

Secretarial Review Draft

REGULATORY IMPACT REVIEW

and

FINAL REGULATORY FLEXIBILITY ANALYSIS

OF A PROVISION ALLOWING POST-DELIVERY TRANSFER OF SHARES IN THE CENTRAL GULF ROCKFISH PILOT PROGRAM

For a proposed Regulatory Amendment to
Implement Amendment 78 to the Fishery Management Plan for
Gulf of Alaska Groundfish

June 2009

EXECUTIVE SUMMARY

In March of 2007, fishing in the Central Gulf of Alaska rockfish fisheries began under a new share-based management program. Under this program, cooperatives receive annual allocations of rockfish and other species (including halibut prohibited species catch) based on the qualified catch histories of their members. These annual allocations are binding, that is, without provision to cover any overage or compensate for any underage. This action considers allowing harvesters to engage in post-delivery transfers of their respective shares to cover overages.

Purpose and Need Statement

The Council has adopted the following the purpose and need statement for this action:

Participants in the Central Gulf of Alaska rockfish fishery pilot program are permitted to join cooperatives, which receive annual allocations of cooperative quota, which provide exclusive privileges to catch specific numbers of pounds of Pacific ocean perch, northern rockfish, pelagic shelf rockfish, Pacific cod, sablefish, thornyhead rockfish, shortraker rockfish, roughey rockfish, and halibut 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 a cooperative's 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.

Alternatives

The Council has identified three alternatives for this 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 (the preferred alternative), post-delivery transfers of shares are permitted. The number and size of post-delivery transfers a person may receive are not limited. Post-delivery transfers are, however, limited to being used exclusively to cover overages. Two options for limiting the time period during which the transfer may be made are set out in this alternative. Under the first, the transfer must take place within 30 days of the landing to which the transfer will be applied. Under the second, which is part of the preferred alternative, the transfer must take place on or before December 31st of the year in which the aforementioned landing was made. Under Alternative 3, moderate limits are placed on post-delivery transfers. Post-delivery transfers are allowed exclusively to cover overages. Transfers are limited to five transfers of each species allocated. Any post-delivery transfer of a species, except halibut PSC, is limited to 25 metric tons. A transfer of halibut PSC is limited to 5,000 pounds. Two options under Alternative 3, limiting the time to make transfers, are considered. Under the first, transfers are required to be made within 15 days of the landing to which the transfer will be applied. Under the second, transfers must be made on or before December 31st of the year in which the aforementioned landing was made.

Effects of Alternative 1 (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 overage is made. Enforcement actions and penalties are at the discretion of agency enforcement officers and attorneys.

Since, at the time of analysis, the program is in its first year, it is difficult to predict the extent to which participants will commit violations by exceeding allocations. Each cooperative is limited by seven or eight species allocations (depending on the sector). As each cooperative approaches its allocation limit, it

is increasingly likely that some overage will arise. End of year consolidation will be driven, in part, by the requirement that a vessel not begin a fishing trip without positive balance of quota of all species. Allocations will likely be consolidated in one or two cooperatives with harvesters in those cooperatives making ‘sweep up’ trips, to complete the season’s harvests. Although consolidation of allocations in one or two cooperatives can be used to avoid overages, it is anticipated that small overages will nonetheless occur, periodically.

Under the status quo, no post-delivery transfers are permitted. Cooperatives that have an overage at the time of landing cannot make a transfer to cover that overage. Processors are generally unaffected by this provision, since the overage charged to the harvester will not affect the processor’s operations. Minor changes in the enforcement burdens are expected under the status quo, as few overages are likely to occur based on an expectation that past patterns of limited overages would continue and the likelihood that this action would provide additional opportunities for cooperatives to settle their quota accounts after a landing, further reducing the risk of exceeding overages.

Effects of Alternative 2 (the preferred alternative) – unlimited post-delivery transfers

Alternative 2 would establish a system of almost unlimited post-delivery transfers to cover overages. 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 an inter-cooperative agreement that has formed in the catcher vessel sector. 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-agreement’ among inter-cooperative members. Overages not covered with a transfer and, thus, subject to penalty, should be fewer than under the status quo, since the provision will allow participants to address some overharvest via transfers.

Since the rockfish fishery has relatively few cooperatives that hold shares, and the shore-based sector is well-organized through the inter-cooperative agreement, quotas are likely to be closely tracked throughout the season. The inter-cooperative agreement is likely to contribute to more stable and predictable prices for post-delivery transfers. Although, based on the existing inter-cooperative agreement, punitive lease rates will likely apply to large overages, lease rates for minor, infrequent overages are likely to be at a reduced rate.

As noted, the Council motion includes two options defining the time during which post-delivery transfers must be completed. Under the first option, a post-delivery transfer must be made within 30 days of the overage. The second option would require the overage to be covered by a transfer filed with managers on or before December 31st of the year in which the overage occurred. Establishing a time limit, based on the date of the overage, might be supported to avoid harvesters believing that the extended period allows substantial time for finding shares to cover an overage. A lengthy period for covering an overage could lead the cooperative to unreasonably delay finding shares to cover the overage, which could result in more uncovered overages. On the other hand, the potential cost of overage penalties is likely to deter most cooperatives from delaying covering an overage. Delaying obtaining a post-delivery transfer needed to cover an overage until shares are unavailable for that transaction is unlikely to be a persistent problem.

Processors will be affected by this alternative in a few minor ways. Under the program, shore-based cooperatives are permitted to transfer allocations to other shore-based cooperatives. Any transfer of quota “out” of a cooperative requires the consent of the processor that is associated with that cooperative. This requirement, together with the requirement that cooperative formation requires consent of the associated processor, ensures the associated processor’s involvement in inter-cooperative transfers (including those undertaken to cover overages). Two types of post-delivery transfers are likely to occur. First, unexpected

transfers to cover relatively small amounts of catch could occur. Because of their small magnitude these transfers will not have a noticeable effect on processors. Second, larger, prearranged, post-delivery transfers could occur. Processors are likely to participate in the negotiation of these prearranged transfers. A processor is unlikely to approve a transfer that it views as significant and adverse, in the absence of compensation. Although this processor involvement is likely to complicate transactions for harvesters, the need for processor consent will ensure that transfers are not detrimental to processors.

The increase in administrative and record keeping requirements to address post-delivery transfers is somewhat limited. Yet, changes in the timing of administrative decisions and processes will pose challenges. In general, NOAA Fisheries will oversee share accounts and share usage, maintaining a record of any overage. Instead of referring overages to NOAA Fisheries Office of Law Enforcement immediately, that notice would be deferred 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 landing), overages would be reported on a rolling basis, as unreconciled overages become violations (i.e., the time to cover the overage lapses). Basing the limitation on the time from the landing could contribute to disputes. The burden of timing these notices is expected to be minor. Overall, allowing post-delivery transfers should reduce the number of enforcement actions prosecuting overages, since a cooperative will have the opportunity (although, not an assured source from which) to acquire shares to correct the pending violation.

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. The limits 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 a limit. The thresholds could be effective in deterring unreasonable reliance on the post-delivery transfer to cover an excessive overage. Yet, the possibility of unreasonable reliance on a speculative post-delivery transfer to cover an excessive overage is limited. Based on the overage penalties in the existing inter-cooperative agreement, participants are likely to realize that the cost of covering an overage would be expected rise with the magnitude of the overage and the later in the season it occurs. This alternative would also limit each cooperative to five post-delivery transfers per species. This limit would allow a vessel to make up to five independent trips with an overage of a species. Although it is possible that a cooperative could have multiple overages of a species, it is unlikely that the limit of five post-delivery transfers would be constraining. This alternative includes the same two options for defining the time for completing a post-delivery transfer, as Alternative 2. Neither option is likely to significantly constrain the effectiveness of the provision.

The effects of Alternative 3 on processors and management and enforcement are likely to be the same as the effects of Alternative 2.

Net benefits to the Nation

A minor overall net benefit to the Nation is likely to arise from this action. The action is likely to reduce the number of overages, by allowing participants to use post-delivery transfers to balance catch quota accounts. The risk of increasing the magnitude of any overage is also limited, since enforcement actions and the associated penalties are likely to deter careless overharvest of allocations. The action has the potential to reduce administrative and enforcement costs, by reducing the number of enforcement actions for overages.

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1 INTRODUCTION

In March of 2007, fishing in the Central Gulf of Alaska rockfish fisheries began under a new share-based management program. Under this program, cooperatives receive an annual allocations of rockfish and other species (including halibut prohibited species catch), based on the qualified catch histories of their members. These annual allocations are binding, that is, without provision to cover any overage or compensate for any underage. This action considers allowing harvesters to engage in post-delivery transfers of their respective shares, to cover overages.

This document contains a Regulatory Impact Review (Section 2) and a Final Regulatory Flexibility Analysis (Section 3) of the 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.¹

This document relies on information contained in the Central Gulf of Alaska Rockfish Demonstration Program Regulatory Impact Review/Environmental Assessment/Initial Regulatory Flexibility Analysis (NMFS/NPFMC, 2005).

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;

¹ The proposed action is a minor change to a previously analyzed and approved action and the proposed change has no effect individually or cumulatively on the human environment (as defined in NAO 216-6). The only effects of the action are potential transfers to cover overages in the fisheries, which will reduce any overharvest of cooperative allocations under the program. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

- 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

The Council has adopted the following the Purpose and Need Statement for this action:

Participants in the Central Gulf of Alaska rockfish fishery pilot program are permitted to join cooperatives, which receive annual allocations of cooperative quota, which provide exclusive privileges to catch specific numbers of pounds of Pacific ocean perch, northern rockfish, pelagic shelf rockfish, Pacific cod, sablefish, thornyhead rockfish, shortraker rockfish, roughey rockfish, and halibut 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 a cooperative’s 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

The Council has identified three alternatives for this 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 (the preferred alternative), post-delivery transfers of shares are permitted. The number and size of post-delivery transfers a person may receive are not limited. Post-delivery transfers are, however, limited to being used exclusively to cover overages. Two options for limiting the time period during which the transfer may be made are set out in this alternative. Under the first, the transfer must take place within 30 days of the landing to which the transfer will be applied. Under the second, which is part of the preferred alternative, the transfer must take place on or before December 31st of the year in which the aforementioned landing was made. Under Alternative 3, moderate limits are placed on post-delivery transfers. Post-delivery transfers are allowed exclusively to cover overages. Transfers are limited to five transfers of each species allocated. Any post-delivery transfer of a species, except halibut PSC, is limited to 25 metric tons. A transfer of halibut PSC is limited to 5,000 pounds. Two options under Alternative 3, limiting the time to make transfers, are considered. Under the first, transfers are required to be made within 15 days of the landing to which the transfer will be applied. Under the second, transfers must be made on or before December 31st of the year in which the aforementioned landing was made.

The specific provisions defining alternatives are:

Alternative 1 – Status Quo (no post-delivery transfers)

Alternative 2 – Unlimited post-delivery transfers (the preferred alternative, as shown in bold)

Purpose of post-delivery transfers

Post-delivery transfers would be allowed exclusively to cover an overage.

Shares used for post-delivery transfers

**Post-delivery transfers of the following shares are permitted:
catcher vessel CQ**

catcher processor CQ

Limits on the magnitude of a post-delivery transfer

None

Limits on the number of post-delivery transfers

None

No cooperative shall be permitted to begin a fishing trip, unless the cooperative holds unused CQ (not an option).

Limits on the time to undertake a post-delivery transfer

A post-delivery transfer will be permitted after a landing for a catcher vessel (or weekending date for a catcher processor) for a period of 30 days.

Suboption: All post-delivery transfers must be completed by December 31st.

Alternative 3 – Moderate limited post-delivery transfers

Purpose of post-delivery transfers

Post-delivery transfers would be allowed exclusively to cover overages.

Shares used for post-delivery transfers

Post-delivery transfers of the following shares are permitted:

- catcher vessel CQ
- catcher processor CQ

Limits on the magnitude of a post-delivery transfer

A post-delivery transfer of primary and secondary species shall be limited to 25 metric tons of CQ on a species basis.

A post-delivery transfer of halibut PSC shall be limited to 5,000 pounds.

Limits on the number of post-delivery transfers

For each species, a cooperative is limited to covering five overages with post-delivery transfer.

No cooperative shall be permitted to begin a fishing trip, unless the cooperative holds unused CQ for all allocated species (not an option).

Limits on the time to undertake a post-delivery transfer

Post-delivery transfers will be permitted after a landing for a catcher vessel (or weekending date for a catcher processor) for a period of 30 days.

Suboption: All post-delivery transfers must be completed by December 31st

2.3 Existing Conditions

This section describes the relevant existing conditions in the rockfish fishery. The section begins with a brief description of the management of the fisheries under the program, followed by descriptions of the harvesting and processing sectors in the fisheries, including only information relevant to this action.

2.3.1 Management of the fisheries

Under the rockfish demonstration program, 95 percent of the directed fishery total allowable catches (TACs) of three target rockfish species (Pacific ocean perch, northern rockfish, and pelagic shelf rockfish (which is comprised of dusky rockfish, yellowtail rockfish, and widow rockfish)) are allocated to the program.² This portion of the TACs is apportioned into exclusive shares that are allocated to a cooperative based fishery, a rockfish program limited access fisheries, and an entry level limited access fisheries. Eligible harvesters can choose to join a cooperative, or fish in its sector's limited access fishery. Allocations to cooperatives are based on its members' fishing histories. The allocation to the limited access fishery is based on histories of eligible harvesters that choose to fish in the limited access. The fishery is open for the harvest of cooperative allocations from May 1 to November 15. The limited access fisheries open July 1 and close for each target rockfish species upon the harvest of the open access TAC-share of that species.

Persons who hold an LLP license used for at least one directed rockfish landing in the Central Gulf of Alaska between 1996 and 2002, are eligible for the program. Each eligible license, in turn, is credited with history, based on all target rockfish species landings during the directed fishery, from 1996 to 2002. Catcher processor license holders are eligible to join a catcher processor cooperative, with any other eligible catcher processor license holder. Each catcher vessel LLP license is eligible for a single cooperative, which must be associated with a specific processor identified by its landings history from 1996 to 2000. The terms of the processor association are not specified, but may include requirements that the cooperative make a portion of its landings with the associated processor. A cooperative is intended to coordinate the harvest of the cooperative's allocation. Each harvester is jointly and severally liable for the acts of the cooperative, including any overharvest of the cooperative's allocation.

In addition to the allocation of target rockfish, cooperatives also receive allocations of 'secondary species,' which include sablefish, shortspine thornyhead rockfish, Pacific cod (for catcher vessel cooperatives only), and shortraker and rougheye rockfish (for catcher processor cooperatives only). Allocations to each sector are based on the average percentage of retained catch of the species in the target rockfish fisheries, during the 1996 to 2002 qualifying period. The allocation is divided among cooperatives in a sector, based on the share of the sector's target rockfish allocation received by the cooperative. The limited access fisheries receive no allocation of these species, but participants are limited in their catch by maximum retainable amounts, as a percentage of the target rockfish harvest. These maximum retainable amounts are reduced from the historic levels, to prevent limited access participants from increasing their harvest of secondary species under the new management regime. Each cooperative also receives an allocation of halibut PSC, which is based on historic halibut bycatch in the target rockfish fisheries and the target rockfish allocation of the cooperatives, in a manner similar to the secondary species allocations, just described. Unallocated species are subject to maximum retainable amounts, which limit the amount of catch that may be retained to a percentage of the target rockfish.

Cooperative allocations are transferable among cooperatives of the same operation type (catcher vessel/catcher processor); and catcher processor cooperative allocations may be transferred to catcher vessel cooperatives. Any transfer of an allocation by a catcher vessel cooperative must be approved by the processor associated with the cooperative.

All allocations are binding on a cooperative. So, if a cooperative has fully harvested its allocation of any allocated species, it must stop fishing. Any overharvest of an allocation is a violation. No opportunity to cover the overage with either acquired quota or quota from the next year exists. In addition, any quota

² Prior to allocation to the rockfish program, an incidental catch allowance is taken out to support incidental catch of these species in other fisheries. Five percent of the remaining TAC is allocated to an entry level fishery that is open only to persons who are not eligible for the rockfish program.

unharvested at the end of the year is forfeited. Penalties are within the discretion of NOAA General Counsel. Minor, infrequent violations are likely to be met with relatively small penalties, including forfeiture of the overage. Large or frequent violations are likely to draw more substantial penalties.

2.3.2 The harvest sector

Prior to implementation of the pilot program, the rockfish fishery was managed as a limited entry derby fishery. The season for all three rockfish species opened near the first of July. Directed fishing for each species would remain open until the TAC was estimated to have been fully harvested, at which time a closure would be announced. In some seasons, the fishery closed because the trawl sector's third quarter halibut PSC allotment for deepwater fisheries in the Central Gulf was fully used. If a portion of the TAC of a species remained available, the fishery would reopen, once the fourth quarter halibut PSC allotment was available.

Participation of trawl catcher vessels in the Central Gulf directed rockfish fishery declined slightly in the years preceding implementation of the pilot program (see Table 1). At the same time, catcher processor participation fluctuated slightly. As a result, catcher vessel landings declined, as a percentage of the total directed trawl catch in the fishery.³

Table 1. Estimated catch and participation of trawl vessels in the Central Gulf directed rockfish fishery (2003-2006).

Year	Species	Catcher processors		Catcher vessels		Total	
		Number of vessels	Catch (in metric tons)	Number of vessels	Catch (in metric tons)	Number of vessels	Catch (in metric tons)
2003	Pacific Ocean Perch	4	1,872.0	34	5,242.5	38	7,114.4
	Northern Rockfish	5	1,580.0	29	2,933.3	34	4,513.3
	Pelagic Shelf Rockfish	5	696.8	31	1,442.8	36	2,139.6
	Total	6	4,148.7	35	9,618.6	41	13,767.3
2004	Pacific Ocean Perch	7	2,989.1	32	4,856.3	39	7,845.4
	Northern Rockfish	7	1,364.3	27	2,227.5	34	3,591.8
	Pelagic Shelf Rockfish	7	735.3	31	1,340.4	38	2,075.7
	Total	8	5,088.7	32	8,424.1	40	13,512.9
2005	Pacific Ocean Perch	7	3,128.9	25	4,331.8	32	7,460.7
	Northern Rockfish	7	2,287.2	24	1,776.9	31	4,064.1
	Pelagic Shelf Rockfish	7	674.1	25	1,039.0	32	1,713.1
	Total	7	6,090.3	25	7,147.6	32	13,237.9
2006	Pacific Ocean Perch	5	3,245.2	25	4,204.8	30	7,450.0
	Northern Rockfish	5	1,870.6	23	1,739.2	28	3,609.8
	Pelagic Shelf Rockfish	5	571.6	25	951.4	30	1,523.0
	Total	6	5,687.5	25	6,895.3	31	12,582.8

Source: NMFS Catch Accounting data (2003-2006).

Catches of allocated secondary species varied across the two trawl sectors in the direct rockfish fishery in the years leading up to the program (see Table 2). Catcher vessels harvested greater amounts of Pacific cod and sablefish, while catcher processors harvested more thornyhead rockfish and shortraker rockfish and roughey rockfish. This pattern follows the historic pattern in the fishery in the qualifying years (1996-2002).

³ Since only trawl vessels are governed by the cooperative portion of the pilot program, only trawl catch is included here. The most non-trawl catch in any of the years for which data are shown, was slightly more than 50 metric tons of all target rockfish species combined.

Table 2. Estimated catch of allocated secondary species by trawl vessels in the Central Gulf directed rockfish fishery (2003-2006).

Year	Species	Catcher processors		Catcher vessels		Total	
		Number of vessels	Catch (in metric tons)	Number of vessels	Catch (in metric tons)	Number of vessels	Catch (in metric tons)
2003	Pacific Cod	4	41.6	32	1,457.5	36	1,499.1
	Sablefish	6	260.0	33	504.9	39	764.9
	Shortraker/Rougheye Rockfish	6	469.7	20	30.2	26	500.0
	Thornyhead Rockfish	6	343.8	29	57.5	35	401.3
2004	Pacific Cod	6	113.2	32	1,358.9	38	1,472.1
	Sablefish	8	276.4	32	515.4	40	791.9
	Shortraker/Rougheye Rockfish	8	126.8	22	10.0	30	136.8
	Thornyhead Rockfish	8	166.1	28	23.0	36	189.1
2005	Pacific Cod	6	86.4	25	723.2	31	809.7
	Sablefish	6	348.8	25	406.1	31	754.9
	Shortraker/Rougheye Rockfish	6	168.8	21	19.7	27	188.5
	Thornyhead Rockfish	6	175.5	23	27.6	29	203.1
2006	Pacific Cod	5	115.4	25	273.9	30	389.3
	Sablefish	6	161.0	25	374.5	31	535.5
	Shortraker/Rougheye Rockfish	5	150.2	21	35.5	26	185.8
	Thornyhead Rockfish	6	140.8	24	35.8	30	176.6

Source: NMFS Catch Accounting data (2003-2006).

Preceding implementation of the program, the distribution of halibut mortality between catcher vessels and catcher processors in the Central Gulf rockfish fishery generally paralleled catch of the rockfish, but catcher vessels took substantially more halibut per ton of directed rockfish catch, than did catcher processors (see Table 3).⁴

⁴ In considering all of the historic catch data, it should be noted that catch distribution after implementation of the program was constrained by the allocations. Since halibut catch cannot be retained, and has no direct value to trawl harvesters, it is possible that bycatch rates will vary under the pilot program management.

Table 3. Halibut mortality of trawl vessels in the Central Gulf directed rockfish fishery (2003-2006).

Year	Operation type	Halibut mortality (in metric tons)
2003	Catcher processor	67.71
	Catcher vessel	155.91
2004	Catcher processor	50.67
	Catcher vessel	213.89
2005	Catcher processor	75.81
	Catcher vessel	141.11
2006	Catcher processor	61.80
	Catcher vessel	81.70

Source: NMFS Catch Accounting data (2003-2006).

Fifteen catcher processors qualified for the rockfish pilot program. The forty-seven catcher vessels that qualified for the program are eligible to form cooperatives in association with 5 inshore processors. Both sectors have considerable qualifying history, with catcher processors having more Pacific ocean perch and pelagic shelf rockfish history, and catcher vessels having more northern rockfish history (see Table 4). In addition to the target rockfish allocations, participants in the program also receive allocations of ‘secondary species’, as well as halibut PSC that are harvested in the rockfish fishery (see Table 5).⁵

Table 4. Eligible licenses and initial quota share allocations by sector.

Species	Sector	Number of eligible licenses	Percent of quota share allocation
Pacific ocean perch	Catcher processor	15	50.4
	Catcher vessel	47	49.6
Northern rockfish	Catcher processor	13	38.6
	Catcher vessel	45	61.4
Pelagic shelf rockfish	Catcher processor	14	54.7
	Catcher vessel	46	45.3

Source: RAM rockfish database (2007).

Table 5. Allocations under the rockfish pilot program by sector (in metric tons) (2007).

Sector	Target rockfish			Secondary species					Halibut PSC
	Pacific ocean perch	Northern rockfish	Pelagic shelf rockfish	Pacific cod	Sablefish	Thornyhead rockfish	Shortraker rockfish	Rougheye rockfish	
Catcher processor sector	3,486	1,240	1,676	*	150	128	60	203	61
Catcher vessel sector	3,432	1,970	1,388	587	386	106	*	*	115
Total allowable catch (all fisheries)	7,612	3,499	3,325	25,565	1,238	989	353	611	400**

Source: RAM rockfish database (2007).

Note: Target allocations to sectors include limited access fisheries, but exclude the entry level fishery.

No allocations of secondary species or halibut PSC are made to the limited access fisheries.

* Subject to MRA, not allocation.

** Third quarter halibut PSC only.

In the first year of the program, two catcher processor cooperatives and 5 catcher vessel cooperatives (one associated with each qualified processor) formed (Table 6). A total of 5 catcher processor licenses entered cooperatives, while 44 catcher vessel licenses entered cooperatives. The largest cooperative received an

⁵ These allocations are based on historic harvests that are both incidental and ‘top off’ harvests that were permitted under the maximum retainable allowances in the directed rockfish fishery.

allocation of slightly less than 20 percent of the target rockfish allocated to the program.⁶ Since 13 catcher processors receive approximately one-half of the annual allocation, it is not surprising that a catcher processor cooperative received the largest allocation under the program.

Table 6. Cooperative allocations of target rockfish in metric tons and as a percent of the total allocation to participants in the program (excluding the entry level) (2007).

Sector	Number of cooperatives	Total rockfish allocation				Pacific ocean perch		Northern rockfish		Pelagic shelf rockfish	
		Largest allocation		Smallest allocation		Largest allocation		Largest allocation		Largest allocation	
		in metric tons	as a percent	in metric tons	as a percent	in metric tons	as a percent	in metric tons	as a percent	in metric tons	as a percent
Catcher processor	2	2,595.1	19.7	1,060.0	8.0	1,699.8	24.6	284.1	8.8	611.3	20.0
Catcher vessel	5	1,884.9	14.3	801.8	6.1	1,018.9	14.7	534.8	16.7	368.0	12.0

Source: RAM rockfish database (2007).

Seven licenses (three catcher vessel licenses and four catcher processor licenses) elected to fish in their respective limited access fisheries (see Table 7). It is notable that the allocation to the catcher processor limited access is larger than the allocation to any single cooperative under the program. The catcher vessel limited access fishery (which included only relatively minor participants in the rockfish fishery) received a relatively small allocation. In addition, six catcher processor licenses elected to ‘opt-out’ of the target rockfish fisheries in the 2007 season. When a participant ‘opts-out,’ any allocation that would have been made to a cooperative, based on the history of the participant, is redistributed to other participants in the sector.

Table 7. Limited access allocations of target rockfish in metric tons and as a percent of the total allocation to participants in the program (excluding the entry level) (2007).

Sector	Number of participants	Total rockfish allocation		Pacific ocean perch		Northern rockfish		Pelagic shelf rockfish	
		Allocation in metric tons	Allocation as a percent	Allocation in metric tons	Allocation as a percent	Allocation in metric tons	Allocation as a percent	Allocation in metric tons	Allocation as a percent
Catcher processor	4	2,747.0	20.8	1,007.6	14.6	674.8	21.0	1,064.6	34.7
Catcher vessel	3	74.1	0.6	37.1	0.5	29.4	0.9	7.5	0.2

Source: RAM rockfish database (2007).

Although extraneous to the regulations, catcher vessel cooperatives in the fishery have formed an inter-cooperative association to coordinate activities across cooperatives. The organization monitors the harvest of allocations by all catcher vessel cooperatives and sets out a structure for cooperative exchanges to facilitate full harvest of quota. The measures in the inter-cooperative agreement include the establishment of reserves to be used to offset excessive harvests by cooperative members, and a structure for the consolidation of quota among cooperatives at the season’s end to allow for a ‘clean up’ or ‘sweep up’ of remaining quota.

To date, no overages have occurred under the program. Since the fishery is in the middle of its first year, whether this trend will continue cannot be determined.

2.3.3 The processing sector

Five processors qualified to associate with cooperatives under the pilot program. Historically, these processors have drawn most of their revenues from fisheries other than the rockfish fishery. Although these processors receive no allocation under the program, the requirement that each catcher vessel

⁶ In addition to the allocation to the program, an allocation of 5 percent of the TAC of each target rockfish species was made to an entry level fishery, and an incidental catch allowance was made to support all other target fisheries in the Central Gulf of Alaska.

cooperative associate with a processor gives the processor a substantial position in the fishery. In most cases, processors likely have an agreement with the cooperative concerning deliveries. These commercial agreements, however, are not public.

The cooperative memberships and allocations provide a reasonable understanding of the distribution of processing interests under the program. In the first year of the program, target rockfish allocations to the 5 cooperatives associated with shore-based processors range from approximately 800 metric tons (or approximately 6.1 percent of the total target rockfish allocation under the program) to approximately 1,800 metric tons (or approximately 14.4 percent of the total target rockfish allocation under the program). Catcher vessel cooperative memberships range in size from 6 licenses to 11 licenses.

2.3.4 Ex vessel pricing and first wholesale pricing

In the years preceding the implementation of the pilot program, ex vessel prices for target rockfish species rose considerably (see Table 8 and NMFS, 2007). This increase paralleled an increase in whole and head and gut (H&G) product first wholesale prices for shore-based plants. With these price increases, a substantially larger amount of rockfish went to whole and H&G products. As in the past, average prices of allocated secondary species (both first wholesale and ex vessel) exceeded prices of target rockfish during this same period (see NPFMC/NMFS, 2005 and Table 9).⁷

Table 8. Average ex vessel prices, production, first wholesale revenues, and average first wholesale prices for target rockfish for inshore processors that qualified for the rockfish pilot program (2003–2005).

Species	Year	Average ex vessel price (\$/lb)	Fillet				Head and gut and whole				Surimi
			Number of plants	Pounds of product	First wholesale revenues (\$)	Average first wholesale price (\$/lb)	Number of plants	Pounds of product	First wholesale revenues (\$)	Average first wholesale price (\$/lb)	Number of plants
Pacific Ocean Perch	2003	0.055	4	1,219,301	2,100,621	1.723	3	314,824	98,768	0.314	1
	2004	0.058	4	578,400	1,056,615	1.827	4	1,731,751	724,018	0.418	2
	2005	0.100	3	310,843	595,379	1.915	4	2,657,624	1,712,607	0.644	1
Northern Rockfish	2003	0.054	4	488,540	677,447	1.387	4	112,897	42,819	0.379	1
	2004	0.057	4	187,545	355,764	1.897	4	697,675	284,736	0.408	1
	2005	0.098	3	77,174	101,501	1.315	4	1,120,166	691,384	0.617	0
Pelagic Shelf Rockfish	2003	0.053	3	338,662	639,828	1.889	2	98,000	47,739	0.487	0
	2004	0.058	4	237,332	416,309	1.754	4	410,638	154,493	0.376	1
	2005	0.099	4	266,168	567,563	2.132	3	208,141	152,795	0.734	1

Source: COAR DATA (2003-2005).

Additional information concerning surimi production withheld for confidentiality.

⁷ In reviewing these production tables, it should be considered that production could not be separated by fishery. COAR data are collected on a species basis, preventing precise estimates of production and prices from a specific fishery. In addition, COAR data are collected on a species basis only, preventing any distinction of estimates related to catch from different gear types. As a consequence, these data include production from both trawl and non-trawl catch. These data should, therefore, be considered as revealing trends. Since rockfish are harvested almost exclusively by trawl vessel, those estimates should be considered relatively accurate for trawl production and prices. Prices and production of sablefish and Pacific cod, on the other hand, are likely to be biased by inclusion of substantial catch from fixed gear participants, who typically receive a higher price for their landings.

Table 9. Average ex vessel price, production, first wholesale revenues, and average first wholesale prices of allocated secondary species by inshore processors that qualified for the rockfish pilot program (2003–2005).

Species	Year	Average ex vessel price (\$/lb)	Number of plants	Pounds of product	First wholesale revenues (\$)	Average first wholesale price (\$/lb)
Pacific cod	2003	0.289	4	17,105,162	20,895,034	1.222
	2004	0.250	4	17,623,282	24,010,531	1.362
	2005	0.276	4	14,834,427	24,308,595	1.639
Sablefish	2003	1.530	4	1,573,363	6,639,966	4.220
	2004	1.331	4	1,858,217	7,152,263	3.849
	2005	1.417	3	1,119,000	4,639,155	4.146
Shortraker Rockfish	2003	0.174	3	32,581	61,618	1.891
	2004	0.279	3	6,863	11,536	1.681
	2005	0.332	3	4,647	7,446	1.602
Rougheye Rockfish	2003	0.114	4	50,375	59,368	1.179
	2004	0.077	4	20,225	22,012	1.088
	2005	0.158	3	31,135	37,896	1.217
Thornyhead Rockfish	2003	0.392	4	78,744	81,507	1.035
	2004	0.301	4	72,644	95,256	1.311
	2005	0.326	4	34,768	56,893	1.636

Source: COAR Data (2003-2005).

First wholesale prices of catcher processor production of target rockfish products are consistent with prices observed in the shore-based sector (see Table 10). These prices also showed a considerable increase in 2005. During this same period, prices of allocated secondary species products exceeded prices of target rockfish for catcher processors.

Table 10. Production, first wholesale revenues, and average prices of target rockfish products by catcher processors that qualified for the rockfish pilot program (2003–2005).

Species	Year	Number of vessels	Pounds of product	First wholesale revenues (\$)	Average price (\$/lb)
Pacific ocean perch	2003	10	11,462,910	6,505,990	0.568
	2004	12	9,809,329	6,947,473	0.708
	2005	11	10,738,090	11,016,058	1.026
Northern rockfish	2003	10	2,105,570	668,276	0.317
	2004	11	2,036,382	976,409	0.479
	2005	12	3,416,432	2,744,286	0.803
Pelagic shelf rockfish	2003	9	2,271,625	1,015,511	0.447
	2004	9	851,575	545,007	0.640
	2005	10	1,006,019	922,800	0.917
Pacific cod	2003	11	17,864,779	14,920,623	0.835
	2004	11	18,047,495	17,443,300	0.967
	2005	11	15,359,107	15,577,962	1.014
Sablefish	2003	11	803,388	2,217,625	2.760
	2004	11	511,918	1,660,316	3.243
	2005	11	578,119	1,979,752	3.424
Shortraker rockfish	2003	11	486,604	732,675	1.506
	2004	11	257,370	459,690	1.786
	2005	10	264,704	424,927	1.605
Rougheye rockfish	2003	9	241,545	210,966	0.873
	2004	11	99,420	111,141	1.118
	2005	8	92,606	107,126	1.157
Thornyhead rockfish	2003	11	973,629	1,436,405	1.475
	2004	11	489,737	757,948	1.548
	2005	11	477,552	600,283	1.257

Source: COAR Data (2003-2005).

2.3.5 Communities

The only identifiable areas with substantial involvement in the catcher vessel sector are the City of Kodiak, Alaska, and several coastal communities in the State of Washington. The rockfish fisheries are a small component of the Kodiak fleet's activity during the year. Historically, vessel fishing rockfish would be active in the fishery for only a few weeks each year. This activity, while relatively minor, could be an important part of the array of fisheries fished by these small trawl vessels. Most vessels in the catcher processor sector are based in Seattle. As with the catcher vessels, these vessels participate in a variety of fisheries, with the rockfish fisheries being a small part of their annual activity. The processing sector under the pilot program is entirely based in Kodiak. Like the other sectors in the fishery, rockfish is a minor part of the annual activity of processors in the program. For all three sectors, the opportunity to receive an exclusive allocation under the pilot program provides some flexibility to adjust operations to more efficiently conduct their operations in the fishery. These production efficiency gains and the stability provided by the allocations are said to provide minor benefits to communities (including processing workforces) by allowing scheduling activities to provide more predictable activity levels. Additional community information is included in the analysis of the pilot program (see NPFMC/NMFS, 2005).

2.3.6 Management and enforcement

To facilitate management and oversight of the rockfish fishery, vessels are required to check-in and check-out of the fishery. When checked in, all catch of the vessel counts against the allocation of the cooperative for which the vessel is fishing. For catcher vessels, catch of target rockfish and secondary species is counted at the time the landing is offloaded and processed by the facility receiving the delivery. Once final weights have been determined, quota of the cooperative is assigned to the landing. Halibut is estimated on a trip basis, using observer data. For catcher processors, catch of all species is estimated using observer data. Full retention of all allocated species, except halibut PSC, is required.

Any overage is noted and referred to NOAA Fisheries Office for Law Enforcement.⁸ In the shore-based sector, the processor typically processes the overage and generally pays the harvester for the landing. Enforcement will then pursue the harvester for any penalty or for the amount of the processor's payment for the overage, to effectuate forfeiture. In some instances, harvesters will direct the processor to make the payment directly to the enforcement agency, effectively forfeiting the catch. This process avoids the unnecessary complication of attempting to segregate overage catch from other catch.

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.

2.4 Analysis of Alternatives

In a share-based fishery, each participant's catch is limited by annual quota holdings. During the fishery, participants estimate catch, attempting to limit catch to their available quota. Even if discards are permitted (such as in the crab 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 (such as the rockfish fishery) that is multispecies, additional dimensions are added. Catch must be coordinated across several species. Any limiting allocation will prevent the harvest of allocations of other species.

⁸ 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 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, overharvests 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 in the rockfish fishery.

Allowing post-delivery transfers in the rockfish fisheries 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 a reliance on post-delivery transfers could exacerbate overages. In addition, the system of post-delivery transfers could complicate management and oversight (e.g., share management and enforcement of overages that are not covered by a transfer). For example, allowing only a short interval to transfer quota to cover overages could complicate enforcement, if timing of a transaction 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.⁹ 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.

2.4.1 Effects on harvesters

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 overage is made. Enforcement actions and penalties are at the discretion of agency enforcement officers and attorneys.

Since the program is in its first 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 an overage will arise. End of year consolidation will be driven, in part, by the requirement that a vessel not begin a fishing trip without quota of each 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 harvesters in those cooperatives making 'sweep up' trips to complete the season's harvests. Most likely, these trips will be conducted by catcher vessel cooperatives, since catcher vessel allocations cannot be transferred to catcher processor cooperatives. Rather than leave minor, residual amounts of their allocations unharvested, catcher processor cooperatives will likely transfer those allocations to catcher vessel cooperatives. The extent to which this consolidation helps participants avoid overages is not

⁹ 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.

known. If a participant chooses to operate a vessel in the fishery, it is likely that it will prioritize harvest of its own allocation. Participants in the fishery will need balance the risk of overharvesting their allocation with the potential additional costs that they may incur when transferring quota to cover an overage.

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 7 or 8 species allocations (depending on the sector), it is possible that unexpected catches could put a cooperative over its allocation.

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

Alternative 2, the preferred alternative, 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. Given that the program is in its first year, it is difficult to predict the extent to which persons 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, pre-negotiated, through an inter-cooperative agreement. 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. 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, although, if “repeat offenses” carry other undesirable consequences, successive transfers might increase in cost beyond the fine amount. Small overages are typically subject to minor penalties and forfeiture of the overage. So, one would expect that the price of a quota to cover an overage would be relatively close to the ex vessel price of the overage for post-delivery transfers of small amounts of quota. Transfers to cover relatively large overages could have lease rates substantially higher than the ex vessel price of the fish. 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 half 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 occur under the current system, because of the time it takes to submit and process a transfer in writing. In the longer term, 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).¹⁰

¹⁰ It should be noted that beginning a fishing trip without quota is a violation. So, cases of transfers to cover intentional overages will only apply to situations where a person begins a trip with less quota than is used on the trip.

Since the rockfish fishery has relatively few cooperatives that hold shares and the shore-based sector is well-organized through the inter-cooperative agreement, quota is likely to be closely tracked throughout the season. The inter-cooperative agreement is likely to contribute to more stable and predictable prices for post-delivery transfers. Although higher than usual lease rates will likely apply to large overages, lease rates for minor, infrequent overages are likely to be at a relatively reduced rate. A higher lease rate would be expected to discourage participants from exceeding their allocations.

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.

In some cases, the requirement of consent of the cooperative's associated processor to approve share trades could interfere with some post-delivery transfers. The potential for this interference is likely limited. Again, two different scenarios are likely to be observed. In the case of minor overages, a processor is unlikely to suffer any noticeable loss from a post-delivery transfer. These minor transfers are likely to receive routine approval from the associated processor. In the case of large overages, it is likely that a processor would be a party to the negotiation, receiving compensation for the transfer in a manner similar to the lease payments received by the harvester. In these cases, the processor is unlikely to consent to its associated cooperative's transfer of a substantial amount of quota to cover an overage amount that has been delivered to another processor without compensation.¹¹

Although post-delivery transfers have the potential to benefit catcher processors with overages, the relatively small number of catcher processor cooperatives will limit its utility. Catcher processors are more likely to benefit from the formation of a single catcher processor cooperative that could coordinate the harvest of all catcher processor shares. Using this arrangement, no catcher processor 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. In addition, catcher processor cooperatives may choose to limit the number of potential overages by fishing most of its allocation, saving a minor residual for transfer to a catcher vessel sector cooperative for the end of season sweep up.

Overall, harvesters are likely to realize minor production efficiency gains under this alternative from allowing post-delivery transfers to cover overages. It is unlikely that harvesters will have excessive overages through unreasonable reliance on the post-delivery transfers. Some harvesters, 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. Harvesters are likely to benefit from a reduction in the number of overage violations, which should be reduced through post-delivery transfers.

Limits on the time to undertake a post-delivery transfer

The Council motion includes two options defining the time during which post-delivery transfers must be completed. Under the first option, a post-delivery transfer must be made within 30 days of the overage.¹² The second option, which is part of the preferred alternative, would require the overage to be reconciled on or before December 31st of the year in which it occurred. Establishing a time limit, based on the date

¹¹ A uniform pricing for post-delivery transfers may be unlikely because processors are required to approve transfers, and a uniform price for a post-delivery transfer could raise antitrust concerns.

¹² Note, this is interpreted as requiring the complete and accurate transfer application to be filed within 30 days of the landing with the overage for catcher vessels (or weekending date of the weekly processing report with the overage for catcher processors). No revision or amendment of a transfer application would be permitted after the deadline. Any application that is not fully and accurately completed on that date would be rejected. For all other time limits, the filing of a complete and accurate application by the deadline is assumed to satisfy the requirement.

of the overage, might be supported to avoid harvesters believing that the extended season established by current management allows substantial time for finding shares to cover an overage. For example, if a cooperative has an overage in July, it would have until December 31st, to cover the overage. This lengthy period for covering an overage could lead the cooperative to unreasonably delay acquiring shares to cover the overage, which could result in more uncovered overages. On the other hand, the potential cost of overage penalties is likely to deter most cooperatives from delaying covering an overage. Since members of a cooperative are jointly and severally liable for an overage, it is unlikely that cooperatives would be tolerant of outstanding uncovered overages. Delaying obtaining a post-delivery transfer needed to cover an overage until shares are unavailable for that transaction is unlikely to be a persistent problem. Since the fishery currently closes on November 15th, the requirement that all post-delivery transfers be completed by December 31st is not likely to prevent any transfers from being made.

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 a target rockfish or secondary species is limited to 25 metric tons. Each post-delivery transfer of halibut PSC is limited to 5,000 pounds. 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 thresholds could be effective in deterring unreasonable reliance on the post-delivery transfer to cover 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 by 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 species. This limit would allow a vessel to make up to five independent trips with an overage of a species. Although it is possible that a cooperative could have multiple overages of a species, it is unlikely that the limit of five post-delivery transfers would be constraining.

Limits on the time to undertake a post-delivery transfer

This alternative includes the same two options for defining the time for completing a post-delivery transfer as Alternative 2. Under one option, post-delivery transfers would need to be completed within 30 days of the landing with the overage. Under the second option, overages would need to be covered by the end of the year. Neither option is likely to constrain effectiveness of the provision.

2.4.2 Effects on the processing sector

The effects of the alternatives on processors arise from any changes in deliveries that occur as a result of allowing post-delivery transfers. Yet, the potential for negative effects on processors from allowing post-delivery transfers is limited, because any transfer by a cooperative requires the consent of its associated processor.

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

Under the status quo, no post-delivery transfers are permitted. Cooperatives that have an overage at the time of landing cannot make a transfer to cover that overage. Processors are generally unaffected by this provision, since the overage charged to the harvester will not affect the processor's operations. Usually,

the processor will process any overage and later purchase it from NOAA Fisheries enforcement at the prevailing price.

Alternative 2 - Unlimited post-delivery transfers (the preferred alternative) and Alternative 3 – Moderately limited post-delivery transfers

The effects of these two alternatives on processors are indistinguishable, so their discussion is consolidated. Under these alternatives, cooperatives are permitted to cover overages with few limitations. Processors will be affected by this activity in a few minor ways. During the time period after the landing and before the cooperative has reconciled its share account with a post-delivery transfer, the processor will have possession of the overage, but not have an identified seller. If the overage is covered, the seller will be the person delivering the entire landing (including the covered overage). If the overage is not covered, the processor has typically purchased the overage from NOAA Fisheries Office of Law Enforcement (OLE). This arrangement is likely to continue in the future. If a cooperative fails to cover an overage at the end of the year, NOAA OLE could take action against the cooperative, but would be unable to seize any previously processed catch. Additional discussion on this issue is provided in Section 2.4.4.

Under the program, shore-based cooperatives are permitted to transfer allocations to other shore-based cooperatives. Any inter-cooperative transfer requires the consent of the processor associated with the cooperative transferring its shares. This requirement, together with the requirement that cooperative formation requires consent of the associated processor, ensures the associated processor's involvement in inter-cooperative transfers (including those undertaken to cover overages).

Two factors should limit the effects of post-delivery transfers on processors. First, any unexpected transfers are likely to be for relatively small amounts of catch, limiting their effect on processors. Second, any larger post-delivery transfer is likely to be prearranged with the processor's involvement in the negotiation. Processors are unlikely to approve of transfers that it views as disadvantageous, in the absence of compensation. Although this processor involvement in transactions is likely to complicate transactions for harvesters, the need for processor consent will ensure that transfers are not detrimental to processors.

In considering the extent of processor leverage in these transactions, one might question whether a processor could use its position to either prevent post-delivery transfers needed to cover unintended overage or exact a large price from a cooperative in need of the transfer. Although this leverage could be exerted, it is likely that the potential benefit would be a relatively small amount of compensation in comparison to the loss of goodwill that the processor would suffer. Since the processor's associated cooperative would need to approve the transaction, the loss of goodwill would likely be with the processor's own cooperative (rather than the cooperative with the overage). Any disapproval of a transfer or exertion of extraordinary leverage would likely work to the detriment of a processor whose associated cooperative will likely wish to coordinate harvests with other cooperatives and might later need a post-delivery transfer. Processors that seek to exploit an overage would likely have a difficult time receiving an post-delivery overage in the future, which could create poor relationships with harvesters that associate with that processor in a cooperative. Under a worst case scenario, such actions could result in the dissolution of the cooperative which could disadvantage both harvesters and the processors, particularly the processor if harvesters chose not to deliver to that processor once they began participating in the limited access fishery and were no longer limited to that specific processor under the cooperative requirements.

Limits on the time to undertake a post-delivery transfer

Two options would define the time period for completing post-delivery transfers under Alternatives 2 and 3. Under the first option, the transfer must be completed within 30 days of the landing with the overage.

Under the second option, which is part of the preferred alternative, these transfers must be completed prior to the end of the rockfish season (December 31st of the year in which the overage occurred). Limits on the time for undertaking post-delivery transfers are unlikely to affect processors. Although the extended timeframe for completing transfers could induce some complacency, the provision is unlikely to lead to any additional uncovered overages. The shorter time frame is unlikely to be too restrictive for harvesters to complete transactions necessary to cover overages.

2.4.3 Effects on communities

Only the City of Kodiak is home to processors eligible to associate with catcher vessel cooperatives in the rockfish pilot program. This action is unlikely to have any distributional effect on any communities, since the distribution of landings among processors is unlikely to change in a noticeable manner and any redistribution is likely to be among processors based in Kodiak. Given the extent of landings in Kodiak, the minor increase in landings arising under Alternatives 2 and 3 is unlikely to have a noticeable effect on the community.

2.4.4 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. Overage prosecution is based on catch accounting records, so specific catch is not confiscated. Overage catches are processed with all other catch to prevent spoilage. If the overage is forfeited, as is typical practice, the processor purchases the overage from NOAA Fisheries Office of Law Enforcement at the prevailing price. Additional penalties may be pursued based on the size of an overage or frequency of overages by the offending operation. Overall, few overages are likely to occur, requiring few enforcement actions.

Alternative 2 - Unlimited post-delivery transfers (the preferred alternative) 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, with slight differences arising under the different options. To streamline the analysis, the discussion of these two alternatives is consolidated.

In general, RAM will oversee share accounts and share usage, as is currently done. At the time of landing, 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 more strictly limits the time to cover overages from the date of landing (i.e., 30 days from the landing), overages would be reported on a rolling basis as overages become final (or the time to cover the overage lapses). Requiring all overages to be covered on or before a specific date (such as, December 31st, as defined in the preferred alternative) may help resolve potential conflicts concerning whether post-delivery transfers are timely. This deadline is clear and provides participants with ample time to resolve overages after fishing is ended, since the cooperative season closes on November 15th.

Overall, allowing post-delivery transfers should reduce the number of enforcement actions prosecuting overages, since a cooperative will have the opportunity to seek to acquire shares to correct the pending violation. These provisions in no way assure that all overages will be reconciled, however. They merely create an *opportunity* that does not exist under the status quo.

2.4.5 Effects on consumers

This action is unlikely to have a noticeable effect on consumers. Very minor, additional amounts of harvests could be made under Alternatives 2 and 3. These additional harvests are likely to be indiscernible in consumer markets.

2.4.6 Net benefits to the Nation

A minor overall net benefit to the Nation is likely to arise from this action. The action is likely to reduce the number of unreconciled overages, by allowing participants to use post-delivery transfers. The risk of increasing the magnitude of any overage is also limited, since enforcement actions and the associated penalties are likely to deter careless overharvest of allocations. The action has the potential to reduce 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 these 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 economic 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 pilot program 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) 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 venturers 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 Central Gulf of Alaska rockfish fishery pilot program are permitted to join cooperatives, which receive annual allocations of cooperative quota, which provide exclusive privileges to catch specific numbers of pounds of Pacific ocean perch, northern rockfish, pelagic shelf rockfish, Pacific cod, sablefish, thornyhead rockfish, shortraker rockfish, roughey rockfish,

and halibut 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 a cooperative's 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

This action directly regulates rockfish cooperatives, which could engage in post-delivery transfers to cover overages. Estimates of the number of these cooperatives that are small entities are based on estimates of gross revenues from the most recent year for which complete data are available (2005). Since rockfish prices vary year-to-year, the gross revenues of participants are difficult to predict. In the first year of the program, seven cooperatives received allocations. Of these, five are estimated to be large entities and two are estimated to be small entities.

3.6 Reporting, record keeping, and other compliance requirements

The reporting, record keeping, and other compliance requirements of the proposed rule will not change. As such, this action requires no additional reporting, record keeping, or other compliance requirements.

3.7 Significant alternatives to the proposed rule

Allowing post-delivery transfers, as contemplated by the proposed action, 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. Two significant alternatives to the proposed action are examined as a part of this analysis. Under the first (the status quo), no post-delivery transfers are permitted. The status quo alternative is unlikely to reduce adverse economic impacts on small entities, since overages will all remain subject to forfeiture and other penalties. The second alternative to the proposed action would limit each cooperative to a certain number of post-delivery transfers and would limit the size of any post-delivery transfer. The additional limits in this alternative would be more constraining on small entities than the proposed action. The limits on size and the number of post-delivery transactions 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.

No other alternative would meet both the conservation and management objectives of the MSA and minimize any adverse effects on small entities. For example, any permitted overage allowance that did not require an explicit transfer of shares to cover that overage would require a reduction in allocations to cooperatives to allow a buffer in the allowable catch, sufficient to accommodate those overages. This reduction in allocations would have a detrimental effect on small entities (particularly those who constrain their catch to their allocation). No alternative to the proposed action meets the stated objective of the action, comports with the MSA requirements, and minimizes adverse economic impacts on small entities.

4 NATIONAL STANDARDS & 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, and the proposed alternatives will contribute to achieving optimum yield.

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 Central Gulf of Alaska rockfish fishery. 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 by minimizing the need for cooperatives to underharvest their allocation in order to stay below their quota allocations, and allow cooperatives to transfer catch after deliveries to balance any overages in a more efficient manner. 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 Gulf of Alaska rockfish 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 compliance for fishery participants and 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 pilot program should reduce the incentives for rockfish fishermen 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 the incentives created by the pilot program to fish in a cooperative manner under a limited access privilege program.

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.

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