

Alaska Region
National Marine Fisheries Service
Gulf of Alaska
Inseason Management Report
December 2009



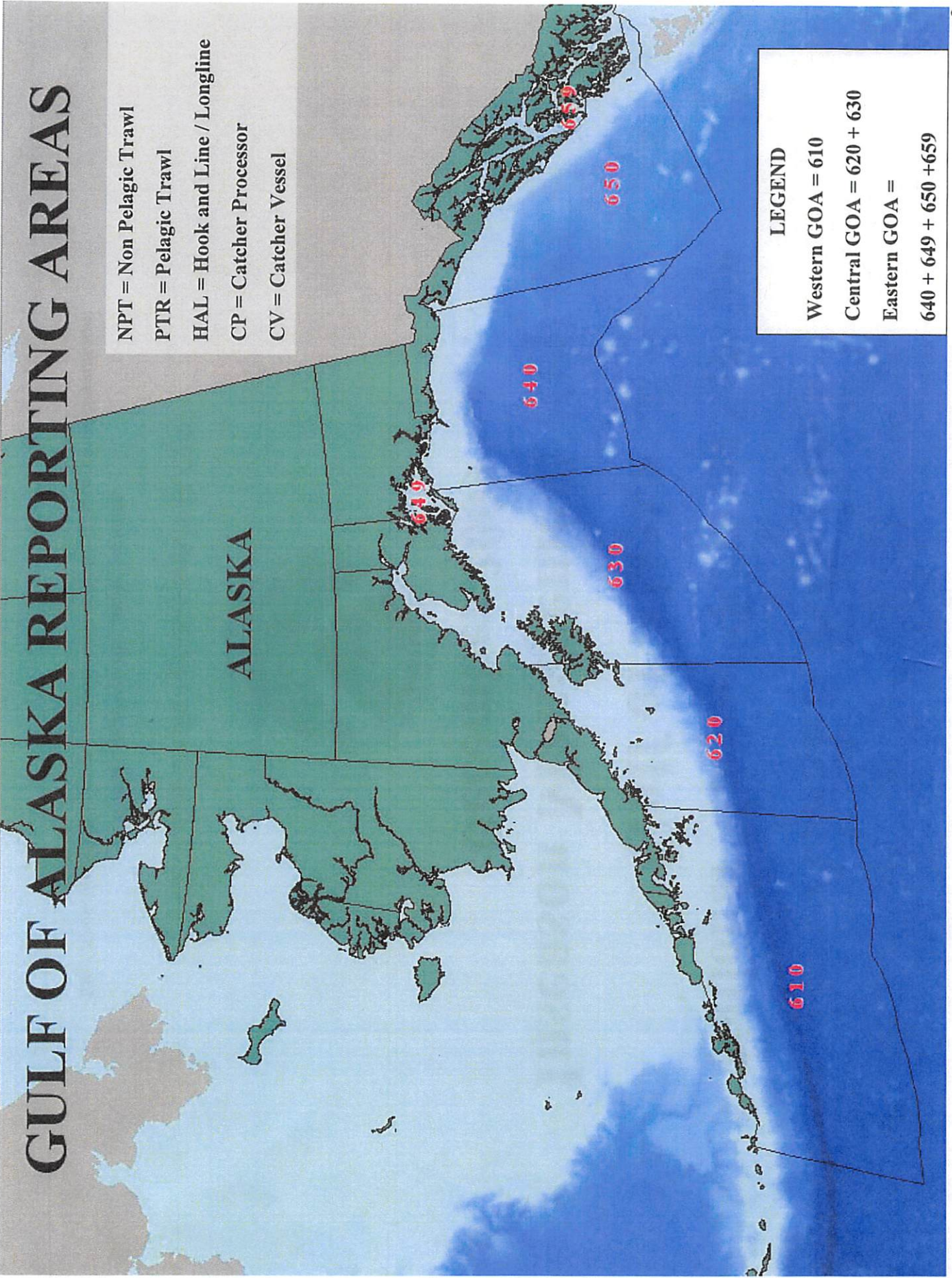
Catch data are through November 14, 2009

Management reports can be found at:
<http://www.alaskafisheries.noaa.gov/sustainablefisheries/inseason/default.htm>

GULF OF ALASKA REPORTING AREAS

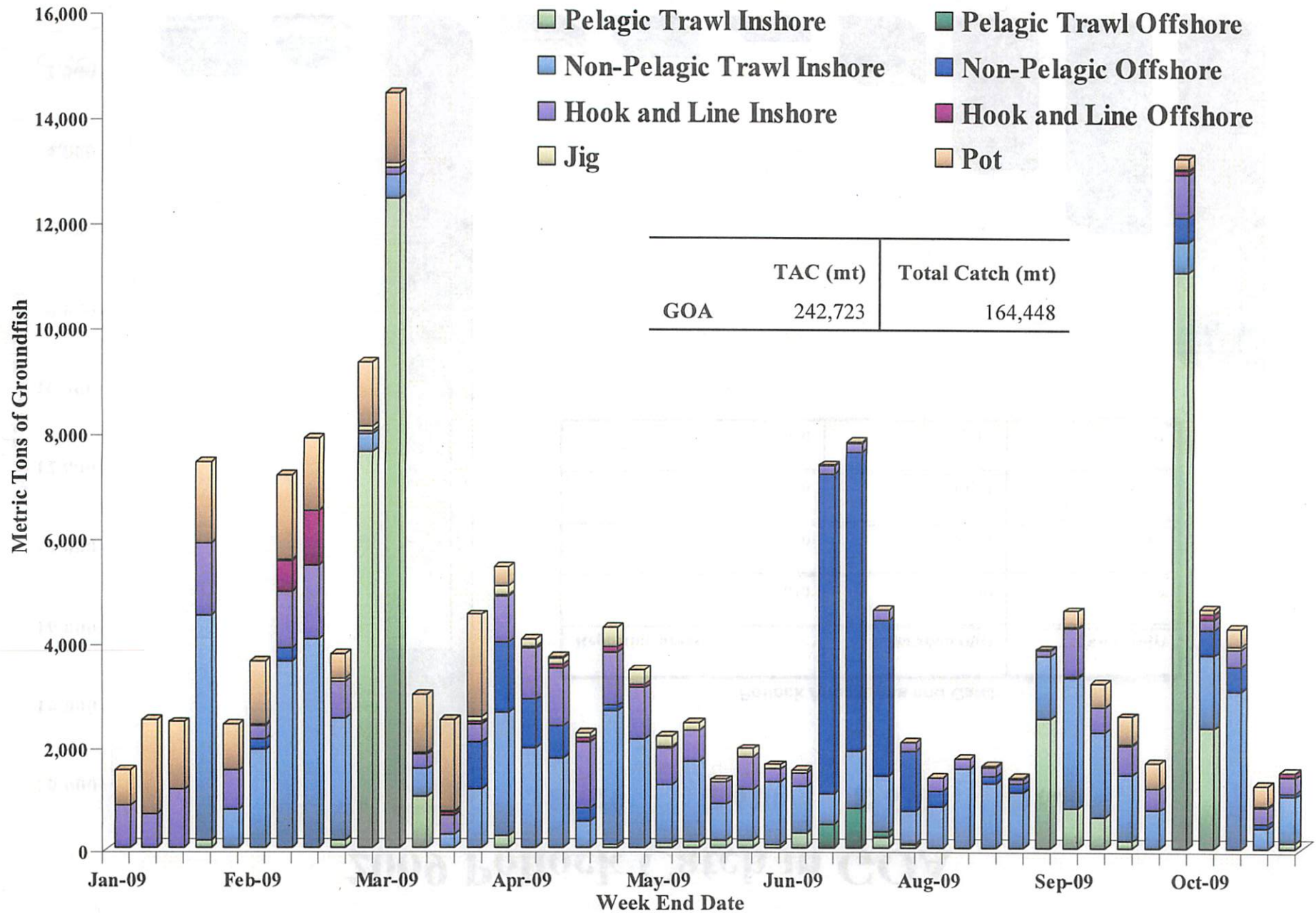
NPT = Non Pelagic Trawl
PTR = Pelagic Trawl
HAL = Hook and Line / Longline
CP = Catcher Processor
CV = Catcher Vessel

ALASKA

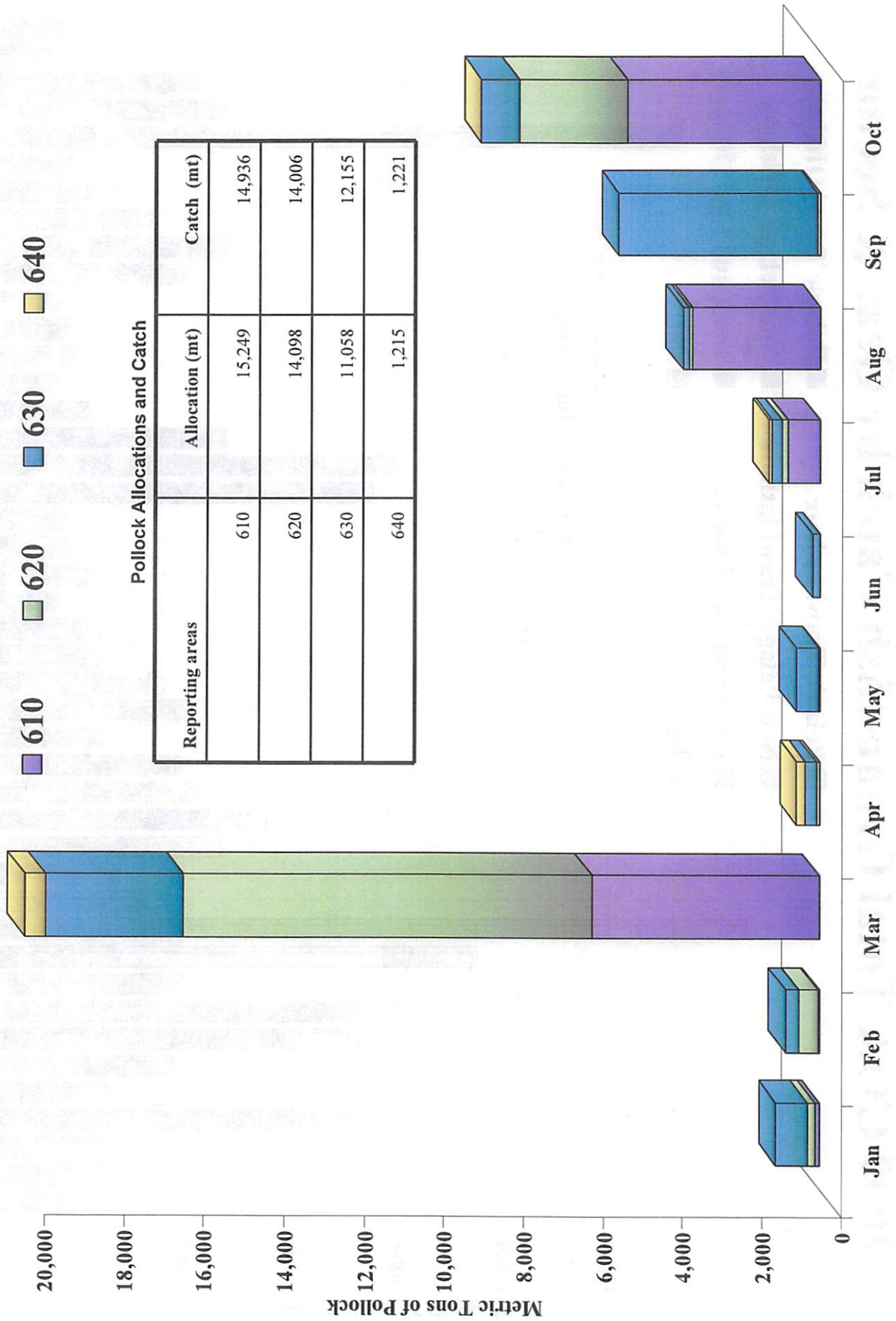


LEGEND
Western GOA = 610
Central GOA = 620 + 630
Eastern GOA =
640 + 649 + 650 +659

2009 GOA Total Groundfish Catch by Gear & Sector



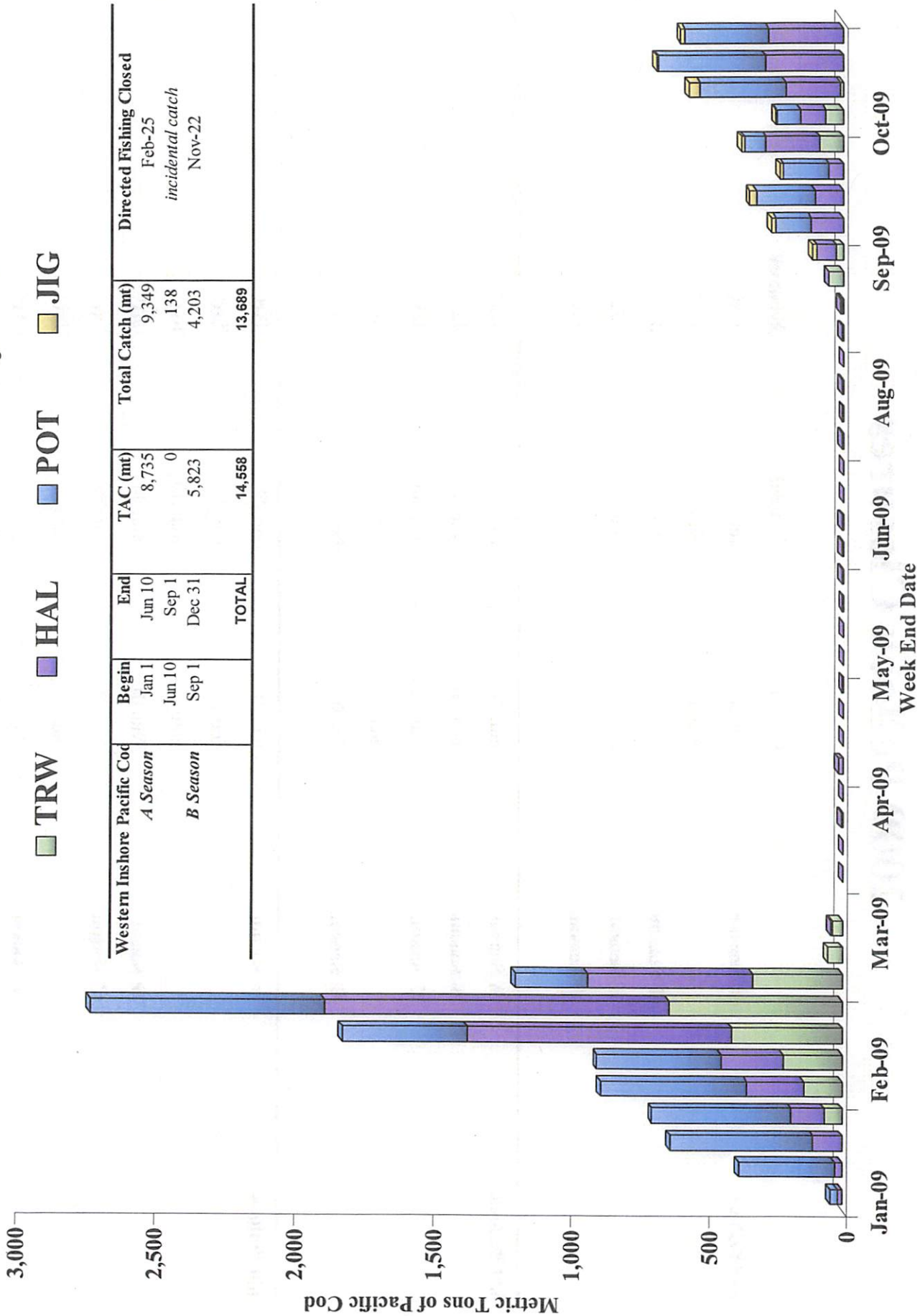
2009 Pollock Catch in GOA



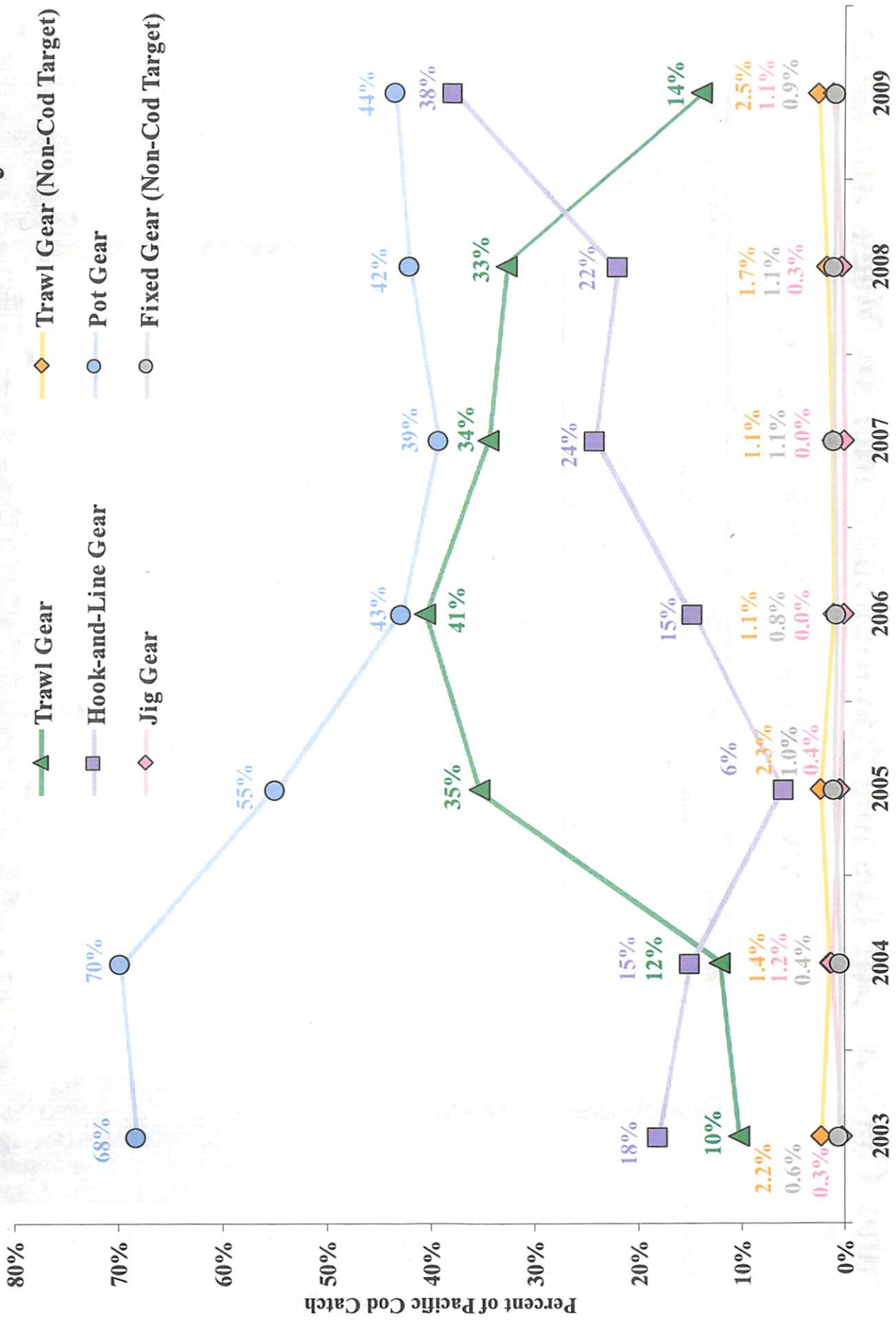
2009 Pollock Closures

		Open	Closed	Reason
610 Pollock	A Season	Jan 20	Jan 22	TAC
		Mar 1	Mar 3	TAC
	B Season	Mar 10	May 12	TAC
	C Season	Aug 25	Aug 31	TAC
	D Season	Oct 1	Oct 6	TAC
<hr/>				
620 Pollock	A Season	Jan 20	Mar 6	TAC
	B Season	Mar 10	Mar 14	TAC
	C Season	Aug 25	26-Aug	TAC
		Sep 29	Oct 1	Reg
	D Season	Oct 1	Oct 4	TAC
<hr/>				
630 Pollock	A Season	Jan 20	Jan 22	TAC
		Feb 11	Feb 11	TAC
		Mar 9	Mar 10	Reg
	B Season	Mar 10	Mar 11	TAC
	C Season	Aug 25	Aug 26	TAC
		Sep 29	Oct 1	TAC
	D Season	Oct 1	Oct 1	TAC

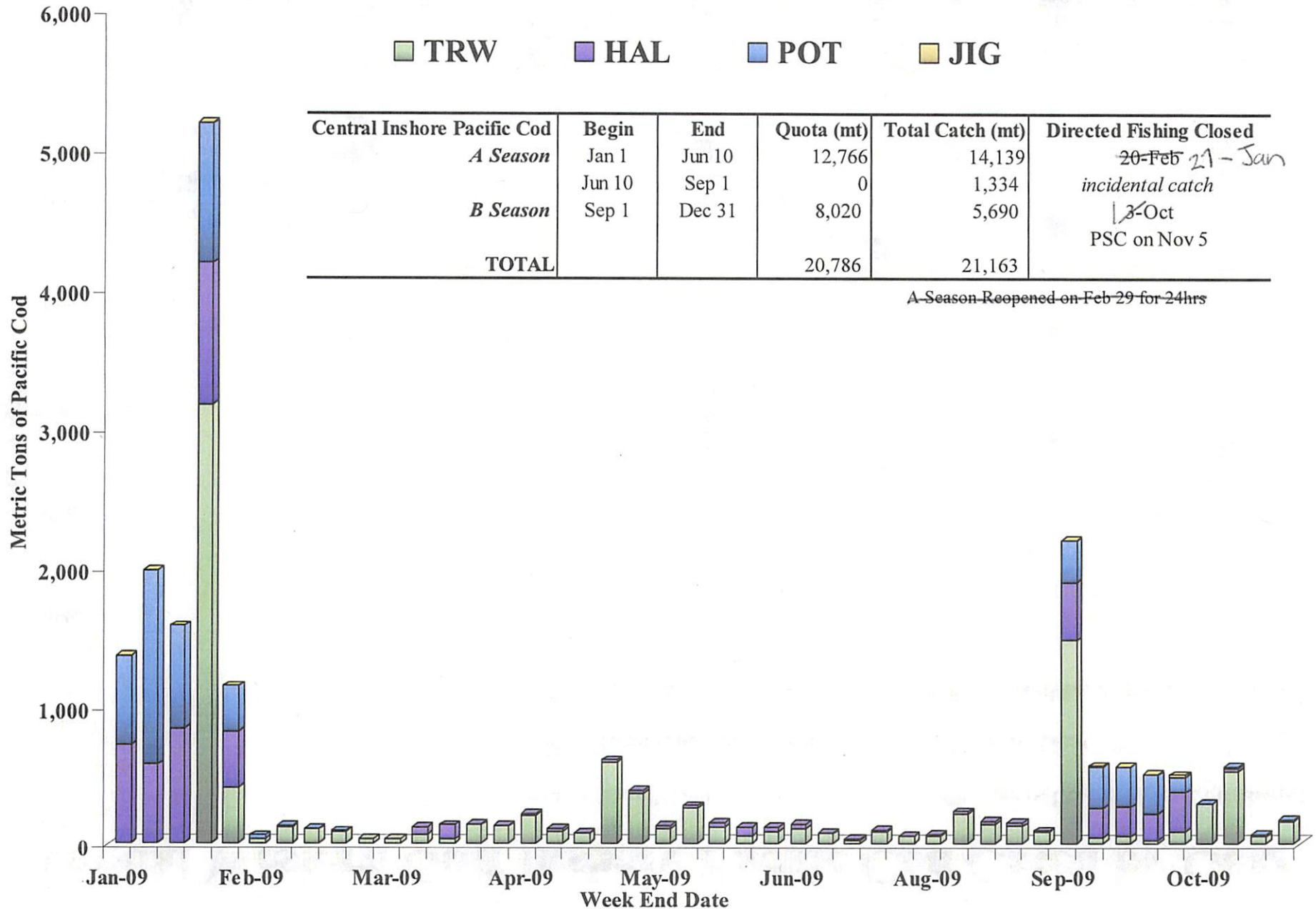
2009 Western Gulf Inshore Pacific Cod Catch by Week and Gear



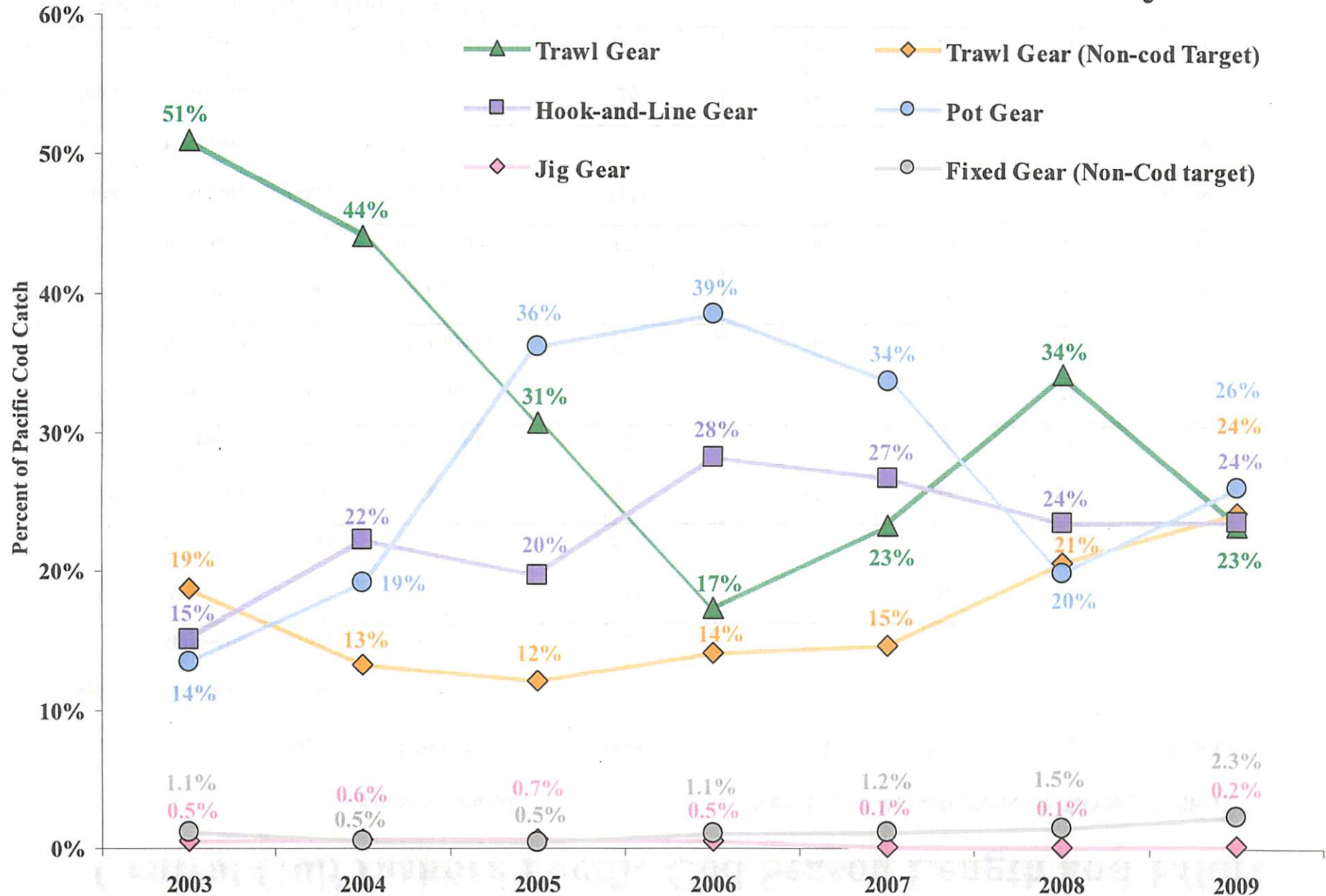
Annual Western Gulf Inshore Pacific Cod Catch by Gear



2009 Central Gulf Inshore Pacific Cod Catch by Week and Gear



Annual Central Gulf Inshore Pacific Cod Catch by Gear



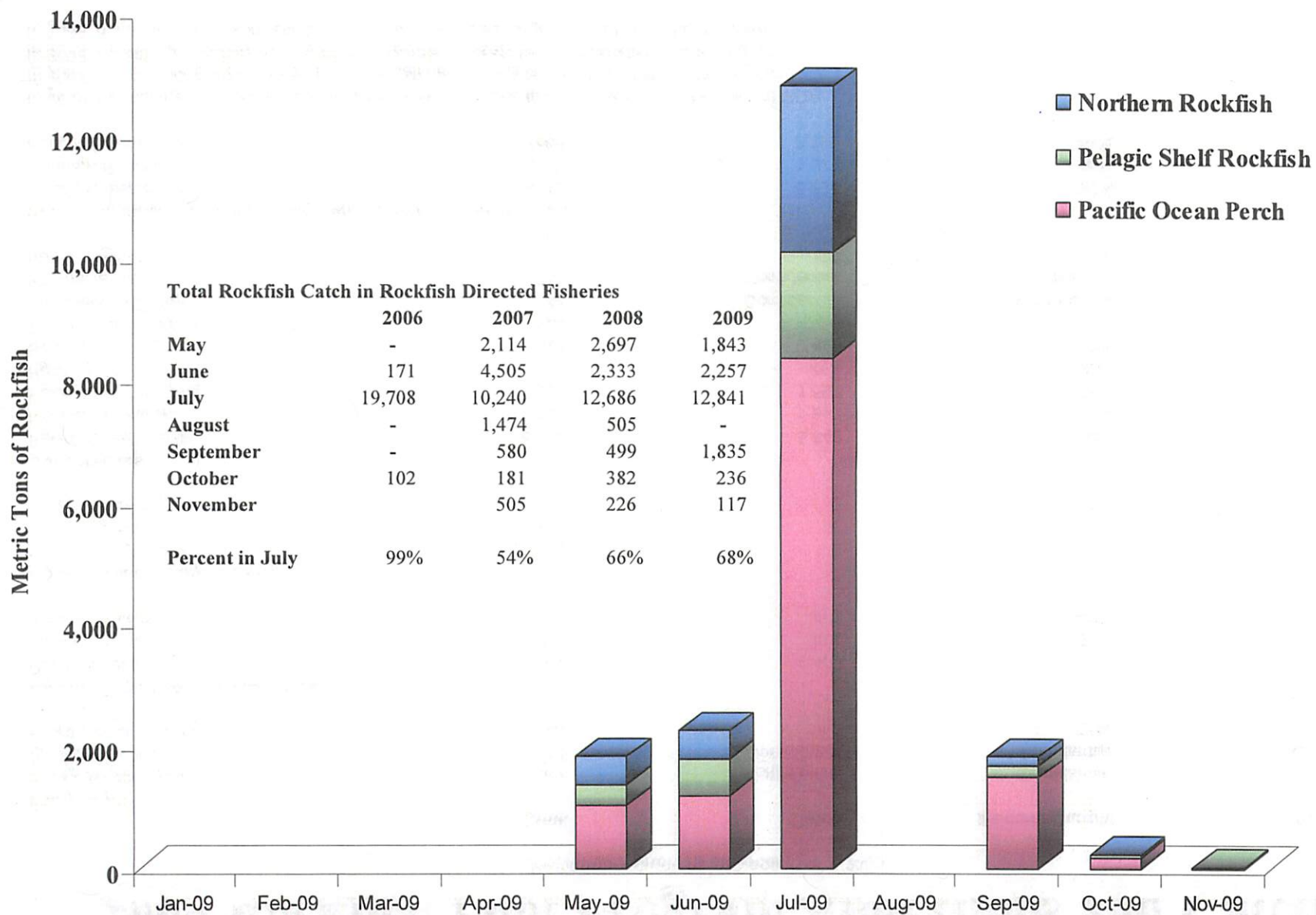
Central Gulf Inshore Pacific Cod Season Length and Effort

		Season Length			Number of Vessels Directed fishing (Effort)			
		Open	Closed	Days	HAL	Pot	Jig	Trawl
2003	A Season	1-Jan	9-Feb	39	96	36	13	41
	B Season	1-Sep	3-Sep	2	22	5	3	33
2004	A Season	1-Jan	31-Jan	30	90	36	34	41
	B Season	1-Sep	17-Nov	59*	50	18	11	42
2005	A Season	1-Jan	26-Jan	25	84	36	29	34
	B Season	1-Sep	No Closure	121	41	30	8	34
2006	A Season	1-Jan	28-Feb	58	60	41	28	33
	B Season	1-Sep	No Closure	121	56	28	6	8
2007	A Season	1-Jan	27-Feb	57	66	57	10	28
	B Season	1-Sep	No Closure	121	58	26	6	24
2008	A Season	1-Jan	20-Feb	51**	78	50	7	30
	B Season	1-Sep	3-Oct	32	57	17	4	30
2009	A Season	1-Jan	27-Jan	26	78	53	9	29
	B Season	1-Sep	1-Oct	30	49	16	5	26

* Season closed from 10-Sep to 28-Sep (17 days)

** Season closed 20-Feb to 29-Feb (8 days)

GOA Targeted Rockfish Catch by Month



2009 Rockfish Pilot Program Allocations and Catch

Preliminary catch as of December 1, 2009

Entry Level	Limit	Catch	Percent Caught	Remaining
Entry Level				
Pacific Ocean Perch	402	Confidential	Confidential	Confidential
Northern Rockfish	110	Confidential	Confidential	Confidential
Pelagic Shelf Rockfish	165	41	25%	124
Catcher Processor Limited Access				
Pacific Ocean Perch	1,403	1,403	100%	0
Northern Rockfish	498	494	99%	4
Pelagic Shelf Rockfish	1,137	472	42%	665
Catcher Vessel Limited Access				
Pacific Ocean Perch	28	0	0%	0
Northern Rockfish	10	0	0%	0
Pelagic Shelf Rockfish	5	0	0%	0
Cooperatives				
Pacific Ocean Perch	6,212	5,842	94%	370
Northern Rockfish	1,590	1,347	85%	243
Pelagic Shelf Rockfish	1,997	1,566	78%	431
Pacific Cod	491	454	92%	37
Sablefish	421	415	99%	6
Thornyhead Rockfish	193	39	20%	153
Shortraker Rockfish	48	Confidential	Confidential	Confidential
Rougheye Rockfish	248	Confidential	Confidential	Confidential
Pacific Halibut	170	27	16%	143
Primary Species Totals Including Central GOA Incidental Catch				
Pacific Ocean Perch	8246	8,027	97%	219
Northern Rockfish	2308	1,977	86%	331
Pelagic Shelf Rockfish	3404	2,162	64%	1,242

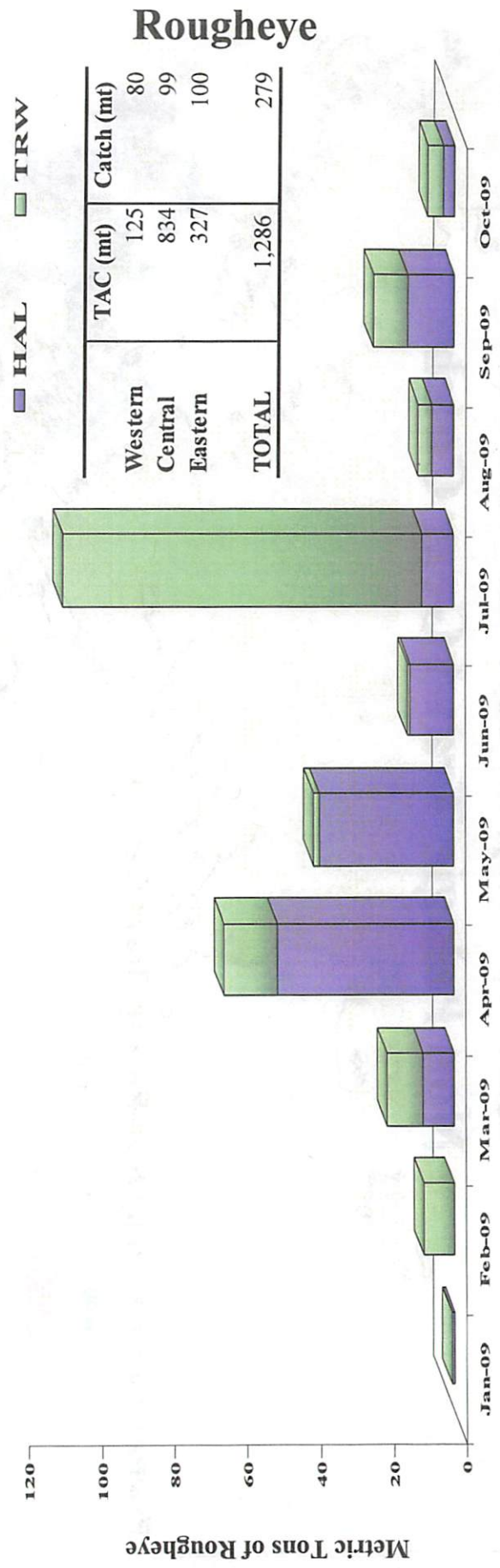
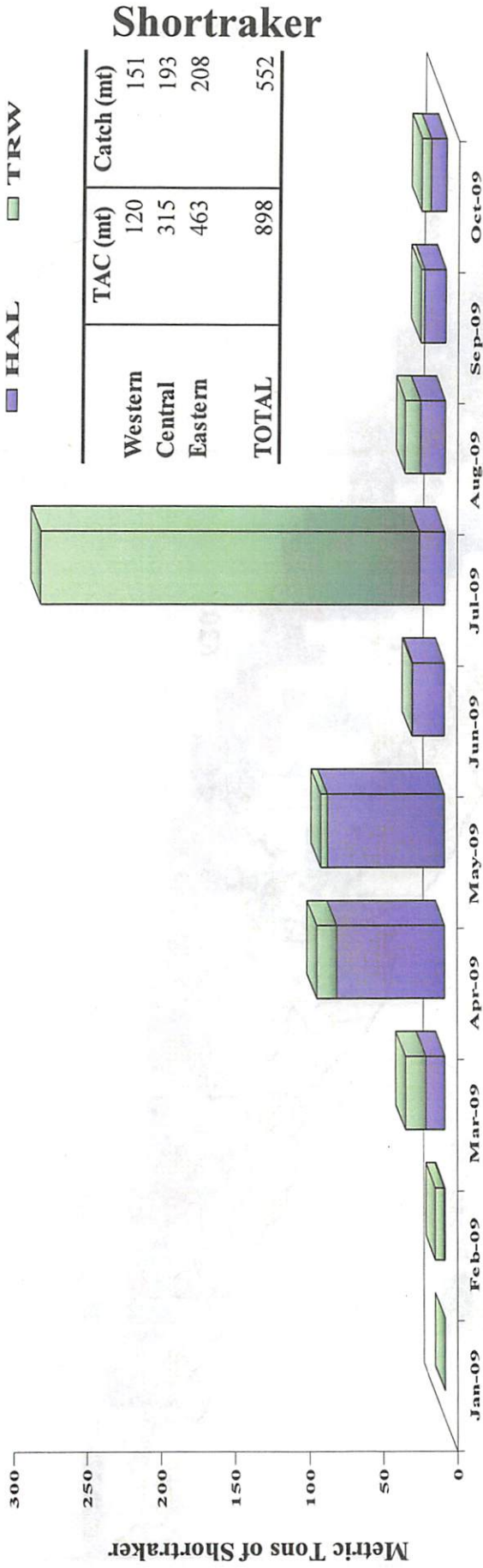
In 2006, five catcher processors and 25 trawl catcher vessels targeted rockfish in the Central GOA.

In 2007, five catcher processors and 27 trawl catcher vessels targeted rockfish in the Program.

In 2008, six catcher processors and 27 trawl catcher vessels targeted rockfish in the Program.

In 2009, 8 catcher processors and 26 trawl catcher vessels targeted rockfish in the Program.

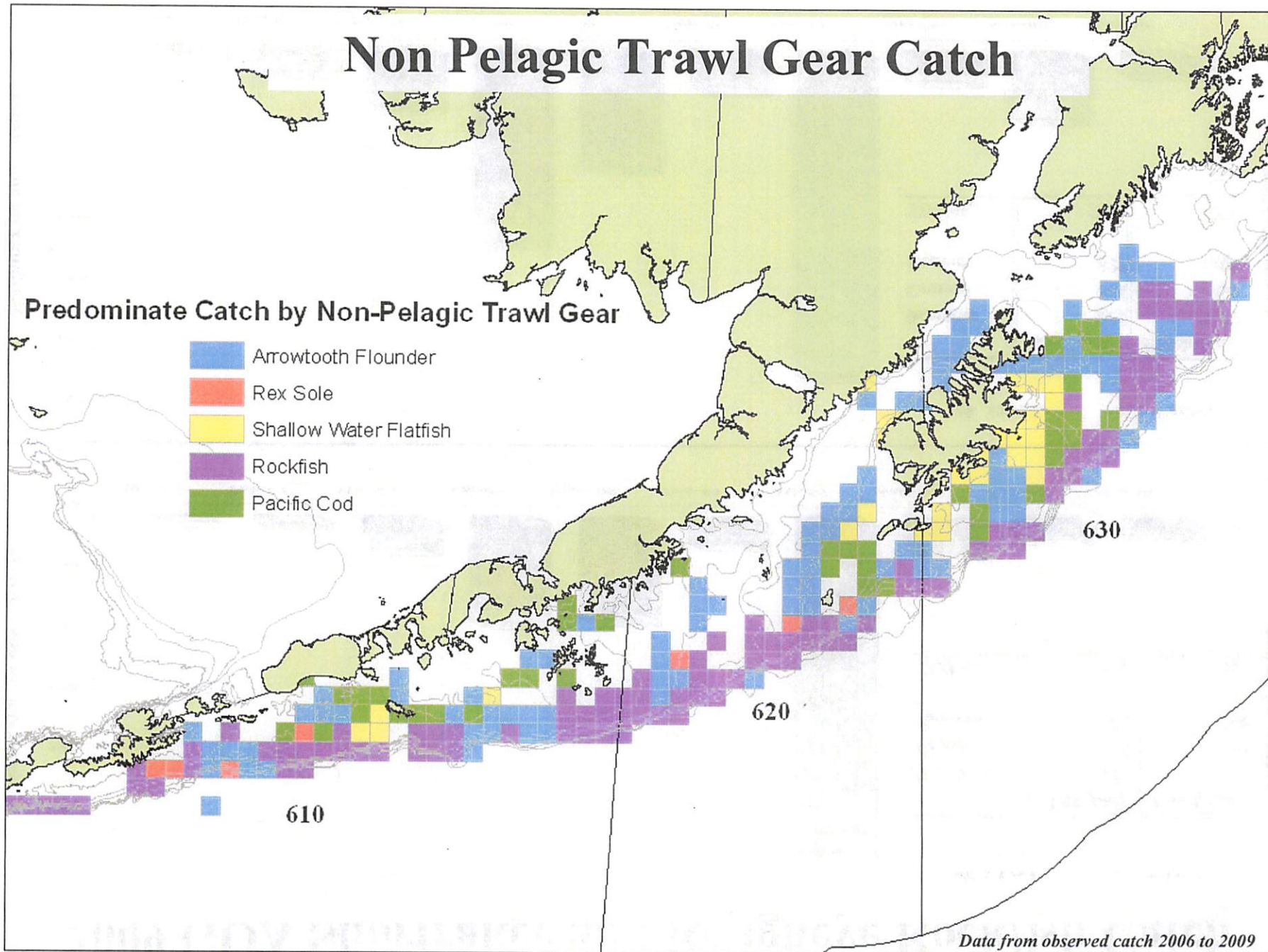
2009 GOA Shorthead and Rougheye Rockfish Catch



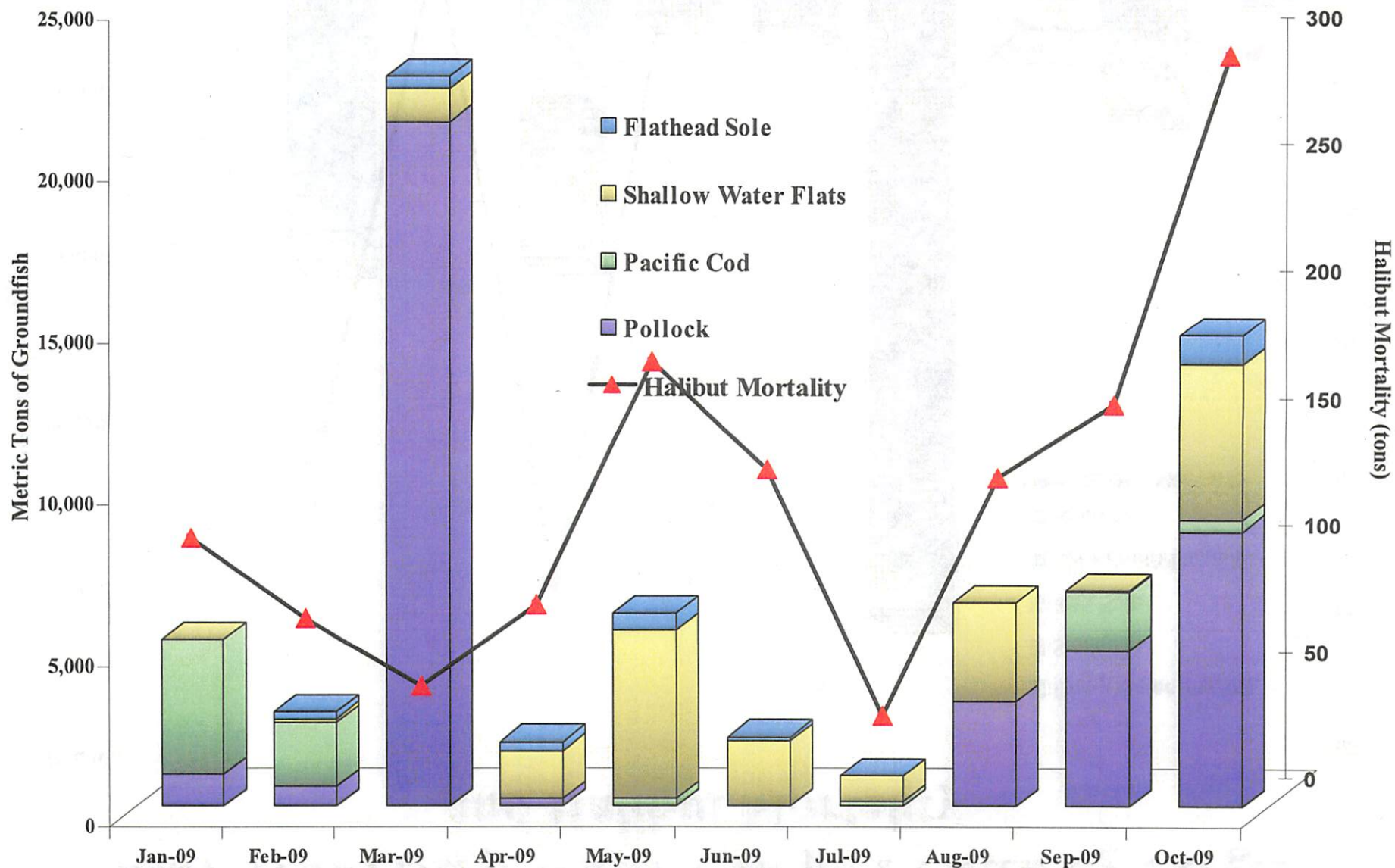
Non Pelagic Trawl Gear Catch

Predominate Catch by Non-Pelagic Trawl Gear

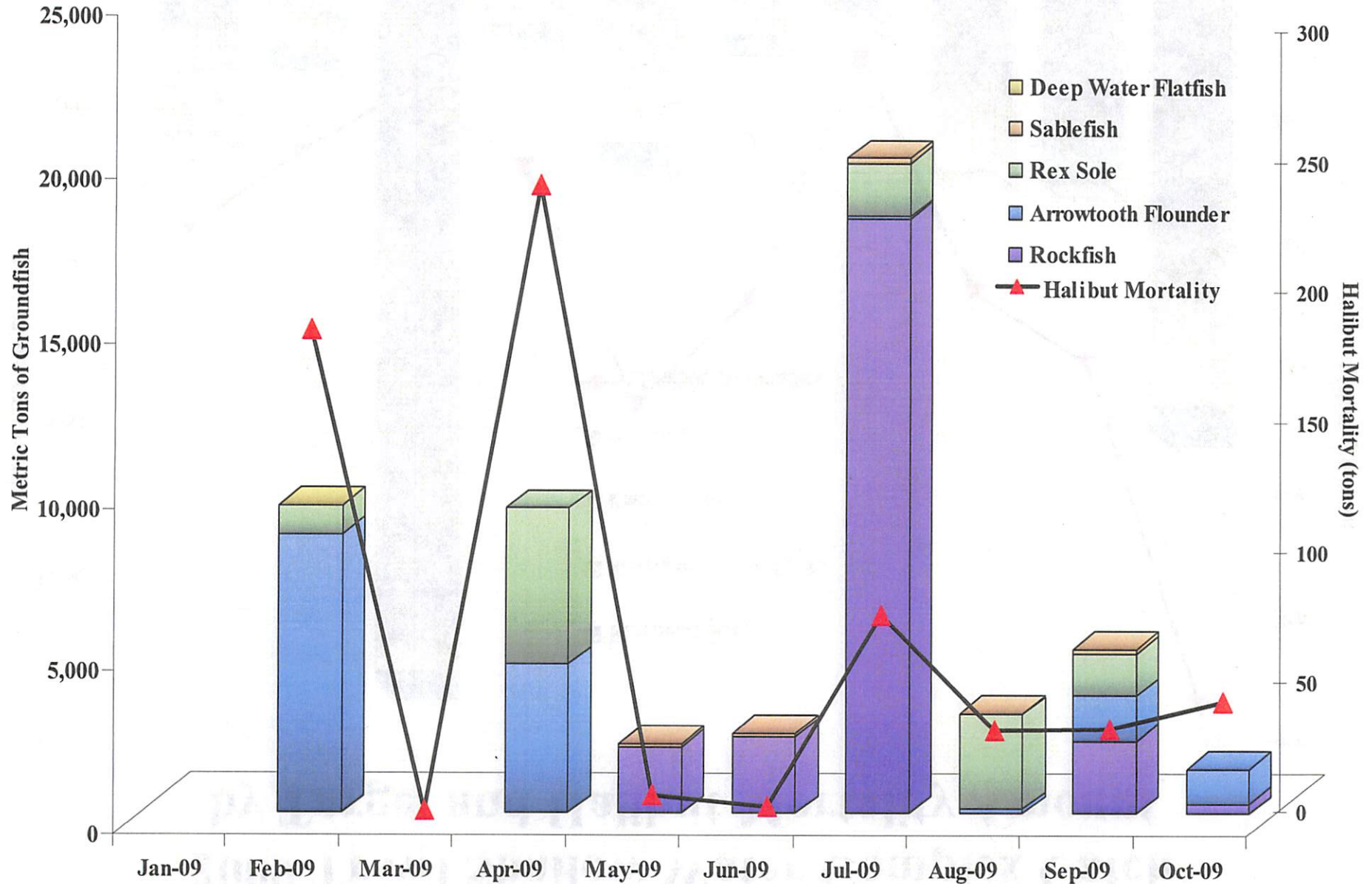
- Arrowtooth Flounder
- Rex Sole
- Shallow Water Flatfish
- Rockfish
- Pacific Cod



2009 Trawl Shallow Water Complex Catch by Target and Halibut Mortality Amount



2009 Trawl Deep Water Complex Catch by Target and Halibut Mortality



2009 Flatfish and Skate Catch in the GOA

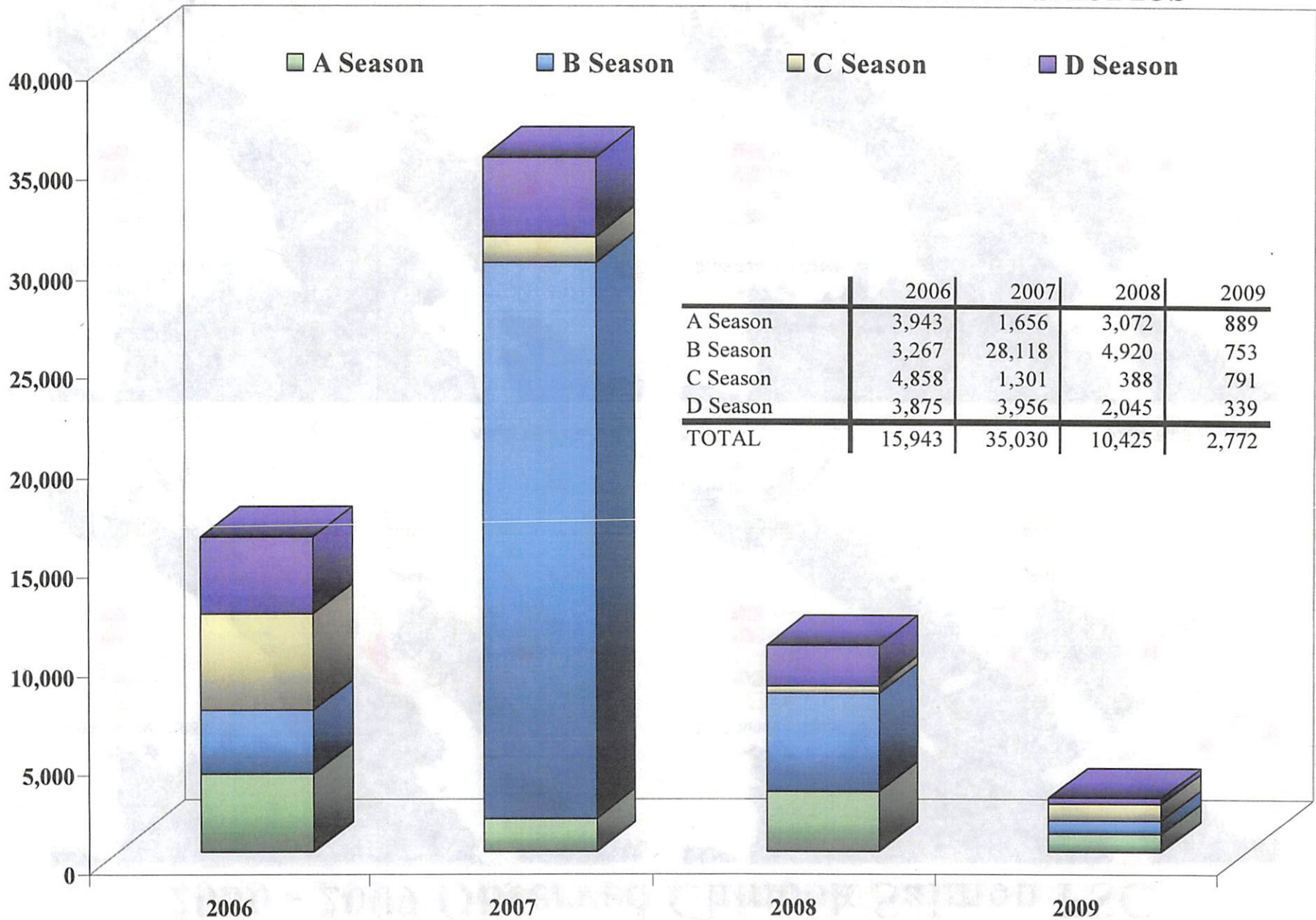
	TAC (mt)	Total Catch (mt)	Percentage caught of TAC
Arrowtooth Flounder			
Central	30,000	22,941	76%
Western	8,000	1,518	19%
Flathead Sole			
Central	6,420	497	8%
Western	2,000	303	15%
Rex Sole			
Central	6,630	4,204	63%
Western	1,007	342	34%
Shallow Water Flatfish			
Central	13,000	8,217	63%
Western	4,500	96	2%
Deep Water Flatfish			
Central	6,927	434	6%
Western	706	8	1%
Big Skate			
Central	2,065	1,664	81%
Western	632	68	11%
Longnose Skate			
Central	2,041	887	43%
Western	78	70	90%

2009 Trawl Halibut Mortality

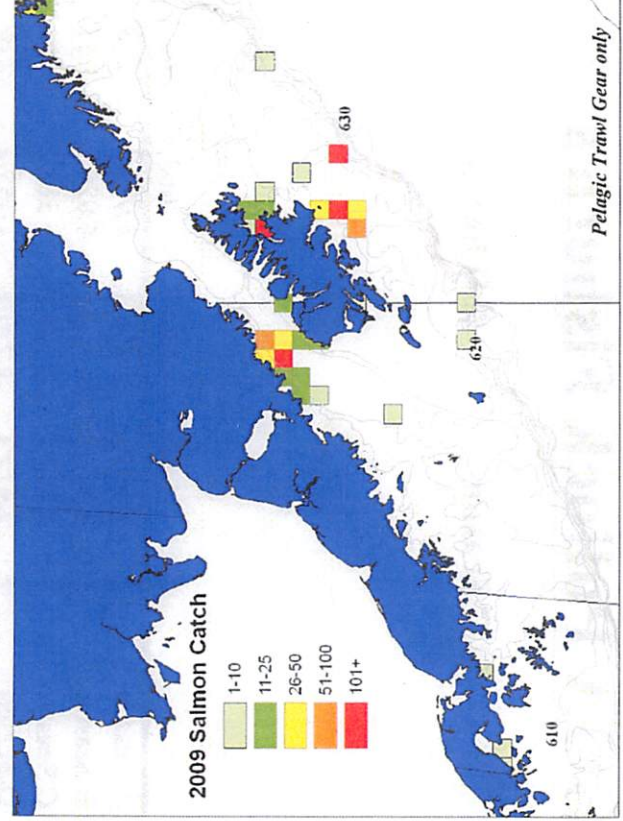
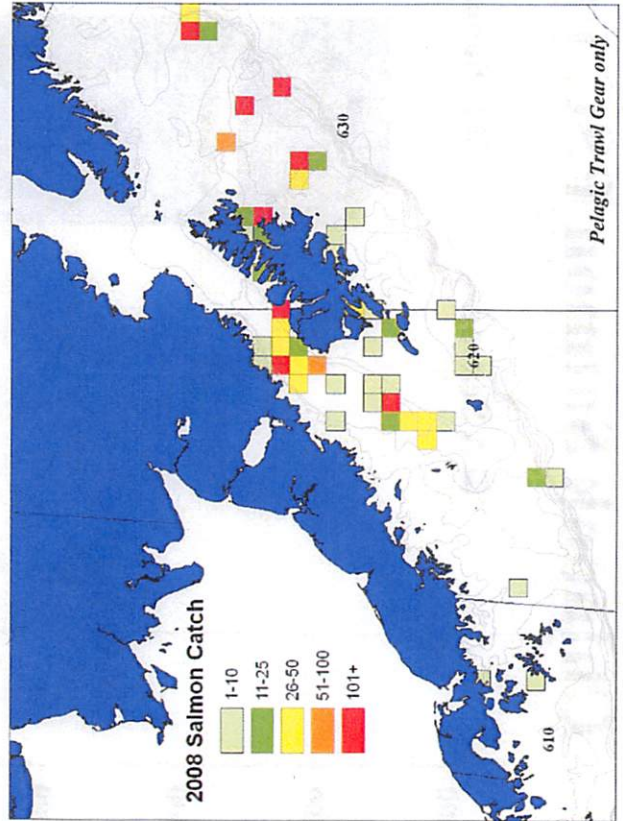
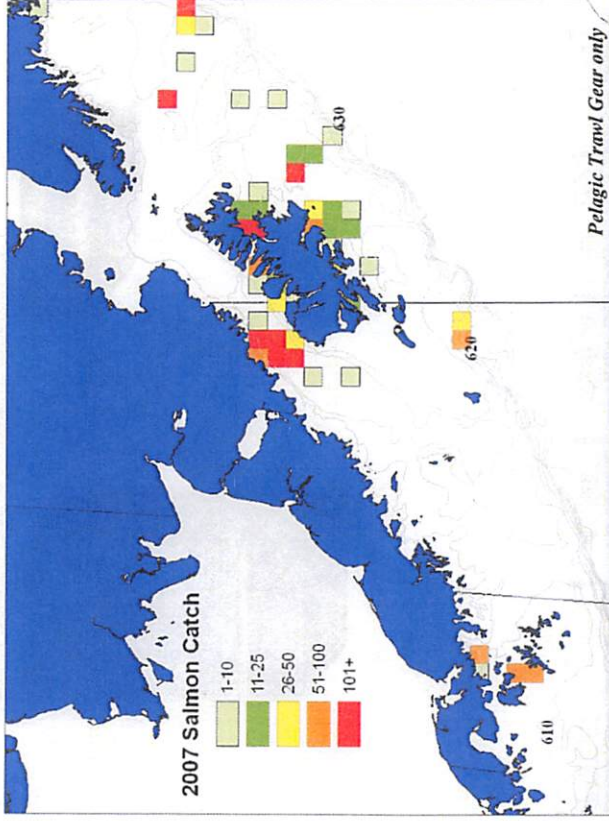
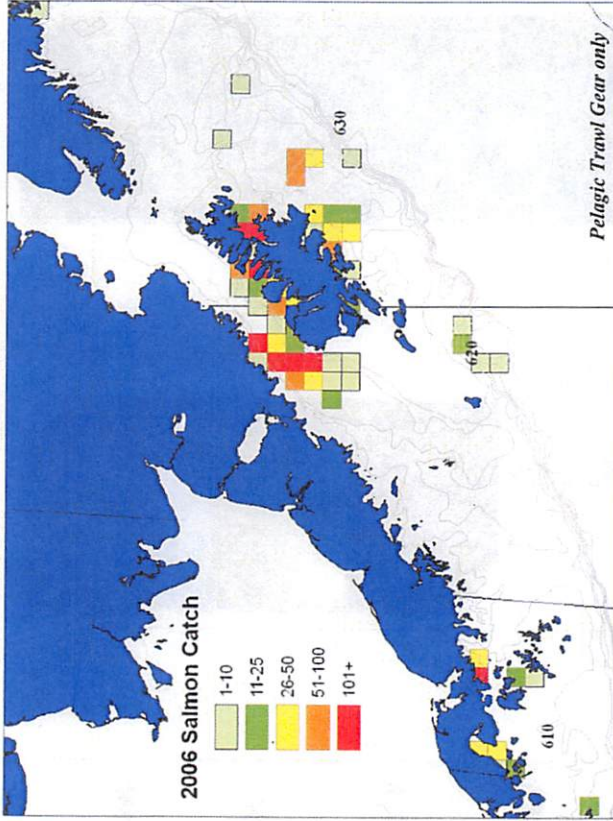
Shallow Water Complex	Season	Start Date	End Date	Limit (mt)	Total Mortality (mt)
	1	Jan 20	Apr 1	450	193
	2	Apr 1	Jul 1	100	349
	3	Jul 1	Sep 1	200	142
	4	Sep 1	Sep 30	150	149
TOTAL				900	834
Deep Water Complex	Season				
	1	Jan 20	Apr 1	100	185
	2	Apr 1	Jul 1	300	240
	3	Jul 1	Sep 1	229	92
	4	Sep 1	Sep 30	0	29
TOTAL				800	547
Rockfish Pilot Program*				170	27
Fall Halibut Allocation		Oct 1	Nov 1	300	396
Total Halibut Mortality				2,000	1,785

* Reallocation of 139 mt of halibut mortality from the Rockfish Pilot Program to the fall halibut allocation on November 15, 2009

Chinook Salmon PSC in GOA Pollock Fisheries



2006 - 2009 Observed Chinook Salmon PSC



Status of FMP Amendments
December 4, 2009

FMP Amendment Status: <u>Actions Since October 2009</u>	Date of Council Action	Start Regional Review	Transmittal Date of Action to NMFS HQ for Review	Proposed FMP Amendment Notice of Availability Published	Proposed Rule Published in Federal Register	Final Rule or Notice of Approval Published in Federal Register
Amendment 30 (KTC) – Arbitration System Changes	April 2008	PR: 1/28/09				
Amendment 31 (KTC) – C-Share Active Participation	April 2008					
Amendment 34 (KTC) – Adjustments to GOA sideboards for BSAI crab vessels	Oct 2008					
Amendment 85 (GOA) – BSAI Sideboard exemption in GOA Rockfish Program Approved June 18, 2009	Oct 2008	PR: 1/30/09 FR: 9/15/09	PR: March 16, 2009 FR: October 20, 2009	March 24, 2009 74 FR 12300 Comment period ended May 26, 2009	April 6, '09; May13'09 74 FR 15420; 22507 Comment period ended 5/21/09;6/22/09	November 3, 2009 74 FR 56728 Effective December 3, 2009
Amendment 86 (GOA) – fixed gear endorsement for Pacific cod	April 2009	PR:12/4/09				
Amendment 91 (BSAI) Chinook Salmon bycatch management or the BS pollock fishery	April 2009					
Arctic FMP and Amd 29 (KTC FMP) Approved August 17, 2009	February 2009	NOA and PR: 4/9/09 FR: 9/22/09	NOA and PR: 5/19/09 FR: 10/15/09	May 26, 2009 74 FR 24757 Comment period ended July 27, 2009	June 10, 2009 74 FR 27498 Comment period ended July 27, 2009	November 3, 2009 74 FR 56734 Effective December 3, 2009
Amendment 95 (BSAI) – separate skates from “other species” complex	October 2009					

Status of FMP Amendments
December 4, 2009

FMP Amendment Status: <u>Actions Since October 2009</u>	Date of Council Action	Start Regional Review	Transmittal Date of Action to NMFS HQ for Review	Proposed FMP Amendment Notice of Availability Published	Proposed Rule Published in Federal Register	Final Rule or Notice of Approval Published in Federal Register
Amendment 94 (BSAI)-require modified nonpelagic trawl gear for directed flatfish fishing in the Bering Sea subarea.	October 2009					
Amendments to all FMPS to authorize permit fees	October 2009					

Status of Regulatory Amendments
December 4, 2009

Regulatory Amendment Status: <u>Actions Since October 2009</u>	Date of Council Action	Start Regional Review of Rule	Transmittal Date of Rule to NMFS Headquarters	Proposed Rule in <i>Federal Register</i>	Final Rule Published in <i>Federal Register</i>
Groundfish/Crab Regulatory Amendments					
Revise MRA accounting period for non-AFA C/Ps for selected groundfish species in the BSAI * Intend to withdraw proposed rule	December 2006	PR: 7/2/08 W/Draw PR 9/1/09	PR: Jan. 28, 2009 Withdraw of PR December 3, 2009	February 13, 2009 74 FR 7209 Comment period ended March 16, 2009	
CDQ regulation of harvest	MSA requirement Council - June 2007	PR: 12/17/08			
Observer Program regulation revisions	April 2008	PR: 2/25/09	PR: September 8, 2009	September 30, 2009 74 FR 50155 Comment period ended October 30, 2009	

Status of Regulatory Amendments
December 4, 2009

Regulatory Amendment Status: <u>Actions Since October 2009</u>	Date of Council Action	Start Regional Review of Rule	Transmittal Date of Rule to NMFS Headquarters	Proposed Rule in <i>Federal Register</i>	Final Rule Published in <i>Federal Register</i>
Groundfish/Crab Regulatory Amendments					
Allow online transfers for CDQ , crab IPQ, and cooperatives	NMFS	PR: 1/6/09 FR: 7/22/09	PR: May 4, 2009 FR: 9/21/09	May 26, 2009 74 FR 24762 Comment period ended June 10, 2009	October 7, 2009 74 FR 51515 Effective Nov. 6, 2009
BSAI fixed gear parallel fishery management measures	June 2009				
Proposed BSAI groundfish harvest specifications for 2010 and 2011	October 2009	PR:10/29/09	PR:11/13/09	December 2, 2009 74 FR 63100 Comment period ends January 4, 2010	
Proposed GOA groundfish harvest specifications for 2010 and 2011	October 2009	PR:10/20/09	PR:11/13/09	November 30, 2009 74 FR 62533 Comment period ends December 30, 2009	
Remove weighing req. for crab landings & rept. for processed product and remove requirement for preliminary AFA coop rept.	NMFS				
eLandings changes to improve and update methods and procedures	NMFS				
Permits requirements-improve efficiency, flexibility and clarify regulatory text	NMFS				

Status of Regulatory Amendments
December 4, 2009

Regulatory Amendment Status: <u>Actions Since October 2009</u>	Date of Council Action	Start Regional Review of Rule	Transmittal Date of Rule to NMFS Headquarters	Proposed Rule in <i>Federal Register</i>	Final Rule Published in <i>Federal Register</i>
Halibut Regulations					
Charter vessel moratorium	April 2007	PR: 9/29/08 FR: 9/4/09	PR: 2/25/2009 FR: 12/2/09	April 21, 2009 74 FR 18178 Comment period ended June 5, 2009	
Halibut charter catch sharing plan	Oct 2008				
Subsistence Halibut – Include Certain Rural Residents	June 2008	PR:6/22/09 FR: 9/15/09	PR: July 21, 2009 FR: October 20, 2009	August 6, 2009 74 FR 39269 Comment period ended Sept. 8, 2009	November 4, 2009 74 FR 57105 Effective December 4, 2009
Remove halibut/sablefish quota from initial recipients who never have fished or transferred quota	June 2006	PR: 8/12/09			
Establish new minimum vessel ownership criteria for using hired skipper of 12 months and 20% interest	December 2007				
Other					
Notice of 2009 standard prices and fee percentage for the IFQ cost recovery program in the halibut and sablefish fisheries	NMFS	11/25/09	December 3, 2009		

Regulatory Actions Completed in 2009
December 4, 2009

- Notice of EFP application – Halibut survival rates: January 22, 2009; 74 FR 3992
- 2009 Chiniak Gully closure –rescinding closure: January 21, 2009; 74 FR 3449
- BSAI pollock and GOA pollock and Pacific cod 2009 TAC adjustments: BSAI: 1/2/09, 74 FR 38 GOA: 1/5/09, 74 FR 233
- Interagency Electronic Reporting System: December 15, 2008; 73 FR 76136
- Amendment 73/77 Removing Dark Rockfish from the BSAI and GOA FMPs: December 31, 2008; 73 FR 80307
- VMS dinglebar gear exemption: January 21, 2009; 74 FR 3446
- BSAI Groudfish 2009/10 Harvest Specifications: February 17, 2009;74 FR 7359
- GOA Groundfish 2009/10 Harvest Specifications: February 17, 2009; 74 FR 7333
- Annual IPHC Regulations: March 19, 2009; 74 FR 11681
- Revisions to MRAs in GOA arrowtooth fishery: March 27, 2009; 74 FR 13348
- Revision to Area 4E seabird avoidance measures: March 27, 2009; 74 FR 13355
- GOA pollock trip limit revisions: April 21, 2009; 74 FR 18156
- Amendment 27 (KTC) Custom processing: May 28, 2009; 74 FR 25449
- Implement 1-Fish Bag Limit in Area 2C: May 6, 2009; 74 FR 21194
- Amendments 62/62: Single Geographic Location and AFA Housekeeping: July 17, 2009; 74 FR 34701
- Amendments 92/82 to BSAI and GOA FMPS - Trawl License Latency: August 14, 2009; 74 FR 41080
- Amendment 28 (KTC) – Post delivery transfers: August 14, 2009; 74 FR 41092
- Amendment 90 (BSAI) Post delivery transfers for Amendment 80 coops & GOA Amendment 78 Rockfish Post-Delivery Transfers: August 21, 2009; 74 FR 42178
- Amendments 33 (KTC) – Revisions to Loan Program: September 1, 2009; 74 FR 45131



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

*National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668*

AGENDA B-2
Supplemental
DECEMBER 2009

November 19, 2009

Eric Olson
Chairman
North Pacific Fishery Management Council
605 W. Fourth Avenue, Suite 306
Anchorage, Alaska 99501

Dear Chairman Olson:

The National Marine Fisheries Service (NMFS) published a proposed rule in September 2009 to amend several regulations implementing the North Pacific Groundfish Observer Program (Observer Program). The proposed rule (Enclosed) would amend administrative, technical, and procedural requirements applicable to observer providers, observers, and industry participating in the Observer Program. The North Pacific Fishery Management Council (Council) adopted these changes at its April 2008 meeting and deemed that these regulations would meet its intent for the proposed action. We are considering four changes to the proposed rule as we proceed to the final rule stage. Additional technical clarifications to the proposed rule may be identified as the final rule is developed and undergoes review. Section 304(b)(3) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires that we consult with the Council before making any revisions to the proposed regulations. This letter describes the changes we are considering and provides the basis for our consultation with the Council at its December 2009 meeting.

The proposed rule addresses six issues; we are considering changes to "Issue 2: Observer Conduct" and "Issue 5: Observer Cost Information" in the final rule. We identified two technical clarifications needed under Issue 2. Two changes are also anticipated under Issue 5: one resulting from public comment received on the proposed rule; and one resulting from NMFS's desire and authority to collect observer cost information on a continual basis, consistent with the purpose and need for the action and with other economic data collection programs adopted by the Council and administered by NMFS.

Observer Conduct

The proposed rule under "Issue 2: Observer Conduct" would require observer providers to develop and maintain policies addressing observer conduct. Observer provider policies would address the use of alcohol and drugs, and sexual conduct, in connection to the observer's official duties. As explained in the preamble to the proposed rule, this requirement would replace regulations prohibiting observers from using or possessing illegal drugs or engaging in sexual contact with vessel or plant personnel, and requiring observer compliance with NMFS's alcohol and drug policies. We are contemplating a minor wording change to the final rule to clarify that observer providers must implement and monitor observer compliance with the conduct policies.



The regulatory wording in the proposed rule at 50 CFR 679.50(i)(2)(iii) states that:

- (A) An observer provider must develop and maintain a policy addressing observer conduct and behavior for their employees that serve as observers.

In the final rule we would clarify the 50 CFR 679.50(i)(2)(iii) wording to require that:

- (A) An observer provider must develop, maintain, and ***implement*** a policy addressing observer conduct and behavior for their employees that serve as observers.

This change emphasizes the shift in the responsibility of managing observer conduct from NMFS to the observer's employer. This clarification better fulfills the purpose and need for this regulatory amendment by requiring observer providers to implement and manage their conduct policies, rather than just maintaining paperwork which may meet the letter of proposed requirement but not meet the objective of requiring observer providers to monitor observer conduct.

The proposed rule under Issue 2 would also require an observer provider to provide a copy of its conduct policies to observers, observer candidates, and the Observer Program Office by February 1 of each year. It is not practical for observer providers to comply with the proposed regulation as worded since all observers and observer candidates who may apply to work for a provider may not be known by February 1 of each year. The February 1 deadline was included in the proposed rule with the intention of providing a deadline by which the conduct policies should be provided to the Observer Program, consistent with other observer provider data submission deadlines (e.g., a copy of contracts between observer providers and the industry and certificates of insurance). Therefore, we intend to modify the regulatory text of the final rule to clarify that the Observer Program Office must receive copies of the conduct policies by February 1 of each year, and separately, that copies be provided to all active observers and observer candidates employed by a provider.

Observer Cost Information

Regulatory amendments under Issue 5 will provide NMFS and the Council with observer coverage cost information to inform economic analyses where observer costs are a factor. The alternative selected by the Council in April 2008 would require observer providers to submit copies of their invoices for services provided in the North Pacific groundfish fisheries to NMFS as the source of the observer cost information. The proposed rule preserves the intent of the Council's April 2008 motion and states that observer providers would be required to submit invoices to NMFS on a monthly basis for a full calendar year every third year. The Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) prepared for this action describes the minimal burden for observer providers to provide this information to NMFS and the shortcomings of an episodic data collection program. NMFS expressed concerns with the proposed three-year data collection interval in the preamble to the proposed rule. The preamble highlighted that a three-year interval would delay NMFS's ability to detect trends in observer coverage costs. Furthermore, a periodic data collection cycle would reduce the precision of any temporal variability evaluation. As noted in the preamble to the proposed rule, the Council's preferred alternative would not allow for a complete, continuous overview of the industry's observer costs due to the three-year lapse between data collection cycles. Finally, a three-year lapse in data collection cycles departs from NMFS's other ongoing economic data collection


programs which collect economic data annually. When compared to other annual collection programs, a three-year collection cycle would be an anomaly and certainly less robust.

Based on the analysis and record discussed above, we would modify the final rule to require that observer providers submit copies of their invoices to NMFS on a continual monthly basis rather than doing so only every three years as stated in the proposed rule. As stated in the proposed rule, invoices must be submitted to NMFS within 45 days of the date on the invoice. This provides a grace period between the time invoices are prepared and when they must be received by NMFS.

We are also contemplating a change to the final rule based on public comment on Issue 5 in the proposed rule. Per the Council's motion, the preamble to the proposed rule lists the items required to be contained on the invoices submitted to NMFS. The corresponding observer's name is listed as a required invoice element. One observer provider commented that it would have to substantially modify its billing invoice in order to include observer name. The observer provider stated that it bills clients at the beginning of the month, before an observer is selected and assigned to the client. Because this element would impose a substantial compliance burden on the observer provider and because it is not imperative for NMFS to have the observer's name on the invoice to conduct economic analyses, NMFS intends to exclude "observer name" from the list of required elements in the final rule.¹

NMFS staff will be available at the Council's December 2009 meeting to respond to any questions on the changes described above, as well as the consultation process under section 304(b)(3) of the MSA. We appreciate the Council's patience and willingness to engage in this process as we strive to develop a consultation protocol that meets the intent of the MSA, is timely, and provides meaningful opportunity to the Council to provide input on changes to proposed rules.

Sincerely,


for Robert D. Mecum
Acting Regional Administrator

Enclosure – September 30, 2009 proposed rule

¹ NMFS inadvertently excluded "observer name" as a required element in the proposed regulatory text. Therefore, the regulatory text will not require modification as a result of this public comment. The preamble to the final rule will discuss the change however.

SUPPLEMENTARY INFORMATION:

Throughout this document, "we", "us", and "our" refer to EPA.

I. General Information**A. What Should I Consider as I Prepare My Comments for EPA?**

1. Submitting CBI. Do not submit this information to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify this ANPR by docket number and other identifying information (subject heading, Federal Register date and page number).
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

B. Where Can I Get a Copy of This Document and Other Related Information?

In addition to being available in the docket, an electronic copy of the Advanced Notice of Proposed Rulemaking is available at <http://www.epa.gov/region09/air/navajo/index.html#upcoming>. Following signature by the EPA Regional Administrator, a copy of this extension notice will be posted at the same Web site.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: September 22, 2009.

Jane Diamond,
Acting Regional Administrator, Region IX.
[FR Doc. E9-23633 Filed 9-29-09; 8:45 am]
BILLING CODE 6560-50-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 679**

[Docket No. 080228322-8338-01]

RIN 0648-AW24

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Observer Program

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes this rule to amend regulations supporting the North Pacific Groundfish Observer Program (Observer Program). This action is necessary to improve the operational efficiency of the Observer Program, as well as improve the catch, bycatch, and biological data provided by observers for conservation and management of the North Pacific groundfish fisheries, including that provided through scientific research activities. The proposed rule is intended to promote the goals and objectives of the Fishery Management Plan (FMP) for Groundfish of the Bering Sea and Aleutian Islands Management Area and the FMP for Groundfish of the Gulf of Alaska.

DATES: Written comments must be received by October 30, 2009

ADDRESSES: Send comments to Sue Salvesson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by "RIN 0648-AW24," by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at <http://www.regulations.gov>.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Fax: 907-586-7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be

posted to <http://www.regulations.gov> without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS (see ADDRESSES) and by e-mail to David_Rostker@omb.eop.gov or by fax to 202-395-7285.

Copies of the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) prepared for this action may be obtained from the NMFS Alaska Region website at <http://alaskafisheries.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Brandee Gerke, 907-586-7228.

SUPPLEMENTARY INFORMATION:**Background**

NMFS manages the U.S. groundfish fisheries in the Exclusive Economic Zone (EEZ) of the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA) under the FMP for Groundfish of the BSAI and the FMP for Groundfish of the GOA, respectively. The North Pacific Fishery Management Council (Council) prepared these FMPs pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1851-1891d. Regulations implementing the FMPs appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

The Observer Program provides the administrative framework for observers to obtain information necessary for the conservation and management of the groundfish fisheries managed under the FMPs. Regulations implementing the Observer Program at § 679.50 require observer coverage aboard catcher vessels, catcher/processors, motherships, and shoreside and stationary floating processors that participate in the groundfish fisheries off Alaska. These regulations also establish vessel, processor, and observer provider responsibilities relating to the Observer Program.

This proposed rule would amend regulations at § 679.2 and § 679.50 applicable to observer providers, observers, and industry required to carry observers. The proposed regulatory amendments are organized under six issues and would: remove regulations that are unnecessary, impractical to apply, or are considered to be unenforceable; revise regulations to explicitly allow observer providers to provide observers for exempted fishing permit-based and scientific research permit-based activities; add regulations to prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day; require observer providers to report to NMFS information about the cost of providing observers; and establish a deadline when observer providers must submit to NMFS, an exemplary copy of each of type of contract they enter into with observers and the fishing industry to NMFS. The Council selected a preferred alternative for each of these issues at its April 2008 meeting. This action is necessary to improve the operational efficiency of the existing Observer Program, as well as to improve the catch, bycatch, and biological data provided by observers for conservation and management of the North Pacific groundfish fisheries, including those provided through scientific research activities.

Issue 1: Observer Certification and Observer Provider Permitting Process

Persons seeking to provide observer services or work as an observer under § 679.50 must obtain an observer provider permit or observer certification, respectively, from NMFS. The granting or denial of observer provider permits and observer certifications are discretionary agency actions. This proposed rule expands NMFS' discretion to consider additional needs and objectives of the Observer Program and other relevant factors when considering whether or not to issue a new observer provider permit or observer certification.

Existing regulations at § 679.50 obligate NMFS to grant a provider permit to an applicant who submits a complete application, meets narrowly-defined criteria regarding criminal history and past performance on federal contracts, and has no conflict(s) of interest with the fishing industry. These regulations prevent NMFS from exercising its discretion to not issue permits when other concerns or inconsistencies with the Observer Program's goals and objectives have been identified in a permit application. This proposed rule would expand

NMFS' discretion by broadening the conditions the observer provider permit application review board may consider in deciding whether or not to issue a new permit. Moreover, this proposed rule would remove the application evidentiary period at § 679.50(i)(1)(iv). This would allow NMFS to tailor a time period in which an applicant may provide additional information on a case-by-case basis.

Current regulations at § 679.50(j)(1)(iv) provide an appeal forum to a candidate for observer certification who fails training to the extent that the program certification official determines that the candidate demonstrates "unresolvable deficiencies" and should not be allowed to re-enter a subsequent training class. Most candidates who fail the initial training are permitted to retake it. However, in the rare instance that a candidate's performance is deficient to the extent he or she is unlikely to improve performance, the certification official can issue an Initial Agency Decision (IAD) denying readmission into a training class. The same appeal forum is provided at § 679.50(i)(1)(v) for an observer provider applicant who is denied an observer provider permit. As explained in the RIR/IRFA for this proposed rule, the appeal forum at § 679.50(j)(1)(iv) has only been activated on two occasions and has not resulted in the subsequent certification of an observer candidate. One appeal resulted in the decision that an observer could retake training; however, that candidate never returned to training. When it has been activated, the appeal process requires both Observer Program staff and NOAA General Counsel to devote a substantial amount of time to the appeal. Moreover, the appellate forum process can consume up to a year before an appeal is resolved, a situation that does not facilitate an observer candidate's interest in obtaining training and a certification for employment within reasonable time frame. Therefore, NMFS proposes to remove the appeal forum provided for observer candidates who fail training and who are notified that they may not retake the course, and for observer provider applicants whose permit applications are denied to better allocate scarce agency resources. This proposed rule does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued.

Issue 2: Observer Conduct

Current regulations at § 679.50(j)(2)(ii)(D) attempt to control

observer conduct so that certified observers present themselves professionally on vessels, at plants, at NMFS sites, and in fishing communities. NMFS has found these regulations impractical to apply and potentially unenforceable. For example, for NMFS to decertify an observer who has violated the Observer Program's drug and alcohol policy, or the regulation that prohibits observers from engaging in physical sexual contact with personnel of the vessel or processing facility to which the observer is assigned, NMFS must establish connection between the unsanctioned behavior and the collection of reliable fisheries data. Proving that such a connection exists, especially in cases in which the unsanctioned behavior occurs outside of the workplace, can be very difficult. Moreover, some of the observer conduct regulations are vague and impractical to apply. For example, current regulations require observers to "refrain from engaging in any activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole." (50 CFR 679.50(j)(2)(ii)(D)). The regulations offer observers no guidance as to the types of behavior that is prohibited, nor does NMFS have any practical means to enforce adherence to these vague standards.

Due to the impracticality of applying these regulations and proving these connections, NMFS has determined that it should not attempt to regulate observer behavior that does not directly affect observer job performance and views the prescription of conduct standards as an employer responsibility. Therefore, NMFS proposes to remove current regulations at § 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual conduct, and to remove references to the Observer Program's drug and alcohol policies in the regulations.

In recognition of the fact that drug and alcohol use and physical sexual activity while deployed may affect an observer's ability to perform his or her duties and may compromise workplace safety, regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior related to drugs, alcohol, and physical sexual conduct. Each provider would be required to submit a copy of its policy to NMFS by February 1 of each year. A requirement would be added under § 679.50(i)(2) that observer providers notify NMFS within 72 hours upon determination that an observer has

violated the provider's conduct policy. This notification shall include the facts and circumstances of the violation. NMFS intends to use this information when assessing observer performance and quality of data collection.

NMFS would not define standards for these policies; thus, providers would exercise discretion when developing their policies. However, NMFS continues to have an interest in the providers' conduct policies. Thus, if NMFS determines that the providers' policies lead to a negative impact on the quality of data collected by observers, NMFS would reconsider this action. If that occurs, NMFS would have to consider additional authorization and funding to institute an effective system to regulate observer conduct and behavior.

Issue 3: Providing Observers for Research Activities

Current regulations at § 679.50(i)(3)(i) prohibit observer providers from having a direct financial interest, other than the provision of observer services, in a North Pacific fishery managed under an FMP. However, observer providers have historically provided observers and "scientific data collectors" to researchers operating under exempted fishing permits (EFPs) and scientific research permits (SRPs). While the regulations do not specifically prohibit observer providers from providing observers or scientific data collectors in support of these activities, they are ambiguous as to whether these activities are allowed under the conflict of interest regulation. This proposed rule would clarify that observer providers are not prohibited from supplying observers and scientific data collectors for fishing conducted pursuant to EFPs and for scientific research activities.

Issue 4: Fishing Day Definition

Regulations at § 679.50(c)(1)(v) require a catcher/processor or catcher vessel equal to or greater than 60 ft (18.3 m) length overall (LOA), but less than 125 ft (38.1 m) LOA, to carry an observer for at least 30 percent of its fishing days per calendar quarter and at all times during at least one fishing trip per calendar quarter while directed fishing for groundfish. A "fishing day" is defined at § 679.2 as a 24-hour period, from 0001 hours Alaska local time (A.l.t.) through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Under these regulations, an observer must be onboard a vessel only at some point, no matter how briefly, during a 24-hour period when fishing occurs and groundfish are retained, to count as a

"fishing day" for the purpose of observer coverage requirements. While many vessels operate with an observer as they would without an observer, NMFS suspects that others intentionally alter their fishing pattern to meet minimum observer coverage requirements. Often, these fishing events are not representative of normal fishing duration, location, and depth, and catch composition may vary significantly from that associated with the vessel's normal, legitimate fishing pattern. These non-representative events bias the observer information NMFS relies on for effective management of the groundfish fisheries.

NMFS' Office of Law Enforcement has also documented instances in which vessel operators intentionally structure fishing activities to fish unobserved until late in the day, pick up an observer and make a short tow prior to midnight, make one more tow immediately after midnight, and then return the observer to port. Additional fishing activities then occur during the remainder of the second day, during which the observer is not onboard. Under the current regulations, this scenario counts for two "observer" days and may result in biased observer data.

To reduce the potential for biasing observer data, the proposed rule would revise the definition of "fishing day" at § 679.2 to be a 24-hour period, from 1201 hours A.l.t. through 1200 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. It will require that an observer be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor will not be considered fishing days, as is currently the case.

This revision would reduce the cost-effectiveness of making a fishing trip solely to manipulate observer coverage requirements. Revising the definition of the 24-hour period from the current midnight-to-midnight definition (from 0001 hours through 2400 hours Alaska local time) to a noon to noon definition (1201 hours through 1200 hours Alaska local time) is intended to discourage vessels from making sets or tows solely for the purpose of obtaining observer coverage around the transitional hours from one fishing day to the next.

Issue 5: Observer Cost Information

Under the current system for Alaska groundfish fishery observer services, vessels and plants required to take observers under § 679.50 contract directly with certified observer providers. Because NMFS is not a party to the contracts, NMFS lacks

information on the actual costs for observer coverage incurred by the groundfish fishery. Without this information, NMFS has had to rely on estimates of the average daily cost of observer coverage across all North Pacific groundfish fisheries to assess the economic effects of various management regimes on impacted entities. Industry has commented that although observer costs vary by region and sector, NMFS' estimates do not take that variability into account. Several factors affect the daily cost of observer coverage; for example, deploying observers to remote locations for short periods of time results in higher costs per day than deploying observers to ports with regularly scheduled air service or in fisheries of substantial duration. NMFS' analyses would be improved by the acquisition of actual cost information.

The MSA authorizes the collection of fees from North Pacific fishery participants to pay for implementing a fisheries research plan, including observer coverage. More accurate information on the cost of the existing observer program would help the Council and NMFS determine appropriate fees and the extent of observer coverage afforded by those fees when a fee-based research plan is developed and implemented.

This proposed rule would require observer providers to submit to NMFS copies of all individual invoices for observer coverage in the North Pacific groundfish fishery. Every third year would be a reporting year for submitting invoices. Observer providers would be required to submit these invoices to NMFS for a full calendar year in each reporting year. If the program were implemented in 2010, providers would be required to submit copies of actual invoices during 2010. Invoices would be submitted again in the next reporting year (e.g., 2013, 2016, 2019).

The Council recommended that observer providers submit copies of actual invoices to NMFS because these are less burdensome than requiring the providers to prepare and submit summarized expense reports; it allows NMFS to understand the full cost of providing observer coverage in the groundfish fisheries off Alaska; it provides for verifiable data; and it allows for increased flexibility in data analysis compared to requiring summarized information from providers. The RIR/IRFA for this action recognizes that under this alternative the primary burden for data-entry and analysis would be shifted from the observer providers to NMFS. However, this alternative would provide NMFS with independently verifiable

information and enhanced analytical flexibility over collecting summarized expense reports from the observer providers because NMFS will be able to confirm the number of days an observer was deployed to a particular vessel and bin the raw invoice information as analytical needs dictate.

As these invoices contain proprietary business information, NMFS will consider this information as business confidential information afforded the protections of section 402 of the MSA. Accordingly, NMFS will collect and maintain this information as it does with other confidential data, and will limit access to unaggregated invoice information to NMFS staff.

The Council also recommended a three-year invoice submission cycle to accommodate ongoing data collection while minimizing the reporting burden on observer providers. NMFS has found shortcomings with the three-year data collection cycle preferred by the Council, as it would delay NMFS' ability to detect trends in observer coverage costs and limit the precision in evaluating the temporal variability of these costs. The Council's preferred alternative would not allow for a complete, continuous overview of the industry's Observer Program costs due to the three-year lapse between data collection cycles; however, it would provide information that NMFS currently needs and lacks. The Council could revisit this issue in the future should NMFS and the Council determine that data are needed more frequently from observer providers.

During a reporting year, within 45 days of the invoice date, observer providers would be required to submit to NMFS a copy of each invoice for services provided that year. NMFS seeks public comment on this submission deadline to help determine if this time period is reasonable for observer providers to provide copies of invoices to NMFS. Invoices shall include the following information: the name of each individual catcher/processor, catcher vessel, mothership, stationary floating processor, or shoreside processing plant to which the invoice applies; the name of the observer who worked aboard each catcher/processor, catcher vessel, mothership, stationary floating processor, or shoreside processing plant; the dates of service for each observer on each catcher/processor, catcher vessel, mothership, stationary floating processor, or shoreside processing plant; the rate charged in dollars per day for observer services; the total charge for observer services (number of days multiplied by daily rate); the amount charged for air transportation; and the

amount charged for other expenses, such as ground transportation, lodging, or excess baggage. These charges would be required to be separated and identified.

Issue 6: Miscellaneous Revisions

The proposed rule would establish a deadline by which observer providers must submit to NMFS an exemplary copy of a contract between the provider and the observer and the provider and the vessel or plant operator requiring observer service in the groundfish fisheries off Alaska. Existing regulations at § 679.50 require the submission of these contracts; however no deadline is specified. This proposed rule would establish a submission deadline of February 1 of each year, which corresponds with the deadline for submitting certificates of insurance required by § 679.50(i)(2)(x)(F). This issue was referenced as Issue 7 in the RIR/IRFA; however, the Council selected the "no action" alternative for Issue 6. Thus, for the purposes of this proposed rulemaking, this miscellaneous revision now comprises Issue 6.

Two other miscellaneous revisions analyzed under this issue in the RIR/IRFA have been subsequently removed from the proposed rule. The first minor revision would have corrected an erroneous reference to observer workload restrictions at § 679.50(c)(5)(i)(A). In developing this proposed rule it came to NMFS' attention that additional corrections to § 679.50(c)(5) were needed. Thus, this reference will be corrected in a separate rule making and is not addressed in this proposed rule. The other miscellaneous revision included in the RIR/IRFA would have corrected references to NMFS' Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website throughout the regulations at § 679.50, as the existing reference is now invalid. Because website references and content are subject to change, NMFS is proposing to exclude references to the Fisheries Monitoring and Analysis Division website from the regulations. This revision under Issue 6 is expected to have the intended effect of the Council's motion as the erroneous references will be revised in the regulations.

Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the regulatory amendment, other provisions of the MSA, and other applicable law,

subject to further consideration after public comment.

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

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see ADDRESSES).

The IRFA for this proposed action describes in detail the reasons why this action is being proposed; describes the objectives and legal basis for the proposed rule; describes and estimates the number of small entities to which the proposed rule would apply; describes any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; identifies any overlapping, duplicative, or conflicting Federal rules; and describes any significant alternatives to the proposed rule that accomplish the stated objectives of the MSA and any other applicable statutes that would minimize any significant adverse economic impact of the proposed rule on small entities.

The description of the proposed action, its purpose, and its legal basis are described elsewhere in the preamble and are not repeated here. The directly regulated entities are different under the different issues addressed in this proposed rule. Because the RFA is applicable only to businesses, non-profit organizations, and governments, observers fall outside of the RFA's scope, and are therefore not discussed in the IRFA.

Five observer provider companies are currently holding observer provider permits and are active in the North Pacific. These entities would be directly regulated by the proposed actions under Issues 2, 3, 5 and 6. All of the current observer provider companies are considered small entities under the RFA. The potential number of small observer provider firms that may be interested in obtaining a permit to provide observer services in the future would be regulated under Issue 1. However, the potential number of observer provider firms cannot be estimated, and because they represent a future scenario, they are not considered

directly regulated under the proposed action.

Trawl and hook-and-line catcher vessels (CVs) and catcher processors (CPs) subject to the 30 percent observer coverage requirements would be directly regulated by the proposed action in Issue 4. Trawl and hook-and-line CVs between 60 feet and 125 feet LOA and hook-and-line CPs between 60 feet and 125 feet LOA in the BSAI and GOA, with the exception of vessels participating in specific programs that require 100 percent observer coverage, would be directly regulated by actions under Issue 4. AFA trawl CVs subject to the 30 percent observer coverage requirements are categorized as large entities for the purpose of the RFA due to their affiliation with one another through the American Fisheries Act (AFA) pollock harvest cooperatives.

The table below summarizes all of the potentially directly regulated small entities, by sector, under Issue 4 of the proposed action. The IRFA likely overestimates the number of directly regulated small entities. NMFS does not have access to data on ownership and other forms of affiliation for most segments of the fishing industry operating off Alaska, nor does NMFS have information on the combined annual gross receipts for each entity by size. Absent these data, a more precise characterization of the size composition of the directly regulated entities impacted by this action cannot be offered.

TABLE 1. ESTIMATE OF THE NUMBER OF SMALL ENTITIES POTENTIALLY DIRECTLY REGULATED BY ISSUE 4 OF THE PROPOSED ACTION.

Sector	2006	2007
Observer Providers	5	5
Trawl CV >60' and ≤125'	39	23
Trawl CP >60' and ≤125'	12	10
H&L CV >60' and ≤125'	97	74
H&L CP >60' and ≤125'	11	11

Proposed actions under Issue 2 and Issue 5 would require additional recordkeeping and reporting requirements for the five observer providers currently supplying services to the Observer Program. Issue 6 actions would impose a deadline for submission of information that is already required of observer providers under existing regulations. Issue 2 actions would require observer providers to have observer policies related to alcohol, drugs, and sexual contact; provide NMFS a copy of the conduct policy by February 1 of each year; and to notify (including the underlying facts and

circumstances) NMFS of a violation of the observer provider's policies within 72 hours after the provider determines that an observer violated a policy. Current regulations at § 679.50(i)(2)(x)(I) require observer providers to notify NMFS of other types of conduct violations within 24 hours of becoming aware of the alleged violation; thus, this proposed action does not substantially alter that reporting requirement. It may take 20 minutes or less for an employee of the observer provider company to report this information to NMFS as fax or email are acceptable means of communication.

The proposed rule under Issue 5 would require observer providers to submit copies of billing invoices to NMFS for a full year, every third year. This recordkeeping and reporting requirement will not require the observer providers to modify or interpret their billing invoices. Observer provider companies should incur minor costs associated with copying and transmitting copies of their actual billing invoices to NMFS under the proposed rule for Issue 5. NMFS estimates that approximately six hours a year would be required for observer providers to email their invoices to NMFS with no additional expenses anticipated because observer providers have computers with internet access. If an observer provider mails copies of his or her invoices to NMFS, it is estimated to cost the observer provider approximately \$48 per year for paper, envelopes, and postage in addition to six hours of labor expected for copying and mailing.

The proposed rule under Issue 6 slightly modifies existing regulations by imposing a February 1 deadline for observer providers to submit to NMFS each type of contract they have entered into with observers or the fishing industry. Because regulations already require observer provider companies to submit this information to NMFS, and because most observer provider companies have been submitting this information by February 1 in the past, this regulatory amendment should impose virtually no additional net burden on the observer provider companies.

The analysis revealed no Federal rules that would conflict with, overlap, or be duplicated by the alternatives under consideration.

With regard to the economic burden of the proposed rule on small entities, the Council selected the least economically burdensome alternatives that met the purpose and need for action based upon the analysis in the RIR and IRFA. The Council selected the only

action alternative under Issue 2 and Issue 6. There were three action alternatives for Issue 5 and the Council selected the least economically burdensome alternative for observer providers by rejecting alternatives that would require providers to compile annual expense reports summarized by fishery or expense category. The alternative that would require observer providers to submit copies of invoices already being prepared as part of their standard bookkeeping was determined to be less burdensome than the other alternatives. The Council sought to further reduce the economic burden on observer providers by requiring them to submit copies of their invoices only once every three years.

Collection-of-Information

This proposed rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval under OMB Control Number 0648-0318. Public reporting burden is estimated to average 30 minutes per individual response for Copies of Invoices; 15 minutes for Observer Provider Contract Copies; two hours for Other Reports; 40 hours for Appeals for Observer Provider Permit Expiration or Denial of Permit (this item is removed with this action); and 40 hours for Observer Conduct and Behavior Policy, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The PRA package submitted for this proposed rule estimated that it will cost each observer provider \$1500 per reporting year to comply with this information submission requirement.

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS Alaska Region at the ADDRESSES above, and e-mail to David_Rostker@omb.eop.gov, or fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: September 24, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 679 as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 et seq.; 1801 et seq.; 3631 et seq.; Pub. L. 108—447.

2. In § 679.2, revise the definition of "Fishing day" to read as follows:

§ 679.2 Definitions.

Fishing day means (for purposes of subpart E of this section) a 24-hour period, from 1201 hours A.l.t. through 1200 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

3. In § 679.50:

A. Remove and reserve paragraph (i)(1)(iii)(B) and remove paragraphs (i)(1)(iv), (i)(2)(i)(C)(1), (j)(1)(iv)(B), and (j)(2)(ii)(D).

B. Redesignate paragraphs (i)(1)(v) through (viii) as paragraphs (i)(1)(iv) through (vii) respectively.

C. Redesignate paragraphs (i)(2)(i)(C)(2) through (4) as paragraphs (i)(2)(i)(C)(1) through (3), respectively.

D. Redesignate paragraphs (i)(2)(iii) through (xii) as paragraphs (i)(2)(iv) through (xiii), respectively.

E. Redesignate newly redesignated paragraphs (i)(2)(xi)(H) and (I) as paragraphs (i)(2)(xi)(I) and (J), respectively, and further redesignate paragraphs (i)(2)(xi)(J)(1) through (5) as paragraphs (i)(2)(xi)(J)(1)(i) through (v), respectively.

F. Redesignate paragraphs (i)(3)(i) through (iii) as paragraphs (i)(3)(ii) through (iv), respectively.

G. Redesignate paragraph (j)(1)(iv)(C) as paragraph (j)(i)(iv)(B).

H. Add paragraphs (i)(2)(iii), (i)(2)(xi)(H), (i)(2)(xi)(I)(1) introductory text, (i)(2)(xi)(I)(2), and (i)(3)(i).

I. Revise paragraphs (i)(1)(i)(A), (i)(1)(iii)(A) introductory text, (i)(2)(i)(B), (j)(1)(iii)(B) introductory text, (j)(1)(iv)(A), (j)(2)(ii) introductory text, and (j)(2)(ii)(A) through (C).

J. Revise newly redesignated paragraphs (i)(1)(iv), (i)(1)(vi)(B), (i)(2)(xi)(G) first sentence, (i)(2)(xi)(I) introductory text, (i)(2)(xi)(J)(1)(v), and (i)(3)(ii) introductory text.

The revisions and additions read as follows:

§ 679.50 Groundfish Observer Program.

* * * * *

(i) * * *

(1) * * *

(i) * * *

(A) The Regional Administrator may issue a permit authorizing a person's participation as an observer provider. Persons seeking to provide observer services under this section must obtain an observer provider permit from NMFS.

* * * * *

(iii) * * *

(A) The Regional Administrator will establish an observer provider permit application review board, comprised of NMFS staff, to review and evaluate an application submitted under paragraph (i)(1) of this section. The review board will evaluate the completeness of the application, the application's consistency with needs and objectives of the observer program, or other relevant factors, and the following criteria for each owner, or owners, board members, and officers if a corporation:

* * * * *

(iv) Agency determination on an application. NMFS will send a written determination to the applicant. If an application is approved, NMFS will issue an observer provider permit to the applicant. If an application is denied, the reason for denial will be explained in the written determination.

* * * * *

(vi) * * *

(B) The Regional Administrator will provide a written initial administrative determination (IAD) to an observer provider if NMFS' deployment records indicate that the permit has expired. An observer provider who receives an IAD of permit expiration may appeal under § 679.43. A permit holder who appeals the IAD will be issued an extension of the expiration date of the permit until after the final resolution of that appeal.

* * * * *

(2) * * *

(i) * * *

(B) Prior to hiring an observer candidate, the observer provider must provide to the candidate copies of NMFS-provided pamphlets and other literature describing observer duties.

* * * * *

(iii) Observer conduct. (A) An observer provider must develop and maintain a policy addressing observer conduct and behavior for their employees that serve as observers. The policy shall address the following behavior and conduct regarding:

(1) Observer use of alcohol;

(2) Observer use, possession, or distribution of illegal drugs and;

(3) Sexual contact with personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or non-performance of the observer's official duties.

(B) An observer provider shall provide a copy of its conduct and behavior policy by February 1 of each year, to:

(1) Observers, observer candidates and;

(2) The Observer Program Office.

* * * * *

(xi) * * *

(G) Observer provider contracts. Observer providers must submit to the Observer Program Office a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services under paragraphs (c) and (d) of this section, by February 1 of each year.

* * * * *

(H) Observer provider invoices.

Beginning in 2010 and in every third calendar year thereafter (e.g., 2013, 2016, 2019), certified observer providers must submit to the Observer Program Office copies of all invoices for observer coverage required or provided pursuant to paragraphs (c) and (d) of this section.

(1) Copies of invoices must be received by the Observer Program Office within 45 days of the date on the invoice and must include all reconciled and final charges.

(2) Invoices must contain the following information:

(i) Name of each individual catcher/processor, catcher vessel, mothership, stationary floating processor, or shoreside processing plant to which the invoice applies;

(ii) Dates of service for each observer on each catcher/processor, catcher

vessel, mothership, stationary floating processor, or shoreside processing plant. Dates billed that are not observer coverage days shall be identified on the invoice;

- (iii) Rate charged in dollars per day (daily rate) for observer services;
- (iv) Total charge for observer services (number of days multiplied by daily rate);
- (v) Amount charged for air transportation; and
- (vi) Amount charged by the provider for any other observer expenses, including but not limited to: ground transportation, excess baggage, and lodging. Charges for these costs must be separated and identified.

(j) *Other reports.* Reports of the following must be submitted in writing to the Observer Program Office by the observer provider via fax or email:

(1) Within 24 hours after the observer provider becomes aware of the following information:

(v) Any information, allegations or reports regarding observer conflict of interest or failure to abide by the standards of behavior described at paragraph (j)(2)(i) or (j)(2)(ii) of this section, or;

(2) Within 72 hours after the observer provider determines that an observer violated the observer provider's conduct

and behavior policy described at paragraph (i)(2)(iii)(A) of this section; these reports shall include the underlying facts and circumstances of the violation.

(3) * * *
 (i) Are authorized to provide observer services under an FMP for the waters off the coast of Alaska as required in this part, or scientific data collector and observer services to support NMFS-approved scientific research activities, exempted educational activities, or exempted or experimental fishing as defined in § 600.10 of this chapter.

(ii) Must not have a direct financial interest, other than the provision of observer or scientific data collector services, in a North Pacific fishery managed under an FMP for the waters off the coast of Alaska, including, but not limited to:

(j) * * *
 (1) * * *
 (iii) * * *
 (B) *New observers.* NMFS may certify individuals who, in addition to any other relevant considerations:

(iv) * * *
 (A) *Denial of a certification.* The NMFS observer certification official will issue a written determination denying observer certification if the candidate

fails to successfully complete training, or does not meet the qualifications for certification for any other relevant reason.

* * * * *
 (2) * * *
 (ii) *Standards of Behavior.* Observers must:

(A) Perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office;

(B) Accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment and;

(C) Not disclose collected data and observations made on board the vessel or in the processing facility to any person except the owner or operator of the observed vessel or processing facility, an authorized officer, or NMFS.

§ 679.50 [Amended]

4. At each of the locations shown in the Location column, remove the phrase indicated in the "Remove" column and replace it with the phrase indicated in the "Add" column for the number of times indicated in the "Frequency" column.

Location at § 679.50	Remove	Add	Frequency
Newly redesignated (i)(2)(i)(C)(3)	in paragraphs (i)(2)(vi)(C) and (i)(2)(vi)(D) of this	in paragraph (i)(2)(xi)(C) of this	1
(i)(2)(ii)(A)		under paragraph (i)(2)(xi)(E) of this	1
Newly redesignated (i)(2)(iv)(B)		in paragraph (i)(2)(xi)(C) of this	1
Newly redesignated (i)(2)(vii)(B)	paragraph (i)(2)(i)(B) of	in paragraphs (i)(2)(vii)(C) and (i)(2)(vii)(D) of this	1
Newly redesignated (i)(2)(xi)(C)	at paragraphs (i)(2)(x)(A)(1)(iii) and	paragraph (i)(2)(i)(B) of	1
(j)(1)(iii)(B)(2)(i)	at paragraph (i)(2)(x)(C)	at paragraphs (i)(2)(xi)(A)(1)(iii) and	1
(j)(1)(iii)(B)(2)(ii)	and (i)(2)(x)(C)	at paragraph (i)(2)(xi)(C)	1
(j)(1)(iii)(B)(3)	the candidate failed the training; whether	and (i)(2)(xi)(C)	1
(j)(1)(iii)(B)(4)(ii)	in the form of an IAD denying	the candidate failed the training and whether	1
(j)(1)(iii)(B)(4)(ii)	will issue a written IAD to the observer	in the form of a written determination denying	1
(j)(3)(iii)		will issue a written initial administrative determination (IAD) to the observer	1



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Alaska Fisheries Science Center
7600 Sand Point Way N.E.
Bldg. 4, F/AKC
Seattle, Washington 98115-0070

AGENDA B-2
Supplemental
DECEMBER 2009

907-789-6617

November 25, 2009

Mr. Eric Olson, Chair
North Pacific Fishery Management Council
Anchorage, Alaska 99501

Dear Mr. Olson:

We are writing in response to the recent letter from Chris Oliver, NPFMC Executive Director, regarding genetic stock of origin determination for chinook and chum salmon taken as bycatch in the Eastern Bering Sea (EBS) pollock fishery. We would also like to take advantage of this opportunity to provide a synopsis of past and present efforts devoted to determine stock composition of salmon bycatch in this fishery. The work we describe has been carried out with the support and cooperation of the Alaska Department of Fish and Game, ADFG, and the University of Alaska Fairbanks (Juneau), UAF; financial support for some of this work has been provided by the fishing industry.

The foundation for stock composition determination is sampling of salmon bycatch by observers deployed in the pollock fishery. Prior to 2009, bycatch sampling was not designed to support estimation of salmon bycatch stock composition. The Alaska Fisheries Science Center (AFSC) implemented changes in observer sampling procedures in the 2009 pollock fishery that increased sampling rates in order to provide improved information on stock composition and provide a basis for further improvements in sampling design. In a complementary effort, a statistical sampling design study was funded by the fishing industry and contracted by ADFG with AFSC cooperation. The results of the sampling design study (Jerry Pella and Hal Geiger <http://www.sf.adfg.state.ak.us/FedAidPDFs/sp09-08.pdf>) were presented to the Council in October 2009. AFSC has provided the Council with an outline of its plan to implement the report's recommendations commencing in 2011 commensurate with the implementation of BSAI Groundfish Plan Amendment 91 and the additional observer resources it will require.

We are preparing for the 2011 season by conducting the necessary sample size analyses and other sampling design work. Stock composition information which we obtain from observer samples of bycaught chinook and chum from the 2007 – 2009 fisheries will be useful in this analysis (see table attached). A primary objective of this analysis is to establish a sampling rate that will be used by observers in the 2011 fishery that will allow



for estimates of salmon bycatch stock composition. AFSC will report to the Council and public on the results of this work by the end of July 2010.

Samples collected by observers are used to make stock composition estimates in a three-step process: DNA extraction, genotyping, and the statistical comparison of genotypes to genetic baselines. AFSC estimates its current laboratory capacity for genotyping at 22,000 fish a year based on experience with chinook, chum and sockeye salmon. We now genotype 6,000 sockeye salmon a year as part of a cooperative Pacific Salmon Commission project with ADFG, and has genotyped as many as 7,000 additional chum and chinook within the same year at rates of up to 100 fish per day. AFSC expects laboratory processing capacity to be sufficient for needs of PSC/ADFG and salmon bycatch in 2011 and beyond. Plans call for laboratory processing rates to support completion of stock of origin analysis within six months of the end of each pollock season starting in 2011. For example, in recent years (1990 – 2007), a nominal sampling rate of 5% on the average total annual combined chinook and chum salmon bycatch from the Bering Sea pollock fishery (195,000) would have yielded 9,750 samples per year. Given the chinook bycatch cap which will be established by regulation under Amendment 91 and historical average annual chum bycatch levels, the possibility is remote of exceeding 10,000 salmon bycatch samples a year in 2011 and beyond. Note that the estimate of annual number of samples is based on annual salmon bycatches observed prior to 2011. Implementation of regulations controlling salmon bycatch in 2011 and beyond may be expected to reduce the long-term bycatches, thereby reducing the estimate of annual number of samples.

Based on our understanding of current schedules, this capacity is also sufficient to handle the number of samples currently awaiting extraction and genotyping (see attached table). Requirements for stock composition information could cause an acceleration of sample processing. Should schedules change, AFSC has recently established the viability of an option to speed up processing of chinook samples. Following the October, 2009 Council meeting, we initiated a pilot project to evaluate this approach for developing chinook salmon stock composition estimates. Using a genetic baseline provided by ADFG, we produced stock composition estimates for a subsample of 742 chinook bycatch samples from the 2008 pollock fishery. The fast turnaround time was made possible by using a collaborating genetics laboratory which has the capability to automate the time consuming step of genotyping the DNA extracts (see table attached). In general, the preliminary 2008 stock composition results are considered promising as they provide values for the major geographic groupings that are similar to those estimates of chinook stock composition of 2005 – 2007 found in the Environmental Impact Statement on Amendment 91

(<http://www.fakr.noaa.gov/sustainablefisheries/bycatch/salmon/deisl208.pdf>).

In the case of chum salmon it is anticipated that the automated approach will be feasible for samples in 2011 and beyond. For chum samples currently on hand, AFSC is working with another collaborating genetics laboratory, the University of Alaska Fairbanks, and

Mr. Eric Olson, Chair
November 25, 2009
Page 3

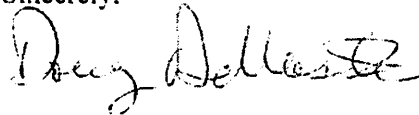
also reassigning existing staff to produce chum bycatch stock composition estimates in a time frame that supports the Council's process. We are also prepared to collaborate with other salmon genetics laboratories whenever circumstances may require more rapid genotyping or additional capabilities for estimating stock composition and we have outlined a process which will address concerns regarding chain-of-custody and confidentiality concerns when working with collaborating institutions.

Beyond estimating stock compositions, developing and maintaining the genetic baselines that cover the Pacific Rim from Korea to California also requires cooperation and collaboration with genetics laboratories and international forums such as the North Pacific Anadromous Fish Commission. NMFS and ADFG have an established process for coordinating and cooperating on the chinook baseline; we expect to continue our longtime collaboration with the University of Alaska Fairbanks and we continue to work with the University of Washington and other partners in the GAPS (Genetic Analysis of Pacific Salmonids) consortium.

The number of salmon tissue samples on hand, the status of their processing and the current schedules for processing are provided in the attached table. We will keep the Council apprised of our progress on this work and we will work with Council staff to adjust the schedule to support Council needs to the extent possible.

Please be assured that the Alaska Fisheries Science Center considers this genetic stock of origin determination research as a high priority. And please do not hesitate to contact us directly if you have further questions or concerns regarding this work.

Sincerely,



Douglas P. DeMaster
Science Director

Attachment

Table. Chinook and chum bycatch by year sampled, number of samples, scheduled completion of (1) DNA extraction, (2) genotyping and (3) formal stock composition report. Preliminary stock composition results may be available before the report.

Chinook Bycatch	No.	DNA extracted	Genotyping	Stock Composition Report
2007 B	1127	December 2009	March 2010	June 2010
2008	1500	Complete	December 2009	March 2010
2009	~600	January 2010	April 2010	June 2010
Chum Bycatch				
1988-2005	5000	Complete	March 2010	April 2011 *
2005	~400	Complete	December 2009	January 2010 *
2006	1564	March 2010	August 2010	October 2010
2007	1537	April 2010	November 2010	December 2010
2008	464	April 2010	November 2010	December 2010
2009	~1600	February 2010	May 2010	June 2010

* AYKSSI Proposal. Overall stock composition estimates not the intended objective of proposal, although can be used for gauge stock compositions over limited strata. Partially dependent on schedule of collaborating laboratory.

CHINOOK SHORES

WATERFRONT FISHING RESORT
PO Box 6555 – KETCHIKAN, AK 99901 – (907) 225-6700

November 24, 2009

Jand DiCosimo
NPFMC
605 West 4th, Suite 306
Anchorage, AK 99501-2252

RE: Charter Halibut Moratorium

Dear Ms. DiCosimo,

It has come to my attention that NMFS could potentially implement the charter halibut moratorium this fishing season in 2010. I have been a proponent of the moratorium as a means to stabilize our industry even though I don't qualify as I started my business in 2006. However, requiring a permit on board in the middle of a fishing season would undermine the integrity of many operators in our industry.

It is clear that the intent of the moratorium is to reduce the number of halibut charter operator's, however I don't believe it is the intent of NMFS to put honest hard working Alaskan's out of business. Requiring a halibut permit on board this season with no time to react would do just this.

I urge you and other plan coordinators to require that the halibut permit be on board the year after the moratorium is in place so we can make the required arrangements to stay in business if we choose.

Our industry has been taking reservations and deposits for the 2010 season since last summer and these people have already purchased their plane tickets. In order to fulfill our commitments we must know a full year in advance who can fish, who can't and where we can buy transferable permits if needed. We can't assume Federal Regulations as NMFS has been working on halibut moratoriums and setting control dates since 1997 to no avail.

if those of us on the cusp assume the worst and tell customers we might not be able to take them halibut fishing, or find someone who can because we still don't know who the permit holders are; we won't have any clients this summer. So we continue to play Russian roulette and assume that NMFS will do what is right and give our industry ample time and opportunity to react to the moratorium.

So the question of the day is: Will our industry have ample time and opportunity to transfer permits and/or hire permit holders by requiring the permits to be on board the year following implementation of the moratorium? We need a definite answer so we can plan for our future.

Sincerely



Jeff Wedekind
President Chinook Shores Inc.

CC: Dr. Jim Balsiger, Sue Salveson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SCOTT VAN VALIN, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 09-961 (RMC)
)	
GARY LOCKE, Secretary,)	
Department of Commerce, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

ORDER

For the reasons stated in the Memorandum Opinion filed simultaneously with this Order, it is hereby

ORDERED that Plaintiffs' motion for summary judgment [Dkt. # 17] is **DENIED**; and it is

FURTHER ORDERED that Defendants' motion for summary judgment [Dkt. # 20] and the Intervenor's motions for summary judgment [Dkt. ## 19 & 22] are **GRANTED**; and it is

FURTHER ORDERED that this case is **DISMISSED**; accordingly, this case is closed.

This is a final appealable order. *See* Fed. R. App. P. 4(a).

SO ORDERED.

Date: November 23, 2009

/s/
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT VAN VALIN, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 09-961 (RMC)
)	
GARY LOCKE, Secretary,)	
Department of Commerce, <i>et al.</i> ,)	
)	
Defendants.)	

MEMORANDUM OPINION

Pacific halibut are a highly desired catch off the coast of Southeast Alaska. This lawsuit pits operators of charter fishing vessels (“Charter Operators”)¹ against the local commercial and subsistence halibut fishermen. Through the National Marine Fisheries Service (“NMFS”), the Secretary of Commerce has issued a formal Rule limiting customers on guided sport boats to a catch of one halibut per calendar day. *See* 74 Fed. Reg. 21194 (adopted May 6, 2009; effective June 5, 2009); 50 C.F.R. § 300.65(d)(2). The Charter Operators contend that the Secretary² failed to explain why limiting the charter sector to a harvest level adopted in 2003 was fair and equitable. The

¹ Plaintiffs are the following Charter Operators in Area 2C of Southeast Alaska: Scott Van Valin, Ken Dole, Rick Bierman, Theresa Weiser, Donald Westlund, and Richard Yamada.

² Defendants are: Gary Locke, Secretary of the Department of Commerce; Dr. Jane Lubchenco, Administrator of the National Oceanic and Atmospheric Administration; and Dr. James Balsinger, Acting Assistant Administrator of NMFS. NMFS is a division of the National Oceanic and Atmospheric Administration, an agency within the Department of Commerce. For ease of reference, Defendants are collectively referred to as “the Secretary.”

Secretary and Intervenors³ oppose. Because the record as a whole reflects that the Secretary adequately considered the equities of the allocation of the halibut harvest, the Secretary's decision was not arbitrary, capricious, or contrary to law. The Secretary and Intervenors' motions for summary judgment will be granted, and the Charter Operators' cross motion for summary judgment will be denied.

I. FACTS

A. Statutory and Regulatory Provisions

Under the Northern Pacific Halibut Act (the "Halibut Act"), 16 U.S.C. §§ 773-773k, the Secretary has broad authority and discretion to "adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and the Act." *Id.* § 773c(b)(1); *see* 50 C.F.R. §§ 300.60 - 300.66. The "Convention" referred to is a treaty between the United States and Canada called the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, Ottawa, 1953, 5 U.S.T. 5, T.I.A.S. 2900 (as amended by the Protocol Amending Convention, Washington, 1979, 32 U.S.T. 2483, 2487, T.I.A.S. 9855). Under the Halibut Act, the International Pacific Halibut Commission ("IPHC"), established by the Convention, can recommend regulations regarding Northern Pacific Halibut to the U.S. Secretaries of State and

³ The following individuals and organizations intervened as defendants: (1) commercial fishermen Linda Behnken, Annah Taft Perry, Ryan Nichols, Josh Moore, David Gibson, Sherri and Kurt Wohlhueter, and Christopher Knight; (2) halibut processors Seafood Producers Cooperative, Halibut Association of North America, and North Pacific Seafoods, Inc.; (3) subsistence fisherman Carolyn Heuer; (4) commercial and subsistence fishermen of the Hoonah Indian Association; and (5) the local communities City of Pelican and City of Port Alexander, which benefit from tax collections that arise from commercial earnings. They are collectively referred to as the "Behnken Group." The Metlakatla Indian Community, which includes subsistence and commercial fishermen, also intervened as defendants. The Behnken Group and the Metlakatla are collectively referred to as the "Intervenors." The Intervenors support the Final Rule at issue in this case.

Commerce. 16 U.S.C. § 773c(c). If approved by both Secretaries, the Secretary of Commerce promulgates the regulations via publication in the Federal Register. *Id.*; 50 C.F.R. § 300.62.

The Halibut Act also provides the Northern Pacific Management Council (the “Council”) with authority to recommend regulations to the Secretary to allocate harvesting privileges among U.S. fishermen. 16 U.S.C. § 773c(c). The Halibut Act requires allocation determinations to be fair and equitable. *Id.* Every year, the IPHC sets the annual total constant exploitation yield (“Total CEY”), that is, the total amount of halibut that may be harvested by all fishing sectors — commercial, sport (charter and unguided), and subsistence — in a given area in a given year. 74 Fed. Reg. at 21194. The IPHC then subtracts estimates of all non-commercial removals (including sport, subsistence, bycatch, and waste) to determine the remainder. The remainder constitutes the available commercial catch, *i.e.*, the “Fishery CEY.” *Id.*

In 2003, the Council recommended that the Secretary adopt a guideline harvest policy to use as a benchmark for monitoring the charter harvest of Pacific halibut. The Secretary adopted the policy and promulgated a regulation, which provides that the Guideline Harvest Level (or “GHL”) may be adjusted downward if the IPHC reduces the CEY. *See* 68 Fed. Reg. 47256 (the “GHL regulations”). The GHL was intended to represent a pre-season specification of an acceptable annual harvest by the charter sector in management Areas 2C and 3A. *Id.* at 47258. The GHL regulations establish the total maximum poundage for the charter vessel fishery each year according to a predetermined formula that depends on that year’s CEY. *Id.* at 47259.

The GHL regulations struck a balance between maintaining historical fishing practices in what had been a predominantly commercial fishery while allowing growth in the newer guided sport fishing sector. The regulations achieved this balance by allocating to the charter fishery

an additional 25% above what it was harvesting at the time. “[T]he goal for the GHL was to provide a limit on the total amount of harvests in the guided fishery that would be designated as a fixed poundage based on an amount equal to 125 percent of the average 1995-1999 harvests. This amount was set higher than existing harvest levels to accommodate some future growth in the recreational sector.” 68 Fed. Reg. at 47259; *see also* 72 Fed. Reg. 74257, 74259 (Dec. 31, 2007) (the GHL regulations allocated to the charter sector 25% more than the average of the guided sport harvest in 1995-1999, a time when the halibut biomass was high).

The 2003 GHL regulations did not actually limit harvests by charter vessel fishermen; they merely set benchmarks for use in future regulation. AR 32, March 2009 Environmental Assessment (“EA”)⁴ at 18.⁵ Charter harvests can be regulated by subsequent regulation, like the Final Rule at issue here.

The GHL regulations were set up to follow and react to actual harvest figures, *i.e.*, harvest restrictions could be adopted in the year following a year that the Guideline Harvest Level

⁴ The EA is the March 2009 Regulatory Impact Review/Final Regulatory Flexibility Analysis/Environmental Assessment of the Regulatory Amendment to Implement Guideline Harvest Level Measures in the Halibut Charter Fisheries in International Pacific Halibut Commission Regulatory Area 2C.

⁵ Originally, the Council proposed that the GHL be enforced via a framework of predetermined and nondiscretionary harvest restrictions that would be implemented automatically each year depending on how much the prior year’s GHL was exceeded. This proposal ran afoul of the requirement of notice and comment rulemaking under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* Thus, the 2003 GHL benchmarks were implemented, but actual harvest restrictions must be the subject of notice and comment rulemaking, as was the Final Rule imposing the one halibut bag limit. *See* 68 Fed. Reg. at 47259 (“This final rule imposes no restrictions on the guided recreational fishery as outlined in the proposed rule. This change from the proposed rule is necessary to address concerns raised about the ability to implement the harvest restriction measures without providing opportunity for public comment under APA rulemaking procedures.”).

was exceeded.⁶ From 2004 to 2007, the GHL in Area 2C was 1.432 million pounds. 74 Fed. Reg. at 21207; EA at 18. In 2008, in response to a reduction in the CEY estimated by the IPHC, the charter GHL was reduced substantially to 931,000 pounds. In 2009, the charter GHL was reduced to 788,000 pounds. 74 Fed. Reg. at 21207. If the halibut stock rebounds, the GHL will increase. See 50 C.F.R. § 300.65(c).

C. The Current Litigation

In recent years, the guided sport sector has exceeded the Guideline Harvest Level in Area 2C by significant margins: by 22% in 2004; by 36% in 2005; by 26% in 2006; and by 34% in 2007. 73 Fed. Reg. 78276, 78277-78 (Dec. 22, 2008 Proposed Rule).⁷ In 2008, the charter sector harvested an estimated 1.914 million pounds of halibut, more than double the 2008 Guideline Harvest Level. See EA at 9 (2008 charter harvest was 983,000 pounds above the 2008 GHL); see also 73 Fed. Reg. at 78277-78. No regulations had been imposed on the charter sector limiting the annual charter harvest until the recently promulgated Final Rule.⁸ Only the commercial sector has

⁶“Given the one-year lag between the end of the fishing season and availability of that year’s harvest data, management measures in response to the guided recreational fleet’s meeting or exceeding the GHL would take up to two years to become effective.” 68 Fed. Reg. at 47257. “[I]f the GHL is exceeded in a given year, appropriate harvest reduction measures would be imposed in following years to reduce harvests incrementally by the percentage at which the previous year’s harvest exceeded the GHL.” 67 Fed. Reg. 3867, 3870 (GHL Proposed Rule Jan. 28, 2002).

⁷ The Final Rule adopted the December 22, 2008, Proposed Rule.

⁸ This is the Secretary’s second attempt to limit charter fishermen to a one-fish daily bag limit in Area 2C. A substantially similar group of plaintiffs challenged a rule that imposed a one-halibut-per-day limit in 2008. See *Van Valin v. Gutierrez*, No. 08-941 (D.D.C.) (challenging 73 Fed. Reg. 30504 (May 28, 2008 final rule). In that case, the Court granted the plaintiffs’ motion for a preliminary injunction, enjoining the enforcement of the 2008 rule. See *id.*, Order [Dkt. # 22]. The Court found that plaintiffs had shown a likelihood of success on the merits on their claim under the APA that the Secretary violated agency regulations. The 2008 rule limited the halibut harvest by the charter sector in anticipation of the projected 2008 harvest — instead of regulating to a past GHL

been subject to annual harvest limits, and their limits have been reduced by 54% between 2005 and 2009. 74 Fed. Reg. at 21207; *see also id.* at 21196 (“A major user group, the commercial setline fishery, has a strictly managed annual catch limit.”).

The lack of limits on the charter harvest did not pose a problem when the halibut biomass was large and the non-commercial harvest was small and stable. However, the charter harvest has been steadily escalating. *See* 74 Fed. Reg. at 21203 (the charter sector harvest has increased by 107% between 1999 and 2005). And the biomass of halibut is declining at this time. Accordingly, the Council recommended that the charter harvest be regulated, and the Secretary of Commerce adopted the Final Rule at issue in this case, limiting each charter sport fisherman in Area 2C to one halibut per calendar day. *See* 74 Fed. Reg. 21194 (effective June 5, 2009).

The Complaint alleges three causes of action. In Count I, The Charter Operators allege that the Secretary violated the APA, 5 U.S.C. § 504, by promulgating the Final Rule without analyzing whether the allocation of the halibut harvest in Area 2C was fair and equitable as required by the Halibut Act, 16 U.S.C. § 733c(c). Compl. ¶¶ 47-48. Count II alleges that the Secretary violated the APA, 5 U.S.C. § 504, and the Halibut Act, 16 U.S.C. §§ 733c(c) & 1853(b)(6), by basing the Final Rule on the 2003 GHIL, which was in turn based on “old” data from 1995 through 1999. The Charter Operators contend that the Secretary should have relied on “more recent and readily available information.” *Id.* ¶¶ 49-50. Finally, Count III asserts that the Secretary promulgated the Final Rule in violation of the Halibut Act because the Final Rule does not provide a fair and equitable allocation of the halibut harvest. The Final Rule allegedly imposes harm on the

as contemplated by the 2003 GHIL regulations. The Secretary then withdrew the 2008 rule. As a result, the Court dismissed the case as moot. *See Van Valin v. Gutierrez*, 587 F. Supp. 2d 118, 120-21 (D.D.C. 2008).

charter sector without a reasonably proportionate benefit to the commercial sector. Further, the Secretary allegedly failed to consider recent growth in the unguided and subsistence sectors. *Id.* ¶¶ 51-52.

The Charter Operators sought a preliminary injunction enjoining enforcement of the Final Rule, and the Court denied the motion, finding that the Charter Operators had not shown the likelihood of success on the merits. *See Van Valin v. Locke*, 628 F. Supp. 2d 67, 73-76 (D.D.C. 2009). Now the parties have filed cross motions for summary judgment.

II. LEGAL STANDARDS

A. Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *see also Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Moreover, summary judgment is properly granted against a party who “after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party’s favor and accept the nonmoving party’s evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than “the mere existence of a scintilla of evidence” in support of its position. *Id.* at 252. In addition, the nonmoving

party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Id.* at 675. If the evidence “is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson*, 477 U.S. at 249-50 (citations omitted).

B. Administrative Procedure Act

The APA, 5 U.S.C. § 551 *et seq.*, requires a reviewing court to set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 736 (D.C. Cir. 2001). In making this inquiry, the reviewing court “must consider whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (internal quotation marks and citation omitted). At a minimum, the agency must have considered relevant data and articulated an explanation establishing a “rational connection between the facts found and the choice made.” *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 626 (1986). An agency action usually is arbitrary or capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

As the Supreme Court has explained, “the scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”

Id.; see *Henley v. FDA*, 77 F.3d 616, 621 (2d Cir. 1996). Rather, the agency action under review is “entitled to a presumption of regularity” and the court must consider only whether the agency decision was based on relevant factors and whether there has been a clear error of judgment. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In cases involving scientific or technical decisions within the agency’s area of expertise, the agency is entitled to a “high level of deference.” *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1320 (D.C. Cir. 1998). Regarding fishery management decisions like the one at issue here, it is especially appropriate for a court to defer to the agency’s choice of “appropriate conservation and management measures based on [its] evaluations of the relevant quantitative and qualitative factors.” *Nat’l Fisheries Inst. v. Mosbacher*, 732 F. Supp. 210, 223 (D.D.C. 1990).

III. ANALYSIS

A. Allegation that the Halibut Act Requires a Finding of Fairness and Equity

Count I of the Complaint alleges that the Secretary violated the APA by promulgating the Final Rule without analyzing whether the allocation of the halibut harvest in Area 2C was fair and equitable “as is required by section 5(c) of the Halibut Act.” Compl. ¶ 48. This allegation is based on the false premise that the Halibut Act requires the Secretary to make a specific *finding* regarding fairness and equity. The Halibut Act contains no such requirement. The Act provides:

If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, *such allocation shall be fair and equitable* to all such fishermen, based on the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges.

16 U.S.C. § 773c(c) (emphasis added). The Act does not require that the Secretary make a finding of fairness and equity; it simply requires that any allocation *be* fair and equitable. Because the Halibut Act does not require the Secretary to make such a finding, the lack of such a finding cannot violate the APA. Thus, summary judgment will be granted in favor of the Secretary on Count I of the Complaint.

B. Allegation that the Final Rule Is Not Fair and Equitable

Count III of the Complaint alleges that the Final Rule is not fair and equitable under the Halibut Act because it does not fairly and equitably allocate the halibut harvest. The Charter Operators contend that the Final Rule imposes harm on the guided sport sector without a reasonably proportionate benefit to the commercial sector and that the Secretary failed to consider recent growth in the unguided and subsistence sectors. Compl. ¶¶ 51-52. They do not challenge “NMFS basic statutory authority to adopt harvest restrictions designed to implement permissible allocation objectives” or “whether the means that NMFS chose are permissible;” they only challenge “whether NMFS has adequately explained *why* it chose the particular outcome it did.” Pls.’ Mem. in Supp. of Mot. for Summ. J. [Dkt. # 17] (“Pls.’s Mem.”) at 2 & 13 (emphasis in original).

To determine whether the allocation made by the Secretary was fair and equitable and whether the Secretary adequately explained the rationale behind the Final Rule, the Court must examine the record as a whole. *See, e.g., San Luis & Delta-Mendota Water Auth. v. Salazar*, Civ. No. 09-407, 2009 WL 3428487, at *19 (E.D. Cal. Oct. 15, 2009) (agency’s action may be upheld if its reasoning can be discerned on the basis of the entire record). The Secretary must have considered relevant data and articulated an explanation establishing a “rational connection between the facts found and the choice made.” *Bowen*, 476 U.S. at 626. The Administrative Record reflects that the

Secretary considered the relevant factors and made a rational determination based on those factors.

The Halibut Act's requirement that any allocation be "fair and equitable" refers to criteria set forth in the Magnuson-Stevens Fishery Conservation Act ("Magnuson Act"), 16 U.S.C. § 1853(b)(6). Under the Magnuson Act, NMFS can establish a limited access program to "achieve optimum yield" in a fishery after taking into account the following factors:

- (1) present participation in the fishery;
- (2) historical fishing practices in, and dependence on, the fishery;
- (3) the economics of the fishery;
- (4) the capability of fishing vessels used in the fishery to engage in other fisheries;
- (5) the cultural and social framework relevant to the fishery and any affected communities;
- (6) the *fair and equitable distribution of access privileges*; and
- (7) any other relevant considerations.

16 U.S.C. § 1853(b)(6) (emphasis added).

National Standard Four of the Magnuson Act addresses fairness and equity in the allocation of fishing privileges as follows:

If it becomes necessary to allocate or assign fishing privileges among various United States 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 manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

Id. § 1851(a)(4). Regulations implementing National Standard Four provide that the allocation of fishing privileges should be rationally connected to the furtherance of a legitimate objective and recognize that "[i]nherent in an allocation is the advantaging of one group to the detriment of

another.” 50 C.F.R. § 600.325(c)(3)(i)(A);⁹ accord *Nat'l Fisheries*, 732 F. Supp. at 225 (regulations that made distinctions based on the type of gear used were fair and equitable even though they imposed greater limits on commercial fishermen than on recreational fishermen).

“[C]ourts have declined to second-guess the Secretary’s judgment simply because the provisions of a [Fishery Management Plan] or a plan allocation ‘have a greater impact upon’ one group or type of fishermen.” *North Carolina Fisheries Ass’n v. Gutierrez*, 518 F. Supp. 2d 62, 89 (D.D.C. 2007) (citing *Nat'l Fisheries*, 732 F. Supp. at 225). “[T]he Secretary is allowed, under [National Standard Four], to sacrifice the interests of some groups of fishermen, for the benefit as the Secretary sees it of the fishery as a whole.” *Alliance Against IFQs v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996). In *Alliance Against IFQs*, the Ninth Circuit held that quotas that effectively shut out of the fishery crewmen who did not own fishing boats in favor of those who owned or leased boats did not violate National Standard Four. Despite the harshness to the non-owning crewmen and the fact that “[a]lternative schemes can easily be imagined,” the court found that the regulations were not arbitrary and capricious because the Secretary considered their interests and other relevant factors and articulated a rational connection between the facts found and the choice made. *Id.* at 350, 352.

Similarly, in *National Coalition for Marine Conservation v. Evans*, 231 F. Supp. 2d 119 (D.D.C. 2002), fishermen who owned small boats challenged the closure of a fishing area, asserting that the regulation was unfair to fishermen who owned smaller boats that could not travel beyond the closed area. The court held that the regulation did not violate the equity requirement of National Standard Four because NMFS had properly evaluated the benefits and costs imposed by

⁹ An allocation is considered equitable where a hardship imposed on one group is outweighed by the benefits received by another. 50 C.F.R. § 600.325(c)(3)(i)(B).

the closure and had compared the consequences with the status quo and alternative allocation schemes. *Id.* at 131-32.

The Charter Operators erroneously argue that the Secretary did not analyze whether the 2009 allocation based on the GHL is fair and equitable and that the Secretary's "entire rationale" that the 2009 allocation is fair and equitable is that the allocation represented by the Guideline Harvest Levels were determined to be fair in 2003. Pls.' Mem. at 36-37. This allegation is belied by substantial evidence in the Administrative Record that the Secretary considered fairness and equity in establishing the 2009 allocation. The Secretary evaluated the benefits and costs to different groups that would be imposed by a one-fish bag limit. The Environmental Assessment for the Final Rule examined the economic impact of the one-fish limit on the following groups: charter boat clients, full and half day providers, commercial longline operators, local residents, consumers, and the public. EA at 31-45; *id.* at 48-49 (Comparative Chart); *see also id.* at 39 (illustrative table estimating potential losses to the commercial sector over the next three years if the status quo is maintained). The very purpose of this analysis was to evaluate the equities and the impact of the one-fish bag limit and compare it to the status quo.

In addition to evaluating the status quo, the Secretary considered the *de facto* allocation of the Pacific halibut harvest in the past. Historically, the Pacific halibut fishery has been mostly a commercial fishery. Between 1997 and 2007, the average annual harvest was approximately 76% commercial, 20% sport (including guided and unguided), and the remainder was subsistence, bycatch and wastage.¹⁰ 73 Fed. Reg. at 78277. The Secretary has been concerned about

¹⁰ While the Final Rule and the GHL regulations did not split the permissible harvest evenly between the commercial sector and the charter sector, that does not mean that the allocation fails to meet the "fair and equitable" requirement. The harvest has never been shared equally by the

the expansion of the guided sport sector since the 1995 problem statement was drafted by the Council continuing through the time the Final Rule was promulgated.

The 1995 problem statement (as revised in the 2001 GHL analysis) demonstrates the Council was concerned about the expansion of the halibut charter industry and how that expansion may affect “the Council’s ability to maintain the stability, economic viability, and diversity of the halibut charter industry, the quality of the recreational experience, the access of subsistence users, and the socioeconomic well-being of the coastal communities dependent on the halibut resource.” The Council went on to indicate six issues of particular concern, including the absence of limits on the annual harvest of halibut by the guided sector and the rapid growth in that sector, which amounted to an “open-ended reallocation from the commercial fishery to the charter industry.”

74 Fed. Reg. at 21214.

The issues of fairness and equity were raised in comments to the Final Rule. For example, Comment 46 alleged that the IPHC allocation procedures that set the GHL violate fairness and equity, and the Secretary responded:

Any resource allocation policy likely will result in some resource users feeling unfairly burdened with the costs of reducing their use of the resource. As the halibut resource has declined in abundance in Area 2C in recent years, the commercial longline fishery’s catch limits have been substantially reduced from 10,930,000 lbs [] in 2005 to 5,020,000 lbs [] in 2009. This represents a 54 percent reduction over four years. During part of this period (2005 through 2007) charter vessel anglers in Area 2C have had record high levels of harvest.

Id. at 21207. The Secretary promulgated the Final Rule in order to address the imbalance caused by the *de facto* reallocation from the commercial industry to the charter industry caused by the charter sector’s rapidly increasing harvests in recent years. The Secretary indicated:

commercial and the charter sectors.

Harvests by charter vessel anglers exceeded the GHL in Area 2C each year from 2004 to 2007, and the best available estimates indicate that the 2008 GHL also was exceeded (Table 1 and Figure 1 of this preamble). Harvests of halibut by the charter sector above its GHL reduce the Fishery CEY. By reducing the amount of fish available to the commercial sector, the charter harvests created an allocation concern. Charter removals should be close to the GHL or the methodology used by the IPHC to determine the Fishery CEY is undermined and results in a *de facto* reallocation from the commercial sector in subsequent years.

Id. at 21194. The Secretary intended the Final Rule to “limit the use of halibut by one sector that has grown significantly in proportion to the other sectors that harvest halibut,” that is, to “limit the growth of one sector and the resulting reallocation from other sectors that use the same finite resource.” *Id.* at 21214-15.

In addition to considering the allocation of the halibut harvest, the Secretary evaluated the conservation of the halibut resource. Where multiple user groups are involved, “conservation and allocation cannot be separated.” *Id.* at 21196. The guided sport sector’s overharvesting potentially undermines IPHC’s conservation and management goals for the overall halibut stock.

Thus, the Final Rule was based in part, on a conservation concern:

Charter vessel harvests in excess of the GHL also create a conservation concern by compromising the overall harvest strategy developed by the IPHC to conserve the halibut resource. The Total CEY and the Fishery CEY have decreased each year since 2004 reflecting declines in the estimated halibut biomass. As the Total CEY decreases, harvests of halibut should decrease to help conserve the resource. Hence, the GHL is linked to the Total CEY so that the GHL decreases in a stepwise fashion as the Total CEY decreases. Despite a decrease in Total CEY and the GHL in recent years, charter vessel harvests have remained high and in excess of the GHL. As conservation of the halibut resource is the overarching goal of the IPHC, the magnitude of charter vessel harvest over the GHL in Area 2C has raised concern that such excessive harvests by the charter sector pose a conservation risk, with the potential to undermine the IPHC’s conservation and management goals for the overall halibut

stock. Therefore, restraining charter sector harvests to approximately the GHL would contribute to the conservation of the halibut resource.

Id. at 21194-95; *see also* EA at 18. “[A] reduction in the charter vessel harvest should leave more halibut in the water to the benefit of all fisheries now and in future years, as well as benefit the health and reproductive potential of the resource.” 74 Fed. Reg. at 21199; *see also id.* at 21212 (“[L]eaving fish unharvested contributes to biomass and Total CEY in subsequent years.”).

The Charter Operators also contend that the Final Rule is inequitable because the hardship imposed on the guided sport industry is not outweighed by the total benefit received by the commercial industry. The national benefits of an allocation are not judged solely in terms of a cost/benefit analysis between two groups. As explained in detail above, the Secretary properly considered the seven factors set out in the Magnuson Act, 16 U.S.C. § 1853(b)(6), including fairness and equity and National Standard Four, *id.* § 1851(a)(4). And the Secretary considered the economic impact of the one-fish limit on numerous groups, including local residents, consumers, and the public, not just the charter and commercial industries. *See* EA at 31-45; *id.* at 48-49 (Comparative Chart). Furthermore, the Secretary gave little weight to quantitative estimates of the economic impact of the Rule because it is not appropriate to compare the economic impact to the commercial sector with the economic impact to the charter sector when their products are so very different. 74 Fed. Reg. at 21212-13. The charter sector’s product is the “fishing experience” while the commercial sector’s product is “halibut sold in competitive markets.” *Id.* at 21213.

When determining fairness and equity the focus is not on the impact of the regulation, but on its purpose. So long as the motive behind the regulation is justified in terms of the fishery management objective, advantaging one group over another is permissible under Standard Four. 50 C.F.R. § 600.325(c)(3)(i)(A); *see also Alliance Against IFQs*, 84 F.3d at 350. The motive behind

the Final Rule was justified in terms of fairness and equity; the Secretary considered the allocation of the halibut resource and conservation of the halibut resource in proper historical context.

The Charter Operators also argue that the 2003 GHL regulations were not fair and equitable and that there was no attempt to make them so because those regulations merely set benchmarks and did not limit the halibut harvest. This argument is unsupported by the Administrative Record. The 2003 GHL regulations set the charter sector GHL at 125% of the amount that the charter sector was then harvesting, 68 Fed. Reg. at 47259, a clear attempt to be fair and permit growth in the burgeoning charter industry. The 2003 GHL regulations explained that “[t]he GHL establishes a pre-season estimate of acceptable annual harvests for the guided recreational halibut fishery” and that further regulations could be implemented via notice and comment rulemaking as needed in the future. *Id.* at 47258-59. The GHGs were intended to “trigger other management measures in years following attainment of the GHG” in order to “maintain a stable guided recreational fishery season of historic length, using area-specific measures.” *Id.* at 47259.

C. Allegation that the Secretary Improperly Relied on Stale Data

Count II of the Complaint asserts that the Secretary violated the APA and the Halibut Act by basing the Final Rule on the 2003 GHG, which was in turn based on allegedly stale data from 1995 through 1999. The Charter Operators argue that the Secretary should have relied on “more recent and readily available information.” Compl. ¶¶ 49-50.

The Halibut Act does not indicate what type of scientific evidence the Secretary should use in making allocation decisions. However, National Standard Two of the Magnuson Act indicates that NMFS should use the “best scientific information available.” 16 U.S.C. § 1851(a)(2). “Far from being rigid, the standard is a practical one requiring only that fishery regulations be

diligently researched and based on sound science, such that NMFS is not obliged to rely upon perfect or entirely consistent data.” *North Carolina Fisheries*, 518 F. Supp. 2d at 85 (citing *The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 157 (D.D.C. 2005) (internal quotation marks omitted)). Courts have upheld decisions made on the best available evidence, recognizing that some degree of speculation and uncertainty is inherent in the decision-making process. *See id.*

The allegation that the Final Rule relied on out-of-date data was raised in Comment 34 to the Final Rule, which asserted that the GHL “was set using incorrect, inconsistent or dated information” and that “for present participation to be properly considered, the Secretary would have to look at more recent catch data for guided anglers and commercial harvesters” 74 Fed. Reg. at 21204. In response the Secretary explained:

NMFS disagrees that incorrect, inconsistent or dated information was used for the GHL or this action. *The Council and NMFS have used the best information available at each step of the process, beginning with the GHL, and continuing through this final rule. The Council and NMFS analyzed and considered data . . . includ[ing] past and present participation, historical dependence of various sectors on the halibut resource, economic impacts of the action on various sectors, cultural and social framework of the various sectors, impacts on other fisheries, and other relevant considerations. . . . The commenter is referred to the GHL analysis and the analysis that accompanies this action for further details on the data considered in developing these actions. The GHL analysis is available on the Council Web site at http://www.fakr.noaa.gov/npfmc/current_issues/halibut_issues/halibut.htm¹¹ and the analysis for this action is available on the NMFS Alaska Region Web site at <http://www.alaskafisheries.noaa.gov/sustainablefisheries/halibut/charters.htm>.¹²*

Id. (emphasis added). The Secretary did examine present participation levels. *See, e.g.*, EA at 9

¹¹ A link to the EA for the 2003 GHL can be found here.

¹² A link to the EA for the 2009 Final Rule can be found here.

(2008 charter harvest was 983,000 pounds above the 2008 GHL); 74 Fed. Reg. at 21207 (the commercial sector has been subject to annual harvest limits, and their limits have been reduced by 54% between 2005 and 2009).

While present participation in the fishery is one factor that the Secretary must examine when considering fishery management measures, another factor is historic harvest participation levels. *See* 16 U.S.C. § 1853(b)(6) (one of the factors to be considered under the Magnuson Act is historic participation and dependence on the fishery). In *Yakutat v. Gutierrez*, 407 F.3d 1054 (9th Cir. 2005), the plaintiffs challenged the Secretary's decision to limit the number of boats fishing for Pacific cod by granting licenses only to boats that caught a prescribed amount of fish during any two years between 1995-1998, and excluding 1999 as a qualifying year. The plaintiffs contended that the exclusion of 1999 was unfair and inequitable because it failed to take into account the most recent participation in the fishery. The court found that it was permissible for the Secretary to place a higher premium on historical participation in the fishery rather than focusing solely on present participation. *Id.* at 1073. When promulgating the Final Rule, the Secretary examined the historical participation in the Pacific halibut harvest and the charter fishery's excessive harvests in recent years.¹³ Overfishing by the guided sport sector was the very thing that compelled the Secretary to promulgate the Final Rule. *See* 74 Fed. Reg. at 21194.

Where overfishing by one group in recent years is the precise concern that the regulation intends to address, it makes sense to disregard the most recent participation data. *See, e.g., Alliance Against IFQs*, 84 F.3d at 347-48 (NMFS had good reason to disregard participation

¹³ The EA included recent data — data from 1995 through 2007 — regarding guided charter participation in the halibut fishery in Area 2C. EA at 21 (Table 4).

data where consideration of that data would have encouraged the overharvesting that the regulatory scheme was meant to restrain). The charter sector exceeded the GHL by 22% in 2004; by 36% in 2005; by 26% in 2006; and by 34% in 2007. 73 Fed. Reg. at 78277-78. And in 2008, the guided sport industry harvested more than double the 2008 Guideline Harvest Level, an estimated 1.914 million pounds of halibut. *See* EA at 9. The Charter Operators' argument that the Secretary should have relied on recent participation data is in essence a claim that they are entitled to a greater allocation of the harvest because they have been harvesting a greater amount in recent years, *i.e.*, that they should be rewarded for exceeding the guidelines year after year. The Secretary understandably chose not to encourage such overharvesting.

The Charter Operators' real complaint is not that the Secretary ignored recent harvest data, but that the Secretary did not make a different allocation decision. But the Court may not substitute its own or the Charter Operators' judgment for that of the Secretary. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency"). Because the Secretary promulgated the Final Rule based on an evaluation of the relevant quantitative and qualitative factors and explained the basis of the Rule, establishing a rational connection between the facts found and the choice made, summary judgment will be granted in favor of the Secretary with respect to Count II.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' motion for summary judgment [Dkt. # 17] will be denied. The Secretary's motion for summary judgment [Dkt. # 20] and the Intervenor's motions for summary judgment [Dkts. ## 19 & 22] will be granted. A memorializing Order

accompanies this Memorandum Opinion.

Date: November 23, 2009

 /s/
ROSEMARY M. COLLYER
United States District Judge