UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau Alaska 99802-1668

AGENDA ITEM C-6

Halibut Catch Sharing Plan

Overview

In September 2011, NMFS completed a preliminary review of public comments received on the proposed halibut catch sharing plan (CSP). In October 2011, NMFS informed the North Pacific Fishery Management Council (Council) that the comments raised issues that may require additional input from the Council before NMFS can proceed to a final rule. NMFS committed to provide a briefing to the Council on specific topics of concern at the Council's December 2011 meeting.

Since the October Council meeting, NMFS worked with Council staff to compile the list of issues that NMFS requests additional input on from the Council. The NMFS report organizes the CSP issues into the following categories:

1. Issues for which NMFS is requesting policy guidance and additional input from the Council;

2. Technical corrections and clarifications to the CSP analysis document and responses to comments that can be addressed by Council staff with little or no direction from the Council; and

3. Issues for which NMFS is requesting Council prioritization of staff resources to develop supplemental discussion and/or analysis to respond to public comments and potentially for addition to the CSP analysis document.

Additional review and discussion of these issues with Council and Council staff could result in some of the issues being moved between the three categories.

For category 1 comments, NMFS requests policy guidance and additional input from the Council to respond to comments and potentially to supplement the analysis for the CSP. In this report, NMFS has provided a suggested response to each public comment based on a review of the CSP record and the CSP proposed rule. NMFS is requesting that the Council review the suggested response and either: (1) recommend that NMFS adopt the suggested response for the CSP final rule, or (2) provide additional input or guidance to NMFS where indicated.

For category 2 comments, NMFS is requesting that Council staff provide supplemental information to respond to the comments and potentially to supplement the analysis for the CSP. NMFS anticipates that the comments in this category would include information or analytical requests that likely could be completed fairly quickly by Council staff without a need for additional direction from the Council.

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For category 3 comments, NMFS is requesting that Council staff provide supplemental analysis to respond to comments and potentially for addition to the CSP analysis. NMFS anticipates that this request may involve more Council staff time than category 2 comments and requests that the Council prioritize staff resources to provide this information.

The Council may provide guidance to NMFS for some of the category 1 issues at the December 2011 meeting. The Council also may discuss how it wishes to prioritize Council meeting and staff resources to provide guidance and/or supplemental analysis on the remaining issues at a future date, possibly at its February 2011 meeting.

NMFS anticipates that the Council's review of the public comments could result in one of three outcomes:

1. The Council provides guidance and/or direction to staff for supplemental analysis at the December 2011 and February 2012 meetings to address NMFS' requests. NMFS would proceed with a final rule for the CSP. The final rule could be implemented during summer 2012 if it is approved by the Secretary of Commerce. Because the CSP is intended to provide pre-season notification of allocations between the commercial and charter sectors, the CSP allocations and charter management measures would not be implemented mid-season if the final rule is effective in mid-2012. (See Appendix 1 for additional discussion.) The CSP allocations and charter management measures would be implemented for the 2013 fishing season. However, it is possible that NMFS could implement the component of the CSP that authorizes transfer of commercial individual fishing quota to charter halibut operators for harvest by anglers in the charter fishery at the time the final rule is effective in summer 2012.

2. The Council proposes revisions to the CSP in December 2011 or February 2012 that change the program in a manner that would not be considered a logical outgrowth of the CSP proposed rule published in July 2011. (See pages 4-6 of Appendix 2 for more information on logical outgrowth determination) If the Council recommends modifications that the public could not have anticipated based on information contained in the proposed CSP published in July 2011, NMFS will be required to notice the public of these changes by undertaking proposed and final rulemaking for the revised CSP. If the Council recommends changes that could have been anticipated by the public from the information contained in the proposed CSP, NMFS could likely complete the final rule for the revised CSP in late 2012 and if approved, implemented for the 2013 fishing season. If NMFS must undertake proposed and final rulemaking for the revised CSP, the timeline for a new CSP could be delayed beyond 2013.

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3. The Council recommends NMFS does not proceed with a final rule for the CSP. The Council could recommend continuation of the current guideline harvest level management program or initiate development of another management program.

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Public comments received on the Halibut Catch Sharing Plan (CSP) proposed rule

1a) NMFS requests policy guidance from the Council in response to the following comments:

Comment 1: In reviewing the program objectives and likely outcomes under the CSP, we support moving forward with implementation of the program in Area 2C. Circumstances in Area 2C necessitate immediate action to meet management objectives identified by the Council. The Area 2C commercial sector has experienced significant cuts in catch limits, while the charter sector GHL has remained stable for three years and actual charter harvests have exceeded the GHL since 2004. In contrast to Area 2C, current conditions in Area 3A do not necessitate an urgent need to have the CSP in place. The Area 3A CSP allocation to the charter sector represents a substantial change from the sector's GHL at current CEY levels, and it is not clear that the proposed CSP management structure meets the Council's management objectives for this area. We encourage NMFS to request the Council to review its recommendation for the proposed CSP in Area 3A and to maintain GHL management during the review.

NMFS Suggested Response: Implementing the CSP only in Area 2C could result in an increase in charter trips and harvest in Area 3A from anglers substituting trips in Area 3A for trips in Area 2C. Hence, implementing the CSP in both areas at the same time avoids a disjointed step-wise approach that could be disruptive to the charter industry. While the highest growth rate in the charter halibut fishery has been observed in Area 2C, the charter halibut fishery also exhibited growth between 1999 and 2007 in Area 3A. The Council developed the CSP combined catch limit tiers and sector allocations to accommodate different circumstances in each area.

Considerations for Alternative Guidance from Council: It is unlikely that a final rule to implement the CSP only in Area 2C would be a logical outgrowth of the proposed rule that the public could have anticipated based on information contained in the proposed CSP. If the Council wishes to review its recommendation for the proposed CSP in Area 3A and maintain GHL management during the review as suggested by the commenter, NMFS would consult with GCAK for guidance on this issue and report back to the Council at a subsequent meeting.

Comment 2: The Council has not yet approved ADF&G logbooks for use as the final estimate of charter harvest in Area 2C and Are 3A. Final estimates are currently based on harvest estimates from the ADF&G mail survey. It will not be practical to request reporting of GAF and non-GAF halibut harvest in the mail survey. Therefore, GAF and non-GAF charter harvest will be confounded in the estimates from the survey. Should the Council not adopt logbooks to manage charter harvests, ADF&G would likely adjust

charter harvest estimates from the mail survey, using the non-GAF proportion of charter harvest reported in logbooks. Should the Council adopt use of logbooks, it may want to address differences between the levels of charter harvest estimated from the mail survey and reported in logbooks because the allocations in the CSP are based on estimated mail survey harvests.

NMFS Suggested Response: The Council and NMFS rely on the expertise of ADF&G to estimate charter harvests using the best information available. NMFS agrees that it would not be practical to request anglers to report GAF and non-GAF charter harvest in statewide harvest surveys. If the status quo method of using statewide harvest survey data to estimate charter harvests in Area 2C and Area 3A is maintained under the CSP, NMFS concurs with the proposed method to adjust charter harvest estimates from the mail survey using the non-GAF proportion of charter harvest reported in logbooks under the CSP.

Request for Additional Guidance from Council: If the Council wishes to maintain the status quo method for adjusting charter harvests, NMFS would address Comment 2 in the CSP final rule as indicated above. This response likely would be a clarification that would not require changes to the CSP proposed regulations, and thus likely would be a logical outgrowth of the proposed rule.

If the Council wishes to adopt charter logbook data for estimating charter harvests in Area 2C and Area 3A and recommends a change to the Area 3A sector allocations under the CSP as suggested in the comment, NMFS would consult with GCAK for guidance on whether the revised allocations were a logical outgrowth of the proposed CSP and report back to the Council at a subsequent meeting.

Alternatively, the Council could recommend that NMFS proceed with a final rule to implement the CSP with the allocations in the proposed rule with the intent of initiating an amendment to the CSP to revise the Area 3A sector allocations based on charter logbook data at a later date

Comment 3: The proposed method of converting IFQ to GAF using the average weight of all halibut harvested in each regulatory area during the previous year prevents accurate accounting of IFQ harvest and charter harvest. The average weight of GAF is expected to exceed the average weight of non-GAF charter halibut. This will result in underreporting of IFQ harvest, as well as overestimation of the charter average weight and possible imposition of management measures that are stricter than necessary to meet the allocation. The proposed rule should include a method for obtaining an average weight for GAF fish only.

The commenters suggested the following methods for obtaining an average weight for GAF halibut:

1. Require the use of electrical nylon strip ties or other similar device by the charter operator to mark GAF halibut to facilitate efficient estimation of GAF in the field by technicians and allow separation of average weight estimates for GAF and non-GAF charter harvest.
2. Distribute to each GAF permit holder a fixed number of locking tags equal to the number of GAF authorized by the permit. This will facilitate efficient estimation of GAF in the field by technicians and allow separation of average weight estimates for GAF and non-GAF charter harvest.
3. Issue GAF in poundage and require charter operators to report the lengths of all GAF to NMFS.

NMFS Suggested Response: NMFS has not adopted a position on modifying the method for converting IFQ to GAF and calculating an average GAF weight.. Under the proposed rule, the average weight of GAF used to convert IFQ to GAF would be based on creel survey data provided by ADF&G. However, method 3 (Issue GAF in poundage and require charter operators to report the lengths of all GAF to NMFS) is the only method that would result in NMFS obtaining an average weight for GAF fish in the first year of CSP implementation. Under this method, NMFS would issue GAF to charter operators in pounds of fish, instead of in number of fish as recommended in the Council preferred alternative[1] and in the CSP proposed rule. Charter operators would be required to report the length of retained GAF halibut to NMFS. NMFS would use the IPHC length-weight relationship to estimate the weight of the retained GAF and would debit the calculated number of pounds from the charter operator's GAF account. Method 3 would remove the need for NMFS to convert pounds of IFQ halibut to number of GAF fish to be issued to charter operators as in the proposed CSP. However, it would require charter operators wishing to lease commercial IFQ as GAF to estimate the number of pounds of halibut to lease rather than the number of halibut, which could potentially be challenging to determine in advance.

Adopting method 1 or 2 would provide a data source for average weight of GAF fish beginning in year 2 of the CSP. In the absence of a method to determine an average weight of GAF in year 1 of the CSP, NMFS would use the average weight of all charter halibut harvested in each area for the first year of the program until average weight data were collected on GAF halibut. However, the Council could consider recommending that NMFS use either method 1 or method 2 in conjunction with method 3. Using method 1 or method 2 to require tagging GAF fish to facilitate efficient estimation of GAF in the field by technicians could supplement the GAF length information provided to NMFS by

[1] The Council's October 2008 CSP motion specified:
GAF would be issued in numbers of fish. The conversion between annual IFQ and GAF would be based on average weight of halibut landed in each region's charter halibut fishery (2C or 3A) during the previous year as determined by ADF&G.

charter operators under method 3. The combination of methods could improve average weight estimates for retained GAF.

If the Council recommends changing the proposed method of converting IFQ to GAF using the average weight of all charter halibut harvested in an area, NMFS recommends that method 3 be implemented in the CSP final rule. NMFS does not support including a tagging program as suggested under method 1 or method 2. NMFS did not contemplate that a tagging program would be implemented as part of the CSP. NMFS does not currently administer any harvest tagging programs and agency staff have not fully evaluated the requirements for such a program. However, based on a preliminary review of tagging programs, NMFS would probably require substantial resources to distribute tags and monitor compliance. It is unclear whether such an infrastructure could be developed in time to be in place for fishing in 2012 or possibly 2013 even if funding were available. Including a tagging program in the CSP final rule as suggested for method 1 or method 2 could delay implementation of the GAF component of the CSP.

Request for Additional Guidance from Council: It is unlikely that implementing method 1 or 2 alone, or implementing method 1 or method 2 in conjunction with method 3, would be a logical outgrowth of the proposed CSP. Implementing a tagging program for GAF would change the CSP recordkeeping and reporting requirements for charter operators in a way not contemplated in the CSP analysis or the proposed rule. The Paperwork Reduction Act requires NMFS to estimate the recordkeeping and reporting burden for affected participants for every regulatory action it proposes to implement. NMFS also must accept public comment on the proposed reporting requirements and the estimated reporting burden.

If the Council recommended implementation of method 1 or method 2 as part of the CSP to obtain estimates of average weight for GAF halibut, NMFS would develop a process for distributing tags and develop regulations for attaching tags to GAF halibut as part of the revised CSP in addition to estimating the burden to charter operators and anglers of the tagging requirement. NMFS also would consult with GCAK for guidance on whether this change to the CSP regulations would be a logical outgrowth of the proposed CSP and report back to the Council at a subsequent meeting.

It is unclear whether implementing method 3 alone would be a logical outgrowth of the CSP proposed rule. Implementation of method 3 would require NMFS to change the proposed CSP regulations as well as revise the estimate of the recordkeeping and reporting burden to charter operators of issuing GAF in pounds and requiring charter operators to report the length of retained GAF to NMFS. If the Council recommends implementation of method 3 alone as a method to develop an average GAF weight, NMFS would consult with GCAK for guidance on whether implementation of method 3 would be a logical outgrowth of the proposed rule and report back to the Council at a subsequent meeting.

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Even if the Council does not recommend modifying the method to assign GAF as proposed under method 3, NMFS may require that operators report the length of retained GAF so that NMFS can determine the average weight of GAF using IPHC length-to-weight ratios. Information on the estimated average weight of GAF reported in the first year of CSP implementation could be used to calculate an average weight for GAF in the following year.

Comment 4: The proposed rule requirement for charter operators to complete a report in the NMFS electronic reporting system by midnight each day GAF are retained is infeasible. Many charter operators take multi-day trips and often do not have internet access.

NMFS Suggested Response: NMFS agrees that charter operators who did not have internet access would not be able to comply with the daily electronic reporting requirement and therefore may not be able to offer GAF to their clients under the CSP proposed rule requirements. NMFS proposed near real-time electronic reporting because the Council recommended that charter operators be able to return GAF to the IFQ holder at any time during the season.[2]

The Council recognized that some GAF permit holders likely would have a balance of unharvested GAF at the end of the sport fishing season. Although the guided sport halibut fishery has typically been open from February 1 through December 31 in recent years, most fishing in the charter fishery occurs from May through August. ADF&G data for 2006 indicate that less than 1 percent of charter halibut harvest occurred after September 30, in either Area 2C or Area 3A. The commercial halibut fishing season typically opens in March and closes in mid-November. Based on this information, the Council recommended that NMFS return remaining unused GAF to the IFQ permit holder 15 days prior to the end of the commercial halibut fishing season because it would not significantly affect charter vessel business operations in aggregate. Further, this timeline would provide the IFQ holder with an opportunity to harvest the IFQ before the end of the commercial fishing season for that year. The IFQ holder also may choose to count the IFQ returned from GAF toward an underage for his or her halibut IFQ account for the next fishing year, as specified in regulations.

[2] The Council's October 2008 CSP motion specified that unused GAF may revert back to pounds of IFQ and be subject to the underage provisions applicable to their underlying commercial QS either automatically on November 1 of each year or upon the request of the GAF holder if such request is made to NMFS in writing prior to November 1 of each year. In October 2010, the Council recommended that NMFS revise the November 1 mandatory GAF return date to 15 days prior to the end of the commercial halibut fishing season in the CSP proposed rule to accommodate different fishing season closure dates in the future.

Request for Additional Guidance from Council: If the ability for charter operators to return GAF to the IFQ holder at any time during the season was removed from the CSP, NMFS could potentially extend the deadline for electronic reporting of GAF to the end of the charter trip on which GAF were retained. This revision could accommodate the business plans of multi-day charter operators while obtaining the required information to track GAF use in a timely manner. The Council could recommend that the CSP retain the mandatory GAF return date (15 days prior to the end of the commercial halibut fishing season) in order to preserve an opportunity for an IFQ holder receiving returned GAF halibut to harvest the IFQ before the commercial fishing season closes for the year.

Alternatively, the Council could consider removing returns of unused GAF to the IFQ holder from the CSP. Removing GAF returns (voluntary within season **and** mandatory 15 days prior to end of commercial fishing season) would simplify the CSP and reduce administrative costs and paperwork burden for charter operators and IFQ holders. However, removing GAF returns would reduce flexibility for charter and commercial halibut operators to adjust to unexpected conditions during the fishing season that result in a charter operator not using all of the GAF issued on his or her GAF permit. If the Council recommended a change to GAF returns for the CSP, NMFS would work with Council staff to analyze the impacts of this change.

It is unclear whether relaxing the daily GAF electronic reporting requirement would be a logical outgrowth of the proposed CSP. The removal of the daily electronic reporting requirement could be considered a reduction to the reporting burden for charter operators. If the Council recommended a change to GAF returns for the CSP, NMFS would consult with GCAK on whether the change would be a logical outgrowth of the proposed CSP and report back to the Council at a subsequent meeting.

1b) NMFS requests input from the Council as to whether the suggested responses to the following comments accurately reflect its intent:

Comment 5: The Council and NMFS did not provide a rationale for its assertion that charter overages and underages will balance out over time. Recent management history shows there will be an asymmetric variation around the charter allocation and a strong bias for overharvest under the CSP. This will compromise overall management of the resource.

NMFS Suggested Response: Section 2.6 of the CSP analysis notes that the Council acknowledged the difficulty in managing charter harvest to a precise amount; therefore, it identified a harvest percentage range that it considers to be an acceptable margin of error. The Council anticipates that under the CSP, projection methods will continue to improve and the projection error will be close to the 3.5% target harvest range around the charter allocation.

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Comment 6: ADF&G and the SSC have commented that errors in harvest projections are likely to exceed the proposed plus or minus 3.5 percent charter harvest range built into the CSP. The Council and NMFS have not provided a rationale for why it selected the range of plus or minus 3.5 percent given this input from its scientific advisory body and ADF&G.

In a January 2009 discussion paper presented to the SSC, ADF&G staff noted that the 3.5% target harvest range is meant to absorb some of the difference in harvest under each management regime, but would also absorb some of the projection error. (http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/HarvestProjectionsDisc709.pdf) It is doubtful, yet uncertain whether this range will absorb all of the projection error. Under the CSP, analysts will be asked to determine whether the projected harvest is within a specified allocation range. Applying the retrospective projections made in 2007 using the best method for each area, ADF&G calculated the errors in determining the charter allocation, i.e., the difference between the charter allocations calculated using projected and final harvests. The errors ranged from - 3.1% to +2.7% for Area 2C and from -2.3 to +1.1% for Area 3A. To reiterate, these are the ranges of errors observed in one-year retrospective projections. Under the CSP, there will be additional error due to forecasting harvest two years ahead and forecasting mean weight (rather than using observed values), as well as errors associated with predicting the effects of bag limit and size limit changes. In some years, these errors may be offsetting, but the projections are likely to fall outside of this 3.5 percentage point buffer at least occasionally.

The SSC comments on the ADF&G discussion paper noted that forecast methods used in the discussion paper are suitable, given current data limitations. (http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/minutes/SSC209.pdf) While the resulting forecasts have had large errors, errors of this magnitude are not surprising given the uncertainties in the data, variability in the processes affecting the halibut stock and its fisheries, and the shortness of the time series. Consequently, the SSC believed that the magnitude and range of uncertainties will prevent the forecast accuracy to be anywhere near the ±3.5% allowed in the charter range allocation of the preferred alternative.

NMFS Suggested Response: NMFS proposed the 3.5% target harvest range around the CSP charter allocation based on the Council's recommendation of the preferred alternative in its October 2008 motion. The Council recommended the management variance not to exceed ±3.5 percentage points around the charter sector allocations. The proposed CSP stated that regulations imposed at each trigger level are expected to keep the charter angler's harvest within the 3.5% target harvest range around the CSP charter allocation. Under the CSP, the Council and NMFS anticipated that ADF&G will use projections of charter anger's harvest to determine the percentage of the combined catch limit that is anticipated to be harvested by charter clients in those areas in the upcoming year. If the projected harvest falls within the acceptable range, the management measures for that trigger point would be implemented. If the charter harvest is projected to exceed

the acceptable percentage, stricter charter regulations would be imposed to reduce the percentage of halibut harvested by the charter sector. If the charter sector is projected to harvest a percentage of the combined catch limit that is lower than the range, charter client harvest regulations may be relaxed to allow the sector to harvest more halibut. If the actual charter harvest varies from the projected amount, ADF&G may use that information in future years to modify its harvest estimation methods.

If the projection error exceeds the 3.5% target harvest range, it is possible that harvest restrictions determined by the CSP matrix and projected charter harvest could be too restrictive or too liberal to limit harvest to the target harvest range. As noted in the response to Comment 5, the Council acknowledged the difficulty in managing charter harvest to a precise amount. However, one of the Council's primary objectives for the CSP was to provide pre-season specification of sector allocations and charter harvest restrictions that would not be adjusted in-season adjustments in order to provide the maximum amount of notice for charter operators and anglers. While the Council acknowledged the difficulties of projecting charter harvest with precision, it anticipates that under the CSP, projection methods will continue to improve and the projection error will be close to the 3.5% plus or minus around the charter allocation.

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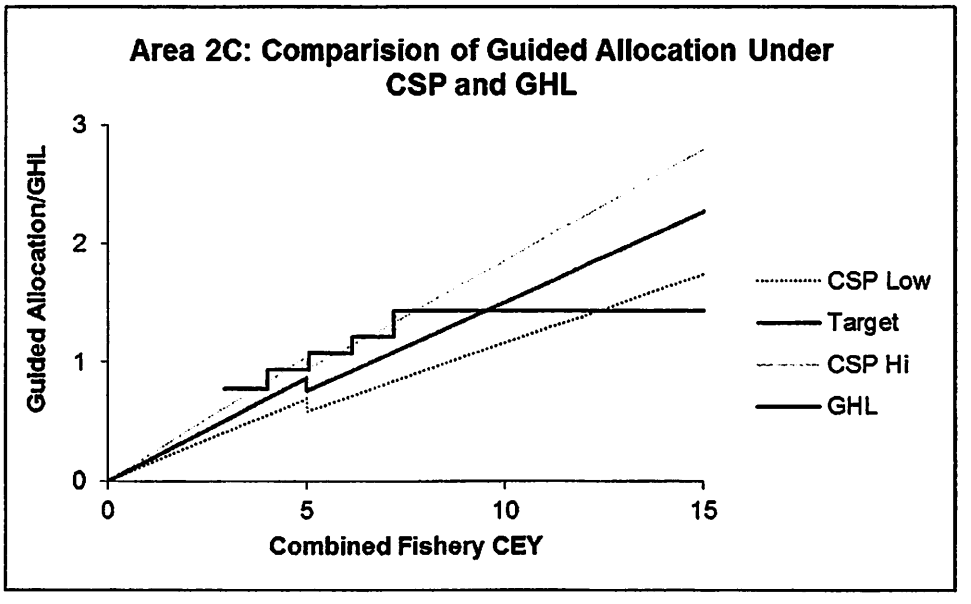
2) NMFS requests assistance from Council staff to respond to comments and make technical corrections and clarifications to the CSP analysis document; additional analysis likely NOT required.

NOTE: NMFS intends to review its suggested responses to Comments 7 – 13 with the Council in December.

Comment 7: As illustrated in the graphs below, the charter allocation under the CSP is up to 30% less than the guided allocation under the status quo GHL at all but the very highest abundance levels. It should be noted that the difference between the GHL and the CSP charter allocation represents harvestable halibut that will be reallocated to the commercial fishery. NMFS has failed to admit in the analysis and the proposed rule the full extent of this reallocation of resources and its impact to coastal economies and guided anglers.



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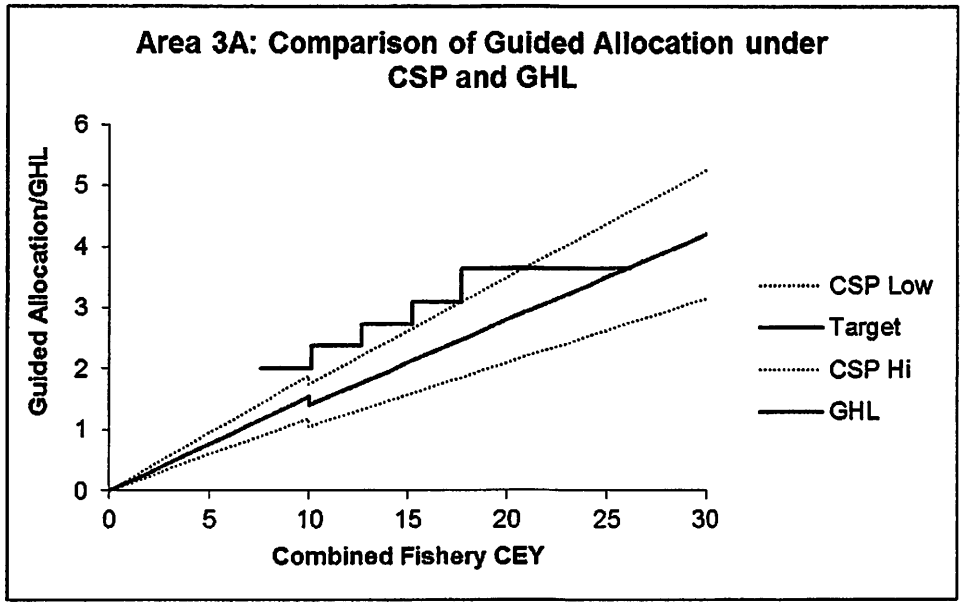

How can the Council and NMFS recommend a CSP charter allocation that would result in such a substantial change from the sector's GHL at the current exploitable biomass levels? Unlike Area 2C, the charter sector has not exceeded their GHL since their peak harvest level in 2007.

Response: NMFS agrees that the CSP analysis should be supplemented to describe the effects of the proposed CSP allocations at current levels of halibut exploitable biomass.

The Council's Preferred Alternative for the allocation under the proposed CSP for Area 3A would implement a fixed percentage of a combined commercial and charter halibut catch limit. The allocation is tied to halibut abundance and will float up and down with changes in that abundance. *This is the biggest difference between the GHL and CSP and is the reason that the Southcentral charter sector would be allocated less than under the current GHL.* The Council intended that the allocations of both sectors would be tied to abundance. In 2008 when the Council selected its preferred alternative, the IPHC projected halibut abundance at much higher levels than have occurred. *Therefore the preferred percentage results in a lower amount of pounds for Southcentral (and Southeast).* The fixed percentage of a combined catch limit would have the Council's desired effect of reducing allocations to both sectors as halibut abundance declined. As halibut abundance increases, as the IPHC reports that it is poised to do perhaps as soon as 2012, both sectors will benefit from increased allocations. At higher levels of abundance, the CSP could provide the charter sector with a larger allocation than the GHL.

The CSP charter allocation would be 14% of a combined catch limit at halibut abundance

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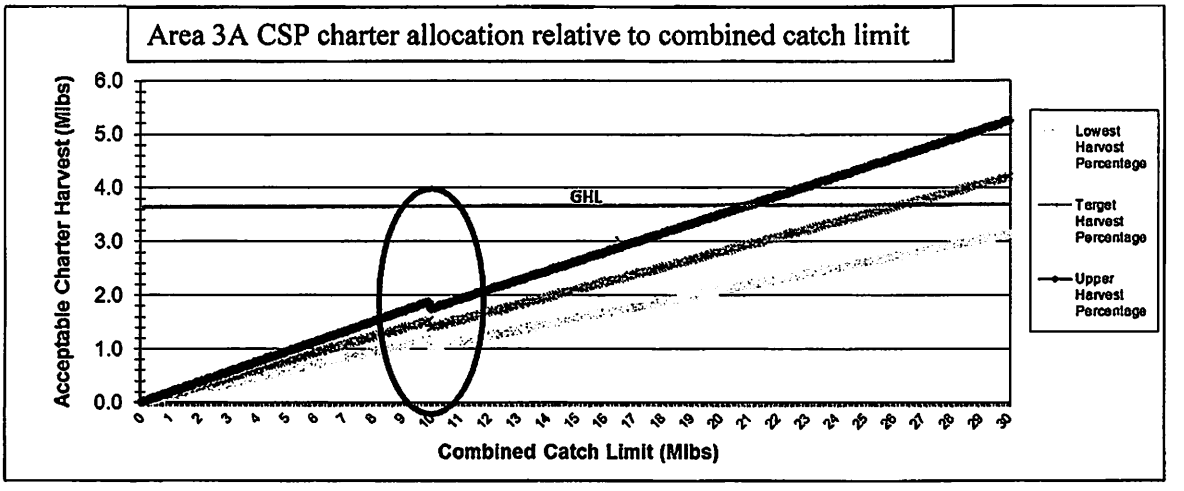
levels (combined fishery Constant Exploitable Yield greater than or equal to 10 Mlb); this percentage was based on 125% of the 1995-1999 avg. charter harvest (current GHL formula). At < 10 Mlb, the charter allocation would increase to 15.4%; this percentage was *based on* 125% of the 2001-2005 avg. charter harvest (GHL formula updated thru 2005) *BUT not equal to that amount.*

The main difference between the current GHL and the proposed CSP lies with the Council's intent that allocations to both sectors' allocations *float with halibut abundance.* In these times of low halibut abundance, *both* sectors would receive less allocation. The Council considered establishing fixed poundage allocations to the charter sector as implemented under the GHL program but rejected this alternative because the Council intended that both sector's allocation be tied to halibut abundance in order to share in the benefits and costs of managing the resource for long-term sustainability.

Comment 8: The purpose and effects of selecting a different charter sector allocation percentage for the lowest combined catch limit tier in the CSP matrix are not clearly discussed in the analysis or the proposed rule. For example, in Area 2C, increasing the combined commercial and charter catch limit from 4.9 Mlb to 5Mlb leads to a decrease in the charter sector allocation (see graph below). Indeed, over the range of the combined commercial and charter catch limits from 5Mlb to 5.6 Mlb, the charter sector allocation is less than when the combined commercial and charter catch limit is 4.9 Mlb. Neither the analysis or proposed rule provides a rationale for this result.



Response: NMFS agrees that the analysis should describe the Council's rationale for selecting a higher percentage allocation at the lowest combined catch limit CSP tier. The Council recommended this approach in order to provide stability in the charter allocation when the combined catch limit drops to relatively low levels. During public testimony on the GHL and the CSP, the charter industry requested management stability and a higher

allocation percentage at low levels of halibut stock abundance to reduce the impacts of lower catch limits. For example, under the CSP, when halibut abundance permits a combined catch of 10 million pounds under tier 2, the charter catch limit is 1,400,000 pounds. But if the halibut population drops and the allowed harvest falls 2 percent to be below the 10 million pound level, the commercial catch limit drops 2 percent but the charter catch limit increases from 1,400,000 pounds to 1,509,000 pounds.

Section 2.6 of the CSP analysis clearly describes the effects of the Council's recommendation on the charter sector allocation:

Figure 20 in the CSP analysis illustrates that the charter sector's target harvest decreases at the break point between Trigger 1 and Trigger 2. The reason for the decrease is the reduction in the target harvest percentage from 15.4 percent in Trigger 1 to 14.0 percent in Trigger 2. The decrease in the charter sector's target harvest, when the combined catch limit increases one pound to a 10.00 Mlb combined catch limit, is 140,000 lb. The 140,000 lb decrease in the charter sector's target harvest is due solely to the change in the target harvest percentage. The 140,000 lb decrease to the charter sector's target harvest is then allocated to the commercial sector as a 140,000 lb increase to its allocation. While the trigger point does cause a substantial shift in the allocation (1.4 percent of the total), the larger target harvest percentage under Trigger 1 allows the charter sector to have a larger target harvest when the combined catch limit is at lower levels. Some members of the charter sector have argued that a fixed allocation is needed to provide stability for their sector. While the larger allocation at lower levels of the combined catch limit does not guarantee a sufficient amount of halibut to meet the charter sector client's demand for halibut trips, it does ensure that more halibut is allotted to the charter sector when combined catch limits are low.

The change in allocations that would occur at the break-point of Trigger 1 and Trigger 2 could place increased public and political pressures on the IPHC when it is setting the combined catch limit, if it is close to the 10.00 Mlb threshold. When the combined catch limit is close to the Trigger 1 and Trigger 2 break point, the charter sector may try to justify a combined catch limit that is just under 10.00 Mlb. That would ensure that their target harvest is larger and acceptable harvest range is larger. Recall that Trigger 1 and Trigger 2 both have a one-fish bag limit if projected harvest falls within the acceptable range. The upper end of the acceptable range is 1.4 percent higher under Trigger 1. That means as little as a one pound change in the combined catch limit could increase the amount of halibut the charter sector could harvest and remain under the cap by about 140,000 lb. While the change in the acceptable range would probably have little impact on the charter sector's harvest regulations, it is likely important, at least from a political perspective, to stay within their acceptable harvest range. The larger cap would help them achieve that goal. Under that same scenario, the commercial sector would likely argue that the combined catch limit should be set just over 10 Mlb. Setting the combined

catch limit over 10 Mlb, would directly increase each QS holder's allocation by about 1.4 percent.

Comment 9: The proposed method to implement charter management measures under the CSP tier is inflexible. The CSP offers limited flexibility to implement alternative regulations (other than default) if projected harvest under the default regulation is not within plus or minus 3.5 percent of the target charter allocation. For example, at low levels of demand, it is possible that the default regulation could be one halibut of any size, even though projected charter harvest under a two fish bag limit would be within the target charter harvest range. Likewise, at high levels of effort, there may be instances where the projected charter harvest exceeds the allocation range under the default regulation and the more stringent regulation called for in the plan.

Additional flexibility to implement the least restrictive regulatory measure, for which the projected harvest is within the specified allocation range, would better align the CSP annual charter management measures with program goals.

Related comment: The CSP proposed rule describes the annual regulatory process that will be followed under the CSP. This process is graphically described in the EA on page xxi. As described, the current process stops after two charter harvest projections even if the projected catch falls outside the charter harvest range. Although not specified by the Council, reasonable logic would indicate the Council intended additional projections should be run with modified bag or size limits until an appropriate management strategy is identified. The commenter suggests the proposed rule and the EA be modified to accommodate this situation.

Response: The Council-recommended tier system establishes a nondiscretionary method for determining annual charter harvest restrictions. Because the CSP will be codified in Federal regulations and be implemented annually by IPHC annual management measures, the CSP must balance the need to use best available stock assessment and charter harvest projection information with the need to specify in regulations, to the extent possible, the potential charter restrictions that could be implemented under different combined catch limit levels. This will provide affected anglers with advance notice and some level of predictability.

Comment 10: There is no rationale behind the selection of charter management measures associated with combined catch limits in the CSP matrix. Although the analysis claims that the levels of the matrix were based on the GHL levels, the data show that this is not the case.

Reviewing the IPHC's compilation of Area 2C total removals from 1974 to the present, it is unlikely under the CSP that area 2C halibut abundance will ever increase to levels large enough to support a two fish of any size rule for charter anglers.

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Reviewing the IPHC's compilation of Area 3A total removals from 1974 to the present, on average, Area 3A charter anglers can expect a two fish of any size bag limit about one out of three years under the CSP.

Response: See the response to Comment 7.

NOTE: NMFS requests assistance to respond to the following comments

Comment 11: What is the rationale for prohibiting harvest by skipper and crew on all charter trips? The analysis did not analyze the economic impact on skipper and crew and did not consider anything less draconian than an outright ban even though other options exist.

Response:

Comment 12: Because the IPHC manages halibut only on the basis of very large areas such as 2C and 3A, the proposed leasing of GAF will very likely result in leases gravitating to a few 'hot spots' within those large regulatory areas. This will lead to over-harvests in those areas until they are no longer places with good populations of halibut.

Response:

Comment 13: Total allowable catch includes the commercial fishery release mortality but does not include guided sport fishery release mortality, which is likely substantial.

Response:

Comment 14a: The discussion of impacts to unguided anglers and subsistence harvesters (page xlii) incorrectly suggests that the status quo and action alternatives are benign. High levels of charter fishing activity adversely affects CPUE for self-sufficient anglers and subsistence harvesters, especially in SE Alaska where charter trips are typically 4 hours or less and thus concentrate on the nearshore grounds of most interest to local sport and subsistence fishermen. Failure to constrain charter-based catches will have increasingly negative impacts on local and fishermen; measures that limit charter-based catches benefit local fishermen.

Response:

Comment 14b: The EA section on Impacts on the Social and Economic Environment, pages 43-44, is unbalanced. It describes potential impacts of the action alternatives on charter operators but neglects to describe their impact on commercial operators, self-sufficient sport fishermen, or subsistence fishermen. The EA makes almost no effort to

quantify the importance of the commercial sector and the economic effects of the CSP. This same imbalance is present in the Summary (page 45) where again, the discussion is in terms of potential adverse impacts to the charter sector with no mention of impacts to the commercial sector or justification for the use of recent overages of the charter sector GHL as the status quo for discussion of impacts of the action alternatives. Throughout the EA, information is provided on the economic contributions of, and impacts to, the charter sector. However, minimal information is included in the EA regarding the economic impacts of the status quo to all who depend on the halibut resource, from harvesters through processors, communities, and consumers. For balance and accuracy, the EA should be amended to include these effects, and, more importantly, the benefits of the CSP.

Response:

Comment 14c: Essential to sport and subsistence fishermen is that the CSP assigns the charter sector a fixed percentage of the resource that is applied to the combined charter and commercial catch limit, a number that is identified after subsistence and sport needs are accommodated. The fixed percentage ensures that the charter catch limit will be proportional to abundance; the new system of projecting charter harvest and using the predetermined management matrix to specify bag and size limits will prevent charter overages. Although these positive aspects of the CSP are discussed in the proposed rule and the EA, the executive summary (p. xlii) and Appendix B section 8.6 include erroneous statements concluding the status quo and the preferred alternative are neutral in terms of impacts to subsistence and unguided sport fishermen. Overfishing has a clear and immediate negative effect on all who depend on the halibut resource. Local depletion has decreased the halibut fishing success rate for sport and subsistence fishermen and driven up safety risks and fuel costs. The EA should be amended to reflect the positive impacts of the CSP relative to the status quo.

Response:

Comment 15: Throughout the Executive Summary discussion of Economic Impacts of the Alternative (pages xxxvi-xlii), it is repeatedly asserted that it is not possible to provide estimates of net revenues by sector. This is incorrect. Analytic methods for estimating net benefits and regional economic impacts of commercial and charter-based fishing are well-developed. Conducting the required analyses is well within the capability of academic researchers as well as researchers employed at the Alaska Fishery Science Center and the Northwest Fishery Science Center. Conducting the analyses would not be costless, but it would certainly be less expensive than many of the research programs routinely conducted by the AFSC, e.g., stock assessment surveys, marine mammal studies, etc. It is valid and appropriate to note that the net benefits and regional impacts of commercial and charter fishing are affected by variations in the prices of inputs and outputs and to changes in the pattern of ownership and that because these factors are in

continuous flux, point estimates of net benefits and regional economic impacts at fixed points in the past or conditioned on hypothetical future conditions are unlikely to accurately predict future conditions.

Response:

Comment 16: The 3.5 percent target harvest range around the charter allocation could equate to a roughly 20 percent range around the charter allocation. We believe this is excessive and doubt that any other sport or commercial fisheries would be allowed to exceed their allocation by 20 percent without compensatory action.

Response:

Comment 17a: The CSP completely lacks any reference to the optimized economic outputs from the proposed allocations to the fishing IFQ holders and those from anglers who choose to fish with a charter operator. There is no underlying economic rationale for the percentage split between these sectors. One of the duties of the Council is to optimize the economic benefits of its allocations for fishery resources. If there is no real meaningful economic analysis of the proposed allocation split, what is the basis and justification of the allocation proposed?

Response:

Comment 17b: Hans Radtke testified to the Council that there is ample economic information and modeling available to the Council and NMFS to do a more than adequate job to examine the potential economic impacts of the proposed CSP. There are at least three reliable sources of economic information on this issue that are detailed economic surveys and can be utilized but were not in the CSP proposal:

- The 2007 report for the Alaska Department of Fish and Game on the Economic Impacts and Contributions of Sportfishing to Alaska;
- The 2009 report for the Marine Conservation Alliance, At-Sea Processors Association, and Pacific Seafood Processors Association on the Seafood Industry in Alaska's Economy; and
- The annual report by NOAA/NMFS on the economic contribution of our nation's marine fisheries.

These three reports can provide an abundance of economic information to form the basis of a basic economic analysis relating to optimized allocations between commercial and charter halibut harvesters. What is the timeline for any future analysis of the now existing economic models, reports and data that have not been adequately incorporated into the allocation scheme between commercial IFQ and charter anglers put forth in the proposed CSP?

Response:

Comment 18a: Page 83 of the analysis, next to last paragraph, last sentence, replays the tired claim that estimates of net benefits to the nation cannot be estimated and ergo the choice of alternatives "must be based on the best judgment of the policy makers." This is incorrect. Estimating net benefits of commercial and charter-based fishing can be conducted using well-known and widely-used analytic approaches. Obtaining estimates sufficiently accurate to differentiate between the status quo and the action alternatives is unlikely to be difficult or overly expensive.

Response:

Comment 18b: The Economic Effects section (starting at page 89) should include quantitative estimates of the net national benefits and regional economic impacts of the action alternatives. As noted in the introduction, this action has been in development in one form or another for the better part of a decade. The estimates of sportfishing demand were conducted on data through 2006, treating 2007- 2011 as out-of-sample forecasts. There has been ample time to have gathered the data necessary for deriving estimates of net national benefits and regional economic impacts of sufficient precision to accurately differentiate between the action and no-action alternatives. That the data needed to conduct these studies was not collected does not reflect favorably on the agency or NPFMC. While the text (page 89, paragraph 2) cites Criddle (2004a) regarding the sensitivity of net national benefits to variations in exogenous factors, the point Criddle (2004a) makes relates to the advantages of market-based mechanisms for allocating catches between sectors. In no way does Criddle (2004a) suggest that it is unreasonable to derive empirical estimates of net national benefits of the action and no action alternatives. In all likelihood, relative differences between the alternatives will be conserved over a wide range of plausible values of the exogenous variables.

Response:

Comment 19: The CSP analysis provides little understanding of the concept of consumer surplus calculations that drive choices by recreational anglers in their decision making process for fishing, even though there is ample literature on the subject available for review and analysis. Criddle points out that in any analysis of angler behavior for halibut allocations, the consumer surplus analysis to the recreational angler is probably more important than the analysis of economic impacts to the charter operators, as anglers make the ultimate decision on where, when and what to fish for. The fatal flaw in the analysis of the proposed CSP is that it assumes angler demand will remain constant regardless of daily bag limits, even though the commentary in the academic literature by Criddle and other economists indicates otherwise. Consumer surplus plays a fundamental role in the decision-making process of anglers and is a primary factor determining angler behavior,

yet this basic understanding of anglers is largely ignored in the CSP by the Council and NMFS.

Response:

Comment 20a: The CSP analysis of behavior of those anglers who choose to fish for halibut with charter operators incorrectly assumes that there will be no leakage from the guided to the unguided recreational sector. A change in daily bag limit from two to one halibut will drastically affect consumer surplus and angler behavior. In Area 2C, with the imposition of the one fish daily bag limit, there has been an increase of up to 50% in unguided activity, so the assumed savings of the one fish daily bag limit for the charter sector being reallocated to the commercial sector is significantly negated, by upwards to 50%.

The shift of anglers from guided to unguided activity is particularly important in Area 3A, where there are many more resident anglers who choose to fish with charter operators. If, as described above, the daily bag limit in Area 3A was reduced from two to one, the 50% increase in unguided angling activity seen in Area 2C also could be expected to occur in Area 3A.

If the underlying assumption of the CSP is to create a mechanism for compensated reallocation to those holders of commercial halibut IFQ from charter anglers, this assumption is not valid because unaccounted changes in angler behavior will fail to provide a functional mechanism to compensate commercial IFQ holders. The CSP will fail to provide 100% of the "savings" in reduced allocation to charter anglers because of leakage to the unguided sector.

Response: The CSP is not designed to "provide 100% of the "savings" in reduced allocations to charter anglers." The CSP is designed d to provide charter operators the opportunity to provide their clients with historic harvest opportunities during times of low abundance while managing the charter fleet within a historically-based allocation. Unguided harvest is controlled by daily bag limits set annually through an established process. If unguided harvest increases to the point where it becomes a conservation concern then one could expect appropriate actions to be considered through that process.

Comment 20b: A shift of anglers from guided to unguided activity results in a significant economic impacts based on data from the 2007 report on Economic Impacts and Contributions of Sportfishing in Alaska, which details the average per day expenditures for trip-related items only, including package trips (lodging, fuel, food, travel packages, etc.):

Saltwater			
Residents, unguided	$162.81	Non-residents, unguided	$209.40
Residents, guided	$466.53	Non-residents, guided	$744.03

The loss in economic impacts and contributions by anglers is basically a three-fold loss when resident and non-resident anglers choose to fish in private boats rather than on guided boats for saltwater trips. Thus, the leakage of anglers from the guided to the unguided sector caused by the CSP will deliver three times less economic activity than the status quo. These impacts were not included in the analysis for the CSP or the proposed rule.

Response: A shift of anglers from guided to unguided fishing opportunities would likely reduce expenditures on, and economic impacts from, the guided fishing industry. However, from a net national benefits perspective there is no indication of an overall aggregate loss in national economic benefits. Anglers who spend less money on guided fishing will likely spend their "saved money" on other expenditures. They could also choose to take more unguided fishing trips and spend the save money on fishing related items such as bait, tackle, food, gear, gasoline, launch fees, and processing fees. Thus, while a transfer away from the guided sector is likely with a transfer of effort overall net national benefits may remain relatively constant.

Comment 20c: The absence of control of harvest by the unguided sector has strong potential to dissipate any benefits that are intended to accrue from the CSP. Leakage of fish from the guided sector by virtue of "directed" fishing by bare-boat charters will destabilize halibut management.

Response: Unguided harvest is controlled by daily bag limits set annually through an established process. If unguided harvest increases to the point where it becomes a conservation concern then one could expect appropriate actions to be considered through that process.

Comment 20d: Leakage of anglers from the guided to the unguided sector comes with a statistically measureable decrease in safety. The issue of safety is discussed briefly in the analysis. The issues of human safety require more than anecdotal mention.

Response:

Comment 21: The analysis estimates of potential for charter income in Area 2C and 3A (pp. 90-91) are incorrect due to NMFS' reliance on projections that the IPHC admits are useless. Tables 49 and 50 on page 97 are also incorrect because of their reliance on the IPHC projections.

Response:

Comment 22: The purchase and resale of GAF is problematic for multiple reasons:

1. GAF are derived from commercial IFQ;
2. GAF harvest will be debited from the commercial fishery total allowable catch;
3. GAF are harvested from charter boats and not commercial fishing boats;
4. GAF are purchased by charter halibut permit holders and sold to individual charter anglers;
5. Charter anglers are not commercial fishermen and neither are most charter captains;
6. GAF likely convert a charter captain into a commercial fishermen because the charter operator buys and sells them. Commercial fishermen and their crew are required to hold state licenses that charter operators and their crew are not require to hold;
7. The CSP contains a ban on same day commercial and charter operations on the same vessel. The sale of GAF onboard a charter vessel is very likely a commercial operation;
8. By international and state of Alaska law, the sale or barter of sport caught fish is illegal.

Response: The CSP is designed to provide charter operators the opportunity to provide their clients with historic harvest opportunities during times of low abundance while managing the charter fleet within a historically-based allocation. The mechanism for creating these opportunities is to provide for a compensated reallocation process via the GAF mechanism. Halibut converted from IFQ to GAF cease to be commercial product when the resulting GAF are issued by NMFS to an eligible charter halibut permit holder. In addition, the charter operator does not sell the GAF fish to the recreational client, instead they are selling the opportunity created by GAF to harvest additional and/or larger fish.

Comment 23a: With dockside prices over $7.00 a pound, it is doubtful that even 10% of the QS allowed for conversion to GAF will be leased. One hundred thousand pounds will do nothing for Area 2C, especially since the CSP allocation will be up to 30% less than the GHL it replaces.

Response: The analysis noted under 2008 quota share to quota pounds conversions ratios and 2008 quota share ownership that the amount of quota shares allowed to be leased in Area 2C would not be enough to provide 100 percent of the anglers in Area 2C with their historic harvest opportunities. This situation is exacerbated by the current high conversation ratio (i.e., it takes more shares to equal one pound of harvestable halibut) and the corresponding high dock price. The GAF process does not guarantee that enough GAF fish will be available. Instead, the process creates a market-based mechanism that is

sensitive to halibut abundance and the willingness to pay of anglers and halibut consumers.

Comment 23b: At today's dockside prices, there is little incentive to lease GAF. If leasing does occur, it will occur at a much higher price than those cited in the analysis. Analysis of GAF availability, potential costs, willingness of quota share holders to lease GAF to the guided sector and willingness of charter anglers to buy GAF are all issues that fall within the scope of the proposed rule. NMFS should have made a good faith effort to analyze the economics of GAF rental and reassess whether this feature makes economic sense to QS holders, charter operators or charter anglers.

Response:

Comment 24: Why didn't the Council and NMFS complete an economic analysis for the CSP similar to the analysis prepared for the Council's action to adjust halibut PSC limits in the GOA, which estimated the economic output per metric ton of halibut utilized in commercial fisheries? In the halibut PSC action, economic analysis appears to be playing a fundamental role in the allocation framework, whereas it played almost no role in the decision to allocate halibut to the commercial and charter sectors under the CSP.

Response:

Comment 25: No rationale is provided for the GAF purchase limits. The holder of a CHP endorsed for 6 anglers could purchase 400 GAF, or 67 GAF per angler endorsement. The holder of a CHP endorsed for 7 anglers could buy 600 GAF, equating to 87 GAF per angler endorsement. The holder of a CHP endorsed for 24 anglers could purchase 600 GAF, or only 25 GAF per anglers. Finally four CHPs endorsed for 6 passengers could be stacked on a 24 passenger vessel for 67 GAF per angler endorsement. These examples illustrate the inequitable treatment of CHP holders because of the arbitrary selection of 6 angler endorsements as the break point between 400 and 600 GAF.

Response: The Council and the AP provided rationale during their deliberations. Both groups expressed concern that a limited number of well-off CHP holders would be able to buy up the potentially limited amounts of GAF available. The GAF purchase limits address this concern by limiting the amount of GAF which can be purchased for a single CHP thus helping ensure the GAF are available to more CHP holders.

Comment 26: In the first full paragraph on page xi of the analysis, in discussing the possible shift of effort from Area 2C to Area 3A, it should be noted that this shift of effort is a response to the relative scarcity of halibut in area 2C and relative abundance of halibut in area 3A---clearly a desirable outcome from the perspective of matching effort to abundance.

Response:

Comment 27: Page xxxvii of the analysis includes crude estimates of the gross revenues to charter operators from trip fees. For balance, the executive summary, page xxxviii, should report estimates of gross exvessel revenues to commercial fishermen.

Response:

Comment 28: The paragraph on page xxxvii of the analysis that carries over from page xxxvi incorrectly discusses direct and indirect benefits in the course of a discussion of net revenues. Direct and indirect benefits are pertinent to a discussion of regional economic impacts, not a discussion of net revenues. The sentence "Consequently these numbers should not be considered an estimate of the economic value, direct or indirect, of the charter fleet." Should be struck.

Response:

Comment 29: The discussion of price flexibilities on page xxxviii of the analysis should reference Herrmann M & KR Criddle. 2006. An econometric market model for the Pacific halibut fishery. *Marine Resource Economics* 21:129-158. Where price flexibilities are actually estimated. Herrmann et al. (1999) did not estimate price flexibilities but instead used estimates obtained for Canadian halibut price flexibilities as purely illustrative values.

Response:

Comment 30: Footnote 15 on page xl of the analysis incorrectly concludes that surplus capacity will exit the charter sector under an LLP. Experience with LLP fisheries throughout the world suggests that excess capacity is attracted to and retained in LLP fisheries. See, e.g., Wilen (1988) Limited entry licensing. *Marine Resource Economics* 5: 313-324.

Response: Wilen's paper discusses commercial fisheries where fishermen seek out an edge by investing in non-controlled elements of the fishery, such as in the Bristol Bay salmon fisheries. They control for length, but not beam, horsepower, etc. So, people can still harvest more by investing in the uncontrolled factors. It's different in the charter fishery because the charter halibut permit angler endorsement limits total angler effort. You can't harvest more by investing in a bigger boat unless that attracts more customers. So, you can see where total capacity won't change because the number of seats can't change under the CHP but the amenities on vessels might change and that might lead to greater capacity utilization (customers).

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Comment 31: Page 165 of the analysis. This section should note that most, if not all, charter trips target not only halibut but other bottom fish such as lingcod, rockfish, shark, and Pacific cod. In addition, many charters also target salmon during a bottomfish trip and view wildlife as part of their experience. The revenue numbers, therefore, do not reflect a "pure" halibut trip.

Response:

Comment 32: Page 192, last paragraph in section 8.3 of the analysis. Note that the role of halibut as a steady production input is new. It did not emerge until after implementation of IFQs in 1995.

Response:

Comment 33: Comments on Appendix B of the analysis.
The Appendix B discussion of processing needs to clearly emphasize that custom processing is a cost to commercial fishermen and that charter processing is a cost to sport fishermen. While payments for processing services represent gross revenues to processors, the associated net revenues will be substantially less than the gross revenues.

Appendix B, section 8.5. This section discusses regional economic impacts of changes that affect the charter fishery. For balance, it should also discuss regional economic impacts of changes that affect the commercial fishery. This section should include the results of a regional economic model such as that being developed by Chang Seung at AFSC.

Appendix B, section 8.6. As noted above, the discussion of impacts to self-sufficient anglers and subsistence fishermen should be revised to account for the effect of charter catches on CPUE and the distance needed to travel to productive fishing grounds. This is particularly relevant in SE Alaska where charter operators typically schedule 4-hour trips and fish on grounds that are very near to population centers.

Appendix B, section 8.5. The regional economic impacts of changes that affect charter operations are discussed in this section. However, once again the regional economic impacts of the status quo and of any changes to the status quo that effect commercial fishermen are not discussed. These need to be added.

Appendix B, section 8.6. This section should be revised to describe the impacts to subsistence and sport fishermen of local depletion. Charter operations have gradually increased their working radius from coastal towns seaward as they deplete the more accessible fishing grounds. This forces resident sport and subsistence fishermen to travel farther in search of halibut, which increases fuel costs, heightens the risk of perilous

fishing in more exposed areas of the ocean, and increases the number of trips needed to find halibut.

Response:

Comment 34: The economic benefit of the commercial sector within Alaska far outweighs the total economic benefit of the charter industry regardless of whether one considers total economic benefits or halibut specific benefits.

Response:

Comment 35: The reality is that the economic impact of travel, lodging, and food claimed by the charter industry is more closely related to the fishing experience than to the number of halibut caught.

Response:

Comment 36: Of the $1.6 billion state-wide sport fish output in 2007, only $200 million can possibly be attributed to the charter halibut fishery in Areas 2C and 3A. Of the $5.8 billion for the commercial fishing sector, the comparable number for Areas 2C and 3A is $478 million.

Response:

Comment 37: Most fishermen borrow money to purchase IFQ, which sells for $25-$35 per pound, and are now struggling to pay loans that were taken out based on quota levels that were two or three times higher than current levels. Some fishermen will not be able to make loan payments this year and may lose their shares. Many currently owe more than they can make by fishing or by selling their shares because of the quota reductions.

Response:

Comment 38: Page 146 of the analysis. The contingent behavior analysis requested by the SSC in February 2009 is not included in the RIR. In place of a statistical model of angler response to alternative management measures, the analysts have substituted their own assumptions. While those assumptions may be correct, an empirically based contingent behavior model would be a more robust mechanism for deducing angler response to changes in seasons, size limits, bag limits, etc.

Response:

3) NMFS requests Council prioritization of staff resources to develop supplemental discussion and/or analysis to respond to public comments and potentially for addition to the CSP analysis document; additional analysis LIKELY required

NOTE: NMFS intends to review Comments 39 and 40 with the Council in December.

Comment 39: It is not evident that the analysis fully examined the potential effects of the CSP on harvest in state managed fisheries or potential costs to the state for management and enforcement of its fisheries. Restrictions in halibut harvest will likely increase targeting of state management species, particularly Chinook and coho salmon, several species of rockfish, and lingcod. These effects are not properly addressed in the EA.

Response:

Comment 40: The sampling access requirement under the CSP was not analyzed in the analysis prior to the Council taking action on the motion. ADF&G does not intend to reallocate sampling resources as a result of this CSP requirement.

Response:

Comment 41a: On page 23, the EA asserts that there is little potential for substitution of charter-based angling effort between halibut and salmon target species. This is contrary to results reported in Herrmann et al. (2001) and published in Criddle et al. (2003) and Hamel et al. 2002, linking sportfishing trip attributes, participation decisions, and regional economic impacts in Lower and Central Cook Inlet, Alaska. *Annals of Regional Science* 36:247-264.

Response:

Comment 41b: The EA attributes too much weight to halibut in assessing impacts to the charter sector of changes in management measures. The EA should be amended to more accurately reflect the relative impact of changing management measures for one of the 33 or 39 species, depending on the IPHC Area referenced, that can be retained in any given day by a charter client.

Response:

Comment 41c: Page 156 of the analysis. The daily recreational bag limit varies from 33-39 or more in Areas 2C and 3A. In 2008, ADF&G Special Publication No 09-11 (Tables 15 & 16) reported that saltwater guided vessels caught a total of 807,618 fish in 2C/3A (not including sablefish and Pacific cod), of which 42% were halibut. This indicates that

saltwater clients already place considerable importance (58%) on species other than halibut. The EA states: "More restrictive regulation will reduce the profitability of this sector." This is overstated and needs to be examined in light of the obvious substitution occurring. This statement is also contradicted by the market that has developed for charter permits. There is clear demand for the newly created charter halibut limited entry permits, which indicates confidence in the future of the halibut charter business. Since January 2011, 58 permits have sold for average prices of $32,000 in Area 2C (April) and $58,833 in Area 3A (May). http://www.fakr.noaa.gov/ram/charter/apps_permits.htm.

Response:

Comment 42a: The RIR should not include unsubstantiated claims such as: Widespread trip cancellations have been reported, due to implementation of the one-fish bag limit in Area 2C. (page 50). Where is the empirical evidence to support this statement? Do logbook data or statewide harvest survey data provide any evidence that there been a statistically significant reduction in the number of angler-days aboard charter halibut vessels in SE Alaska or that this reduction is attributable to regulatory changes rather than overall reductions in mean halibut size and continuing adverse economic conditions? For example, if reductions took place, did they exceed the 11.8% reduction in statewide visitors reported in McDowell (2011) or the 15% drop in visitor spending reported in McDowell (2010) or the 14.5% drop in cruise ship visitorship also reported in McDowell (2010)? Hearsay, particularly unattributed hearsay has no place in a regulatory impact review.

Response:

Comment 42b: The EA states the number of charter trips has declined significantly between 2008 and 2010 in both Areas 2C and 3A. While Area 2C charter fishermen try to fix the blame for this on regulatory changes designed to present their overfishing, bag and size limits have not changed in Area 3A. Yet, both areas have experienced significant declines in demand. The only conclusion is that changing national economic conditions are the driving force behind the reduced demand for charter services, not regulatory issues. Meanwhile, the demand for commercially caught halibut keeps *increasing*, despite the economic "slow down," a fact reflected in the strong upward trend in halibut ex-vessel price. 2010 ex-vessel halibut prices set records that were then promptly broken by 2011 prices. Consumers are hungry for commercially- caught halibut; the demand currently out-strips the supply. These statistics indicate an optimal allocation would meet these demand changes by *increasing* the commercial allocation. Instead, the CSP seeks to balance the needs of all sectors through a percentage-based allocation and to allow the market-based transfer system to adjust allocations in response to changes in demand.

Response:

Comment 43: Page xli of the analysis. The discussion of impacts to communities in this section assumes charter overfishing is an acceptable part of the status quo, when in fact that overfishing has imposed significant costs. The costs, and conversely the benefits of preventing charter overfishing, should be described. This section also includes the comment repeated later at 50 that the one fish bag limit has decreased client demand. The decrease in client demand should be evaluated relative to the State- wide decline in Alaska tourism, the reductions in tourism spending, and the reduced availability of halibut---all of which are already discussed in the analysis. The EA/IRFA at 155 suggests that the 2007-2009 recession "likely" played a part in the decline of Area 2C bottomfish anglers. The following 2009 information from *The Juneau and Southeast Economic Indicators 2010* (Juneau Economic Development Council 2010, available at http://jedc.org/forms/2010_Juneau_&_SE_Economic_Indicators_Final.pdf) demonstrates the scale of the recession on the tourism business.

- From 2008-2009, Juneau's Leisure and Hospitality annual employment was down 180 jobs.
- From 2008-2009, passenger transportation indicators were down: ferry -12%, Alaska Air -9%, Other Air -5%, cruise ship -1%.

In sum, the statement attributing decline in angler demand to regulation is unsubstantiated and should be evaluated in a larger context or struck.

Response:

Comment 44: Discussion of the consequence of fewer LEPs being issued than the most recent number of participating vessels (page 51 of the analysis) should report on average capacity utilization by participating vessels: what fraction of available space is used on an average trip; and what fraction of LEP vessels are operated on a fulltime basis. This section should also note that the reason vessels did not qualify is that they entered the fishery after the control dates or did not report significant catches before the control dates and chose to enter buoyed by speculation that the Council would revise the control dates. This phenomenon of speculative entry is a well-known pathology of long-drawn lead-ins to LLP and catch share programs. See, e.g., Anderson TL Hill PJ (1990) Race for property rights. *Journal of Law and Economics* 33: 177-197.

Response:

Comment 45a: Because time has elapsed since the harvest projections (e.g., pages 76-85) were developed, there is opportunity to test the forecast accuracy of the model projections by comparing those projections with actual catches. Data from 1996-2006 were used to project charter harvests from 2007 through 2011. Data for 2007-2010 are now available to compare with the forecasts. Are the forecasts unbiased? What is the coefficient of variation on the forecast errors? Is there a significant difference between

the mean square error over 2007-2010 relative to the mean square error over 1996-2006? Etc.

Response:

Comment 45b: Projections cited in the analysis for expected Area 3A harvest levels are out of date. Table 71 on page 131 states that Area 3A projected charter allocations would range from 4.24 million pounds in 2010 to 5.89 million pounds in 2015 and that expected harvest restrictions would be 2 fish of any size. Using actual 2011 data, the Area 3A tier would be 2, the allocation would have been 2.52 million pounds, and the harvest rule would have been 1 fish. It should also be noted that the biomass trend in Area 3A through 2011 is down. Projections for Area 2C are likewise out of date, with projections for 2011 suggesting a charter catch limit of 1.02 million pounds, when in actuality the allocation would have been half that amount. The projections were made 3½ years ago in 2008. Since then, among other things, the IPHC has suspended its Slow Up- Fast Down (SUFD) policy and of course it now has the knowledge and experience of what the stock has done from 2008 through 2010.

The analysis admits in several places that the projections used in the initial analysis are out of date. Table 18 on page 60 compares projected and actual CEYs and page 155 also has a note on the projections used in the analysis, referring the reader to a "New Information" section. Mixing old and new information is deceitful and observes that NMFS would have been wise to update the analysis by replacing out of date information with the latest scientific information prior publishing the proposed rule.

Response:

Comment 46: In considering net national benefit, the "sharing" of the halibut resource by the public must be evaluated. Commercial fishermen bring the fish to the public; charter operators take the public to the fish—but orders of magnitude less "public" is served by the charter industry. Even at these low levels of abundance, the Area 2C and 3A commercial catch limits equate to roughly 9 million "finished" pounds of halibut, or 35 million halibut meals per year. One can assume that the average person does not eat halibut more than three times in a year, which translates to the commercial fishermen in these two areas annually providing access to the halibut resource for 9-10 million Americans plus another 2-3 million non-Americans through export. The Area 2C and 3A charter industry, on the other hand, provides an expensive recreational opportunity to approximately 230,000 clients per year. (EA at xxxvii) In sum, the commercial fishery provides 44 times more Americans access to the halibut resource, provides national economic benefit through export—and demand for commercially caught halibut is still increasing. The public access aspect of "catch sharing" clearly tips the allocation scales toward the commercial fishery.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau Alaska 99802-1668

Response:

Comment 47: The discussion of impacts to communities (page xli of the analysis) needs improvement. Because most of the discussion proceeds from the perspective of describing possible negative impacts of reductions in charter-based fishing, it leaves the impression that regional economic impacts associated with a sector that has consistently exceeded its GHL should serve as the *status quo ante*. The entire discussion could have instead been written using a circumstance where the charter sector adhered to its GHL and any increases above that GHL represent losses in regional benefits from commercial fisheries. In addition, this section is very much in need of a discussion of how the regional economic impacts of commercial and charter fishing depend on the degree to which owners, operators, and employees are *bona fide* local residents and that their purchases and expenditures are for locally acquired goods and services. There is abundant information on ownership and residency for the commercial halibut fishery and for charter halibut LLP holders. That empirical data should be summarized and reported here. This section repeats assertions that the 1-fish bag limit in SE Alaska will reduce client demand. This limit has been in place for over one year. What is the empirical evidence that client demand has actually been reduced? I.e., do the logbook data or statewide harvest survey data provide any evidence that there been a statistically significant reduction in the number of angler-days aboard charter halibut vessels in SE Alaska?

Response:

December 2011
C-6(c)
NMFS report on CSP

Appendix 1
Catch Sharing Plan (CSP) discussion points

I. **Implement GAF only for 2012.**

NMFS likely can implement GAF only in 2012, if we have conversion data for fish to pounds and vice versa for each area. The individual fishing quota (IFQ) transfer and fee systems can be expanded, and design/development of the reporting system is already well underway, as is the design and implementation of the actual database changes.

The CSP would be simpler, more understandable, and require fewer transactions and paperwork for constituents if the CSP did not allow returns from GAF to IFQ accounts. Constituents would incorporate this into lease contracts. If the ability to return GAF to IFQ is desired, a lesser but still helpful improvement over the proposed design would be to include only the NMFS mandatory end-of-year conversion from unused GAF to IFQ.

II. **Single, delayed allocation and fishery start in implementation year.** This is the simplest alternative to Administer, as it results in "business-as-usual".
   a. Not possible if the season start date is not known when the IPHC meets in late January.
   b. Likely not palatable to industry as it could greatly complicate operational considerations, and increase costs, disrupt contracts and markets, etc.

III. Implement sector ratios and allocations mid-year

The existing IFQ system cannot accommodate the issuance of additional IFQ pounds mid-year while keeping intact certain program features. The most problematic is transfers, which are linked to, and greatly complicate, the second feature, adjustments based on prior-year fishing.

<u>Brief IFQ Background and Structure</u>

The existing IFQ program allows transfers year round except January (after prior year IFQ expires and before NMFS issues the next year's IFQ). Adjustments to the new year's IFQ allocation for quota share (QS) units held, based on under- or over-fishing IFQ derived from that QS the prior year, are made at the time the new IFQ is issued. However, the relationship between adjustments and under-/over-fishing is not straightforward; that is, under-fishing the prior year does not guarantee a carryover addition adjustment to that annual IFQ species-area-category account; and overfishing the prior year may result in no adjustment, an administrative adjustment, or a violation).

Note that the vast majority of IFQ (catcher vessel IFQ) may not be leased except in a few, very restrictive situations (military call-up, emergency medical situations, under surviving heir provisions on death of an individual QS holder, and in the Community Purchase Program).

IFQ adjustments are computed at the start of each year and depend in part on transfers completed throughout the prior year. Because adjustment "follows the QS" through transfers, and the same QS units may be transferred numerous times within a year, accounts held by two or more persons are "linked" by these complex computations if they engaged in transfers with each other.

In addition to transfer data, stable end year remaining IFQ balances are required to compute adjustments. The basic process is that each person's remaining IFQ account balance is negative, 0, or positive. If non-zero, the system finds the current holder of the QS that generated that IFQ the prior year and moves some of that balance to the new QS holder's account. This, in turn, revises that QS holder's balance. When this process is complete for all transfers (including leases), each person's revised remaining balance is examined: negative, 0 or positive. The negative balances result in an equal amount (pound for pound) in a future year overage adjustment (debit). However, underages have a use-or-lose feature and are limited to a carryover amount equal to the lesser of what's remaining or 10 percent of the "IFQ Account". The IFQ Account has been interpreted to mean the amount of IFQ that would derive from QS held using the previous year's ratio (the previous year's ratio must be used to get the prior year pound-for-pound amount).

Adjustments are not only an extremely popular program feature, but are crucial to avoiding waste and discard mortality, TAC overruns, and an excessive number of enforcement violations and investigations; for example, the IPHC strongly supports underage carryover lest IFQ holders overfish and discard down to avoid leaving annual allocation in the water, and 100% overage carryover adjustment debiting is needed to "pay back" the resource and avoid exceeding the annual commercial "TAC" (setline allocation).

In the 15 IFQ program years of adjustments, (starting with year 2) because carryover is limited and more people tend to underfish than overfished, there has been a 1-2% net potential addition to TAC each year. However, this has not been realized as this pattern has been consistent.

IV. Potential for mid-year allocation addition

Regardless of the logistics of mid-season issuance of additional IFQ, this would be a substantive change to a program that has been operational for 16 years, and will cause some amount of confusion and disruption to routine industry practices. Additionally, it is likely to increase constituent and Agency costs, and in addition to authorizing rulemaking, may require amendment to OMB Paperwork Reudction Act (PRA) approval.

Mid-year implementation is not feasible if there is any chance that the eventual IFQ commercial "TAC" would be lower than that used at the start of the year. This could result in "TAC" overages beyond that potential already resulting from prior-year adjustments. This also could cause numerous "instant" or *de facto* violations for IFQ

permitholders who already fished, especially if they already used the regulatory allowance to exceed a permit by a modest amount for future administrative adjustment.

NMFS envisions only two feasible alternatives for retaining the adjustment feature with a second, mid-season IFQ issuance. Suspending adjustments as part of any alternative is neither feasible administratively (this would require substantive programming for which there is likely insufficient available time or staff) nor desirable from a management perspective. The resultant lack of accountability for exceeding permitted amounts could result in substantive TAC overruns and additional violations. Additionally, this would cause constituents, lenders (including NMFS) and permit brokers to substantially change their routine transfer contracts and procedures and could delay time-sensitive transactions. And, IFQ addition could disrupt NOAA Office of Law Enforcement violation actions and sanctions already underway. NMFS Restricted Access Management (RAM) would need to know well in advance (essentially, now) if a mid-season distribution will occur in order to notice constituents (from harvesters to markets), who plan fishing operations and transfers in advance of the year.

1. Disallow QS transfers from the start of the year until after issuance of the additional IFQ. This is the simpler of the two options and would allow additional IFQ issuance to the start-year QS/IFQ holder.
    a. RAM would re-compute annual QS/IFQ ratios and reissue all IFQ permits, and would presume that IFQ permitholders intended to allow already-approved Hired Masters to have access to entire revised IFQ account amounts. IFQ permitholders will have to arrange to get copies of IFQ permits onboard vessels deployed at the time of distribution; unlike requested transfers, this could occur without significant notice. Ratios would have to be re-computed or future year data retrieval and reporting would be erroneous.
    b. The date on which additional IFQ would be distributed and transfers resumed would likely not be known at the start of the year, pending implementing CSP regulations. Uncertainty alone is likely to upset fishing operations, as IFQ holders will have to (re)engage crew, make delivery plans, etc. in a knowledge vacuum and with uncertain dates. Processors and markets could be disrupted.
    c. Transfers might not occur in time to support 2012 fishing, or might not occur all year. Until allowed, lack of ability to transfer would at best inconvenience, and at worst, severely harm, some constituents who need access to quota proceeds, who intend to retire, who need to complete a transaction to satisfy a legal or contractual requirement (a 1031 IRS like-kind exchange, execution of a will, divorce decree, or other operation of law or pursuant to a security agreement), and in securing financing including obtaining NMFS loans, or for other reasons.

2. Allow QS transfers prior to distribution, retaining adjustments for the next year. Additional IFQ would be issued to persons holding QS at the time of the additional issuance even if not the start-year issuee, or the following year complex

adjustment process would not work, causing confusion and permit issuance and fishery delays.

a. Need for additional transfers, with attendant time, cost, and administrative burden for recipients who already sold or leased QS/IFQ that year. This will increase the PRA burden and costs for the public.
b. RAM would still need to suspend transfers temporarily to complete the second IFQ distribution.

Other considerations:

1. It's questionable that NMFS has sufficient staff and time to implement such changes for 2012.
2. If substantively delayed, additional IFQ distribution might occur too late to economically fish the additional IFQ allocation, to fish in safe weather, to avoid excessive bycatch (species are co-located at depth in fall/winter), for lease to charter operators as GAF, or even for RAM to approve requested transfers.

C-6 (c)
Appendix 2

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

March 21, 2003

MEMORANDUM FOR: David Benton
Chair, North Pacific Fishery Management Council

FROM: Jonathan Pollard
Attorney-Advisor

SUBJECT: Summary of rulemaking requirements applicable to the development and implementation of Alaska groundfish fishery specifications

This memorandum responds to the Council's request for a summary of the rulemaking requirements applicable to the procedure for development and implementation of Alaska groundfish fishery specifications. The memorandum reviews past and recent court decisions, with particular emphasis on decisions in the Ninth Circuit.

Conclusions and Recommendations:

In developing revisions to the Alaska groundfish fishery specification procedure, NOAA Fisheries and the North Pacific Fishery Management Council should consider the following issues:

(1) the possibility that the Magnuson-Stevens Act independently requires NOAA Fisheries to publish proposed fishery specifications in the Federal Register and receive public comment on them for a period of 15 to 60 days. This is an open question in the Ninth Circuit Court of Appeals, which includes Alaska (although the only district court in the Ninth Circuit to consider this issue held that the Magnuson-Stevens Act does require notice and comment on fishery specifications).

(2) proposed fishery specifications published for public comment pursuant to the Administrative Procedure Act (APA) should be based on the data and studies upon which NOAA Fisheries intends to rely in developing the final specifications. Final specifications that rely in significant part on data and studies that were not available when the proposed specifications were proffered for public comment may in some cases not be deemed "a logical outgrowth" of the proposed rule and may be invalid for that reason.

(3) the APA normally requires a notice of proposed rulemaking published in the Federal Register with an opportunity for public comment before the final rule is published in the Federal Register. The APA's "good cause" waiver of notice and opportunity for comment is an exception to be "narrowly construed and only reluctantly countenanced."

Fishery specifications implemented pursuant to a procedure that categorically requires waiver of this rulemaking requirement would be legally insufficient. Although a recent Ninth Circuit opinion states that "habitual invocation of the good cause exception" is not necessarily improper, generic concern over timing and complexity of fishery management is not a legally sufficient basis to waive notice and comment.

(4) publication of annual interim specifications without notice and comment as required by current regulations raises serious legal concerns under the APA. Interim specifications would serve no purpose in a revised specification procedure that results in 15-month or 18-month fishery specifications.

(5) NOAA Fisheries needs a sufficient amount of time between Council action and approval of fishery specifications to document their compliance with applicable laws, such as the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

The Alaska Groundfish Fishery Specification Procedure:

The current Alaska groundfish annual fishery specification regulations require NOAA Fisheries to publish a notice of the next year's proposed fishery specifications in the Federal Register as soon as practicable after consultation with the North Pacific Fishery Management Council, and accept public comment on the proposed specifications for 30 days. 50 C.F.R. § 679.20(c)(1)(A) and (B). NOAA Fisheries typically publishes its notice of proposed specifications in the Federal Register in December after consultation with the Council at its October meeting.[1] The regulations also provide that "interim specifications" will become effective on January 1 without any opportunity for public comment and will remain effective until superseded by the notice of final specifications. 50 C.F.R. § 679.20(c)(2). NOAA Fisheries typically publishes its annual notice of interim specifications in December or January.[2] NOAA Fisheries is required to consider public comments on the proposed specifications received during the comment period and, after another consultation with the Council which typically occurs in December, publish final specifications in the Federal Register. 50 C.F.R. § 679.20(c)(3)(i). The final specifications supersede the interim specifications and are effective for the remainder of that fishing year only. NOAA Fisheries typically publishes its annual notice of final specifications in

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[1] *See Notice of Proposed Specifications for 2003*, 67 Fed. Reg. 76362 (December 12, 2002); *Notice of Proposed Specifications for 2000*, 64 Fed. Reg. 69464 (December 13, 1999); *Notice of Proposed Specifications for 1998*, 63 Fed. Reg. 71867 (December 30, 1998).

[2] *See Notice of Interim Specifications for 2003*, 67 Fed. Reg. 78739 (December 26, 2002); *Notice of Interim Specifications for 2000*, 65 Fed. Reg. 60 (January 3, 2000); *Notice of Interim Specifications for 1999*, 64 Fed. Reg. 50 (January 4, 1999).

February or March, ensuring that the first months of the fishing year are managed pursuant to the interim specifications.[3]

The Rulemaking Requirements of the Magnuson-Stevens Act:

Two recent cases have addressed whether the notice and comment requirement of Magnuson-Stevens Act section 304(b)(1)(A) applies to fishery specifications and other framework actions implemented pursuant to fishery management plans.[4] In 2001, the District Court for the Northern District of California held that the 2001 Pacific coast groundfish fishery specifications and annual management measures were regulations for which section 304(b)(1)(A) required a prior notice and comment period of 15 to 60 days. *Natural Resources Defense Council v. Evans*, 168 F. Supp. 2d 1149 (N.D.Cal. 2001). Alternatively, the court held that NOAA Fisheries had not justified its waiver of prior notice and opportunity for public comment under the Administrative Procedure Act. NOAA Fisheries appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's holding that NOAA Fisheries had violated the Administrative Procedure Act. However, the Ninth Circuit Court of Appeals did not address the question whether NOAA Fisheries also violated the Magnuson-Stevens Act's notice and comment requirement and vacated (rescinded) this portion of the district court's order. *Natural Resources Defense Council v. Evans*, 316 F.3d 904 (9th Cir. 2003).

In an opinion at odds with the *Natural Resources Defense Council* district court opinion, the District Court for the District of Massachusetts distinguished between "regulations" and "actions" and held that the notice and comment requirement of section 304(b)(1)(A) applies only to regulations, not to actions taken by NOAA Fisheries pursuant to regulations. *Conservation Law Foundation v. U.S. Department of Commerce*, 229 F. Supp. 2d 29 (D. Mass. 2002) (*on appeal*).

Because the Court of Appeals declined to reach the question in *Natural Resources Defense Council*, the applicability of the notice and comment requirement of section 304(b)(1)(A) remains an open question in the Ninth Circuit.

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[3] *See Notice of Final Specifications for 2000*, 65 Fed. Reg. 8282 (February 18, 2000); *Notice of Final Specifications for 2000*, 64 Fed. Reg. 12103 (March 11, 1999); *Notice of Final Specifications for 1998*, 63 Fed. Reg. 12689 (March 16, 1998).

[4] Section 304(b)(1)(A) provides in part that "[u]pon transmittal by the Council to the Secretary of proposed regulations prepared under section 303(c), the Secretary shall immediately initiate an evaluation of the proposed regulations to determine whether they are consistent with the fishery management plan, plan amendment, this Act and other applicable law. Within 15 days of initiating such evaluation the Secretary shall make a determination and . . . if that determination is affirmative, the Secretary shall publish such regulations in the Federal Register . . . for a public comment period of 15 to 60 days . . . ."

The Administrative Procedure Act:

In addition to any procedural requirements imposed by the Magnuson-Stevens Act, NOAA Fisheries must also comply with the rulemaking requirements of the APA when implementing fishery specifications. *Natural Resources Defense Council*, 316 F.3d at 907. Section 553 of the APA specifies general requirements for informal rulemaking by federal agencies. Unless one of the APA's exemptions applies, agency rulemaking must comply with the following minimum procedural requirements:

> (1) a notice of proposed rulemaking must be published in the Federal Register, such notice to include a statement of the time, place and nature of the public rulemaking proceeding; a reference to the legal authority under which the rule is proposed; and either the terms or a description of the subjects and issues to be addressed by the proposed rule;
>
> (2) interested persons must be given an opportunity to submit written data, views or arguments on the proposed rule; and
>
> (3) publication of the final rule must occur not less than 30 days before its effective date.

In order to evaluate the current Alaska groundfish annual fishery specification procedure and its alternatives, NOAA Fisheries and the Council must address two main issues presented by APA section 553: (1) the adequacy of notices of proposed rulemaking prepared for the annual fishery specifications; and (2) the availability of "good cause" waiver in particular circumstances.

Adequacy of Notices of Proposed Rulemaking:

The notice and comment provisions of the APA are intended to encourage public participation in the rulemaking, to help educate the agency and to produce more informed agency decisions. *Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990); *Washington Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981). To further these goals, courts have consistently held that a notice of proposed rulemaking must fairly notify interested persons of the issues involved in the rulemaking. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1103 (D.C. Cir. 1980). Unless an exemption applies, failure to publish a proposed rule in the Federal Register may result in a court setting aside the final rule. The rule may also be set aside when the notice of proposed rulemaking published in the Federal Register was inadequate to afford the public a meaningful opportunity to comment on the issues involved in the rulemaking; in this type of case the test is whether the final rule is a "logical outgrowth"of the proposed rule such that the public could reasonably have anticipated the final rulemaking from the proposed rule. *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1402-04 (9th Cir. 1995).

A number of courts have applied the "logical outgrowth" test to rulemakings in which agencies base final rules on studies or data that were not made available when the notice of proposed rulemaking was published. In a leading early case of this type, the Environmental Protection

Agency based cement production air emission standards on test results that existed when the agency published the proposed rule but that had not been made available for public comment. The court found "a critical defect in the decision-making process in the initial inability of the petitioners to obtain - in timely fashion - the test results and procedures used on existing [cement] plants which formed a partial basis for the emission control level adopted . . . ." *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 392 (D.C. Cir. 1973). The court further stated that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on inadequate data or data that, critical degree, [sic] is known only to the agency." *Portland Cement Association*, 486 F.2d at 393.

The Court of Appeals for the District of Columbia restated the legal requirement as follows:

> The APA requires that a notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved," and that the agency "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." Integral to the notice requirement is the agency's duty "to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules . . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.

Solite Corp. v. EPA, 952 F.2d 473, 484 (D.C. Cir. 1991) (*citations omitted*).

Agencies may, however, consider supplementary data unavailable at the time of publication of the proposed rule that "expands upon and confirms" information contained in the notice of proposed rulemaking and addresses alleged deficiencies in the preexisting data, "so long as no prejudice is shown." *Idaho Farm Bureau Federation*, 58 F.3d at 1402 (*quoting Solite Corp.*, 952 F.2d at 484). In such a case, the final rule will likely be deemed a "logical outgrowth" of the proposed rule. *Small Refiner Lead Phase-Down Task Force v. EPA*, 706 F.2d 506, 547 (D.C. Cir. 1983); *Solite Corp.*, 952 F.2d at 485. In practice, this means that an agency may rely on supplementary data and studies to corroborate or explain apparent discrepancies in material that was available for comment when the notice of proposed rulemaking was published, particularly when the new data or studies are not in dispute. *Ober v. EPA*, 84 F.3d 304, 314 (9th Cir. 1996). Courts frequently find procedural error when an agency relies on new data or studies to publish a final rule that significantly departs from its proposed rule. *Air Transport Association of America v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (FAA should have published supplementary data for additional public comment when data provided sole justification for FAA's action); *Ober v. EPA*, 84 F.3d at 314 (EPA should have published supplementary information for additional public comment when information was critical to EPA's decision and accuracy of the information was open to serious question); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d at 1402-04 (FWS should have published supplementary USGS report for additional public comment when report "was central" to the FWS' decision to list the Springs Snail as an endangered species, when report provided the

only information relating to the decline in spring flow, and when report's accuracy was in question).

These "logical outgrowth" cases pose an obvious legal problem for the current Alaska groundfish annual fishery specification procedure and for any other alternative that requires publication of the proposed specifications prior to the development of the annual groundfish stock assessments. The current annual fishery specification regulations require NOAA Fisheries to publish a notice of the next year's proposed fishery specifications in the Federal Register as soon as practicable after consultation with the Council, and accept public comment on the proposed specifications for 30 days. 50 C.F.R. § 679.20(c)(1)(A) and (B). In practice, NOAA Fisheries publishes a notice of proposed specifications for public comment shortly after consultation with the Council at its annual October meeting. However, the stock assessments that fully inform the next year's fishery specifications are not available until the second week of November. The Council considers these new stock assessments and public comment at the December Council meeting and then recommends its final fishery specifications to NOAA Fisheries. This schedule allows the Council to base its final recommendations on the November stock assessments each year, but it ensures that NOAA Fisheries' published notice of proposed specifications cannot take those November stock assessments into consideration.

As explained above, Ninth Circuit caselaw would not flatly prohibit NOAA Fisheries from publishing final fishery specifications that rely in significant part on data and studies that were not available when the proposed rule was published for public comment. Although the notice of proposed specifications published under the current fishery specification procedure may be written in anticipation of the new data and studies that will be available later in November, the legal problem is presented when the new data and studies contradict, rather than expand upon and confirm, information contained in the notice of proposed specifications. In this case a notice of final specifications that departs from the proposed specifications in reliance on these new data and studies would not be "a logical outgrowth" of the proposed specifications and would be legally insufficient for that reason.[5] *Idaho Farm Bureau Federation*, 58 F.3d at 1402. The risk of legal insufficiency is greatest when the accuracy of the new data and studies is in dispute, as is often the case in fishery conservation and management. Basing the initial notice of proposed specifications on consideration of the November stock assessments or conducting a second cycle of notice and comment rulemaking would obviate this risk.[6]

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[5] In this situation the Administrative Conference of the United States has recommended a second cycle of notice and comment rulemaking in consideration of new data or studies developed after publication of the proposed rule. *Administrative Conference of the United States Recommendation 76-3*, ¶¶ 1(a) and (b) (1976).

[6] It has been argued that publication of proposed specifications after the November stock assessments are developed would prevent NOAA Fisheries from using the most recent survey information in management of the fisheries in the early part of the year. It is worth noting, however, that fisheries are now managed as late as mid-March under the interim fishery specifications, which themselves do not take into account the November stock assessments.

Waiver of APA Notice and Comment Rulemaking Requirements:

The current Alaska groundfish annual fishery specification procedure requires that "interim specifications" become effective on January 1 without any opportunity for public comment and remain effective until superseded by the notice of final specifications. 50 C.F.R. § 679.20(c)(2). Each year NOAA Fisheries invariably waives for "good cause" the opportunity for notice and comment and delayed effectiveness for the notice of interim specifications, determining that compliance with these rulemaking requirements is "impracticable" and "contrary to the public interest" under section 553(b)(B) of the APA.[7] The question is whether the APA authorizes this habitual waiver under the current Alaska groundfish annual fishery specification procedure or any other alternative that routinizes waiver of notice and comment rulemaking requirements

The good cause waiver for prior notice and comment is to be "narrowly construed and only reluctantly countenanced." *Utility Solid Waste Activities Group, et al., v. EPA*, 236 F.3d 749 (D.C. Cir. 2001); *Independent Guard Ass'n of Nevada Local No. 1 v. O'Leary*, 57 F.3d 786 (9th Cir. 1995); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Courts apply this exception narrowly to prevent it from swallowing the notice and comment requirement. *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795 (D.C. Cir. 1983). "Emergencies, though not the only situations constituting good cause, are the most common." *Riverbend Farms, Inc., v. Madigan*, 958 F.2d 1479, 1484 n. 2 (9th Cir. 1992); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir.1982). The Ninth Circuit's inquiry into whether an agency properly invoked the good cause waiver "proceeds case-by-case, sensitive to the totality of the factors at play . . . ." *Natural Resources Defense Council*, 316 F.3d at 911. The Ninth Circuit Court of Appeals has stated that the good cause exception "authorizes departure from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission.," *Cal-Almond*, 14 F.3d 429, 441 (9th Cir. 1993) (*quoting Riverbend Farms*, 958 F.2d at 1485), or when "delay would do real harm." *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995).

In *Riverbend Farms*, the Secretary of Agriculture set orange volume restrictions by convening public meetings each Tuesday to make initial calculations, then publishing a final rule each Friday in the Federal Register for the next week. The weekly rules stated the Secretary's finding that it was impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register. However, the *Riverbend Farms* court concluded that the Secretary lacked good cause for failing to give notice in the Federal Register of the weekly meetings and failing to solicit written public comments and that actual notice of the weekly meetings to the affected industry did not satisfy APA's requirement of notice to the general public. *Riverbend Farms*, 958 F.2d at 1486-87. In addition, the court found that the Secretary failed to demonstrate that "it would be impracticable to publish a notice in the Federal Register a few days before the . . . meeting, advising the public

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[7] *See Interim 2003 Harvest Specifications for Groundfish in the Bering Sea and Aleutian Islands Area*, 67 Fed. Reg. 78739, 78749-50 (December 26, 2002).

of the time and place of the meeting, the legal authority for the proposed volume restrictions and the proposed volume restrictions." *Riverbend Farms*, 958 F.2d at 1486.

The Ninth Circuit has confirmed the *Riverbend Farms* analysis in subsequent cases. In *Cal-Almond*, the U.S. Department of Agriculture established budget estimates and annual assessment rates for almonds from 1980 to 1986, each year asserting that the rate could not be formulated with prior notice and comment and a delayed effective date. To formulate the rate, a government-appointed California Almond Board held meetings each July to gather crop projection information for that year and receive comments from interested parties. After deciding on its recommendations, the Board gave each almond handler notice of the proposed rate, then submitted the rate to the Secretary of Agriculture, who issued final rules without first publishing a proposed rule and requesting public comment. The Secretary of Agriculture apparently contended that "since the Board's annual harvest forecast and proposed budget depended on the crop projections for that year, the formulation of a recommended budget and assessment rate cannot be accomplished early enough to allow for both notice and comment and the postponement of the effective date of the rule until 30 days after publication, as required by the APA." *Cal-Almond*, 14 F.3d at 441. The court disagreed based on its opinion in *Riverbend Farms*. The court stated that it could find no good cause to waive notice and comment for "*annual* meetings and rules" in the instant case where it had "found no reason in *Riverbend Farms* to depart from the notice-and-comment procedure for *weekly* meetings and rules." *Cal-Almond*, 14 F.3d at 441-442.

In *Natural Resources Defense Council*, the Ninth Circuit found that NOAA Fisheries failed to "engage in any context-specific analysis of the circumstances giving rise to good cause" when it promulgated its 2001 Pacific Coast groundfish fishery specifications. *Natural Resources Defense Council*, 316 F.3d at 912. In its Federal Register notice at 66 Fed. Reg. 2372 (January 11, 2001), NOAA Fisheries asserted the following "good cause" justification for waiving the APA requirement for prior notice and opportunity for comment on the specifications:

> This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late implementation. Much of the data necessary for these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by

> which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, SSC, and Council meetings in September and November 2000 where these recommendations were formulated. Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register.

The court ultimately found the waiver language merely repeated generic concerns about timing and the complexity of fishery management. The court concluded that

> [i]f there were no good cause in *Riverbend Farms* for failure to publish notice of *weekly* meetings advising the public of proposed volume restrictions on the marketing of oranges, despite the fact that the committee responsible for recommending to the Secretary of Agriculture weekly volume restrictions was constantly revising projections right up until, and occasionally even during, the week in question, then, as we said in *Cal-Almond*, the timeliness of rulemaking on an annual basis cannot constitute good cause.

Natural Resources Defense Council, 316 F.3d at 912 (*citations omitted*) (*emphasis in original*). The court reasoned directly from its holding in *Cal-Almond*, noting in each case the decisionmaker issued a final rule without first publishing a proposed rule for public comment, asserting that the timing of key studies did not allow for publication of a proposed rule before the scheduled effective date of the final rule.. Although the court held that NOAA Fisheries failed to make a sufficient showing that "good cause" existed for the 2001 Pacific Coast groundfish fishery specifications and management measures, the court observed that "habitual invocation of the good cause exception" is not necessarily improper. However, in this case, NOAA Fisheries needed to show that some "exigency apart from generic data collection and timing constraints interfered with its ability to promulgate [the] specifications and management measures." *Natural Resources Defense Council*, 316 F.3d at 912.

The current Alaska groundfish fishery specification procedure does not meet the legal standards articulated in *Natural Resources Defense Council*. The interim specifications are the subject of consultation with the Council in October each year; however, NOAA Fisheries typically publishes the final interim specifications at the end of December or beginning of January - more than two months later - without any additional opportunity for public comment. NOAA Fisheries invariably waives the APA requirements for prior notice and comment and delay in effectiveness date for reasons that are very similar to those invalidated in *Natural Resources Defense Council*.[8] The Ninth Circuit Court of Appeals likely would reject this generic assertion of good cause for the

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[8] For example, see NOAA Fisheries' notice of Bering Sea and Aleutian Islands 2003 interim fishery specifications at 67 Fed. Reg. 78749-50 (December 26, 2002).

same reasons it rejected the good cause findings in *Riverbend Farms, Cal-Almond* and *Natural Resources Defense Council*. Although the *Natural Resources Defense Council* court stated that habitual invocation of the good cause exception is not necessarily improper, any Alaska groundfish fishery specification procedure that by design prospectively *compels* annual waiver of notice and comment would not meet the legal standards articulated in that case; that is, such a fishery specification procedure would generally *require* findings of good cause rather than *permit* individual findings based on the requisite "context-specific analysis of the circumstances."[9] *Natural Resources Defense Council*, 316 F.3d at 912.

NOAA Fisheries is the final decisionmaker for approval and implementation of fishery specifications. Although the public is afforded opportunities to comment on the Council's recommended specifications, it is clear that at least in the Ninth Circuit opportunities to comment to the Council on its recommendations do not satisfy NOAA Fisheries' APA notice and comment responsibility in subsequent rulemaking to approve and implement the recommendations. NOAA Fisheries has based waivers of APA notice and comment requirements in part on prior opportunities for extensive public participation at regional fishery council meetings.[10] However, this argument has not met with success in the Ninth Circuit; indeed, the waiver rejected by the *Natural Resources Defense Council* court was based in part on the opportunities for public participation at the Pacific Fishery Management Council's meetings during development of the Council's recommendations on the 2001 Pacific Coast groundfish fishery specifications. 66 Fed. Reg. 2372 (January 11, 2001). Although the court recognized the opportunity for public participation at Pacific Council meetings, the court finally observed that "under the [fishery specification] process that has been in place there is no notice or formal opportunity to comment to NMFS, which is the final decisionmaker." *Natural Resources Defense Council*, 316 F.3d at 911.

Moreover, Ninth Circuit caselaw makes it clear that the APA's notice and comment requirement is not satisfied by the mere publication of a proposed rule and acceptance of public comment; for the process to be meaningful, the agency must consider comments submitted on the proposed rule and respond to significant ones in the published final rule. *Safari Aviation, Inc. v. Garvey*,

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[9] The utility of notices of interim specifications is questionable anyway; separate interim specification notices might easily be eliminated in a revised specification procedure that results in 15-month or 18-month fishery specifications. Under such a procedure the groundfish fisheries in the first months of a year could be managed pursuant to specifications that had been published the preceding year. This procedure would not differ greatly from the current practice of managing the first months of the fishing year pursuant to the interim specifications.

[10] Although the *Conservation Law Foundation* court held that NOAA Fisheries' compliance with an abbreviated framework rulemaking procedure that included public participation at New England Fishery Management Council meetings constituted "good cause" under the APA for waiving notice and comment rulemaking, courts in the Ninth Circuit are not constrained to follow this holding. *Conservation Law Foundation*, 229 F. Supp.2d at 34, n. 10.

300 F.3d 1144, 1150-51 (9th Cir. 2002); *Idaho Farm Bureau Federation*, 58 F.3d at 1404-05; *American Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992). NOAA Fisheries, not the Council, is the federal agency responsible for compliance with these APA rulemaking requirements.

Courts may vacate a final rule unlawfully promulgated without prior notice and opportunity for comment. Section 706 of the APA states that courts shall "set aside agency action . . . found to be . . . without observance of procedure required by law;" however, this provision is qualified by the rule of harmless error codified in section 706. A court that rejects an agency waiver of notice and comment rulemaking must take "due account" of the harmless error rule in fashioning a remedy. *Riverbend Farms*, 958 F.2d at 1487. Courts finding harmless error may allow a rule unlawfully promulgated without observance of APA procedural requirements to remain in effect pending completion of new proceedings complying with the APA. *Western Oil & Gas v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). Ninth Circuit courts have held that "the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of the decision reached.'" *Cal-Almond*, 14 F.3d at 442 (*quoting Riverbend Farms*, 958 F.2d at 1487 (*quoting Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir. 1986))). In *Riverbend Farms* and *Cal-Almond*, failure to comply with the APA's notice and comment requirements was harmless error in large part because the public was afforded alternate opportunities for public comment. *Cal-Almond*, 14 F.3d at 442; *Riverbend Farms*, 958 F.2d at 1488. Opportunities for public participation at Council meetings during development of Council recommendations may be relevant in determining whether NOAA Fisheries commits harmless error by approving and implementing them without observance of APA notice and comment requirements; however, NOAA Fisheries must not commit procedural error anticipating that a court will find the error harmless and the imposed remedy painless.

Waiver of APA Delayed Effectiveness for Good Cause:

Section 553(d)(3) provides a waiver of the APA requirement of a 30-day delay in effectiveness which courts have held is an easier burden to meet. The delay in effectiveness is "intended to give affected parties time to adjust their behavior before the final rule takes effect," whereas prior notice and comment ensures public participation in rulemaking. *Riverbend Farms*, 958 F.2d at 1485. *See also U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-290 (7th Cir. 1979); *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (noting that sections 553(b) and (d) provide notice so affected parties can adjust to new rules but 553(b) serves the "even more significant purpose" of public participation in rulemaking). Courts have found good cause to waive the cooling off period where agencies showed "inescapable or unavoidable limitations of time," "demonstrable urgency," and prior participation of affected parties, whereas prior notice and comment can only be waived if it is unnecessary, impracticable or contrary to the public interest. In *Riverbend Farms*, the Ninth Circuit upheld the determination of good cause to waive the delay in effective date because requiring the waiting period would "cause great harm" and "throw the entire regulatory program out of kilter" and because the public knows that the rules are effective each Friday and has advance notice of what they are likely to contain. *Riverbend*

Farms, 958 F.2d at 1485. Although waiver of the APA requirement of a 30-day delay in effectiveness may be easier to justify than waiver of prior notice and opportunity to comment, the waiver still must be based on context-specific analysis of the circumstances giving rise to good cause.[11]

Compliance With Other Applicable Laws:

Finally, the current procedure established for publishing the interim specifications allows NOAA Fisheries very little time to document their compliance with other applicable laws, such as NEPA and the ESA. Publication of the 2003 interim specifications was delayed until late December 2002 until the necessary NEPA and ESA analyses of fishing pursuant to the interim specifications were completed.[12] Any revisions to the procedure should take into account the time necessary to complete this documentation.

cc: James Balsiger
Susan Salveson
Jane Chalmers
Mariam McCall
Lisa Lindeman
Eileen Cooney
Elizabeth Mitchell

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[11] Section 706 of the APA also requires courts to take due account of the harmless error rule for unlawful waiver of the 30-day delay in effectiveness.

[12] *See Interim 2003 Harvest Specifications for Groundfish in the Bering Sea and Aleutian Islands Area*, 67 Fed. Reg. 78739, 78749-50 (December 26, 2002).

INTERNATIONAL PACIFIC HALIBUT COMMISSION

News Release

December 2, 2011

2320 W. COMMODORE WAY, SUITE 300 SEATTLE, WA 98199-1287

International Pacific Halibut Commission Staff Preliminary Catch Limit Recommendations: 2012

In making catch limit recommendations for 2012, staff has considered the results of the 2011 stock assessment, changes in the commercial and survey indices used to monitor the stock, and a harvest policy that reflects coastwide policy goals.

Coastwide overall commercial fishery weight per unit effort (WPUE) was largely unchanged (+1%) in 2011 from 2010 values, although a significant decline continued (-18%) in Area 3B. Area 2A commercial WPUE also declined significantly, although this area is the sole remaining derby-style fishery and in consequence the commercial index is more variable than other areas. In contrast, commercial WPUE increased from 8-15% in Areas 2B, 2C, and 4B. The 2011 IPHC stock assessment survey WPUE values (adjusted for hook competition, survey timing, and averaged as in the apportionment process) increased notably in Area 2C but continued to decrease by about 20% in Areas 3B, 4A, and 4CDE. The coastwide survey value declined by approximately 9% from 2010 to 2011.

The stock exploitable biomass continues to decline, reflecting lower recruitment from the 1989 to 1997 year classes and smaller size at age. Recruitment from more recent year classes is stronger but halibut size at age continues to be much lower than that seen in the recent period (1997-1998) of historic high biomass, so these year classes are recruiting to the exploitable biomass more slowly than past year classes. For historical context, total 2011 removals (commercial, recreational, personal use, wastage, plus bycatch mortality in non-target fisheries) of 60.3 million lb, net weight (Mlb) are about 40% below the maximum seen in 2004 but about double the minimum value (29.0 Mlb) seen in 1978.

The staff recommendations continue to be based on applying the SUFullD (Slow Up – Full Down) policy of a 33% increase from previous year's catch limits when stock yields are projected to increase and adopting the full decrease in recommended catch, when stock yields are projected to decrease.

Catch Limit Recommendations for 2012

The 2011 stock assessment resulted in a coastwide estimate for the 2012 Fishery Constant Exploitation Yield (FCEY) of 33.882 Mlb, a decline of approximately 19% from the 2011 value of 41.07 Mlb. While FCEY values increased in Areas 2A and 2C, these increases were offset by decreased values for all other areas, ranging from 13-32%. For 2012, the staff continued with the hook competition and survey timing adjustment factors to account for variation in the catchability of the survey fishing gear, and a three-year reverse weighting of the adjustment factors. For all areas, direct deductions for all bycatch and wastage mortality between 26-32 inches are made in the area of occurrence to determine the FCEY, as was done in 2011.

The largest changes in recommended 2012 Catch Limits occur in Areas 3B, 4A, and 4CDE. Only Areas 2A and 2C show recommended catch limit increases for 2012. The staff recommended Catch Limits totaling 33.135 Mlb for 2012, a decrease of approximately 19% from 2011 Catch Limits, are presented in Table 1. The Area 2A recommendation includes all

removals (commercial, treaty Tribes, and sport) allocated by the Pacific Fishery Management Council's Catch Sharing Plan. Area 4CDE is treated as a single regulatory unit by the Commission, although the North Pacific Fishery Management Council's Catch Sharing Plan allocates the Commission catch limit into limits for the individual regulatory areas. The Area 2B catch limit recommendation includes totals for the commercial and sport fisheries. The Canadian Department of Fisheries and Oceans will allocate the adopted catch limit between the sport and commercial fisheries.

The catch limit recommendations for Areas 2C and 3A include the use of the North Pacific Fishery Management Council (NPFMC) and National Marine Fisheries Service (NMFS) authorized Guideline Harvest Levels (GHL) for the halibut recreational charter fisheries of 0.931 Mlb and 3.103 Mlb, respectively, as the projected removals by that sector for 2012. The catch limit recommendations are made with the assumption that both Canada and the U.S. will manage to their domestic targets for sport fisheries.

These recommendations, along with public and industry views on them, will be considered by IPHC Commissioners and their advisors at the IPHC Annual Meeting in Anchorage, Alaska, during January 24-27, 2012. These recommendations are preliminary and, as final data are included in the assessment, may be updated for the Annual Meeting but are not expected to change significantly.

Proposals concerning changes to catch limits should be submitted to the Commission by December 30, 2011. Catch limit proposals are available on the Commission's webpage (http://www.iphc.int/meetings-and-events/annual-meeting/catch-limit-comments.html) or from the Commission's office. Additional details about the Annual Meeting can also be found on the web page.

Table 1. IPHC staff recommended catch limits for 2012, by IPHC regulatory area (million lbs, net weight). The 2011 fishery catch limits are included for comparison.

Regulatory Area	2011 Adopted Fishery Catch Limit	2012 IPHC Staff Recommended Fishery Catch Limit
2A[a]	0.910	0.989
2B[b]	7.650	6.633
2C	2.330	2.624
3A	14.360	11.918
3B	7.510	5.070
4A	2.410	1.567
4B	2.180	1.869
4CDE[c]	3.720	2.465
Total	41.070	33.135

[a] Includes sport, tribal, and commercial fisheries.
[b] Includes sport and commercial fisheries.
[c] Individual catch limits for Areas 4C, 4D, and 4E are determined by the North Pacific Fishery Management Council catch sharing plan.

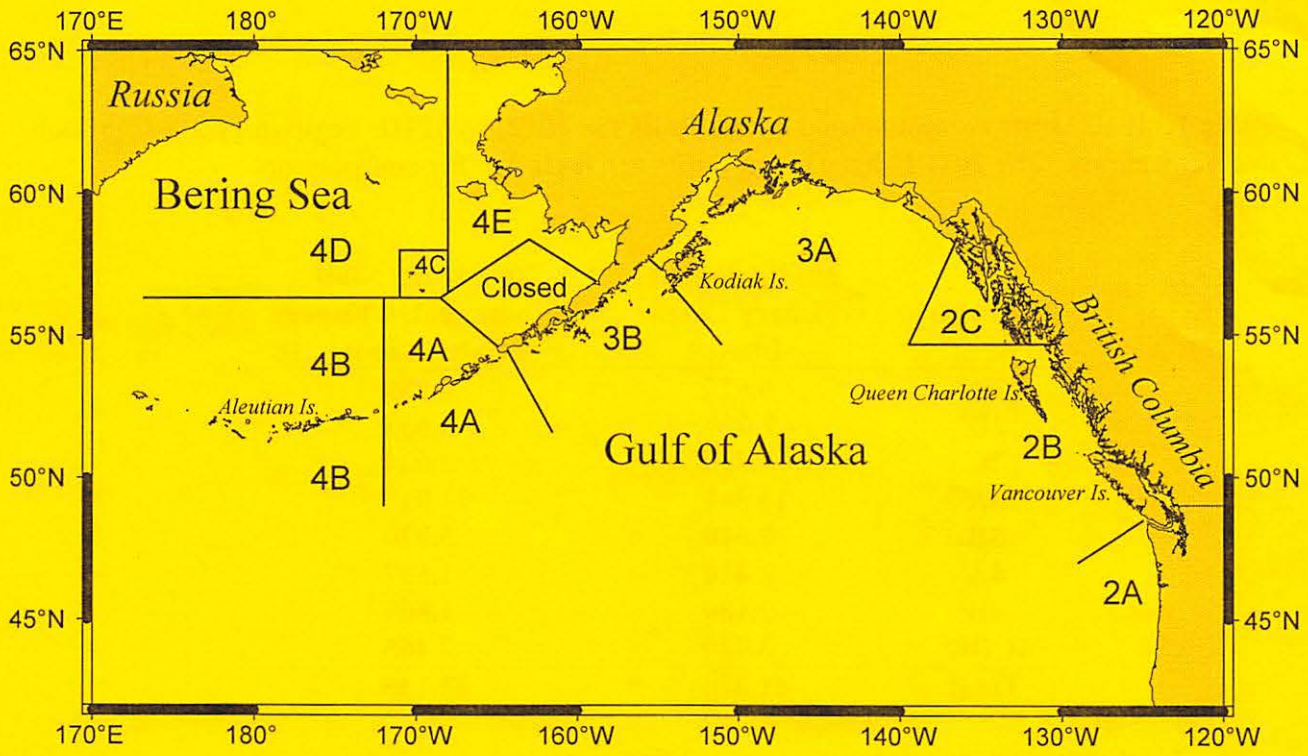

Figure 1. International Pacific Halibut Commission Regulatory Areas.

INTERNATIONAL PACIFIC HALIBUT COMMISSION
2320 W. COMMODORE WAY, SUITE 300
SEATTLE, WASHINGTON 98199-1287

Charter Management Implementation Committee Report

December 6, 2011

Anchorage Alaska

Attendance The meeting convened at approximately 4pm.

Committee: Chair Ed Dersham, Seth Bone, Ken Dole, Tim Evers, Kent Huff, Stan Malcom, Andy Mezirow, Richard Yamada

NPFMC Staff: Jane DiCosimo, Mark Fina

NOAA: Glenn Merrill, Rachel Baker

ADF&G: Scott Meyer, Charlie Swanton, Ruth Christiansen, Bob Clark, Barbi Failor

IPHC: Gregg Williams

Public: Approximately 15 members of the public

Opening Remarks

Chair Ed Dersham opened the meeting with general remarks on the range of topics on the agenda to address charter halibut management for Area 2C and Area 3A in 2012, in the short term (amend the CSP Tier 1), and in the long term. Mr. Dersham identified that the committee would limit its recommendations in accordance with the International Pacific Halibut Commission (IPHC) staff recommendations for commercial catch limits and corresponding GHLs, and would not address potential further reductions that were covered in the IPHC webinar on November 29, 2011. He said it was his intent to get through the entire agenda during the meeting.

Committee Discussion of 2012 Management for Area 2C

Mr. Dersham requested that Scott Meyer answer questions from the committee on the Alaska Department of Fish and Game (ADF&G) discussion paper which analyzed a range of proposed management measures to keep charter halibut harvests to its GHL in Area 2C, which had been requested during the committee's October 2011 meeting. The paper covered GHLs of 788,000 lb (the 2011 GHL) and 931,000 lb (the 2012 GHL that results from the IPHC staff recommendations) for 2012. Committee members received several clarifications from Scott Meyer on components of his analysis.

Mr. Dersham asked if Area 2C committee members were prepared to propose their recommendations for 2012 management measures for Area 2C. After a short break Richard Yamada summarized the consensus recommendations for Area 2C, which were based on the analysis provided by Scott Meyer and IPHC staff recommendations on November 30, 2011. In making their recommendations, Area 2C committee members wrestled with which options would have the greatest improvement for operators throughout the region and recognized that each management option affected each port differently. As was noted by the committee chair and other committee members, it is difficult to say with certainty which option is preferable until the IPHC makes its final determination on harvest limits for the 2012 season. The consensus recommendations are ranked (below) in priority for Council consideration.

1. *One day per week closure, with no maximum fish size on the remaining days of the week.* With regard to a recommendation on a specific day, committee members suggested that the day should be that which provides the greatest conservation effect. According to the paper, Tuesdays would have the greatest effect.

Committee members noted that multiple day of the week closures could result in undue hardships on anglers from cruise ships whose schedules are not flexible. Day closures would not require handling and measuring fish and would minimize unaccounted release mortality. It would eliminate leakage to the non-guided sector and handling mortality.

2. *Reverse slot limit.*
   a) U45/O62 - Under the "best case" assumptions in the paper, a reverse slot limit would be 45" and below and 64" and above.
   b) U42/O64 - Under a more conservative model, the reverse slot limit could be 42" and below and 64" and above.

3. Maximum size limit.

The committee stipulated that a maximum size limit at the highest justifiable size was their third preference.

Committee member indicated that these recommendations were not ideal solutions for all business models, but that they represented the best options that could be implemented for the 2012 season. The reverse slot limit would allow trophy fish, which is very important to all business models and critical to some business models. A committee member noted that handling of released fish would be minimal as there are very few large fish, but the possibility of catching and keeping one is critical to the industry. Forty-five inches is still a reasonable size halibut and is a big increase to the current maximum size limit of 37 inches. Committee members acknowledged the potential mortality of released fish. Gregg Williams clarified that sport release mortality is not currently included in the IPHC process for setting halibut catch limits, but such a management measure (reverse slot limit) may spur the IPHC into doing so, similar to what is currently done with commercial wastage.

Committee Discussion of 2012 Management for Area 3A

Tim Evers and Andy Mezirow recommended the status quo for Area 3A, based on ADF&G charter halibut harvest projections for 2012. No action appears to be needed either under the current GHL (3.65 Mlb) or the GHL that results from IPHC staff recommendations for 2012 (3.103 Mlb). Giving up *captain and crew fish* would be the first choice for a management measure if additional action is warranted.

Committee Discussion of Changes to the Catch Sharing Plan

The chair also addressed how the Council will make its recommendations on the CSP to the Council. Mr. Dersham suggested that committee members make recommendations for management measures that were better suited to the charter industry for 2013 and beyond than under the currently proposed components of the CSP. Because the fate of the Catch Sharing Plan (CSP) is uncertain, Mr. Dersham encouraged forwarding multiple options that could be analyzed for future consideration. He noted that NMFS staff will report to the Council later in the week on additional clarifications as to which management options could be considered a logical outgrowth of the proposed rule and which could not be considered such. Committee members then proposed a wide range of management options that could be considered by the Council, for either within the "logical outgrowth" context or outside of it.

Andy Mezirow asked if amending the Guided Angler Fish (GAF) program is within the scope of the committee. After concurrence from the chair, Andy described why the purchase of GAFs is not optimal because better capitalized permit holders have an advantage. Tim Evers noted that it would be better to provide opportunities for both purchasing and leasing GAF, if the program was to be implemented.

Richard Yamada described his Charter Halibut Allocation Management Plan (CHAMP) proposal (Proposal 1 in the committee handout (http://www.alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/Implementation/YamadaProposal1011.pdf)). Because of the two core difficulties with sport fish management: changes in the annual average size fish and unknown angler demand, he proposed range of some lower percent of allocation and provided buffer. In times of low abundance, guided anglers would be managed under the least restrictive harvest measure that would be projected to achieve a harvest of 90% of the regulatory allocation for the upcoming season. If at the end of the season the harvest is below this 90%

threshold, the underage difference would be added to the next season's allocation. On the other hand, if at the end of the season the harvest is over 110% of that season's regulatory allocation, the overage difference would be deducted from the next season's allocation. It is assumed that this 20% range in projecting harvest is well within the capabilities of regulators at the moment and that a plus or minus 10% underage or overage would balance itself out over time. This proposal also requests consideration of three alternative harvest measures for Area 2C.

1. Daily bag limit of two fish under the commercial minimum size limit, currently 32 inch of which an angler may substitute one of these fish to be a fish of any size, but this fish of any size may only be done once annually for this angler.
2. Daily bag limit of one halibut with a maximum size of 45" or larger.
3. Daily bag limit of two fish with a maximum size of 37".

Several other proposals were generally discussed but not in detail. These include a Harvest Day/Trip Management Tool proposed by Stan Malcom ((Proposal 2 in the committee handout (http://www.alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/ Implementation/HARVESTday1011.pdf)). A pre-determined number of "Harvest Days/Trips" would be assigned to each valid charter halibut permit (CHP) each season. Each CHP would be issued an equal number of Harvest Days/Trips. The number of Harvest Days/Trips allocated would be based on assumption of total usage of those Harvest Days/Trips using average harvest rates, sizes and clients per trip from the previous season. Permit stacking would be allowed (by purchase or lease) in order to increase the number of Harvest Days/Trips per vessel. Those vessels wishing to make multiple trips in a single day can do so by using a Harvest Day/Trip for each trip.

Ken Huff submitted a proposal for a Sub Area method in Area 2C for a short-term or long-term management option ((Proposal 3 in the committee handout (http://www.alaskafisheries.noaa.gov/npfmc/ PDFdocuments/halibut/Implementation/ HuffProposal1111.pdf). This would give each sub area the opportunity to choose the best harvest option for the business model in their area. Using the total GHL, have data analysis done for all of the different options available, then each sub area would choose the option that works best for that sub area. Total harvestable pounds would remain the same area wide, just the harvest method from sub area to sub area would change. Methods of harvest could include:

1. Reverse Slot Limit
2. Days of the Week Closure
3. One Fish Maximum Size (Hybrid method)
4. Annual limits
5. Two Fish 32" and under
6. Slot Limits
7. Trip Limits
8. Two or Three fish any size Annual
9. and any other method that works best for a business model in each of the sub areas.

Prior to the meeting an interim proposal for a Catch Accountability Through Compensated Halibut (CATCH) Guided Recreational Pool Plan Components was submitted as a placeholder for future consideration ((Proposal 4 in the committee handout (http://www.alaskafisheries.noaa.gov/npfmc/PDFdocuments/ halibut/Implementation/CATCH_plan1211.pdf)).

Ken Dole suggested that the same measures recommended for 2012 could be examined in a trailing regulatory amendment. Seth Bone recommended that annual limits also should be analyzed. Kent Huff spoke in support of an annual trophy limit.

Ed appreciated the work put into the proposals and commented on issues that came up at the IPHC interim meeting regarding potential lower biomass estimations. Jane DiCosimo briefly addressed the currently proposed CSP matrix and specifically the Tier 1 box that identifies the one fish of a maximum size that would be implemented if approved by the Secretary, unless otherwise revised by the Council. She spoke to support simple, short term measures that could be implemented through separate rulemaking in conjunction with the CSP, in order to revise the tier 1 box of the CSP matrix. Ed agreed with Jane's explanation but stated that the options before the Council were more expansive, such that the individuals

could recommend to the Council during public testimony on the C-6 agenda item (and the Council could make) more substantive changes to the CSP.

Andy asked about the effect of the difference of adding a small fish U26 because he thought that the IPHC did not count them in determining the CEY. Ed noted that the Council and Commission are planning a work shop in late April to address a number of questions that the Council and the public have raised. Jane directed the committee to the Executive Director's report (Agenda B-1), which contains a draft work shop outline that was prepared by the Council and Commission staffs.

The committee took public testimony from two charter captains. They suggested a number of management measures for consideration (most of which were covered by committee members at one of their two meetings).

Committee Recommendations for Short Term Changes to the CSP

Area 2C

- Annual limit (allowing retention of at least one trophy fish)

Area 3A

- Include buying as an alternative to leasing GAF fish
- Two fish any size
- Restricting Captain & Crew Harvest (annual limit/6-8-10, monthly closures)
- One Trip per day (trip limits, weekly? monthly? season?)
- Two fish of Maximum size
- One fish <32", one fish >32"
- Reverse Slot limits (2nd fish above or below a certain size limit)
- Two fish any size except July & August, one fish <32, one fish >32 July & August
- Two fish > 32"
- One fish any size (all season)
- Annual limit of 4/6/8 fish

Committee Recommendations for Long Term Changes to the CSP

Area 2C

- Harvest Day/Trip Management Tool
- Charter Halibut Allocation Management Plan (CHAMP)
- Subarea Management
- CATCH Program

Area 3A

- Include buying QS as an alternative to leasing GAF Fish (CSP)
- Angler Day Program/Common Pool
- Limited Entry Program/Common Pool
- Guided Angler Fish/Allocated Effort Based Method
- Harvest Tag

The meeting adjourned at approximately 6:30 pm.