



March 30, 2022

Mr. Simon Kinneen
Chairperson
North Pacific Fishery Management Council
1007 West Third, Suite 400
Anchorage, Alaska 99501-2252

Dear Mr. Kinneen,

Thank you for the February 10, 2022 motion requesting emergency action under the Fishery Management Plan (FMP) for Groundfish of the Gulf of Alaska (GOA), the FMP for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI), and the Halibut Act to allow the temporary transfer of catcher vessel halibut and sablefish IFQ for all individual quota share (QS) holders for the 2022 fishing season (RIN 0648-BL27). I appreciate the North Pacific Fishery Management Council's (Council) intent to address the ongoing impacts of the COVID-19 pandemic in the halibut and sablefish IFQ fishery. However, I am denying this request for emergency action for the following reasons which are explained in more detail below.

- The recent circumstances and continued impacts of the COVID-19 pandemic are not unforeseen nor recently discovered circumstances.
- The Council chose not to initiate a long-term action prior to the expiration of the 2021 emergency action which would have allowed the extension of that emergency rule through the end of March 2022 and provided IFQ holders with the certainty of having the ability to use temporary transfers at the start of the 2022 fishing season.
- The existing medical transfer provision and hired master provision of IFQ Program provide flexibility to most (not all) IFQ Program participants who would otherwise benefit from the implementation of temporary IFQ transfers in 2022.
- NOAA Fisheries, Alaska Region, plans to initiate an action to analyze alternatives that would revise the effective date of the limitation on the use of medical transfers to not count medical transfers approved during the COVID-19 pandemic toward the limit of 3 in any 7-year period. This potential revision to the existing medical transfer provision and the additional flexibility resulting from the Council's request to remove halibut vessel use caps in Area 4 in 2022 would provide needed flexibility to facilitate harvest of allocated species.

Background

The February 2022 request for emergency action would implement the same emergency action submitted by the Council on May 15, 2020 and February 10, 2021 under the authority of Section

305(c)(3)(B) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Halibut Act. The duration of the COVID-19 pandemic and health emergency was not foreseen when the Council recommended, and NOAA Fisheries implemented those two previous emergency actions to allow temporary IFQ transfers in March of 2021 and June of 2020 (86 FR 16542, March 30, 2021; 85 FR 38100, June 25, 2020). Each of the previous emergency actions were effective for the majority of the fishing season in which they were implemented with the expectation that travel restrictions and health mandates would be relaxed or removed before the subsequent fishing season. Several factors contributed to these expectations including the rapid growth in understanding and knowledge about the virus and the development and distribution of an effective vaccine against COVID-19.

In June 2021, NOAA Fisheries requested the Council to consider whether it wished to initiate action to prepare a regulatory amendment to address the temporary transfer provision of the IFQ Program on a permanent basis prior to the expiration of the emergency action implemented on March 30, 2021. The Council did not initiate action to evaluate long term measures and the emergency rule was not extended for 186 additional days and expired on September 27, 2021.¹

In evaluating the third request from the Council to implement the same emergency regulations in 2022, NOAA fisheries explored the use of the public health emergency provision of Section 305(c)(3)(C) of the Magnuson-Stevens Act. Under this provision, such regulation may remain in effect until the circumstances that created the emergency no longer exist, provided that the Secretary of HHS concurs with NOAA Fisheries' action. This would allow the duration of temporary emergency regulations to be more flexible and directly tied to the duration of the health emergency rather than the statutory limitation of 180 days with the possibility to extend up to an additional 186 days.

NOAA fisheries used the public health emergency provision to promulgate an interim final rule on March 29, 2021, to provide continued authority to waive observer coverage requirements due to the impacts of the COVID-19 public health emergency. That interim final rule, revised the termination date of the initial emergency observer waiver rulemaking published on March 27, 2020 (85 FR 17285). The Observer waiver rule expires on March 26, 2022, or when the Secretary of Health and Human Services (HHS) determines that the COVID-19 Pandemic is no longer a public health emergency, whichever is earlier. Upon expiration of the Observer waiver rule the Agency's authority is terminated to waive observer coverage, observer training, and other program requirements, due to the COVID-19 public health emergency.

The COVID-19 pandemic continues to impact all aspects of American life and business and has done so since early 2020. However, significant progress has been made in combating the pandemic over the past two years. New information has emerged since the Council made its recommendation on February 10, 2022. On February 25, 2022, the Center for Disease Control and Prevention issued new community levels as a tool to help communities decide what steps to

¹ See the B2 NMFS Management Report available under agenda item B2 on the June 2021 Council meeting agenda at: <https://meetings.npfmc.org/Meeting/Details/2104>.

take based on the latest data.² On March 1, 2022, President Biden remarked upon the impacts from COVID-19 as well as the progress made over the past two years and outlined four common sense steps to safely move forward and get back to more normal routines including the use of vaccines and treatments for severe illness, preparing for new variants, ending the closure of schools and businesses and returning to the office.³

In alignment with the updated CDC considerations for wearing masks, the Department of Commerce continues to monitor community levels and update its mitigation and prevention strategies as new information becomes available. States and local authorities have COVID-19 mitigation plans in place to slow the spread and prevent serious illness and will continue to adapt those plans as conditions change and new information becomes available. Remote fishing communities continue to require measures to mitigate the spread of illness, while allowing the businesses they depend on to continue. The City of St. Paul has maintained a testing requirement and 5-day quarantine, regardless of vaccination status, upon arrival.⁴ Other communities such as the City of Cordova have maintained a 14-day quarantine for interstate travelers, although essential workers such as fishermen are allowed to attend their work stations during this time.⁵ The City of Yakutat maintains testing and strict social distance requirements for interstate travelers.⁶ Many other small communities such as Kodiak, Seward, and Homer direct travelers to follow current State of Alaska requirements.

The IFQ Program includes the medical transfer and hired master provisions that provide limited exceptions to the owner-on-board provision. The hired master provision may be used by IFQ Program participants who are initial recipients of CV QS (excluding Areas 2C for halibut or SE for sablefish, which correspond to Southeast Alaska). An initial recipient who can demonstrate at least 20 percent ownership of a vessel may be absent from the vessel conducting IFQ fishing. This exception allows fishermen who traditionally operated their fishing businesses using hired masters prior to implementation of the IFQ Program to continue to hire a master to conduct IFQ fishing under the IFQ Program. By limiting the hired master provision to initial recipients, the use of this owner-on-board exception will decline and eventually cease with the transfer of all QS from initial recipients to new entrants (“second generation”).

The medical transfer provision at 50 CFR 679.42(d)(2) allows a QS holder not otherwise qualified to hire a master to temporarily transfer their annual IFQ if the QS holder or their immediate family member has a temporary medical condition that prevents them from fishing. This provision is intended to provide a mechanism for QS holders who are experiencing a medical condition that would prevent them from fishing during a season to transfer their annual IFQ to another individual. Use of this provision requires a signature from a licensed healthcare provider to verify the medical condition exists. Beginning March 16, 2020, the use of the medical transfer provision is limited to any three years in a seven-year period.

² Accessed on 3/3/2021 at: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>.

³ Accessed on 3/3/2021 at: <https://www.whitehouse.gov/state-of-the-union-2022/>.

⁴ Accessed on 3/11/2021 at: <https://covid19.stpaulak.com/>.

⁵ Accessed on 3/11/2021 at: <https://covid19.cityofcordova.net/fishermen/>.

⁶ Accessed on 3/11/2021 at: <https://covid19.cityofcordova.net/fishermen/>.

Emergency Rule Criteria

Under section 305(c) of the Magnuson-Stevens Act and NOAA Fisheries' guidelines for the use of emergency rules, the Secretary of Commerce's authority to take emergency interim action, as delegated to NOAA Fisheries, addresses *unanticipated* events or serious conservation and management problems that require *immediate* attention. The phrase "an emergency exists involving any fishery" is defined as a situation that:

- (1) Results from recent, unforeseen events or recently discovered circumstances;
- (2) Presents serious conservation or management problems in the fishery; and
- (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts to the same extent as would be expected under the normal rulemaking process.

All three criteria must be met for NMFS to approve a petition for emergency action and implement emergency regulations. Based on a review of the best available information, the motion does not meet all three of these criteria.

Though there may be a serious management problem for a portion of the IFQ fishery and the Council has recommended emergency regulations that have been demonstrated to mitigate the issue, these circumstances are not unforeseen or recently discovered.

For similar reasons and in consideration of the Administrative Procedure Act's (APA) procedures for issuing final rules after prior notice and an opportunity for public comment, NMFS also finds that an emergency basis justifying issuance of a final temporary rule is not met under the APA. Thus, the temporary, emergency final rule would not be authorized under the Halibut Act, as well.

I recognize that the temporary transfer provision recommended by the Council would provide more flexibility to a wide range of IFQ holders (including initial recipients who are eligible to hire a master) and that the emergency transfer provision would not require concurrence from a health care professional; however, I believe that the existing flexibility available under the medical transfer provision and the hired master provision is sufficient to facilitate the harvest of halibut and sablefish IFQ during the 10 month IFQ season in 2022 which began on March 6, 2022 and ends on December 7, 2022.

Some initial recipients who qualify to hire a master may not have experience using the hired master provisions; however, they still qualify to do so. Both the medical transfer provision and the hired master provision are available to individual CV QS holders, and they provide flexibility for individuals to either transfer their IFQ for a medical reason as determined necessary by a medical professional or to hire a master to harvest their IFQ. Therefore, I am denying the Council's request for emergency action. I understand that the timing of this decision and providing notice to the IFQ program participants is important because the IFQ fishing season opened on March 6, 2022 and operational plans must be made and the transfer options available are an important factor in those decisions.

Additionally the Council has recommended expedited rulemaking under the Halibut Act to remove halibut vessel use caps in Area 4 in 2022. NOAA Fisheries, Alaska Region, plans to initiate an action to revise the effective date of the limitation on the use of medical transfers to not count medical transfers approved during the COVID-19 pandemic toward the limit of 3 in any 7-year period. NOAA Fisheries will consult with the Council in the development of this action to consider if medical transfers approved by the NOAA Fisheries in years during which emergency regulations were implemented in light of the COVID-19 pandemic should count toward this limitation. Some IFQ QS holders may have used the medical transfer provision in 2020 and 2021 due to the health risks associated with the COVID-19 pandemic prior to the approval of the emergency rules authorizing the use of temporary IFQ transfers in those years. Due to the new limitation that restricts use of the medical transfer provision to any three years in a seven-year period, this provision could begin to restrict the use of the medical transfer provision starting in 2023.

I understand the Council's intention to provide IFQ QS holders with the flexibility necessary to facilitate harvest of allocated species. The IFQ Program has improved the race for fish and provided significant improvements in how the fishery operates and supports a diverse range of business models. I ask the Council to consider the lessons learned over the past two years and consider if long-term changes are necessary. I believe the standard Council process is the best approach to develop a well-reasoned proposal for management measures that are flexible and adaptable to facilitate the harvest of allocated species under the IFQ program. If you have any questions, please contact Mr. Jonathan M. Kurland, Regional Administrator, Alaska Region at jon.kurland@noaa.gov.

Sincerely,



Janet L. Coit
Assistant Administrator for Fisheries