

FINAL REGULATORY FLEXIBILITY ANALYSIS

For a Regulatory Amendment to Provide a Two-Week Trawl Closure Near Unimak Pass to Facilitate an Experiment Investigating the Effects of Commercial Fishing on Local Abundance of Pacific Cod

Implemented Under The Authority Of The
Fishery Management Plan For The
Groundfish Fishery of the Bering Sea and Aleutian Islands

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Abstract: This Final Regulatory Flexibility Analysis (FRFA) provides an analysis of a final regulatory amendment. Approval of the regulatory amendment would impose a two-week ban on trawl, hook-and-line and pot fishing in the specified area near Unimak Pass in the eastern Bering Sea. This short-term closure would be in effect between March 15 and March 31 in the years 2003 - 2006. The changes in fishing regulations are needed to permit NMFS to conduct unimpeded experiments on the effects of commercial trawling on local abundance of Pacific cod, as part of a comprehensive research program on sea lion/fishery interactions. The FRFA provides an analysis of the expected impacts of proposed action on small entities.

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Executive Summary

This Final Regulatory Flexibility Analysis (FRFA) examines the adverse impacts on small entities of a final rule that will close waters north of Unimak Pass to fishing for groundfish during the last two weeks of March in 2003, 2004, 2005, and 2006. This action would implement the area closure in 2003, 2004, 2005, and 2006, in order to facilitate the proposed experiments in those years. In each of these years, no trawling, hook-and-line, or pot fishing would be permitted in waters located within a quadrilateral bounded by the four points: (1) 54 30 N 165 14 W, (2) 54 35 N 165 26 W, (3) 54 48 N 165 04 W, and (4) 54 44 N 164 56 W, and outside of an arc drawn 10 nm from Cape Sarichef., between March 15 and 31. The restriction would not apply to jigging. Regulations at 50 C.F.R. part 679 would be amended to accomplish this.

The objective of the proposed action is to reduce the loss of pots in this experiment, and to increase the statistical power and usefulness of the experimental results as a test of the localized depletion hypothesis.

The proposed rule was published in the *Federal Register* on January 23, 2003 (68 *FR* 3225). The public comment period ended on February 7, 2003. No comments were received on the proposed rule.

There were an estimated 21 to 56 small entities per year active during the closure period in the Alaska statistical area that includes the area to be closed from 1998 to 2001. These vessels had estimated average annual gross revenues from all fishing activity in Alaska that ranged between and \$1.02 million and \$1.63 million in those years. Estimated average gross revenues from the Alaska statistical area during late March (the period during which the closure will take place) ranged from \$10,000 to \$19,000 during those years.

This regulation does not impose new recordkeeping or reporting requirements on the regulated small entities.

Three other alternatives were examined. Alternative 1, the status quo, would not meet the objective of this action to obtain information on rates of localized depletion of Pacific cod. Alternative 2 would close a slightly different treatment area to trawling for this period. This alternative was not chosen because it was found, in discussion with fishermen, to restrict trawling more than was necessary to meet the objectives of the action. Moreover, closing the area to trawling might encourage an influx of hook-and-line and pot gear operations during the two weeks of the experimental closure (once the potential gear conflicts with trawl gear were eliminated). This may produce a mis-interpretation of the experimental results, and may lead to gear conflicts when the closure area is reopened to trawling in early April. Alternative 3 would close the area used in Alternative 2, but to trawl, hook-and-line, and pot gear. This alternative

was not chosen because the preferred alternative was found, in discussion with fishermen, to restrict trawling more than was necessary to meet the objectives of the action.

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1 Introduction

This Final Regulatory Flexibility Analysis (FRFA) examines the impacts on small entities of a final rule that will close waters north of Unimak Pass to fishing for groundfish during the last two weeks of March in 2003, 2004, 2005, and 2006. These waters are adjacent to an area that has already been closed to trawling for Pacific cod and pollock due to the proximity of a Steller sea lion haulout at Cape Sarichef on the western end of Unimak Island in the Aleutians.

This closure is meant to increase the scientific value of an experiment to test the hypothesis that Pacific cod trawling causes localized depletion of Pacific cod stocks. The results of this experiment may have important implications for regulations that currently restrict fishing activity in order to protect Steller sea lion stocks.

The proposed rule was published in the *Federal Register* on January 23, 2003 (68 *FR* 3225). The public comment period ended on February 7, 2003. No comments were received on the proposed rule.

2 The purpose of a FRFA

The Regulatory Flexibility Act (RFA), first enacted in 1980, 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 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.

On March 29, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act. Among other things, the new law amended the RFA to allow judicial review of an agency's compliance with the RFA. The 1996 amendments also updated the requirements for a final regulatory flexibility analysis, including a description of the steps an agency must take to minimize the significant economic impact on small entities. Finally, the 1996 amendments expanded the authority of the Chief Counsel for Advocacy of the Small Business Administration (SBA) to file *amicus* briefs in court proceedings involving an agency's violation of the RFA.

In determining the scope, or 'universe', of the entities to be considered in a FRFA, NMFS generally includes only those 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, or portion thereof, of the industry (e.g., user group, gear type, geographic area), that segment would be

considered the universe for the purpose of this analysis. NMFS interprets the intent of the RFA to address negative economic impacts, not beneficial impacts, and thus such a focus exists in analyses that are designed to address RFA compliance.

Data on cost structure, affiliation, and operational procedures and strategies in the fishing sectors subject to the proposed regulatory action are insufficient, at present, to permit preparation of a “factual basis” upon which to certify that the preferred alternative does not have the potential to result in “significant adverse impacts on a substantial number of small entities” (as those terms are defined under RFA).

Because, based on all available information, it is not possible to ‘certify’ this outcome, should the proposed action be adopted, a formal FRFA has been prepared and is included in this package for Secretarial review.

3 What is required in a FRFA?

Under 5 U.S.C., Section 604(a) of the RFA, each FRFA is required to 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.

4 What is 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 ‘small business concern’ which is defined under Section 3 of the Small Business Act. ‘Small business’ or ‘small business concern’ includes any firm that is independently owned and operated and not dominant in its field of operation. The 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 firm 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 \$3.5 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, 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 \$3.5 million criterion for fish harvesting operations. Finally 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 percent 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 has the power to control less than 50 percent 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 controls the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor or subcontractor is treated as a participant in a joint venture 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 not-for-profit 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 less than 50,000.

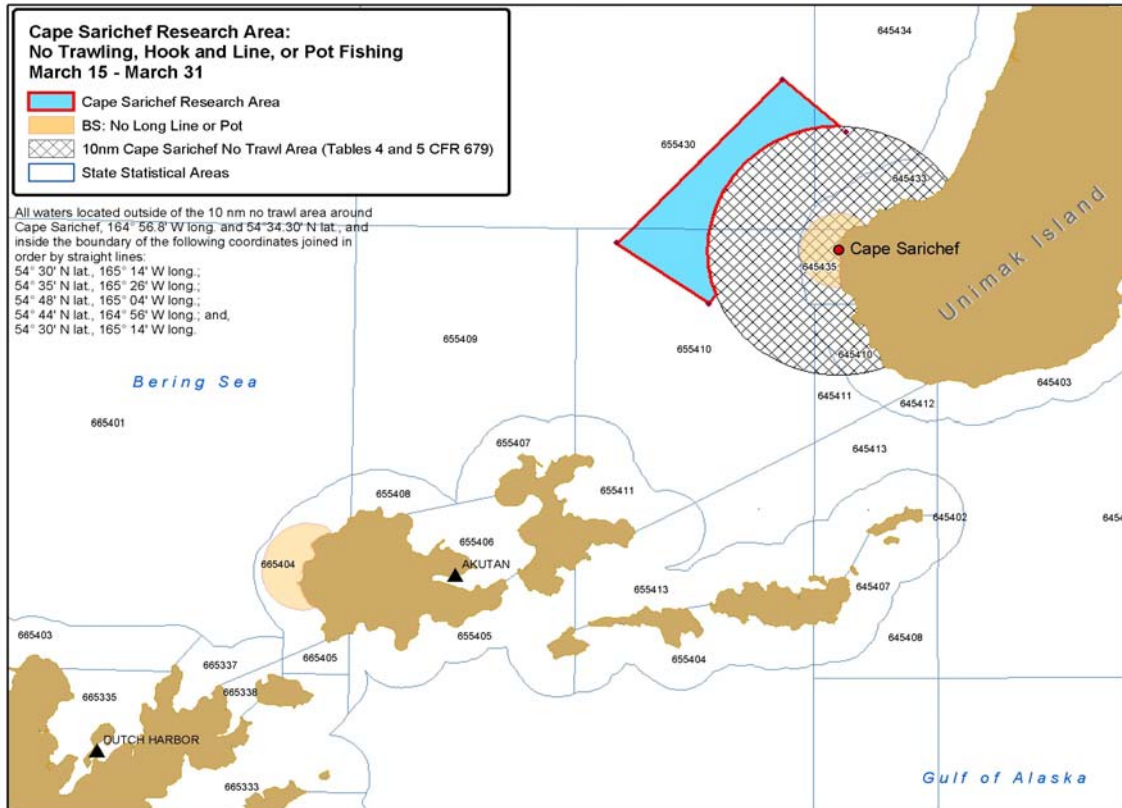
5 What is this action?

The Council considered four alternatives for this action at its October 2002 meetings, and adopted Alternative 4 (The other alternatives are summarized in Section 10 of this FRFA. Detailed descriptions and analysis of these alternatives may be found in NMFS, 2002). A proposed rule describing this action was published in the *Federal Register* on January 23, 2003 (68 *FR* 3225).

Under Alternative 4, the area closure described below would be implemented in 2003, 2004, 2005, and 2006, in order to facilitate proposed experiments in those years. In each of these years, no trawling, hook-and-line, or pot fishing would be permitted in waters located within a quadrilateral bounded by the four points: (1) 54 30 N 165 14 W, (2) 54 35 N 165 26 W, (3) 54 48 N 165 04 W, and (4) 54 44 N 164 56 W, and outside of an arc drawn drawn 10 nm from Cape Sarichef., between March 15 and 31. The restriction would not apply to jigging.

Regulations at 50 C.F.R. 679 would be amended to accomplish this. The Area closed under the proposed action is shown in the figure below.

Area restricted by the preferred alternative (Alternative 4) for this action



6 Need for and objectives of the rule

The western distinct population segment (DPS) of the Steller sea lions has declined precipitously over the last 20 years. Consequently, the western DPS has been listed as endangered under the Endangered Species Act.

Many believe that one cause of the decline may be localized depletion of Steller sea lion groundfish prey by commercial fishing operations. To limit the potential for this localized depletion, fishing regulations that became effective in 2002 incorporate restrictions on fishing near Steller sea lion critical habitat. These restrictions impose costs on industry. Nonetheless, many feel that the restrictions already imposed are not strict enough.

While the localized depletion hypothesis is logically possible, there is little actual empirical evidence to support or refute it, or to relate actual levels of localized depletion to impacts on Steller sea lion populations. NMFS's Alaska Fisheries Science Center (AFSC) has obtained funding to do an experiment with pot gear to test the localized depletion hypothesis in waters off of Cape Sarichef. Pot fishing would be conducted before and after periods of intense trawling in trawled, and adjacent non-trawled waters. However, the trawl season will still be open during the "after" portion of the experiment, and ongoing trawling operations in some of these waters may destroy pots, interfering with the experiment, and reducing the ability of the experiment to discriminate between hypotheses (reducing the "power" of the statistical tests). This would reduce the value of the experimental results for helping design a regulatory system that protects sea lions and avoids an undue burden on industry. The proposed action would reduce these conflicts and increase the power of the experiment's statistical tests.

The objective of the proposed action is to reduce the loss of pots in this experiment, and to increase the statistical power and usefulness of the experimental results as a test of the localized depletion hypothesis.

7 Public Comments

The proposed rule was published in the *Federal Register* on January 23, 2003 (68 FR 3225). The public comment period ended on February 7, 2003. No comments were received on the proposed rule.

8 Number and description of small entities affected by the proposed action

What are the regulated entities?

The entities that will be regulated by this action are the catcher vessels and catcher-processors that would have fished in the treatment area in the second half of March, and that will not be able to do so from 2003 to 2006. These include vessels using trawl, hook-and-line and pot gear.

Number of small regulated entities

As noted, the SBA small entity threshold is \$3.5 million dollars in gross revenues from all operations. The revenue estimate should include the revenues from all affiliated operations. For example, if a fishing vessel was owned by a company with two or more vessels, the revenues from all of these vessels should be included in the revenue estimate.

The numbers of small and large entities active in Alaskan statistical area 655430 in the second half of March for each year from 1998 to 2001¹ ranged between 21 in 2000 and 57 in 1998 (NMFS 2002, Table 5.6-1).

Description of small regulated entities²

The average annual gross revenues for the small operations ranged between about \$1.02 million and \$1.63 million from 1998 to 2001. These vessels obtained most of their revenues from groundfish, a relatively small amount from crab, and even less from herring, salmon or halibut. The average gross revenues for these small entities in all of Area 655430 (an area substantially larger than the treatment area) during the last two weeks in March, were about \$10,000 in 1998, \$18,000 in 1999, \$19,000 in 2000, and \$17,000 in 2001. (PSMFC, AKFIN 8-30-02).

Medium sized (60-125 foot) bottom trawlers targeting Pacific cod and delivering to shoreside processors were the most important element in the fleet fishing for groundfish in Alaska statistical area 655430 during the second half of March from 1998 to 2001. The relative size of this fleet's catch decreased, however, during this period. Vessels of this description harvested 78% of the groundfish from the statistical area in 1998, but their share declined to 31% in 2001. This decline is paralleled by an overall decline in harvests from this area over the period. It was, in fact, the decline in the harvests by this class of vessel that accounted for most of the decline in overall harvest from the area. (NMFS Alaska Region Catch by Vessel data set)

The numbers of vessels in this fleet also declined during this period. The smaller numbers of vessels in 2000 and 2001, and potential confidentiality issues, make it difficult to characterize these changes. However, as harvests by the vessels described above declined, harvests by vessels with other characteristics became relatively more important. Catcher-processors became more important in 2000 and 2001. Pot gear, in particular was important in 2001, also accounting for about a third of the Area 655430 harvest. Harvests from vessels targeting Pacific cod declined somewhat, but remained high. (NMFS Alaska Region Catch by Vessel data set).

¹Statistics have been reported for Alaska statistical area 655430 because this is the finest spatial resolution available. The area that would be closed is a relatively small part of 655430 in its southeast corner. While small in space, it lies in an Area in 655430 in which much Pacific cod fishing takes place (NMFS, 2002).

²A more detailed description of the fleet may be found in the EA/RIR/IRFA for this action (NMFS 2002).

9 Recordkeeping and reporting requirements

The FRFA should include “a description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record...”

This regulation does not impose new recordkeeping or reporting requirements on the regulated small entities.

10 Description of significant alternatives

A FRFA should include “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. ”

Four alternatives were considered for this action. The preferred alternative, as described above, is Alternative 4. The reasons why Alternatives 1 to 3 were not chosen are summarized in the following table.

Alternatives subjected to detailed study

| Alternative | Description | Impact on directly regulated small entities | Why not chosen if better for directly regulated small entities? |
|-------------|--|--|---|
| Alt 1 | Status quo: no closure of treatment area | No impact on regulated small entities. | Does not accomplish the objectives of this action. |
| Alt 2 | Treatment area defined as arc around northwest quadrant of Cape Sarichef restricted trawl zone. Treatment area closed to all trawling | Small trawl entities may not fish in the treatment area from March 15 to March 31. They are likely to be able to make up lost revenues by fishing elsewhere during this period, but only at increased cost. If they continue to fish in areas near the treatment area, they will be operating further from port facilities at Akutan, Unalaska, and King Cove. There would be no adverse impacts on hook-and-line or pot fishermen. | This alternative uses an “arc” shaped treatment area that overlaps the treatment area in the preferred alternative. However, because of some differences in shape, the area in this alternative restricts trawling activity more than is necessary to increase the power of the experimental results. Closing the area to trawling, but allowing an influx of hook-and-line and pot gear may produce a mis-interpretation of experimental results, and may lead to gear conflicts when the treatment area is reopened to trawling in early April. These negative impacts are mitigated by the preferred alternative which adjusts the area of the arc to avoid certain areas of particular concern to fishermen and prevents new entry by other gear users. |
| Alt 3 | Treatment area defined as arc around northwest quadrant of Cape Sarichef restricted trawl zone. Treatment area closed to trawling, hook-and-line, and pot fishing for groundfish | Small trawl entities, hook-and-line and pot fishermen may not fish in the treatment area from March 15 to March 31. The impacts on trawl operations would be the same under Alts 2 and 3. Small numbers of hook-and-line and pot fishing operations would potentially also face the same adverse impacts. This “loss” is only potential because these operations do not currently make substantial use of this area, at this time of the year, under the status quo. | This alternative uses an “arc” shaped treatment area that overlaps the treatment area in the preferred alternative. However, because of some differences in shape, the area in this alternative restricts trawling activity more than is necessary to increase the power of the experimental results. This negative impact is mitigated by the preferred alternative which adjusts area of the arc to avoid areas of particular concern to fishermen. |

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Literature cited

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