post-delivery transfers will likely be negotiated to be greater than prevailing lease rates, but less than the expected penalty on the overage. Small overages are typically subject to minor penalties and forfeiture of the overage. One would expect that the price of quota to cover an overage would be relatively close to the estimated cost of the penalty and forfeiture for post-delivery transfers of small amounts of quota. Transfers to cover relatively large overages could have lease rates substantially higher than the estimated cost of the penalty and forfeiture of the overage. Persons responsible for unintended, large overages are likely to be in a relatively weak negotiating position when faced with a substantial penalty for the overage.

It is possible that some large overages will be covered by transfers at a price similar to the prevailing lease rates, if those transfers are to cover an intentional overage with pre-negotiated terms of transfer. These arrangements are likely to occur as a part of inseason coordination of the harvest of allocations among vessels. For example, a person may elect not to send a vessel back out for a trip to harvest quota that is a small portion of the vessel's capacity, if another vessel that is already on the grounds has space to handle that catch on its current trip. These transfers might not occur under the current system because of the time it takes to submit and process a transfer in writing. In the long run, the electronic, real time system of transfers currently under development should minimize the number of these pre-negotiated transfers to cover large intended overages. Instead, transfers will be processed prior to landing (and in most cases prior to harvesting the fish to be covered by the transfer). Transfers to cover overages will only apply to situations where a person begins a trip with less quota than is used on the trip. In any case, it remains the responsibility of the cooperatives to manage their allocations in order to prevent overages (not covered by post delivery transfers). It should be noted that beginning a fishing trip without quota is a violation. An alternative could be to require a specific amount of quota prior to beginning a fishing trip. While this provision might have appeal as a potential means to prevent overages, it is problematic for a few reasons. First, any minimum amount of quota is likely to be somewhat arbitrary, as defining an amount of quota that is reasonably intended to prevent an overage from occurring will depend on the circumstances (i.e., targeting on the trip, seasonal bycatch rates, etc.). In addition, enforcement of a minimum quota requirement will be complicated by the need to track allocations and vessel activities in the fisheries. Given the limited potential benefit and the enforcement complexity, whether a minimum quota requirement is appropriate is questionable.

Despite the relative lack of constraints on transfers under this alternative, the likelihood of a substantial number of uncovered, large overages is relatively small. Penalties for violations are likely to increase with the magnitude of overages. Persons are unlikely to risk large overages without a known source of shares to cover that overage to avoid a potential enforcement action and penalty.

Although post-delivery transfers have the potential to benefit participants with overages, the relatively small number of cooperatives that could form will limit its utility. Participants are more likely to benefit

from the formation of a single cooperative that could coordinate the harvest of all shares. Using this arrangement, no shares would be available to cover an overage, since they would all be held by a single cooperative. The single cooperative could more efficiently administer the distribution of catch among vessels in the sector to avoid an overage.

Overall, Amendment 80 participants are likely to realize minor production efficiency gains under this alternative from allowing post-delivery transfers to cover overages. It is unlikely that participants will have excessive overages through unreasonable reliance on the post-delivery transfers. Some cooperative members, however, will be more likely to attempt to fully harvest their allocations, if they know that a post-delivery transfer could be used to cover a minor overage. Cooperative members are likely to benefit from a reduction in the number of overage violations, which should be reduced through post-delivery transfers.

Alternative 3 – Moderately limited post-delivery transfers

Alternative 3 is similar to Alternative 2, but imposes a few additional restrictions on post-delivery transfers. The effects of the two alternatives are largely the same, except for differences arising from these additional restrictions. Under Alternative 3, each post-delivery transfer of allocated Amendment 80 species is limited to 100 metric tons for each species. In addition, each post-delivery transfer of PSC is strictly limited: halibut PSC limit is 15,000 pounds, red king crab PSC limited is 3,000 animals, *C. bairdi* PSC limit is 10,000 animals for each zone, and *C. opilio* PSC limit is 35,000 animals. These amounts are likely sufficient to cover an unintentional overage arising from a single tow. In some instances, it is possible (although unlikely) that an overage arising from a single tow could exceed one of these amounts. The limits, however, could reduce the effectiveness of the provision in addressing harvesting efficiencies that could be realized through inseason transfers used to coordinate harvesting activity that cannot be completed in a timely manner.

The thresholds could be effective in deterring unreasonable reliance on the post-delivery transfers as a means of covering an excessive overage. Yet, the possibility of unreasonable reliance on a speculative post-delivery transfer to cover an excessive overage is limited. Participants are likely to realize that the cost of covering an overage will rise with the magnitude of the overage. Sellers of quota, who realize that the potential penalty facing a person with a substantial overage will be punitive, are likely to exploit that position offering shares for a higher price. In addition, covering a large overage is more likely to be complicated by the need to involve the selling cooperative's associated processor, increasing the price for the transfer and transaction costs.

This alternative would also limit each cooperative to five post-delivery transfers per each species allocation. This limit would allow the cooperative to make up to five independent overages for an allocation. Although it is possible that a cooperative could have multiple overages of an allocation, it is unlikely that the limit of five post-delivery transfers would be constraining. Since only three cooperatives could form under the program, the potential for repeated overages of an allocation by a cooperative is somewhat limited. In addition, a cooperative facing the limit is likely to contract for transfers of large enough in magnitude prior to fishing to avoid exceeding the limit of five post-delivery transfers for the allocation.

Under this alternative, post-delivery transfers would need to be completed within 30 days after the weekend date of the landing with the overage. The limit on post-delivery transfers is unlikely to constrain effectiveness of the provision.

2.4.2 Effects on management and enforcement

Alternative 1 – No post-delivery transfers (status quo)

Under the status quo, post-delivery transfers are not permitted. At the time of landing, offloads are weighed, assigned to quota and credited against catch by RAM, and any overage is determined and reported to NOAA Fisheries Office of Law Enforcement. If the overage is confiscated, typical practice is to seek forfeiture. Additional penalties may be pursued based on the size of an overage or frequency of overages by the cooperative. Overall, few overages are likely to occur, requiring few enforcement actions (see discussion in Alternative 3 above for more details on this issue).

Alternative 2 - Unlimited post-delivery transfers and Alternative 3 – Moderately limited post-delivery transfers

Under the two alternatives allowing post-delivery transfers, cooperatives are permitted to cover overages with few limitations. The effects of the two alternatives on management and enforcement are very similar, although with slight differences arising under the different options. To streamline the analysis, the discussion of these two alternatives is consolidated.

Since post-delivery transfers are permitted only to cover overages, the increase in administrative and record keeping requirements to address post-delivery transfers is somewhat limited. In general, RAM will oversee share accounts and share usage. At the time of landing (weekending date), RAM will maintain a record of any overage, but instead of reporting overages to NOAA Fisheries Office of Law Enforcement immediately, RAM would defer reporting until the time permitted to cover the overage with a post-delivery transfer has lapsed. Under the option that limits the time to cover overages from the date of landing (i.e., 30 days from the weekending date), overages would be reported on a rolling basis as overages become final (or the time to cover the overage lapses).

Overall, allowing post-delivery transfers should reduce the number of enforcement actions prosecuting overages, since cooperative will have the opportunity to acquire shares to correct the pending violation.

2.4.3 Effects on consumers

This action is unlikely to have a noticeable effect on consumers. Very minor additional amounts of harvest could be made under the proposed actions. These additional harvests are likely to be indiscernible in consumer markets.

2.4.4 Net benefits to the Nation

A minor overall net benefit to the Nation is likely to accrue from this action. From the post-delivery transfer aspect, the action is likely to reduce the number of overages in the Amendment 80 fisheries. The risk of increasing the frequency and/or magnitude of overages may also be limited, since acquiring post-delivery quota will not be costless to the operator. Transactions costs associated with locating, negotiating for, and obtaining sufficient quota to offset an overage will take effort, time, and money. The potential for enforcement actions and the associated penalties are likely to add to the economic and administrative disincentives to careless overharvest allocations. The action has the potential to reduce NOAA administrative and enforcement costs by reducing the number of enforcement actions for overages.

3 Regulatory Flexibility Analysis

3.1 Introduction

The Regulatory Flexibility Act (RFA), first enacted in 1980, and codified at 5 U.S.C. 600-611, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: 1) to increase agency awareness and understanding of the impact of their regulations on small business; 2) to require that agencies communicate and explain their findings to the public; and 3) to encourage agencies to use flexibility and to provide regulatory relief to small entities.

The RFA emphasizes predicting significant adverse economic impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts, while still achieving the stated objective of the action. When an agency publishes a proposed rule, it must either, (1) “certify” that the action will not have a significant adverse effect on a substantial number of small entities, and support such a certification declaration with a “factual basis”, demonstrating this outcome; or, (2) if such a certification cannot be supported by a factual basis, prepare and make available for public review an Initial and a Final Regulatory Flexibility Analysis (an IRFA and a FRFA) that describes the impact of the proposed rule on small entities.

Based upon a preliminary evaluation of the proposed action alternatives, it appears that “certification” would not be appropriate. Therefore, this FRFA has been prepared.

Section 604(a) of the Regulatory Flexibility Act describes the requirements for a FRFA:

When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

The “universe” of entities to be considered in a FRFA generally includes only those small entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment of the industry, or portion thereof (e.g., user group, gear type, geographic area), that segment would be considered the universe for purposes of this analysis.

In preparing a FRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule (and alternatives to the proposed rule), or more general descriptive statements if quantification is not practicable or reliable.

3.2 Definition of a small entity

The RFA recognizes and defines three kinds of small entities: 1) small businesses; 2) small non-profit organizations; and 3) and small government jurisdictions.

Small businesses: Section 601(3) of the RFA defines a “small business” as having the same meaning as a “small business concern,” which is defined under Section 3 of the Small Business Act. A “small business” or “small business concern” includes any firm that is independently owned and operated and not dominate in its field of operation. The U.S. Small Business Administration (SBA) has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States, or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust, or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the U.S., including fish harvesting and fish processing businesses. A business “involved in fish harvesting” is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates), and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates) and employs 500 or fewer persons, on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other or a third party controls or has the power to control

both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party, with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities, solely because of their common ownership.

Affiliation may be based on stock ownership when: (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50% or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) If two or more persons each owns, controls or have the power to control less than 50% of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners control the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint ventures if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations: The RFA defines "small organizations" as any nonprofit enterprise that is independently owned and operated and is not dominant in its field.

Small governmental jurisdictions: The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000.

3.3 Need for and objectives of the rule

The Council developed the following purpose and need statement defining its rationale for considering this action.

Participants in the Amendment 80 cooperative program are permitted to join cooperatives that receive annual allocations of cooperative quota, which provide exclusive privileges to catch specific amounts of Atka mackerel, AI Pacific ocean perch, flathead sole, Pacific cod, rock sole, and yellowfin sole and halibut, Zone 1 red king crab, C. opilio, Zone 1 C. bairdi, and Zone 2 C. bairdi prohibited species catch. Any harvest in excess of a cooperative quota allocation is a regulatory violation punishable by confiscation of catch and other penalties. Since all catch is counted against cooperative quota, the uncertainty of catch quantities and composition creates

potential for overages. A provision allowing for post-delivery transfer of cooperative quota to cover overages could reduce the number of violations, allowing for more complete harvest of allocations, and reduce enforcement costs without increasing the risk of overharvest of allocations.

3.4 Public comments

NMFS published a proposed rule for this action on January 5, 2009 (74 FR 254). An IRFA was prepared and summarized in the classification section of the preamble to the proposed rule. The public comment period on the proposed rule ended on February 17, 2009. NMFS received three public submissions containing six unique comments on this action. These comments did not address the IRFA.

3.5 Number of small entities

Amendment 80 incorporates statutory mandates in Section 219 of the Consolidated Appropriations Act of 2005 (Public Law No. 108-447; December 8, 2004) to establish two sectors of BSAI trawl fishery participants: (a) the Amendment 80 sector; and (b) the “BSAI trawl limited access sector.” The Amendment 80 sector is comprised of non-AFA trawl catcher processors eligible to fish Amendment 80 species under this statutory mandate. The BSAI trawl limited access sector is comprised of AFA catcher processors, AFA catcher vessels, and non-AFA catcher vessels

Based on the Final Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for Amendment 80 (July 20, 2007), there are a total of 28 qualified Amendment 80 catcher processor vessels that qualify to join a cooperative(s) as a result of this amendment. Catcher processor vessels both harvest and process the fish they catch. These catcher processors then sell their product into the first wholesale market. The owners of all but one of the 28 vessels had annual receipts that averaged over \$4 million in first wholesale revenue from 1995 through 2006. In addition, vessel operators can also be considered large entities through either their affiliation (e.g., as owners of multiple vessels) or through participation in a formal cooperative management arrangement. Of the 28 qualified Amendment 80 vessels, all are associated with entities over the \$4 million threshold, are members of a cooperative, and/or had annual receipts over \$4 million and therefore would be classified as large entities. Nonetheless, empirical data with which to verify these conclusions and which could be employed as the “factual basis” for certifying this action, as provided under RFA, are not readily available. The decision was made, therefore, to prepare an IRFA and a FRFA for this action.

3.6 Recordkeeping and reporting requirements

This action does not change existing reporting, recordkeeping, or other compliance requirements. Any person wishing to cover an overage will be required to engage in a transfer cooperative quota. The required reporting and recordkeeping for a post-delivery transfer is the same as for any other transfer of cooperative quota.

3.7 Significant alternatives to the proposed rule

The preferred alternative allows post-delivery transfer of cooperative quota exclusively for the purposes of covering catch overages. Allowing post-delivery transfers should facilitate a reduction in overages that result in forfeiture of catch and other penalties. Small entities are likely to benefit from this action, to the extent that those forfeitures and other penalties are avoided. The number of post-delivery transfers a person may receive, and their size, is not limited. Post-delivery transfers are limited to being used to cover

catch overages. To facilitate finalization of accounts in the fisheries, any post-delivery transfer must take place by the end of the calendar year.

Under the status quo, no post-delivery transfers are permitted. Any overage at the time of landing is considered a violation subject to a potential enforcement action. By disallowing post-delivery transfers, small entities could be disadvantaged by incurring penalties for minor overages.

One other alternative was considered in addition to the preferred alternative. Under Alternative 3, transfers of allocated retainable species are limited in number and size. Both of these limits, however, could lead to unnecessary penalties and forfeitures, in the event the person with the overage could not find shares with which to reconcile the overage. The economic burden (e.g., transaction costs) that these limits could impose, especially on small entities, could not be justified by reasonably foreseeable reductions in groundfish delivery overages resulting from this rule. Therefore, these limits were dropped from the preferred alternative.

Under Alternative 3, all transfers are required to be completed within 30 days of the weekending date of the overage delivery. Small entities, which are less likely to have internal administrative capacity to quickly locate shares to cover an overage could be disadvantaged by alternatives defining short time periods for completing a post-delivery transfer. In addition, small entities whose owners harvest the entity's quota could be disadvantaged by these limitations since they may be unable to search for cooperative quota for transfer while actively fishing. The preferred alternative removes this disadvantage by requiring that all post-delivery transfers be completed by the end of the calendar year, after the primary groundfish fishing seasons have closed.

The effects of the preferred alternative on large and small participants are similar. Allowing post-delivery transfers should facilitate a reduction in overages that, under the status quo, may result in forfeiture of catch and other penalties. Since all entities directly regulated by this proposed action are members in a cooperative that rely on managers to coordinate harvest activity, it is unlikely that any are "small", based upon SBA criteria. In the absence of definitive data to confirm this, however, the FRFA suggests that, if small entities are directly regulated under this action, none would be disproportionately affected, competitively disadvantaged, or otherwise excessively burdened by this action.

4 National Standards and Fishery Impact Statement

4.1 National Standards

Below are the ten National Standards as contained in the Magnuson-Stevens Act, and a brief discussion of the consistency of the proposed alternatives with each of those National Standards, as applicable.

National Standard 1

Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery

Nothing in the proposed alternatives would undermine the current management system that prevents overfishing.

National Standard 2

Conservation and management measures shall be based upon the best scientific information available.

The analysis draws on the best scientific information that is available, concerning the BSAI Amendment 80 fisheries. The most up-to-date information that is available has been provided by the managers of these fisheries, as well as by members of the fishing industry.

National Standard 3

To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

The proposed action is consistent with the management of individual stocks as a unit or interrelated stocks as a unit or in close coordination.

National Standard 4

Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be (A) fair and equitable to all such fishermen, (B) reasonably calculated to promote conservation, and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

The proposed alternatives would treat all participants the same, regardless of their residence. The proposed change would be implemented without discrimination among participants and is intended to contribute to the fairness and equity of the program by allowing participants to make full use of landed catch within the share allocations made under the program. The action will not contribute to an entity acquiring an excessive share of privileges.

National Standard 5

Conservation 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.

This action will improve efficiency in utilization of the resource. The action does not allocate shares, but simply allows participants to make more complete use of their catch and share allocations.

National Standard 6

Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

None of the alternatives would be expected to affect changes in the availability of BSAI groundfish resources each year. Any such changes would be addressed through the annual allocation process, which is not affected by the alternatives.

National Standard 7

Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

This action does not duplicate any other measure and could reduce costs of enforcement actions in the fisheries.

National Standard 8

Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

This action will not have adverse effects on communities or affect community sustainability.

National Standard 9

Conservation 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.

This action will have no effect on bycatch.

National Standard 10

Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

The program should reduce the incentives for Amendment 80 participants to fish in inclement weather, or fish in a manner that compromises safety. The alternatives considered under this action do not affect any potential benefits arising out of those incentives.

4.2 Section 303(a)(9) – Fisheries Impact Statement

Section 303(a)(9) of the Magnuson-Stevens Act requires that any management measure submitted by the Council take into account potential impacts on the participants in the fisheries, as well as participants in adjacent fisheries. The impacts of the alternatives on participants in the harvesting sector and processing sector have been discussed in previous sections of this document. This action will have no effect on participants in other fisheries.

5 List of Preparers, Persons Consulted, and References

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