

# Public Testimony Sign-Up Sheet


Agenda Item C-5 Amendment 80

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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver   
Executive Director

DATE: November 27, 2007

SUBJECT: Amendment 80 Post-Delivery Transfers and Rollovers

|                           |
|---------------------------|
| ESTIMATED TIME<br>2 HOURS |
|---------------------------|

ACTION REQUIRED

Initial review of the analysis

BACKGROUND

At its October 2007 meeting, the Council adopted a draft purpose and need statement and alternatives to amend the Amendment 80 program to permit (1) transfer of cooperative quota to cover overages after the time of landing and (2) rollovers of Amendment 80 limited access allocation that is projected to be unharvested to the Amendment 80 cooperatives. The post-delivery transfer provision would be intended to reduce the potential for enforcement actions related to unintended overages, in the event a cooperative can acquire shares to cover an overage within a reasonable time. The rollovers of projected unharvested Amendment 80 limited access allocations to Amendment 80 cooperatives would be intended to reduce unharvested species allocations to ensure the TAC is utilized to the fullest extent practicable. In response to the Council's request, staff drafted an analysis of the alternatives for Council review. At this meeting the Council will decide whether the analysis, Item C-5(a), is sufficient to be released for public review.

**REGULATORY IMPACT REVIEW**

**and**

**INITIAL REGULATORY FLEXIBILITY ANALYSIS**

**OF A PROVISION  
ALLOWING POST-DELIVERY TRANSFER  
OF SHARES AND AMENDMENT 80 LIMITED ACCESS ROLLOVERS IN THE  
BERING SEA & ALEUTIAN ISLANDS AMENDMENT 80 PROGRAM**

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

December 2007

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# 1 Introduction

Amendment 80 established a share-based management program for non-AFA trawl catch processors in the Bering Sea and Aleutian Islands. Under the program, cooperatives would receive allocations of six Bering Sea and Aleutian Islands (BSAI) species (Atka mackerel, Aleutian Islands (AI) Pacific ocean perch, flathead sole, Pacific cod<sup>1</sup>, rock sole, and yellowfin sole). Since three separate management areas are established for both Atka mackerel and Pacific ocean perch, each cooperative will receive a total of ten allocations. In addition to these species allocations, five allocations of prohibited species catch (PSC) will be made under Amendment 80 (halibut, Zone 1 red king crab, *C. opilio*, Zone 1 *C. bairdi*, and Zone 2 *C. bairdi*). So, each cooperative is likely to receive fifteen separate allocations under the program. These annual allocations are binding without provision to cover any overage or compensate for any underage. One of the two actions under consideration for this amendment package would allow Amendment 80 vessels to engage in post-delivery transfer of their respective shares to cover overages.

The second action under consideration by the Council is rollovers from the Amendment 80 limited access sector to the Amendment cooperative. Amendment 80 allows vessels to join a cooperative or stay in the Amendment 80 limited access fishery. The Amendment 80 limited access fishery would continue to operate under a 'race for fish' within the combined allocation. In cases where vessels elect to stay in the Amendment 80 limited access fishery, there is the potential some of their fisheries could close prematurely due to exhausting their halibut PSC allocation. In those cases where the Amendment 80 limited access fishery is closed prior to harvesting all of their allocation, that Amendment 80 allocation has become stranded ITAC and cannot be harvested by any other trawl vessels operating in the BSAI area. Currently, the Amendment 80 program does not have a mechanism for the unharvested allocation to roll from the Amendment 80 limited access fishery to the Amendment 80 cooperatives. This action considers allowing rollovers of unharvested allocations from the Amendment 80 limited access fishery to the Amendment 80 cooperatives.

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

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

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

## 2 Regulatory Impact Review

This chapter provides an economic analysis of the action, addressing the requirements of Presidential

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

Executive Order 12866 (E.O. 12866), which requires a cost and benefit analysis of federal regulatory actions.

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

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

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

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

## **2.1 Purpose and Need Statement**

This amendment package addresses two separate proposed actions. The first action is post-delivery transfers for Amendment 80 cooperatives. The second action is rollovers of unharvested allocation in the Amendment 80 limited access group to Amendment 80 cooperatives. Presented below is the Purpose and Need Statement associated with each action.

### **Post-Delivery Transfers**

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

## Amendment 80 Limited Access Rollover

*Amendment 80 allocates six target species and five PSC categories to vessels fishing in the non-AFA trawl catcher-processor sector. Vessels may choose to form cooperatives and combine their allocations, or they may choose to fish in an 'Amendment 80 limited access' fishery that continues to operate under a 'race for fish' within the combined allocations. Given that each allocation represents a cap, it is likely that the Amendment 80 limited access fishery will be closed on one species or PSC while leaving significant amount(s) of the other species unharvested. Amendment 80 does not provide a mechanism for this unharvested fish to roll from the Amendment 80 limited access fishery to the Amendment 80 cooperatives for harvest. Without this provision, some amount of allocated species may be stranded in the Amendment 80 limited access sector. Creating a mechanism to roll this unharvested amount to the Amendment 80 cooperatives prior to the end of the year will facilitate more complete harvest and utilization of these allocations.*

## 2.2 Description of Alternatives

Presented below is a description of the alternatives associated with post-delivery transfers and Amendment 80 limited access rollovers.

### Post-Delivery Transfers

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

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

#### Alternative 2 – Unlimited post-delivery transfers

##### Purpose of post-delivery transfers

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

##### Limits on the magnitude of a post-delivery transfer



None

Limits on the number of post-delivery transfers

None

No person shall be permitted to begin a fishing trip, unless the person holds unused CQ.

Limits on the time to undertake a post-delivery transfer

A post-delivery transfer will be permitted at any time until the fishing season ends (December 31<sup>st</sup>).

**Alternative 3 – Moderate limited post-delivery transfers**

Limits on the magnitude of a post-delivery transfer

A post-delivery transfer of allocated retainable species shall be limited to:  
100 metric tons of CQ on a species basis

A post-delivery transfer of halibut PSC shall be limited to:  
15,000 pounds

A post-delivery transfer of red king crab PSC shall be limited to:  
3,000 animals

A post-delivery transfer of bairdi PSC (each zone) shall be limited to:  
10,000 animals

A post-delivery transfer of opilio PSC shall be limited to:  
35,000 animals

Limits on the number of post-delivery transfers

For each allocation, a cooperative is limited to receiving post-delivery transfers to cover five overages.

No person shall be permitted to begin a fishing trip, unless the person holds unused CQ.

Limits on the time to undertake a post-delivery transfer

Post-delivery transfers will be permitted after a weekend date for a period of 30 days.

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

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

### Amendment 80 Limited Access Rollover

The Council has identified two alternatives for the rollover of unharvested Amendment 80 limited access allocation to the Amendment 80 cooperatives. Alternative 1 is the status quo, under which no rollover of unharvested Amendment 80 limited access allocation to the Amendment 80 cooperative would be permitted. Under Alternative 2, a mechanism to allow allocations of target species and PSC that are projected to be unharvested in the Amendment 80 limited access fishery to roll over to the Amendment 80 cooperatives. This rollover is not intended as a means to cover overages within the Amendment 80 cooperative sector. Below are the alternatives under consideration by the Council for rollovers from the Amendment 80 limited access fishery to the Amendment 80 cooperatives.

#### Alternative 1 – Status Quo (no Amendment 80 limited access rollover)

#### Alternative 2 – Amendment 80 Limited Access Rollovers

Any unharvested portion of the Amendment 80 allocated species or unharvested portion of PSC in the Amendment 80 trawl limited access fishery that is projected to remain unused by the NMFS may be rolled over to Amendment 80 cooperatives.

## 2.3 Existing Conditions

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

### 2.3.1 Management of the fisheries

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

Each year, the Amendment 80 program will allocate an amount of Amendment 80 species available for harvest, called the initial total allowable catch (ITAC), and crab and halibut PSC to the Amendment 80 sector and the BSAI trawl limited access sector. Allocations made to one sector are not subject to harvest by participants in other fishery sectors except rollovers from the trawl limited access sector to the Amendment 80 cooperatives.

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

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

Persons that receive Amendment 80 quota share can join a cooperative to receive an exclusive harvest privilege for a portion of the ITAC. Amendment 80 quota share holders can form a cooperative with other Amendment 80 quota share holders on an annual basis. A cooperative will receive an amount of cooperative quota equivalent to the proportion of quota share held by all of the members of the cooperative relative to the total quota share holders. Each Amendment 80 cooperative will also receive an annual cooperative quota with an exclusive limit on the amount of crab and halibut PSC the cooperative can use while harvesting in the BSAI. This crab and halibut PSC cooperative quota will be assigned to a cooperative proportional to the amount of Amendment 80 quota share held by the members. These annual allocations are binding without provision to cover any overage or compensate for any underage.

The Amendment 80 program allows Amendment 80 cooperatives to receive a rollover of an additional amount of cooperative quota, if a portion of the Amendment 80 species or crab or halibut PSC allocated to the BSAI trawl limited access sector is projected to go unharvested. This rollover to Amendment 80 cooperatives is at the discretion of NMFS with consideration given to projected harvest rates in the BSAI trawl limited access sector and other criteria. Each Amendment 80 cooperative will receive an additional amount of cooperative quota that is based on the proportion of the Amendment 80 quota share assigned to that Amendment 80 cooperative as compared with the amount of Amendment 80 quota share assigned to all other Amendment 80 cooperatives.

Amendment 80 quota share holders that do not join an Amendment 80 cooperative can participate in the Amendment 80 limited access fishery. The Amendment 80 program will assign to the Amendment 80

limited access fishery the amount of the Amendment 80 sector's allocation of Amendment 80 species ITAC and crab and halibut PSC that remains after allocation to all of the Amendment 80 cooperatives. Participants fishing in the Amendment 80 limited access fishery will continue to compete with each other. NMFS would manage openings and closing of the Amendment 80 limited access fishery, much as it currently manages the existing fisheries. NMFS would open directed fishing for an Amendment 80 species only if there is sufficient ITAC assigned to the Amendment 80 limited access fishery. In addition, halibut PSC and crab PSC assigned to the Amendment 80 limited access fishery would continue to be apportioned among target fishery categories, and halibut PSC would continue to be based on seasonal apportionments as established in §679.21. When the Amendment 80 limited access fishery fully utilize their halibut PSC apportioned to a target fishery category, that target fishery would be closed to fishing for the Amendment 80 limited access group. When all of the halibut PSC apportioned to the Amendment 80 limited access group has been fully utilized, the group is prohibited from trawling for the remainder of the year in the BSAI. When the Amendment 80 limited access fishery fully utilize their crab PSC, the group would be prohibited from trawling in the crab savings area applicable to the crab PSC exhausted, but the group can continue to trawl in other BSAI areas.

### 2.3.2 Description of BSAI Amendment 80 Fisheries

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

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

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

For Atka mackerel and AI POP, the allocation will phase in the final allocation percentages over a period of years. For Atka mackerel, that period would be four years, and for AI POP, it would be two years. The allocation percentages for Atka mackerel would start in 2008 at 98 percent for areas 541/BS and area 542 and then be reduced 2 percent every year for four years, culminating at a 90 percent allocation in 2012. For area 543, the H&G trawl CP sector would be allocated 100 percent of the Atka mackerel starting in 2008. For AI POP in areas 541 and 542, the allocation would start at 95 percent in 2008 and decrease to 90 percent in 2009. For area 543, the allocation to the sector would be 98 percent starting in 2008. Table

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

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

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

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

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

| Year | Species       | Subarea | Catch (in metric tons) | Number of Vessels |
|------|---------------|---------|------------------------|-------------------|
| 2003 | Atka mackerel | 541     | 5,600                  | 13                |
|      |               | 542     | 25,391                 | 11                |
|      |               | 543     | 17,880                 | 8                 |
|      | AI POP        | 541     | 3,724                  | 12                |
|      |               | 542     | 2,961                  | 10                |
|      |               | 543     | 6,028                  | 8                 |
| 2004 | Atka mackerel | 541     | 2,850                  | 13                |
|      |               | 542     | 27,909                 | 11                |
|      |               | 543     | 18,075                 | 9                 |
|      | AI POP        | 541     | 2,335                  | 13                |
|      |               | 542     | 2,965                  | 10                |
|      |               | 543     | 5,149                  | 9                 |

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

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

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

### 2.3.3 Prohibited Species

Allocated to the Amendment 80 sector are halibut, red king crab, *C. opilio*, Zone 1 *C. bairdi*, and Zone 2 *C. bairdi* PSC. The amount of PSC assigned to the Amendment 80 sector is specified in Table 2-5. Halibut PSC and crab PSC limits would be allocated to the Amendment 80 sector for use while targeting their allocation of groundfish and any other non-allocated BSAI groundfish. Halibut PSC apportionment to the Amendment 80 sector in 2008 will be 2,525 mt. The following years through 2012, the

apportionment of halibut PSC to the Amendment 80 sector will be reduced by 50 mt each year. In 2012 and subsequent years, the allocation of halibut PSC to the Amendment 80 sector would remain at 2,325 mt, unless changed by the Council in the future. Like halibut PSC, the crab PSC limited to the Amendment 80 sector is reduced to 80 percent of the initial allocation. This reduction would be phased in gradually at 5 percent per year starting in 2009 and ending in 2012. Crab PSC allowance would be allocated to the Amendment 80 sector for use while targeting their allocation of groundfish and any other non-allocated BSAI groundfish. PSC allowance allocated to the Amendment 80 sector will be further divided between the cooperatives and the non-cooperative pool. Table XX provides PSC from 2003 to 2007 by the Amendment 80 sector for halibut, red king crab, *C. opilio*, Zone 1 *C. bairdi*, and Zone 2 *C. bairdi*.

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

**Table 2-5. Apportionment of crab PSC and halibut PSC to the Amendment 80 sector**

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

### 2.3.4 Description of the Non-AFA trawl Catcher Processor Sector

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

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

The following information on employment for the Amendment 80 sector is from the *Alaska Groundfish Fisheries Final Programmatic Supplemental Environmental Impact Statement* that was published on June 2004. The average crew size for an Amendment 80 vessel is about 34 persons, which is about one-third of the average employment on a surimi catcher processor and less than half of the average crew of a fillet

catcher processor. A typical crew might include a captain, a mate, two engineers (one each for the vessel and processing equipment), a cook/housekeeper, two to three crew members dedicated to the deck, a processing foreman and assistant, and about 25 processing workers. On some vessels two or three crew members may split their time between processing and deck work. Any variation in crew size usually is the result of a change in the number of processing workers employed. An annual average of 1,022 FTE positions were generated by this vessel class during the 1992-2001 period, and estimated yearly payments to labor average \$55 million.

### 2.3.5 Value of BSAI Groundfish Fisheries

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

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

| year | species        | total production (mt) | Wholesale value (\$) | vessel count |
|------|----------------|-----------------------|----------------------|--------------|
| 2003 | Pacific cod    | 15,481                | 35,757,540           | 22           |
|      | Flathead sole  | 6,143                 | 8,409,281            | 22           |
|      | Rock sole      | 10,077                | 16,857,624           | 22           |
|      | Yellowfin sole | 39,443                | 38,138,876           | 21           |
|      | AI POP         | 5,889                 | 7,342,403            | 14           |
|      | Atka mackerel  | 27,846                | 23,788,679           | 17           |
| 2004 | Pacific cod    | 20,175                | 46,337,169           | 23           |
|      | Flathead sole  | 7,478                 | 11,932,480           | 23           |
|      | Rock sole      | 15,538                | 28,975,138           | 23           |
|      | Yellowfin sole | 38,730                | 38,747,700           | 22           |
|      | AI POP         | 4,485                 | 6,954,906            | 16           |
|      | Atka mackerel  | 29,747                | 28,899,959           | 22           |
| 2005 | Pacific cod    | 15,927                | 43,801,491           | 22           |
|      | Flathead sole  | 7,146                 | 13,679,454           | 22           |
|      | Rock sole      | 12,977                | 27,173,369           | 22           |
|      | Yellowfin sole | 52,221                | 69,132,577           | 22           |
|      | AI POP         | 4,071                 | 9,940,121            | 21           |
|      | Atka mackerel  | 33,626                | 36,188,872           | 21           |
| 2006 | Pacific cod    | 15,571                | 56,602,382           | 22           |
|      | Flathead sole  | 6,897                 | 15,798,814           | 22           |
|      | Rock sole      | 13,890                | 30,584,579           | 22           |
|      | Yellowfin sole | 50,938                | 72,685,321           | 22           |
|      | AI POP         | 5,163                 | 14,586,815           | 21           |
|      | Atka mackerel  | 34,959                | 33,227,634           | 22           |

Source: NMFS



### 2.3.5.1 BSAI Groundfish Products and Secondary Processing Activity

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

#### Primary Products

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

Table 2-7 shows the various primary products by weight, made from three of the BSAI groundfish categories of interest in the subject action, during the 1998-2003. A large percentage of flatfish are frozen whole, while a small percentage, primarily yellowfin sole, are made into kirimi, a steak-like product. Atka mackerel is primarily produced as a headed and gutted or whole product. Most flatfish, by volume, are also headed and gutted, in some instances with the roe left intact, when present. It should be noted that comparing products by weight can be misleading. For example, fillets are typically skinless and boneless product, so a 5-lb yellowfin sole might yield 1.25 lbs of fillets. The price per pound for fillets is higher than for head-and-gut product, primarily because fillets require less secondary processing (i.e., engender more "value-added" by the initial processor).

**Table 2-7. Volume of Selected BSAI Groundfish Products, by Species and Product Type (1,000 mt), 2003–2006**

| Product            | 2003     |       | 2004     |       | 2005     |       | 2006     |       |
|--------------------|----------|-------|----------|-------|----------|-------|----------|-------|
|                    | Quantity | Value | Quantity | Value | Quantity | Value | Quantity | Value |
| <b>Pacific cod</b> |          |       |          |       |          |       |          |       |
| Whole fish         | 4        | \$5   | 2        | \$3   | 2        | \$3   | 1        | \$2   |
| Head & gut         | 72       | \$178 | 91       | \$216 | 82       | \$238 | 72       | \$255 |
| Salted/split       | -        | -     | -        | -     | -        | -     | 1        | \$4   |
| Fillets            | 17       | \$80  | 9        | \$44  | 9        | \$55  | 11       | \$76  |
| Other products     | 16       | \$24  | 11       | \$20  | 12       | \$26  | 13       | \$31  |
| All products       | 110      | \$287 | 113      | \$283 | 105      | \$321 | 98       | \$368 |

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

| Product              | 2003     |       | 2004     |       | 2005     |       | 2006     |       |
|----------------------|----------|-------|----------|-------|----------|-------|----------|-------|
|                      | Quantity | Value | Quantity | Value | Quantity | Value | Quantity | Value |
| <b>Flatfish</b>      |          |       |          |       |          |       |          |       |
| Whole fish           | 14       | \$15  | 14       | \$14  | 24       | \$31  | 26       | \$34  |
| Head & gut           | 55       | \$65  | 56       | \$79  | 67       | \$112 | 73       | \$124 |
| Kirimi               | 4        | \$4   | 2        | \$3   | 2        | \$2   | -        | -     |
| Fillet               | 1        | \$4   | 1        | \$3   | 0        | \$2   | 1        | \$4   |
| Other products       | 1        | \$1   | 1        | \$2   | 1        | \$2   | 2        | \$2   |
| All products         | 74       | \$90  | 75       | \$100 | 94       | \$148 | 101      | \$163 |
| <b>Atka mackerel</b> |          |       |          |       |          |       |          |       |
| Whole fish           | 7        | \$4   | 5        | \$3   | 1        | \$1   | 3        | \$2   |
| Head & gut           | 21       | \$20  | 25       | \$26  | 33       | \$36  | 33       | \$31  |
| All products         | 28       | \$24  | 30       | \$29  | 34       | \$37  | 35       | \$34  |

Source: NMFS

### **Overview of Secondary Processing Activities**

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

### **2.3.5.2 Product Flows and Markets for BSAI Flatfish and Rockfish Species**

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

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

Other distinguishable markets have developed for rock sole with roe, Atka mackerel, and AI POP. The major market for rock sole with roe is Japan; most rock sole with roe is shipped frozen whole directly to Japan, where it is reprocessed. Most of this production remains in the Japanese consumer market. Rock

sole without roe generally follows the same path as flatfish. Atka mackerel is more popular in Japan and Korea than elsewhere; most of the fleet's production is exported to Japan or Korea for secondary processing and consumption. Nearly all of the AI POP harvested in the BSAI is exported to China, where it is reprocessed and then shipped to Japan for final consumption.

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

### **2.3.6 Management and enforcement**

All Amendment 80 catch of the vessel counts against the allocation of the cooperative for which the vessel is fishing. Once final weights have been determined, quota of the cooperative is assigned to the landing. Catch of all species is estimated using observer data. Any overage is noted and referred to NOAA Fisheries Office for Law Enforcement.<sup>2</sup> Enforcement will then pursue the participant for any penalty.

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

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

## **2.4 Analysis of alternatives**

### **2.4.1 Post-Delivery Transfer**

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

In many share-based programs, some flexibility is built into the program structure to accommodate imprecision and uncertainty in catch. In the halibut and sablefish program, up to 10 percent of a person's annual IFQ allocation that is unharvested will be reissued in the following year. Conversely, overharvest of up to 10 percent of a person's remaining allocation on the last trip is permitted, with a deduction from

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<sup>2</sup> Processors are required by regulations to report any amounts of groundfish harvests or deliveries which they possess, which were taken or retained in violations of fisheries regulations.

the following year's allocation. These carryover provisions limit the need for precisely estimating or catching IFQ. No similar provisions exist for either underages or overages for Amendment 80 cooperatives.

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

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

#### **2.4.1.1 Effects on Amendment 80 Cooperative Participants**

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

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

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

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<sup>3</sup> Nova Scotia uses share-based management programs for different gear types. Transfers across gear types are permitted only after the season closing. The rationale for permitting these cross-gear transfers is to prevent potential TAC overruns and to reduce the incentive to discard.

its own allocation.

Although consolidation of allocations in one or two cooperatives can be used to avoid overages, it is likely that a few overages could occur prior to the end of the season. Since each cooperative is limited by 10 species allocations, it is possible that unexpected catches could put a cooperative over its allocation.

### **Alternative 2 – Unlimited post-delivery transfers**

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

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

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

It is possible that some large overages will be covered by transfers at a price similar to the prevailing lease rates, if those transfers are to cover an intentional overage with pre-negotiated terms of transfer. These arrangements are likely to occur as a part of inseason coordination of the harvest of allocations among vessels. For example, a person may elect not to send a vessel back out for a trip to harvest quota that is half of the vessel's capacity, if another vessel that is already on the grounds has space to handle that catch on its current trip. These transfers might occur under the current system because of the time it takes to submit and process a transfer in writing. In the long run, the electronic, real time system of transfers currently under development should minimize the number of these pre-negotiated transfers to cover large intended overages. Instead, transfers will be processed prior to landing (and in most cases prior to harvesting the fish to be covered by the transfer).<sup>4</sup>

Despite the relative lack of constraints on transfers under this alternative, the likelihood of a substantial number of uncovered, large overages is relatively small. Penalties for violations are likely to increase with

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<sup>4</sup> It should be noted that beginning a fishing trip without quota is a violation. So, cases of transfers to cover intentional overages will only apply to situations where a person begins a trip with less quota, than is used on the trip.

the magnitude of overages. Persons are unlikely to risk large overages without a known source of shares to cover that overage to avoid a potential enforcement action and penalty.

Although post-delivery transfers have the potential to benefit participants with overages, the relatively small number of cooperatives that could form will limit its utility. Participants are more likely to benefit from the formation of a single cooperative that could coordinate the harvest of all shares. Using this arrangement, no shares would be available to cover an overage, since they would all be held by a single cooperative. The single cooperative could more efficiently administer the distribution of catch among vessels in the sector to avoid an overage.

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

### **Alternative 3 – Moderately limited post-delivery transfers**

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

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

This alternative would also limit each cooperative to five post-delivery transfers per each allocation. This limit would allow a vessel to make up to five independent trips with an overage of an allocation. Although it is possible that a cooperative could have multiple overages of an allocation, it is unlikely that the limit of five post-delivery transfers would be constraining.

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

constrain effectiveness of the provision.

### **2.4.1.2 Effects on management and enforcement**

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

Under the status quo, post-delivery transfers are not permitted. At the time of landing, offloads are weighed, assigned to quota and credited against catch by RAM, and any overage is determined and reported to NOAA Fisheries Office of Law Enforcement. Overage prosecution is based on catch accounting records, so specific catch is not confiscated. Overage catches are processed with all other catch to prevent spoilage. If the overage is forfeited, as is typical practice, the Amendment 80 vessel purchases the overage from NOAA Fisheries Office of Law Enforcement at the prevailing price. Additional penalties may be pursued based on the size of an overage or frequency of overages by the cooperative. Overall, few overages are likely to occur, requiring few enforcement actions.

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

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

Since post-delivery transfers are permitted only to cover overages, the increase in administrative and record keeping requirements to address post-delivery transfers is somewhat limited. In general, RAM will oversee share accounts and share usage. At the time of landing, RAM will maintain a record of any overage, but instead of reporting overages to NOAA Fisheries Office of Law Enforcement immediately, RAM would defer reporting until the time permitted to cover the overage with a post-delivery transfer has lapsed. Under the option that limits the time to cover overages from the date of landing (i.e., 30 days from the weekending date), overages would be reported on a rolling basis as overages become final (or the time to cover the overage lapses). Basing the limitation on the time from the landing could contribute to disputes. To administer this provision, a catcher processor landing would be considered to have occurred on the weekending date, on which the weekly processing report is filed. It is possible that using a time limit based on a landing could contribute to disputes. For example, a cooperative may contest the time limit on notice grounds, if they were not aware of the overage at the time of landing. Even if these disputes are unsuccessful, they could be considered mitigating circumstances when establishing penalties for overages.

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

### **2.4.2 Rollovers**

#### **2.4.2.1 Effects on Amendment 80 Participants**

##### **Alternative 1 – Status Quo (no Amendment 80 limited access rollovers)**

Under the status quo alternative, no reallocation of Amendment 80 species, halibut PSC, or crab PSC from the Amendment 80 limited access fishery to Amendment 80 cooperatives would be permitted. Any limited access Amendment 80 allocation that is unharvested would remain stranded in the Amendment 80

limited access fishery allocation and cannot be harvested by Amendment 80 cooperatives vessels or BSAI trawl limited access sector.

It is difficult to predict the amount of Amendment 80 species that would remain unharvested, since implementation of the Amendment 80 program will not start until 2008. However, it is possible that some amount of ITAC allocated to the Amendment 80 limited access fishery could remain unharvested. NMFS management of the Amendment 80 limited access is intended to reduce this potential for unharvested ITAC. For example, if NMFS determines there is not enough Pacific cod ITAC allocation for a directed fishery at the beginning of the year, they could close the fishery to directed fishing. When directed fishing for Pacific cod closes, any catch of Pacific cod must be retained up to the maximum retainable allowance (MRA) and catch over the MRA must be discarded. Any catch of Pacific cod on MRA status by the Amendment 80 limited access fleet would accrue to their ITAC allocation. If the Amendment 80 limited access Pacific cod ITAC allocation has been exhausted, NMFS will put the Pacific cod fishery on PSC status, requiring the fleet to discard all catch of Pacific cod.

Management of PSC also provides some flexibility for the Amendment 80 limited access fishery in reducing the potential for unharvested ITAC. NMFS will continue apportioning Amendment 80 limited access fishery PSC between fisheries. When the Amendment 80 limited access fishery fully exhausts its PSC that is assigned to a fishery, NMFS will close that fishery to trawling (for crab PSC, NMFS will close the associated crab savings area instead of the entire BSAI area). Since NMFS is managing the PSC across the different fisheries for the Amendment 80 limited access fishery, it is difficult to determine the extent there would be stranded Amendment 80 species that could be reallocated to the Amendment 80 cooperatives as a result of PSC closures. However, using the entire Amendment 80 limited access fishery PSC limit prior to the end of the year could result in stranded ITAC allocation. If, for example, the Amendment 80 limited access fishery utilizes all of its halibut PSC allocation prior to the end of the year, NMFS will close all trawling in the BSAI for the Amendment 80 limited access fleet. The same is true for crab PSC but closures are limited to the BSAI crab protection areas.

### **Alternative 2 – Amendment 80 limited access rollovers**

Alternative 2 would establish a mechanism for reallocating projected unharvested Amendment 80 species and PSC from the Amendment 80 limited access fishery to the Amendment 80 cooperatives. Attempts to ensure optimum yield of the resource are consistent with Council policy as well as with MSA National Standard 1. Currently, the Amendment 80 program authorizes a rollover of Amendment 80 species and PSC allocated to the BSAI trawl limited access sector to the Amendment 80 cooperatives if projected to go unharvested. However, the Amendment 80 program does not provide a mechanism for reallocation of unharvested Amendment 80 species or PSC from the Amendment 80 trawl limited access fishery. Despite managing the Amendment 80 species allocation to ensure full harvest of the Amendment 80 limited access allocations, there is a potential some portion of the Amendment 80 species allocations assigned to the Amendment 80 limited access fishery could go unharvested.

Given the Council was silent on details of the rollover action, and this action is related to the rollover regulations already included in the Amendment 80 program, the rollover mechanism under Alternative 2 could be designed to be identical to the current Amendment 80 rollover program for consistency. As a result, the following analysis assumes any rollovers from the Amendment 80 limited access fishery to the



Amendment 80 cooperatives will be designed to be consistent with current regulations for rollovers from BSAI limited access sector to the Amendment 80 cooperatives.<sup>5</sup>

Being consistent with existing rollovers for Amendment 80, the Regional Administrator may reallocate a portion of an Amendment 80 species ITAC, crab PSC, or halibut PSC amount assigned to Amendment 80 limited access fishery to Amendment 80 cooperatives if the amount assigned to the Amendment 80 limited access fishery is projected not to be harvested or used. Any reallocation will result in an amended catch quota permit for each Amendment 80 cooperative. The timing of the reallocation will be at the discretion of the Regional Administrator.

Similar to the current Amendment 80 program regulations, the Regional Administrator may consider the following factors when reallocating an Amendment 80 species, or crab PSC, or halibut PSC amounts from the Amendment 80 trawl limited access fishery to Amendment 80 cooperatives:

- (1) The risk of biological harm to a groundfish species or species group
- (2) The risk of socioeconomic harm to other domestic fishery participants
- (3) The impact that the allocation might have on the socioeconomic well being of Amendment 80 cooperatives
- (4) Current catch and PSC use in the Amendment 80 limited access fishery
- (5) Historic catch and PSC use in the Amendment 80 limited access fishery
- (6) Harvest capacity and any stated intent on the future harvesting patterns of vessels in the Amendment 80 limited access fishery
- (7) Administrative requirements to reissue catch quota permits, and
- (8) Any other relevant biological, socioeconomic, or administrative factors.

Requiring the Regional Administrator to consider all the factors noted above through a formal analysis could delay a reallocation. NMFS does not intend to prepare a formal analysis of all of the listed criteria. Such an analysis would substantially increase the amount of time required to reallocate fishery resources within a fishing season and would undermine the ability of NMFS to ensure the effective harvest of fishery resources.

The formulas for reallocating Amendment 80 species or crab PSC could be the same as those in the final regulations for the Amendment 80 program, which are presented below.

#### **Rollover of Amendment 80 species**

*Amount of additional catch quota issued to an Amendment 80 cooperative = amount of Amendment 80 species available for reallocation to Amendment 80 cooperatives x (amount of catch quota for that Amendment 80 species initially assigned to that Amendment 80 cooperative /  $\sum$  catch quota for that Amendment 80 species initially assigned to all Amendment 80 cooperatives).*

#### **Rollover of halibut PSC**

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<sup>5</sup> Unlike Amendment 80 species and crab PSC which is reallocated to the Amendment 80 cooperatives at a 100 percent from the trawl limited access sector, only 95 percent of the halibut PSC is reallocated to the Amendment 80 cooperatives.

*Multiply the amount of the halibut PSC limit to be reallocated by 95 percent (0.95). This yields the maximum amount of halibut PSC available for allocation to Amendment 80 cooperatives.*

*Amount of additional catch quota issued to an Amendment 80 cooperative = maximum amount of halibut PSC available for reallocation to Amendment 80 cooperatives x (Amount of halibut PSC catch quota initially assigned to the Amendment 80 cooperative /  $\sum$  halibut PSC catch quota initially assigned to all Amendment 80 cooperatives.)*

### **Rollover of crab PSC**

*Amount of catch quota issued to an Amendment 80 cooperative = amount of crab PSC available for reallocation to Amendment 80 cooperatives x (amount of that crab PSC catch quota initially assigned to that Amendment 80 cooperative /  $\sum$  crab PSC catch quota initially assigned to all Amendment 80 cooperatives).*

Reallocation of halibut PSC to the Amendment 80 cooperatives is different from allocation of Amendment 80 ITAC species and crab PSC in that only 95 percent of any halibut PSC is reallocated to cooperatives. The remaining 5 percent stays in the water. The proposed action is silent on whether to include this same calculation in the reallocation of halibut PSC from the Amendment 80 limited access fishery to the Amendment 80 cooperatives. The Council's original intent in deducting 5 percent of the halibut PSC in any reallocation to the Amendment 80 cooperatives was to induce the Amendment 80 cooperatives to be more aggressive in avoiding halibut bycatch. This same intent could be applied to the reallocation of halibut from the Amendment 80 limited access fishery. Some members of the Amendment 80 sector have stated that halibut PSC that is reallocated from trawl limited access sector originate from halibut allocations outside the Amendment 80 sector, in contrast to reallocations from the Amendment 80 limited access fishery which originate from Amendment 80 sector halibut PSC allocation. **The Council should provide guidance to staff on whether to include 5 percent reduction in any halibut PSC reallocation from the Amendment 80 limited access fishery.**

As noted in the analysis of Alternative 1, it is difficult to predict the amount of Amendment 80 species that would remain unharvested in the Amendment 80 limited access fishery, given that program will not start until 2008 fishing year. However, it is possible that some amount of ITAC allocated to the Amendment 80 limited access fishery could remain unharvested.

Increasing the potential for rollovers from the Amendment 80 limited access fishery to the Amendment 80 cooperatives is the cooperative formation requirements. Cooperative formation in the Amendment 80 program requires 30 percent of the Amendment 80 vessels in addition to three separate entities. Under most circumstances, it would be expected that all Amendment 80 participants would join a cooperative given the small number of qualified Amendment 80 entities. However, if there are too few remaining sector members that have yet to join a cooperative to allow formation of another cooperative, each of the remaining vessels would need to accept the terms of one of the existing cooperatives, or fish in the Amendment 80 limited access fishery. Under the current Amendment 80 cooperative structure, a cooperative could leverage its negotiating position with those wanting to join the cooperative by offering meager terms knowing those outside of the cooperative would be forced to accept these terms, or participate in the Amendment 80 limited access fishery. Influencing cooperative leverage is the absence of mandatory cooperative admission provision in the Amendment 80 program and reallocation of Amendment 80 species and PSC limits to Amendment 80 cooperative from the Amendment 80 limited access fishery and the trawl limited access sector.

Reducing the potential for rollovers is the flexible management of the Amendment 80 limited access fishery. For example, if NMFS determines there is not enough Pacific cod ITAC allocation for a directed fishery at the beginning of the year, they could close the fishery to directed fishing. When directed fishing for Pacific cod closes, any catch of Pacific cod must be retained up to the maximum retainable allowance (MRA) and catch over the MRA must be discarded. Any catch of Pacific cod on MRA status by the Amendment 80 limited access fleet would accrue to their ITAC allocation. If the Amendment 80 limited access Pacific cod ITAC allocation has been exhausted, NMFS will put the Pacific cod fishery on PSC status, requiring the fleet to discard all catch of Pacific cod. With regards to PSC, NMFS apportions the Amendment 80 limited access fishery halibut and crab PSC between fisheries. When the Amendment 80 limited access fishery fully exhausts its halibut or crab PSC in a fishery, NMFS will close that fishery to trawling (for crab PSC, NMFS will close the associated crab savings area instead of the entire BSAI area). Since NMFS is managing the PSC across the different fisheries for the Amendment 80 limited access fishery, it is difficult to determine the extent there would be stranded Amendment 80 species that could be reallocated to the Amendment 80 cooperatives as a result of PSC closures. However, using the entire Amendment 80 limited access fishery PSC limit prior to the end of the year could result in stranded ITAC allocation. If, for example, the Amendment 80 limited access fishery utilizes all of its halibut PSC allocation prior to the end of the year, NMFS will close all trawling in the BSAI for the Amendment 80 limited access fleet. The same is true for crab PSC but closures are limited to the BSAI crab protection areas. In general, managing the Amendment 80 limited access fishery with soft caps could reduce reallocations since the fleet can continue to fish for those remaining ITAC allocations even after a fishery closes to directed fishing.

### **2.4.3 Effects on consumers**

Neither action is unlikely to have a noticeable effect on consumers. Very minor, additional amounts of harvests could be made under the proposed actions. These additional harvests are likely to be indiscernible in consumer markets.

### **2.4.4 Net benefits to the Nation**

A minor overall net benefit to the Nation is likely to arise from this action. From the post-delivery aspect, the action is likely to reduce the number of overages by allowing participants to use post-delivery transfers. The risk of increasing the magnitude of any overage is also limited, since enforcement actions and the associated penalties are likely to deter careless overharvest of allocations. The action has the potential to reduce administrative and enforcement costs by reducing the number of enforcement actions for overages. From the rollover aspect, the proposed action could reduce the amount of unharvested Amendment 80 limited access fishery ITAC allocation, ensuring the TAC is utilized to the fullest extent practicable.

## **3 Regulatory Flexibility Analysis**

### **3.1 Introduction**

The Regulatory Flexibility Act (RFA), first enacted in 1980, and codified at 5 U.S.C. 600-611, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: 1) to increase

agency awareness and understanding of the impact of their regulations on small business; 2) to require that agencies communicate and explain their findings to the public; and 3) to encourage agencies to use flexibility and to provide regulatory relief to small entities.

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

Based upon a preliminary evaluation of the proposed program alternatives, it appears that “certification” would not be appropriate. Therefore, this IRFA has been prepared. Analytical requirements for the IRFA are described below in more detail.

The IRFA must contain:

1. A description of the reasons why action by the agency is being considered;
2. A succinct statement of the objectives of, and the legal basis for, the proposed rule;
3. A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
4. A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule;
6. A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
  - a. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
  - b. The clarification, consolidation or simplification of compliance and reporting requirements under the rule for such small entities;
  - c. The use of performance rather than design standards;
  - d. An exemption from coverage of the rule, or any part thereof, for such small entities.

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

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

### **3.1.1 Definition of a Small Entity**

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

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

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

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

Affiliation may be based on stock ownership when: (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50% or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) If two or more

persons each owns, controls or have the power to control less than 50% of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

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

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

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

### **3.2 A description of the reasons why action by the agency is being considered**

There are two separate actions being proposed. The first action is post-delivery transfers for Amendment 80 cooperatives. The second action is rollovers of unharvested allocation in the Amendment 80 trawl limited access group to Amendment 80 cooperatives. Presented below is the Purpose and Need Statement associated with each action.

#### **Post-Delivery Transfers**

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

#### **Amendment 80 Limited Access Rollover**

*Amendment 80 allocates six target species and five PSC categories to vessels fishing in the non-AFA trawl catcher-processor sector. Vessels may choose to form cooperatives and combine their allocations, or they may choose to fish in an 'Amendment 80 limited access' fishery that continues to operate under a 'race for fish' within the combined allocations. Given that each*

*allocation represents a cap, it is likely that the Amendment 80 limited access fishery will be closed on one species or PSC while leaving significant amount(s) of the other species unharvested. Amendment 80 does not provide a mechanism for this unharvested fish to roll from the Amendment 80 limited access fishery to the Amendment 80 cooperatives for harvest. Without this provision, some amount of allocated species may be stranded in the Amendment 80 limited access sector. Creating a mechanism to roll this unharvested amount to the Amendment 80 cooperatives prior to the end of the year will facilitate more complete harvest and utilization of these allocations.*

### **3.3 The objectives of, and the legal basis for, the proposed rule**

Under the current regulatory structure, BSAI groundfish species are managed by NOAA Fisheries, under the Bering Sea & Aleutian Islands Groundfish FMP. The authority for this action and the FMP are contained in the Magnuson-Stevens Act, as amended by the Magnuson-Stevens Fishery Conservation and Management Reauthorization (P.L. 109-479).

### **3.4 A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply**

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

Based on the Final Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for Amendment 80 (July 20, 2007) there are a total of 28 qualified Amendment 80 catcher processor vessels that qualify to join a cooperative(s) as a result of this amendment. Catcher processor vessels both harvest and process the fish they catch. These catcher processors then sell their product into the first wholesale market. The owners of all but one of the 28 Amendment 80 qualified catcher processor vessels had annual receipts that averaged over \$4 million in first wholesale revenue from 1995-2002.

### **3.5 A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule**

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

### **3.6 An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule**

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

### **3.7 A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens**

**Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities**

The Council has identified two separate actions. The first action is post-delivery transfer of which there are three alternatives. Alternative 1 is the status quo, under which no post-delivery transfers are permitted. Any overage at the time of landing is considered a violation subject to a potential enforcement action. Under Alternative 2, post-delivery transfers are relatively unlimited. Post-delivery transfers of shares are permitted. The number of post-delivery transfers a person may receive and their size are not limited. Post-delivery transfers are limited to being used to cover overages. Under Alternative 3, moderate limits are placed on post-delivery transfers. Post-delivery transfers are allowed exclusively to cover overages. Transfers of allocated retainable species shall be limited to 100 metric tons of catch quota on a species basis. The following are the limits on transfer of PSC:

- halibut PSC shall be limited to 15,000 pounds
- red king crab PSC shall be limited to 3,000 animals
- *C. bairdi* PSC (each zone) shall be limited to 10,000 animals
- *C. opilio* PSC shall be limited to 35,000 animals

Transfers are limited to five transfers of each allocation. No person shall be permitted to begin a fishing trip, unless the person holds unused catch quota. All transfers are required to be made after a weekending data for a period of 30 days.

The effects of the first action on large and small participants are similar. Allowing post-delivery transfers should facilitate a reduction in overages that result in forfeiture of catch and other penalties. Since all entities directly regulated are members in a cooperative, which rely on managers to coordinate harvest activity, it is unlikely that any small entities will be disproportionately affected by this action.

The second action the Council has identified is rollover of unharvested Amendment 80 limited access allocation to the Amendment 80 cooperatives. Alternative 1 is the status quo, under which no rollover of unharvested Amendment 80 limited access allocation to the Amendment 80 cooperatives would be permitted. Under Alternative 2, a mechanism to allow allocations of target species and PSC that are projected to be unharvested in the Amendment 80 limited access fishery to roll over to the Amendment 80 cooperatives. This rollover is not intended as a means to cover overages within the Amendment 80 cooperative sector.

The primary effect of permitting rollovers of Amendment 80 stranded species from the Amendment 80 limited access fishery to the Amendment 80 cooperatives would be to ensure the TAC is utilized to the fullest extent practicable. Since this action addresses only reallocating projected unharvested allocation that would likely remain unharvested throughout the remainder of the fishing year, it is unlikely that any small entities will be disproportionately affected by this action.

## **4 National Standards and Fishery Impact Statement**

### **4.1 National Standards**

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



### ***National Standard 1***

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

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

### ***National Standard 2***

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

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

### ***National Standard 3***

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

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

### ***National Standard 4***

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

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

### ***National Standard 5***

Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose.

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

### ***National Standard 6***

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

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

### ***National Standard 7***

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

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

### ***National Standard 8***

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

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

### ***National Standard 9***

Conservation and management measures shall, to the extent practicable, (A) minimize bycatch, and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

This action will have no effect on bycatch.

### ***National Standard 10***

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

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

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

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

## **5 References**

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### **Persons Consulted**

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Mr. Eric Olson, Chairman  
North Pacific Fishery Management Council  
605 West 4th Avenue, Ste 306  
Anchorage, AK 99501-2252

November 28, 2007

Re: C-5 Amendment 80

Dear Chairman Olson:

The Fishing Company of Alaska, Inc. ("FCA") would like to congratulate you on your recent election as Council Chairman. We look forward to working with the Council and you. FCA writes today to suggest some refinements to the Amendment 80 limited access privilege program for the non-American Fisheries Act ("AFA") trawl, or head-and-gut, catcher processor sector in addition to those already under consideration.

Although no fishing has yet occurred under Amendment 80, the need for additional modifications beyond those already identified by Council staff is already evident. Specifically, staff has recommended the creation of a rollover program from the Amendment 80 limited access sector to the Amendment 80 cooperative sector to avoid having stranded fish. Second, staff recommended post-delivery transfers among cooperatives be permitted so as to account for any inadvertent overages. FCA would like to make a few additional suggestions which compliment these proposals and help to ensure that Amendment 80 better meets the Council's specified goals and objectives for the program.

Specifically, and perhaps most obviously, the post-delivery transfer rule presupposes the existence of more than one cooperative and is designed to "reduce the number of violations, allow[] for more complete harvest of allocations, and reduce enforcement costs without increasing the risk of overharvest of allocations." The fact is, however, that under the current Amendment 80 rules requiring three unique entities and 9 vessels to form a cooperative, only one coop has formed and formation of any others is impossible. Thus, unless these rules are changed, the post-delivery transfer rule will have no effect and its objectives will not be served. FCA, therefore, recommends that the Council consider altering the rules regarding cooperative formation to more closely match those it chose for the Rockfish Pilot Program, under which one or more entities could form a cooperative with two or more vessels.

Before explaining this and its other proposals in more detail, however, FCA must note the outstanding litigation on Amendment 80. As you are likely aware, FCA and, separately and independently, Fishermen's Finest and Arctic Sole Fisheries, filed court challenges to discrete

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elements of Amendment 80. While council resolution of outstanding Amendment 80 issues is generally preferable, the Magnuson-Stevens Act allows only 30 days after a final rule issues to file a challenge. Given this mandatory statutory timeline, a fishing company is often required to file such a challenge, while still preferring for the Council to address the issues at such through established processes.

To this end, FCA, in conjunction with Fishermen's Finest (as the cases have been joined), entered into an agreement with the Government to extend the time for the government to file its answer and administrative record until the beginning of next year. This intervening period permits FCA to present reasonable adjustments to the Amendment 80 program directly to the Council.

Most significantly in this respect, and returning to FCA's recommendation regarding cooperative formation rules, relaxing these standards in a rational way will not cause a proliferation of numerous cooperatives, each with small total shares of the overall allocation of Amendment 80 species. Almost all active sector participants, save two, formed a single cooperative. For its part, the Council *rejected* the option of creating a single cooperative structure, such as prevails in the AFA catcher vessel and catcher-processor sectors.

The decision by these other H&G companies to form a unitary cooperative was not unexpected. Most have long been joined together through the Groundfish Forum and the Best Use Coalition. Thus, as things stand now and for the foreseeable future, FCA's six Amendment 80-qualified vessels will not be able to participate in a cooperative. Not only does this mean that a significant amount of total allowable catch will still be harvested under the "race-for-fish" that Amendment 80 was designed to end, but it will prevent the sector as a whole from engaging in transfers to better utilize its overall allocations.

FCA's objective is to be able to form a cooperative with its own vessels, as it has done under the Rockfish Pilot Program. Thus, FCA requests that the Council consider adopting a similar rule as it adopted for that program, allowing a single entity with two or more vessels to form a coop. Given the composition of the H&G sector, this change would likely lead to a stable long run arrangement in which two, or possibly three, cooperatives would form in the sector, as the Council intended. Any concerns over proliferation of numerous small cooperatives could be allayed by requiring, for instance, membership of up to four vessels, or that each cooperative control some minimum percentage, say 20 percent, of the Amendment 80 sector quota.

This more flexible approach best serves Amendment 80's goals. These goals include: (1) improving retention and utilization; (2) allocating Amendment 80 species based on historic and present fishing patterns and future needs of the industry; (3) allowing for formation of cooperatives in order to "encourage fishing practices with lower discard rates and to improve the opportunity for increasing the value of harvested species while lowering costs"; and (4) preventing Amendment 80 vessels from expanding capacity and efforts into other fisheries.

Focusing particularly on objective three, relating to ending the race for fish in the H&G sector, improving its ability to minimize use of prohibited species catch ("PSC"), and reducing incidental catch of non-target species, a Council decision to add flexibility to the coop formation rules allows these benefits to be realized to a much greater degree. In contrast, for the 2008 fishing year, FCA finds itself in a race for fish and PSC with another vessel in the Amendment 80

limited access sector. If allowed to coop, however, FCA would be able to minimize incidental catch and PSC use, as having guaranteed access to its quota allows it to fish more slowly. This is particularly important given the ambitious and challenging reductions in access to halibut, crab, and Pacific cod allocated under Amendments 80 and 85.

Moreover, the formation of a second cooperative would help the sector as a whole achieve optimum yield because of the efficiency post-delivery transfers provides. Under the situation that will prevail in 2008, by contrast, it may be very difficult to avoid a situation in which perhaps significant amounts of total allowable catch will be foregone because of a lack of mechanism to undertake such transfers.

In short, added flexibility will make all the members of the sector better off, and help the Council and NMFS better achieve the important objectives it sought with Amendment 80. (While the proposal to reallocate quota from the Amendment 80 limited access sector to the cooperative sector may go some distance towards preventing stranding of fish, we note that the original rationale for limiting rollovers from the trawl limited access sector to the co-op sector only, was to "encourage" participants to join co-ops. Since current regulations have forced FCA into limited access, there is no basis for making this a punitive action that would only benefit the co-op sector. Rollovers should go both ways - i.e., from the limited access sector to the cooperative sector and from the cooperative sector to the limited access sector. In doing so, you achieve the higher goal of limiting stranded fish within either sector.) As it stands now, the vast of majority of fish that could be reallocated, would have been available to FCA if it were allowed to form a cooperative. FCA is particularly dependent on Atka mackerel and Aleutian Island Pacific Ocean perch, accounting for over 50% of the allocation of each. Given the nature of these fisheries, not only is it unlikely that other H&G vessels could or would be able to harvest all of any late season reallocation, it violates basic notions of fair play to put one company's allocation at such risk simply because the established rules prevent it from forming a cooperative. No matter how carefully FCA fishes, it risks losing significant allocations should the other vessel in the limited access sector use excessive amounts of PSC.

Another issue that FCA raised in its suit is that of treating Pacific cod allocations to the cooperative sector as a hard cap. Because Amendment 85 significantly reduced the H&G sector's allocation of Pacific cod, from nearly 19% in recent years to 13.4% under the amendment, Pacific cod has become as constraining as PSC on the ability of the sector to prosecute its primary fisheries. FCA is particularly disadvantaged in this regard because the Amendment 80 allocation formula favored vessels involved in a directed fishery, and all of FCA's cod catch has been incidental. Thus, there is a significant risk that even if FCA were allowed to form a cooperative, much of its allocation could be stranded.

Accordingly, unless the Pacific cod allocation to cooperatives is treated as a soft cap, it may be difficult for more than the one existing cooperative to be formed. This would be counterproductive because, as explained above, the ability for more vessels to participate in cooperatives actually helps the sector as a whole adjust to lower cod and PSC allocations and reduce bycatch overall. Under such soft cap management, Pacific cod would be subject to the maximum retainable allowance until the cooperative reached its allocation, at which time it would become PSC that cannot be retained. The groundfish retention standard (GRS) will create a strong incentive to avoid Pacific cod all year, to the extent possible, and particularly when it is on

PSC status. Therefore, FCA would request that such a Pacific cod soft cap option be considered and analyzed.

Adding, and ultimately adopting, these measures to the current proposed rulemaking would significantly improve the Amendment 80 program for all Amendment 80 sector participants. We hope that you will give these proposals serious consideration and thank you for your time and attention.

Sincerely yours,



Mike Szymanski  
Government Affairs

cc: NPFMC members

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The Council recommended and the rule implements a minimum number of unique entities for cooperative formation in order to encourage participants in the Amendment 80 sector to work collectively to efficiently harvest resources, minimize bycatch, and provide an opportunity for smaller vessel operators to coordinate with larger vessel operators to minimize the potential costs of GRS compliance. The final EA/RIR/FRFA describes the criteria considered by the Council in recommending three unique entities be required to form a cooperative. **The Council sought to balance the desire of smaller vessel operators to form alliances with larger operators. The fewer the number of persons required to form a cooperative, the more likely that larger numbers of cooperative would form, increasing management and administrative costs, and potentially creating situations in which smaller operators cannot effectively negotiate with larger operators to form cooperative arrangements.** Conversely, requiring a large number of unique persons to form a cooperative could reduce the likelihood of cooperative formation significantly because a larger number of persons would need to agree on a range of operational issues. The Council considered a minimum of three unique entities as a reasonable number to encourage collaborative arrangements.

Some participants may engage in a series of negotiating strategies to form cooperatives, and nothing in the rule prevents a participant from likewise forming alliances and establishing cooperatives with similarly situated and interested entities. Cooperative formation is intended to result in parties reaching mutual consensus on a host of factors to encourage efficiencies of scale. No participant is precluded from that process by the rule. If other participants in the Amendment 80 sector choose not to form cooperative relationships with a specific participant, the limited access fishery provides an option for that participant.