

## INITIAL REGULATORY IMPACT REVIEW

to

### REVISE FEDERAL DEFINITION of SPORT FISHING GUIDE SERVICES

**Date:** May 20, 2013

**Lead Agency:** NOAA Fisheries Service  
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**Responsible Official:** Jim Balsiger, Alaska Regional Administrator

**Summary:** The Council is considering whether to amend the definition of "sport fishing guide services" in Federal regulations that govern the charter halibut fishery in Southeast and Southcentral Alaska to be more consistent with State of Alaska regulations. The Council adopted a problem statement and a suite of alternatives and options in February 2013 for analysis based on a discussion paper it reviewed at that meeting. A few businesses have developed a guide-assisted model that allows them to provide indirect assistance to anglers to harvest halibut for compensation from shore or adjacent vessels. This practice is not considered to be "sport fishing guide services" in Federal regulations because the guide is not on board the vessel. As a result, anglers on these vessels are allowed to fish under more liberal regulations in effect for unguided anglers.

In addition to the no action alternative (Alternative 1), Alternative 2, Option 1 would not require a guide to be onboard the same vessel as the guided angler. The Council also adopted placeholders for possible definitions of "compensation" and "assistance" in the Federal definition for sport fishing guide services; this resulted in Alternative 2, Option 2 and Alternative 2, Option 3. The analysis contains one suboption that would adopt State regulatory text for the Federal definition; a second suboption would revise one word in the State text. The Council may consider State regulatory text as the basis for Option 3 for analysis.

The Council may proceed with final action on Option 1 alone, or Options 1 and 2, even if a preferred alternative under Option 3 cannot be identified at the time of final action on the proposed action. Final action may be scheduled for October 2013.

**Public Comments:** Public comments on this draft will be accepted through June 2013.

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*among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.*

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

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

## **1.1 Management Authority**

The IPHC and NMFS manage fishing for Pacific halibut through regulations established under authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). The IPHC adopts regulations governing the Pacific halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea (Convention), signed at Ottawa, Ontario, on March 2, 1953, as amended by a Protocol Amending the Convention (signed at Washington, D.C., on March 29, 1979). For the U.S., regulations developed by the IPHC are subject to acceptance by the Secretary of State with concurrence from the Secretary of Commerce. After acceptance by the Secretary of State and the Secretary of Commerce, NMFS publishes the IPHC regulations in the Federal Register as annual management measures pursuant to 50 CFR 300.62. The final rule implementing IPHC regulations for the 2013 fishing season was published March 15, 2013, at 78 FR 16423. IPHC regulations affecting sport fishing for halibut and vessels in the charter fishery in Areas 2C and 3A may be found in sections 3, 25, and 28 of that final rule.

The Halibut Act, at sections 773c (a) and (b), provides the Secretary of Commerce with general responsibility to carry out the Convention and the Halibut Act. In adopting regulations that may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act, the Secretary of Commerce is directed to consult with the Secretary of the department in which the U.S. Coast Guard is operating, currently the Department of Homeland Security.

The Halibut Act, at section 773c (c), also provides the North Pacific Fishery Management Council (Council) with authority to develop regulations, including limited access regulations, that are in addition to, and not in conflict with, approved IPHC regulations. Regulations developed by the Council may be implemented by NMFS only after approval by the Secretary of Commerce. The Council has exercised this authority in the development of subsistence halibut fishery management measures, codified at 50 CFR 300.65, and the guideline harvest level program and limited access program for charter operators in the charter fishery, codified at 50 CFR 300.67. The Council also developed the Individual Fishing Quota (IFQ) Program for the commercial halibut and sablefish fisheries, codified at 50 CFR part 679, under the authority of section 773 of the Halibut Act and section 303(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

Regulations implementing the charter fishery for Pacific halibut may be found at Subpart E - Pacific Halibut Fisheries, Section 300.61: Definitions; Section 300.65: Catch sharing plan and domestic management measures in waters in and off Alaska; Section 300.66: Prohibitions, and Section 300.67: Charter halibut limited access program, Annual Management Measures, and Guideline Harvest Levels.

## 1.2 Purpose and Need for Action

Fishing activities for Pacific halibut are subject to charter fishery restrictions under Federal regulations if a guide is “onboard the vessel” with the charter angler and is providing “sport fishing guide services,” along with other regulatory requirements. In its report to the Council in April 2012, NOAA Office of Law Enforcement staff informed the Council of a particular fishing practice in Area 2C in which guides were observed providing indirect assistance to anglers, likely for compensation, from adjacent vessels or shore. Therefore persons providing indirect assistance, who are not onboard the vessel with the anglers, and therefore are not subject to limited entry requirements or Federal regulations that limit charter anglers to more restrictive daily harvest (bag) limits and size limits than are in regulations for unguided anglers. *The policy issue before the Council is whether this is consistent with its management policy for charter halibut sector.*

Using the fishing practices described above, anglers legally are allowed to retain halibut under more liberal bag limits and size limits for non-guided anglers while still receiving assistance from a nearby, sometimes tethered, vessel. Such harvests are not subject to Federal charter halibut harvest restrictions because no guide is on board the same vessel as the angler. In contrast, State of Alaska sport fish regulations do not require a guide to be onboard the same vessel as the angler for the trip to be considered guided fishing. If fishing guide services (as defined by the State) are provided to the angler, those harvests are considered charter removals by the State.

The Council has expressed concern that its policy intentions for managing the charter sector may be circumvented by requiring the guide to be onboard the same vessel with the angler and that some sport harvests are counted towards the unguided sector that should accrue to the charter sector. After reviewing a requested interagency staff discussion paper<sup>1</sup> in February 2013, the Council expressed its concern that currently legal fishing practices, or development of new fishing practices, may expand in the future if the Council takes no action to address these fishing activities. Therefore the Council adopted a motion (Appendix 1) that expressed its intent to consider a regulatory amendment to remove the requirement that the guide be onboard the same vessel as the angler and make Federal fishing regulations more consistent with State fishing regulations in this regard. The motion also expressed its intent to define compensation and assistance in Federal regulations in the context of providing sport fishing guide services.

In February 2013, the Council adopted the following **problem statement** for the proposed action.

*The Council has received information highlighting halibut fishing practices in Area 2C that allow anglers to circumvent guided daily bag and size limits, and allows operators to provide sport fishing guide services without required Charter Halibut Permits (CHPs) for the Pacific halibut charter sector. It may be necessary to revise and clarify Federal definitions of terms including 'sport fishing guide services', 'compensation', and 'assistance', to meet Council intent to define guided halibut fishing. The current loopholes not only affect the CHP program but, as long as differential bag and size limits exist in Area 2C, and if they expand to Area 3A in the future, have the potential to increase the overall removals of halibut and affect other sectors that use the halibut resource.*

In its problem statement, the Council raises some issues that require clarification. First, NOAA staff has since clarified that no loophole occurs in Federal fishery regulations and fishing in the manner described is legal. Current Federal regulations are being effectively enforced and litigated. Federal agencies have neither requested nor recommended Council action. All sport halibut harvest removals are being estimated and no specific conservation concern has been identified with regard to sport halibut harvest accounting. Instead, the Council identified a policy concern; i.e., whether current Federal regulations

<sup>1</sup> <https://alaskafisheries.noaa.gov/npfnc/PDFdocuments/halibut/ChartHalibutDef213.pdf>

result in implementation of a management program for the charter halibut sector that is consistent with Council intent. Second, potential management action outside the Charter Halibut Limited Access Program (CHLAP) is beyond the scope of this analysis. The proposed alternatives only address fishing activities for the charter halibut sector; the Council has not expanded its proposed action to include entities not covered by the CHLAP or the unguided sector. To better match the perceived problem in the fishery and the proposed alternatives the Council may wish to revise its problem statement. The staff offers the following revisions of the current problem statement for Council consideration.<sup>2</sup>

*The Council has received information highlighting halibut fishing practices in Area 2C that allow anglers to circumvent the Council's intent for daily bag and size limits for the Pacific halibut charter fishery. It may be necessary to revise and clarify Federal regulations to meet the Council's intent to define guided halibut fishing. The current discrepancy between Federal and State regulations in the definition of sport fishing guide services not only affects the Charter Halibut Permit program but, as long as differential bag and size limits exist in Area 2C, and if they expand to Area 3A in the future, have the potential for some guided sport removals to be accounted against the non-guided sport sector.*

*A few companies have developed a guide-assisted business model that allows them to provide "sport fishing guide services" to anglers to catch halibut for compensation from shore or adjacent vessels. This practice is not considered to be "sport fishing guide services" in Federal regulations because the guide is not on board the vessel. As a result, these businesses are not required to have a Charter Halibut Limited Access Permit. Additionally, the clients (anglers) using guide-assisted services are allowed to fish under the more liberal regulations for unguided anglers.*

The purpose and need for the proposed action is to revise Federal regulations to align regulatory text regarding sport fishing guide services for Pacific halibut with State of Alaska regulations in order to keep anglers from fishing in a manner that is contrary to Council intent. Consistent language for defining fishing guide services under Federal and State regulations is one of the Council's goals. It may be necessary to diverge in regulatory language, but not in effect. The lack of Federal definitions for "compensation" and "assistance" also results in challenges for Federal enforcement staff and for the public. Clear definitions would enhance public understanding of Federal regulations implementing the Council's management programs for Pacific halibut and enhance fairness, as some operators and anglers endeavor to harvest halibut within the boundaries of Council intent, while others seek to circumvent those constraints. However, defining specific assistance activities may incorporate a much larger user group than the Council intended (i.e., the bare boat industry) and create a new inconsistency with State regulations.

The Council noted that under this proposed action the Council does not intend to change the allocation to the charter sector under the halibut Catch Sharing Plan or increase the number of charter halibut permits initially issued under the CHLAP.

### **1.3 Description of Management**

#### **1.3.1 Charter Halibut Limited Access Program**

The CHLAP established Federal charter halibut permits (CHPs) for operators in the charter halibut fishery in Areas 2C and 3A. Beginning February 1, 2011, all vessel operators in Areas 2C and 3A with charter

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<sup>2</sup> Logbook-reported harvests by fishing operations that do not meet the Federal definition can only be separated from the "truly" guided harvest if it is known that ALL harvest by this type of operation was guide-assisted. If some of it was truly "self-guided" (i.e., unguided), then the harvests can not be separated and the guided harvest that is reported in ADF&G logbooks will be inflated. It is likely that all of the data should not be excluded.

anglers onboard must have an original, valid permit onboard during every charter vessel fishing trip on which Pacific halibut are caught and retained. CHPs are endorsed for the appropriate regulatory area and the number of anglers that may catch and retain charter halibut on a trip.

NMFS implemented this program based on recommendations by the Council to meet allocation objectives in the charter halibut fishery. This program provides stability in the fishery by limiting the number of charter vessels that may participate in Areas 2C and 3A. Vessel operators had to meet minimum participation requirements to receive an initial issuance of CHPs. Implementation of the CHLAP has resulted in consolidation in the charter halibut fishery as operators who did not meet the qualification criteria exited the fishery.

NMFS issued charter halibut permits initially to qualified applicants who were licensed by ADF&G and who, according to the Official Record, had at least five logbook fishing trips recording halibut effort during one of the initial qualifying years (2004 or 2005) and recent participation year (2008). Complete regulations are published at 50 CFR 300.65, 300.66, and 300.67.

### 1.3.1.1 Permit holders, Permits, and Anglers

Table 1 shows the number of permits (by fishing area and type), permit holders, and anglers. Data will change over time with additional CHP transfers and CQE and MWR permit issuance. All holders are counted, but each person is counted once per area even if he or she holds multiple permits. Person counts are not additive across areas and types. In Area 2C, for example, at any time as many as 2,734 anglers may fish on charter vessels operated by 356 CHP holders who hold 533 permits (this estimate does not account for multiple charter trips per day per CHP or that not every angler endorsement on a CHP will be used each trip). For both areas, over 6,600 anglers may fish for halibut under charter each day.

**Table 1 Distinct CHP Holders, Permits, and Anglers as of October 16, 2012 (Source: NMFS RAM\*)**

Area	Permit Type <sup>1</sup>	CHP Holders <sup>2</sup>	Active Permits	Average CHPs per Holder	Anglers
2C	CHP	356	533	1.5	2,734
	CQE	11	44	4.0	264
	MWR	1	1	1.0	Unlimited
3A	CHP	439	439	1.0	3,277
	CQE	9	63	7.0	378
	MWR	3	6	2.0	Unlimited

\*RAM is reviewing the accuracy of this table.

<sup>1</sup>CHP regular permit with angler endorsements, CQE = community permits, and MWR = U.S. Military Morale, Welfare and Recreation Program permits.

<sup>2</sup>CHP holders reflect all holders of all permits, but each holder is counted once, regardless of the number of CHPs held.

### 1.3.2 Guideline Harvest Level Program

In 1997, the Council adopted separate guideline harvest levels (GHLs) for the Area 2C and Area 3A charter halibut fisheries. The GHLs are benchmark harvest levels for participants in the charter halibut fishery. The GHLs represent pre-season specifications of acceptable annual halibut harvests in the charter fisheries in Areas 2C and 3A. To accommodate some growth in the charter sector, while approximating historical levels, the Council recommended the GHLs were to be based on 125 percent of the average charter halibut fishery harvest from 1995 through 1999 in each area. For Area 2C the GHL was set at

1,432,000 pounds net weight, and in Area 3A the GHL was set at 3,650,000 net pounds weight. The Council recommended a system of step-wise adjustments to the GHLs to accommodate decreases and subsequent increases in abundance. The Council recommended this system of GHL adjustments to provide a relatively predictable and stable harvest target for the charter halibut sector. The GHLs for 2013 of 788,000 pounds in Area 2C and 2,734,000 pounds in Area 3A are effective February 1, 2013, through December 31, 2013.

Since 2012, harvest restrictions for the charter halibut fishery in Alaska have been determined annually by the Council and the IPHC to maintain harvest by the charter halibut anglers to the GHLs. NMFS publishes these regulations each year as part of the IPHC Annual Management Measures. The following summary of regulations governing the charter fishery is not the complete list of limitations and prohibitions specific to this program.

### 1.3.2.1 Area 2C

The GHL in Area 2C has declined since its implementation in 2004, except for a one year increase of one step in 2012 (Table 2). And the Area 2C charter halibut harvest exceeded its GHL every year during 2004 through 2010, despite management measures designed to control charter harvest in this area. The effect of reductions to the bag limit and size limit for the charter sector, when compared with the unguided sector, is evident. The large decline in charter harvest in 2009 was due to implementation of the 1-fish bag limit (almost exactly the reduction that was predicted by ADF&G) and the huge drop in charter average weight with the 37-inch maximum size limit in 2011 (also as predicted by ADF&G). It is important to note that size at age was declining during this time. Data are not available to determine how much of the decline in halibut mean weight in the sport fishery is attributable to regulatory restrictions or to changes in mean weight of the fish in the population.

**Table 2. Area 2C sport halibut harvest history by sector (Source: ADF&G).**

Year	Charter				Non-Charter			Total Sport Harvest		
	No. Fish	Avg. Wt. (lb)	Yield (M lb)	GHL (M lb)	No. Fish	Avg. Wt. (lb)	Yield (M lb)	No. Fish	Avg. Wt. (lb)	Yield (M lb)
1995	49,615	19.9	0.986		39,707	19.3	0.765	89,322	19.6	1.751
1996	53,590	22.1	1.187		41,307	22.8	0.943	94,897	22.4	2.129
1997	51,181	20.2	1.034		53,205	21.4	1.139	104,386	20.8	2.172
1998	54,364	29.1	1.584	No	42,580	21.5	0.917	96,944	25.8	2.501
1999	52,735	17.8	0.939	GHL	44,301	20.4	0.904	97,036	19.0	1.843
2000	57,208	19.7	1.130		54,432	20.6	1.121	111,640	20.2	2.251
2001	66,435	18.1	1.202		43,519	16.6	0.721	109,954	17.5	1.923
2002	64,614	19.7	1.275		40,199	20.3	0.814	104,813	19.9	2.090
2003	73,784	19.1	1.412	1.432	45,697	18.5	0.846	119,481	18.9	2.258
2004	84,327	20.7	1.750	1.432	62,989	18.8	1.187	147,316	19.9	2.937
2005	102,206	19.1	1.952	1.432	60,364	14.0	0.845	162,570	17.2	2.798
2006	90,471	19.9	1.804	1.432	50,520	14.3	0.723	140,991	17.9	2.526
2007	109,835	17.5	1.918	1.432	68,498	16.5	1.131	178,333	17.1	3.049
2008	102,965	19.4	1.999	0.931	66,296	19.1	1.265	169,261	19.3	3.264
2009	53,602	23.3	1.249	0.788	65,549	17.3	1.133	119,151	20.0	2.383
2010	41,202	26.4	1.086	0.788	52,896	16.7	0.885	94,098	20.9	1.971
2011	36,545	9.4	0.344	0.788	42,202	16.2	0.685	78,747	13.1	1.029

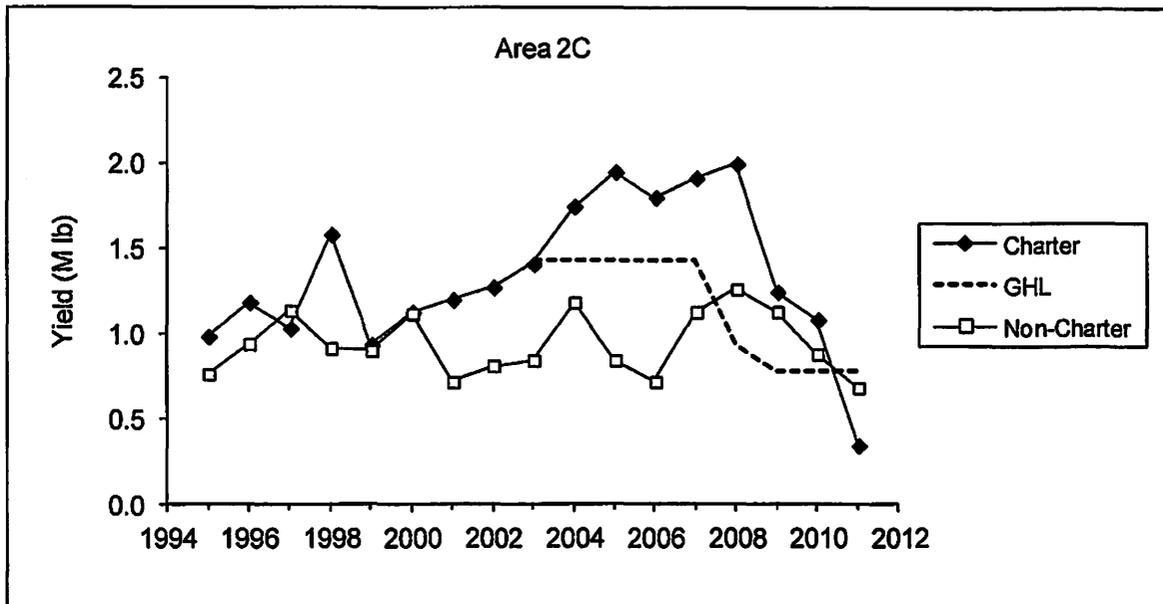


Figure 2. Area 2C charter and non-charter harvests, respective to the GHLs (Source: ADF&G).

Table 3. Area 2C Guideline Harvest Level and Estimated Charter Harvest from 2004 to 2013. (Source: ADF&G)

Year	GHL millions of pounds	Catch millions of pounds	Charter bag/size limit
2004	1.432	1.750	2 fish per day of any size (same as for unguided anglers)
2005	1.432	1.952	2 fish per day of any size (same as for unguided anglers)
2006	1.432	1.804	2 fish per day of any size (same as for unguided anglers)
2007	1.432	1.918	2 fish per day, 1 under 32 inches (72 FR 30714)
2008	.931	1.999	2 fish per day, 1 under 32 inches
2009	.788	1.245	1 fish per day of any size <sup>1</sup> (74 FR 21194)
2010	.788	1.086	1 fish per day of any size
2011	.788	.344	1 fish per day under 37 inches (76 FR 14300)
2012	.931	.645 <sup>2</sup>	1 fish with "U45O68" reverse slot limit <sup>3</sup>
2013	.788		1 fish with "U45O68" reverse slot limit <sup>3</sup>

<sup>1</sup>In addition to the 1-fish daily bag limit, this rule implemented a prohibition on harvest by the charter vessel guide and crew, and a line limit equal to the number of charter vessel anglers onboard, not to exceed six lines. These prohibitions are still in place.

<sup>2</sup>preliminary estimate

<sup>3</sup>Under a reverse slot limit, retained fish must be under 45 inches (U45) or over 68 inches (O68)

To ensure that the halibut stocks would continue to develop to a level that would permit optimum yield in the halibut fisheries, the Council and IPHC have recommended a number of regulatory measures in Area 2C to limit charter halibut harvest to its GHL. Currently, charter anglers in Area 2C observe a “reverse slot limit.” The reverse slot limit allows charter anglers to retain one halibut that is less than or equal to 45 inches or greater than or equal to 68 inches in length per day. In contrast, unguided anglers in Area 2C are allowed to retain two halibut of any size per day.

### 1.3.2.2 Area 3A

The GHL in Area 3A has remained at its original level since implementation in 2004, except for a one-step reduction implemented in 2013 due to a decline in halibut biomass in the area. There is no difference in the regulatory restrictions for halibut between charter and unguided anglers in Area 3A (except for limits on retention of fish by crew); however, halibut harvested by charter anglers were generally (except for Kodiak) larger in 2011 than halibut harvested by unguided anglers. Since the GHL was implemented in 2004, charter halibut anglers in Area 3A have been managed by the same harvest restrictions as unguided anglers, i.e., a two-fish daily bag limit with no size restrictions (even in 2013 under a reduced GHL). Table 4 demonstrates the differences between numbers of fish and average weight between the charter and unguided fisheries. The larger size of charter halibut is generally attributed to the knowledge and skill of the guides, or the ability of larger boats to reach fishing grounds with larger fish. The bag limit and size limit in Area 3A has remained unchanged since the GHL was implemented, and remains equal to the limits for unguided anglers (Table 5).

**Table 4. Area 3A sport halibut harvest history by sector (Source: ADF&G).**

Year	Charter				Non-Charter			Total Sport Harvest		
	No. Fish	Avg. Wt. (lb)	Yield (M lb)	GHL (M lb)	No. Fish	Avg. Wt. (lb)	Yield (M lb)	No. Fish	Avg. Wt. (lb)	Yield (M lb)
1995	137,843	20.6	2.845		95,206	17.5	1.666	233,049	19.4	4.511
1996	142,957	19.7	2.822		108,812	17.6	1.918	251,769	18.8	4.740
1997	152,856	22.3	3.413		119,510	17.6	2.100	272,366	20.2	5.514
1998	143,368	20.8	2.985	No	105,876	16.2	1.717	249,244	18.9	4.702
1999	131,726	19.2	2.533	GHL	99,498	17.0	1.695	231,224	18.3	4.228
2000	159,609	19.7	3.140		128,427	16.9	2.165	288,036	18.4	5.305
2001	163,349	19.2	3.132		90,249	17.1	1.543	253,598	18.4	4.675
2002	149,608	18.2	2.724		93,240	15.9	1.478	242,848	17.3	4.202
2003	163,629	20.7	3.382	3.650	118,004	17.3	2.046	281,633	19.3	5.427
2004	197,208	18.6	3.668	3.650	134,960	14.4	1.937	332,168	16.9	5.606
2005	206,902	17.8	3.689	3.650	127,086	15.6	1.984	333,988	17.0	5.672
2006	204,115	17.9	3.664	3.650	114,887	14.6	1.674	319,002	16.7	5.337
2007	236,133	16.9	4.002	3.650	166,338	13.7	2.281	402,471	15.6	6.283
2008	198,108	17.0	3.378	3.650	145,286	13.4	1.942	343,394	15.5	5.320
2009	167,599	16.3	2.734	3.650	150,205	13.5	2.023	317,804	15.0	4.758
2010	177,460	15.2	2.698	3.650	124,088	12.8	1.587	301,548	14.2	4.285
2011	184,293	15.2	2.793	3.650	128,464	12.6	1.615	312,757	14.1	4.408

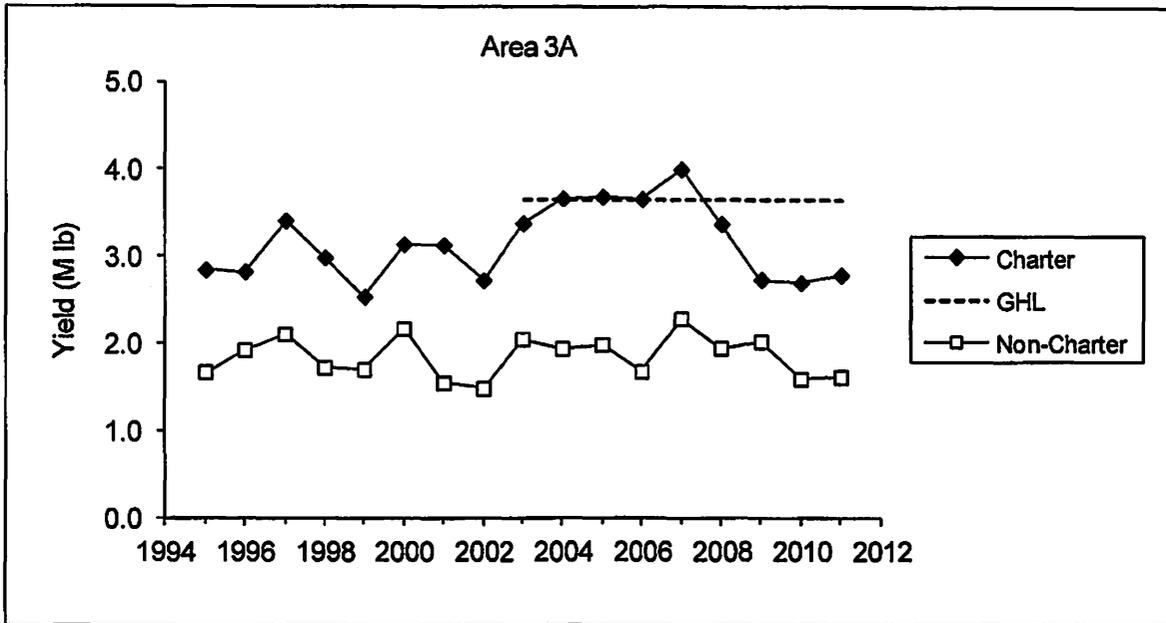


Figure 3. Area 3A charter and non-charter harvests, respective to the GHLs (Source: ADF&G).

Table 5. Area 3A Guideline Harvest Level and Estimated Charter Harvest from 2004 to 2013 (Source: ADF&G).

Year	GHL millions of pounds	Estimated catch millions of pounds	Charter bag limit
2004	3.650	3.668	2 fish per day of any size (same as for unguided anglers)
2005	3.650	3.689	2 fish per day of any size (same as for unguided anglers)
2006	3.650	3.664	2 fish per day of any size (same as for unguided anglers)
2007	3.650	4.002	2 fish per day of any size (same as for unguided anglers)
2008	3.650	3.378	2 fish per day of any size (same as for unguided anglers)
2009	3.650	2.734	2 fish per day of any size (same as for unguided anglers)
2010	3.650	2.698	2 fish per day of any size (same as for unguided anglers)
2011	3.650	2.793	2 fish per day of any size (same as for unguided anglers)
2012	3.103	2.375 *	2 fish per day of any size (same as for unguided anglers)
2013	2.734	N/A	2 fish per day of any size (same as for unguided anglers)

\*preliminary estimate

Currently there is no incentive for charter anglers in Area 3A to circumvent the Council's intent because charter and guided anglers are subject to the same restrictions on daily bag limits and size limits. If charter harvest in Area 3A regularly exceeds its GHIL (or allocation under the CSP), the Council may recommend different management measures for charter anglers in Area 3A as well, and thereby create the incentive for the practice to expand.

### **1.3.3 Proposed Halibut Catch Sharing Plan**

In October 2012, the Council adopted a motion to recommend a CSP for the charter and commercial halibut fisheries in Areas 2C and 3A to NMFS. The CSP would replace the GHIL Program. The 2012 Council motion is available at <http://www.alaskafisheries.noaa.gov/nfmc/PDFdocuments/halibut/CSPMotion1012.pdf>.

The primary objectives of the CSP are to define an annual process of allocating halibut between the charter and commercial fisheries in Area 2C and Area 3A, establish allocations that balance the differing needs of the charter and commercial sectors and vary with changing levels of annual halibut abundance, allow limited use of commercial IFQ by the charter sector above the initial charter allocation, and specify a process for determining harvest restrictions for charter anglers that are intended to limit harvest to the annual charter fishery catch limit.

Upon implementation, the annual CSP catch limits for the commercial and charter sectors would be determined and implemented for each area by a predictable and standardized methodology as part of the IPHC's annual recommendations for halibut fishery conservation and management. If the proposed CSP is approved, NMFS would implement the sector-specific catch limits under the CSP in the annual management measures published in the *Federal Register* each year, as specified by regulations at 50 CFR 300.62.

As part of the proposed CSP, the Council also recommended that ADF&G charter logbooks be used as the data source for numbers of charter halibut harvested under the CSP. The ADF&G developed the logbook program in 1998 to provide information on participation and harvest by individual vessels and businesses in charter fisheries for halibut as well as other state-managed saltwater species. Logbook data are compiled to show where fishing occurs, the extent of participation, and the species and the numbers of fish kept and released by individual anglers. This information is essential for regulation and management of the charter halibut fisheries in Area 2C and Area 3A. ADF&G has recently added saltwater charter logbook reporting requirements to accommodate information required to implement and enforce Federal charter halibut fishing regulations, such as the Area 2C one-halibut per day bag limit and the CHLAP.

In order to provide flexibility for commercial and charter fishery participants, the Council also recommended that the CSP authorize annual transfers of commercial halibut IFQ as guided angler fish (GAF) to charter halibut permit holders for harvest in the charter fishery. Under the commercial IFQ Program, commercial halibut operators hold quota share (QS) that yields a specific amount of an annual harvest privilege, or IFQ. GAF would offer charter vessel anglers in Area 2C or Area 3A an opportunity to receive a limited amount of IFQ from commercial QS holders to harvest halibut in addition to, or instead of, the halibut harvested under the daily bag limit for charter anglers. Charter anglers using GAF would be subject to the harvest limits in place for unguided sport anglers in that area, currently a two-fish limit in Areas 2C and 3A. Halibut harvested as GAF would not be part of the charter allocation, but would be counted toward the commercial catch limit.

## **1.4 Alternatives**

After reviewing an interagency staff discussion paper in February 2013, the Council adopted the alternatives and options listed below for analysis. The Council's intent to amend Federal regulations to define sport fishing guide services to be consistent with State regulations to keep people from fishing in a manner that is contrary to the Council's intent resulted in Alternative 2, Option 1. The Council also responded to the February 2013 discussion paper that suggested that the Council may wish to indicate its

policy intent for which activities would constitute “compensation” and “assistance” in the sport fishing guide services definition; this resulted in Alternative 2, Option 2 and Option 3. The Council authorized the staffs to propose possible definitions of compensation and assistance under Options 2 and 3, as the Council believed that there may be other examples that it could consider.

The analysis assumes that the Council may choose any combination of the options and suboptions under Alternative 2. A possible scenario may be that the Council may select Alternative 2, Option 1 as its preferred alternative if it wishes to revise the definition of sport fishing guide services, even if no action is taken to define “compensation” and/or “assistance” in Federal regulations.

After final action the Council may wish to clarify its intent on whether it wishes to review proposed regulatory text prior to submission of the regulatory amendment (RIR/IRFA, proposed rule, and other accompanying memos) to the Secretary for approval because regulations under the Pacific Halibut Act are not required to be “deemed<sup>3</sup>” by the Council at the time of final action. Such Council review may provide additional opportunities to refine either or both Council intent and draft regulatory text.

**Alternative 1. No action**

**Alternative 2. Revise and clarify the Federal definition of sport fishing guide services.**

Option 1. Revise the definition to remove the language “by being onboard a vessel with such person.”

Option 2. Define ‘compensation’ within the context/definition of sport fishing guide services.

Suboption 1. The definition of ‘compensation’ would be aligned with the proposed State of Alaska definition, if the proposed State definition is amended to replace “actual” daily expenses with “reasonable” daily expenses.

Option 3. Define ‘assistance’ within the context/definition of sport fishing guide services.

Suboption 1. Examples of assistance include, but are not limited to, providing a handheld GPS unit containing coordinates for halibut fishing locations.

The staff recommends that the Council consider adopting the following alternatives and options for analysis to improve clarity and to reflect recent action by the Board of Fisheries to define compensation. The revised options are not intended to convey any intention by Federal or State agencies for selection of a preferred alternative.

**Alternative 1. No action**

**Alternative 2. Revise and clarify Federal definitions.**

Option 1. Revise the definition of sport fishing guide services to remove the language “by being onboard a vessel with such person”.

Option 2. Define ‘compensation.’ within the context of sport fishing guide services.

Suboption 1. The definition of ‘compensation’ would be aligned with the State of Alaska definition.

“Compensation” (1) means direct or indirect payment, remuneration, and other benefits received in return for services, regardless of the source; in this paragraph, “benefits”

<sup>3</sup> The Council policy is to “deem” proposed regulations that clearly and directly flow from the provisions of its motions for preferred alternatives to be necessary and appropriate in accordance with section 303(c), and therefore the Council authorizes the Executive Director and the Chairman to review the draft proposed regulations when provided by NMFS to ensure that the proposed regulations to be submitted to the Secretary under section 303(c) are consistent with these instructions. The Council normally chooses to let the Executive Director and Chairman, or their designees, to review the regulations and alert the Council should there be any items of concern.

includes (A) wages or other employment benefits given directly or indirectly to an individual or organization, and (B) dues, payments, fees, and other remuneration given directly or indirectly to a fishing club, business, organization, or individual who provides sport fishing guide services; (2) does not include reimbursement for the *actual* daily expenses for fuel, food, or bait;

Suboption 2. The definition of ‘compensation’ would be aligned with the State of Alaska definition, with one word substitution.

“Compensation” means direct or indirect payment, remuneration, or other benefits received in return for services, regardless of the source; in this paragraph, “benefits” includes wages or other employment benefits given directly or indirectly to an individual or organization, and any dues, payments, fees, or other remuneration given directly or indirectly to a fishing club, business, organization, or individual who provides sport fishing guide services; and does not include reimbursement for the *reasonable* daily expenses for fuel, food, or bait;

Option 3. Define ‘assistance’ within the context of sport fishing guide services.

“Assistance” means accompanying or physically directing the sport fisherman in sport fishing activities during any part of a sport fishing trip.

#### 1.4.1 Alternative 1, Status Quo

Alternative 1 is the status quo. Taking no action would result in continuation of Federal regulations that implement the Council’s design of, and intent for, managing the charter halibut fishery, including the CHLAP, the GHL Program, and the proposed CSP. The Council adopted the No Action Alternative as a baseline against which to evaluate the effects of its proposed alternative and options.

The 2009 NMFS decision memorandum to the proposed rule for regulations to implement the CHLAP Program acknowledged that a shift to “unguided” angling could occur as a result of requiring the guide to be onboard the vessel. The memo specified that,

*“A charter vessel is a vessel used for hire in sport fishing for halibut, but does not include a vessel without a hired operator. The proposed action would not apply to an unguided or independent angler... In its review of this proposed rule, NOAA General Counsel expressed concern regarding our intent to have this action apply only to charter operations that have the charter vessel guide on board the vessel. This may result in charter operators shifting their business model to unguided fishing boat rentals. Although this may in fact occur, I believe that this policy issue needs to be addressed through the Council process and in consultation with the State of Alaska before we consider broadening the scope of the regulations to encompass any sectors other than charter operations with a guide on board. Although State of Alaska regulations regarding sport fishing can be interpreted to apply more broadly than our intent with the proposed rule, I do not expect this difference to lead to substantial confusion for the sport fishing community because the Federal rules would clearly apply only to charter operations with a guide on board. Additionally, NMFS has not analyzed the effects of broadening the proposed rule to apply to various types of indirectly assisted recreational fishing operations. Our preliminary research into this issue suggests that it may be complex and controversial to define which types of entities could be affected by a broader regulation. This supports exploring the matter further through the Council process rather than introducing it to the public through the proposed rule.”*

The ADF&G SWHS continues to be used to estimate charter halibut harvests under the GHL program<sup>4</sup> for Area 2C and Area 3A. Because the SWHS relies on harvest information provided by the angler, the

<sup>4</sup> The Council used SWHS estimates as the basis for determining the GHLs for Area 2C and Area 3A.

classification of harvest depends on how the angler chooses to report it. There is information to indicate that some clients of charter businesses that guide from a separate vessel report their harvest as guided and some report it as unguided. Therefore, a portion of this harvest is being reported as guided even though it does not meet the Federal definition of sport fishing guide services.

ADF&G charter logbook data will be used to determine charter halibut harvests under the proposed CSP<sup>5</sup>. ADF&G requires licensed guides that are compensated for providing assistance to clients to catch halibut to report that halibut catch in the logbook, even if the guide is not on board the same vessel as the clients. ADF&G staff can use logbook data to detect businesses in Area 2C whose clients routinely harvest two halibut per day, and it is presumed that these are charter operations that provide assistance to anglers from a separate vessel. If it is known that all fishing trips by these businesses were conducted with the guide in a separate vessel, these harvests could conceivably be excluded when logbooks are used to estimate charter harvests under the CSP. However, there is no information contained in the logbook itself that would indicate when the guide is on board the same vessel as the anglers or in a separate vessel.

#### 1.4.1.1 Current Definitions

Federal regulations include three definitions that are relevant for determining whether more restrictive charter daily bag limits apply to anglers on board the vessel in Area 2C (and possibly in the future in Area 3A). These definitions are “charter vessel angler,” “charter vessel guide,” and “sport fishing guide services.” Only the latter definition is the subject of the proposed action. The definitions at § 300.61 are as follows:

*Charter vessel angler, for purposes of §§ 300.65(d), 300.66, and 300.67, means a person, paying or non-paying, using the services of a charter vessel guide.*

*Charter vessel guide, for purposes of §§ 300.65(d), 300.66 and 300.67, means a person who holds an annual sport guide license issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services.*

*Sport fishing guide services, for purposes of §§ 300.65(d) and 300.67, means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being onboard a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.*

NMFS interprets “services” in the definition of “charter vessel angler” to mean “sport fishing guide services.” Under this interpretation, a person who takes or attempts to take halibut would only be a charter vessel angler if that person is receiving sport fishing guide services from a charter vessel guide. According to the definition for “sport fishing guide services,” a person would be considered a charter vessel angler only if that person was receiving assistance to catch and retain halibut from a charter vessel guide who is on board the same vessel and being compensated to assist the person to take or attempt to take halibut.

The Council record for development of the CHLAP is silent on whether a guide must be onboard the vessel to be subject to charter halibut fishing regulations, and the Council’s analysis supporting the CHLAP did not explicitly address whether the guide would be expected to be onboard. Therefore it is appropriate for the Council to state its intent through this proposed action.

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<sup>5</sup> The State might exclude certain logbook data under the status quo. The State could exclude all data for businesses known to routinely guide anglers from a separate vessel, but not without violating State confidentiality statutes because the harvest of fewer than 4 businesses could be obtained by subtraction from the total. In addition, there are many businesses that occasionally report harvest of more than 2 halibut per angler. The degree to which these represent reporting errors versus occasional instances of guiding from a separate vessel is unknown.

#### 1.4.1.2 Analysis of Impacts

Taking no action is believed to result in an unknown, but relatively small number of anglers fishing under unguided sport fishing regulations (2 fish of any size) rather than the more restrictive charter fishing regulations (one fish, U45/O68 reverse slot limit) in Area 2C. It is likely that some additional poundage of halibut would be harvested under more liberal bag and size limits by these anglers, at least a portion of which would be counted under the SWHS as charter removals. With logbook monitoring under the proposed CSP, all of this harvest would be logged as charter harvest, even though it does not meet the Federal definition of charter harvest. Therefore, the status quo may result in continued inaccuracies in accounting of sport.

The SWHS accounts for estimates of all sport halibut harvest in terms of numbers of fish. It does not account for all removals in terms of biomass since some unguided harvest is assigned the charter average weight and some charter harvest is assigned the unguided average weight. Using the logbook upon implementation of the CSP, unguided harvest (no guide on board) would be counted as charter harvests and assigned the charter average weight. The SWHS estimate of unguided harvest would likely still be slightly lower because some of the harvest by guides who are not onboard is reported as charter harvest.

The Council must determine its tolerance for the potential for these harvests to be misreported by an angler who may be confused whether s/he is fishing under guided or unguided sport regulations (although the angler's intentions may sometimes be inferred by harvests of one or two fish per day).

The bag limits are the same for guided and unguided halibut sport fishing (two fish of any size) in Area 3A; however a reduced bag/size limit may be implemented for the charter sector in Area 3A in the future, which could create similar incentives for new fishing practices in this area too.

#### 1.4.2 Alternative 2

The Council's February 2013 motion indicated its intent that Alternative 2 would align all regulations regarding sport fishing guide services for Pacific halibut with the State of Alaska regulations (see Section 1.6.4. for other regulations that would be revised under Alternative 2, Option 1). The Council may choose any combination of the options and suboptions under Alternative 2, and it noted that none are mutually exclusive. This is interpreted to mean that that the Council may select Option 1 by itself, Options 1 and 2, or Options 1, 2, and 3. It is less likely that the Council would select Option 2 and/or Option 3, without Option 1.

##### 1.4.2.1 Option 1. Change Federal definition of "sport fishing guide services"

###### 1.4.2.1.1 Federal regulations

Definitions of charter vessel angler, charter vessel guide, and sport fishing guide services in Federal regulations are important for tracking and managing charter halibut harvests in Area 2C because charter anglers are subject to more restrictive daily bag and size limits than are in place for unguided anglers.

The current Federal definition of sport fishing guide services is given in Section 1.4.1.1. The Council and agency staffs agree on the proposed regulatory language for Alternative 2, Option 1 under consideration in this analysis. While not necessary for continued enforcement of current Federal regulations, the Council expressed interest in addressing what it considers to be fishing activities that are contrary to its intent for management of the charter halibut sector. Option 1 proposes to revise the definition by removing the words "by being onboard a vessel with such person" to read,

*Sport fishing guide services, for purposes of §§ 300.65(d) and 300.67, means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.*

#### 1.4.2.1.2 State regulations

The following definitions in State statute relate to this issue<sup>6</sup>.

Sec. 16.40.299. Definitions.

In AS 16.40.260 - 16.40.299,

- (1) *"sport fishing guide" means a person who is licensed to provide sport fishing guide services to persons who are engaged in sport fishing;*
- (2) *"sport fishing guide services" means assistance, for compensation or with the intent to receive compensation, to a sport fisherman to take or to attempt to take fish by accompanying or physically directing the sport fisherman in sport fishing activities during any part of a sport fishing trip; "sport fishing guide services" does not include*
  - (A) *sport fishing services; or*
  - (B) *services provided by an assistant, deckhand, or similar person who works directly under the supervision of and on the same vessel as a sport fishing guide;*
- (3) *"sport fishing services" means the indirect provision of assistance, for compensation or with the intent to receive compensation, to a person engaged in sport fishing in taking or attempting to take fish or shellfish by a business that employs a sport fishing guide to provide sport fishing guide services to the person during any portion of a sport fishing trip; "sport fishing services" does not include*
  - (A) *an activity for which a sport fishing guide license is required; or*
  - (B) *booking and other ancillary services provided by a tour broker or agent to a sport fishing services operator.*

#### 1.4.2.1.3 Analysis of Impacts

Federal enforcement staff has not identified an inability to enforce current regulations; therefore the Council must determine whether action under Alternative 2 reflects its intent for management of the charter halibut sector.

ADF&G examined logbook data from Area 2C in an effort to quantify the practice of guiding from a separate vessel. Specifically, logbook data were examined for all instances of reported daily halibut harvests of two halibut per person in 2010, 2011, and through July 31, 2012. During this period, the charter halibut daily bag limit in Area 2C was one halibut, while the noncharter daily bag limit was two halibut. The underlying assumption in this analysis is that a charter business would be unlikely to routinely allow harvest of two halibut per client unless that business was confident that their clients did not meet the Federal definition of a "charter vessel angler." These data give a general indication of the number of businesses in Area 2C that provided guide-assisted halibut fishing that did not meet the Federal definition of sport fishing guide services (because the guide is not on board the same vessel as the angler), but did meet the more general State definition.

In 2010, 34 businesses in Area 2C reported at least one instance of an angler harvesting two halibut per angler (Table 6). All but two businesses reported eight or fewer instances of an angler harvesting two halibut per day, and 17 of these businesses reported exactly one instance. Seven businesses reported instances of anglers harvesting two halibut per day that made up more than 5% of their total angler-days for the year. However, five of these seven businesses reported less than 40 angler-days in total for the year. It is unknown to what degree occasional or rare reports of two halibut per angler represent reporting issues rather than guide-assisted halibut fishing. Assuming these minor cases represent misreporting,

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<sup>6</sup> The State definition differs from the current Federal definition (see bolded text).

only two businesses that completed logbooks are believed to have routinely offered guide-assisted halibut fishing that did not meet the Federal definition of guide services in 2010.

**Table 6. Summary of sport charter businesses that reported harvests of two halibut per person from Area 2C waters in 2010, 2011, and through July 31, 2012 (Source: ADF&G).**

Year	Total number of businesses reporting at least one angler-day with harvest of 2 halibut	Number of businesses with more than 5% of angler-days reporting harvest of 2 halibut	Number of businesses that likely met State, but not Federal, definition of guided
2010	34	7	2
2011	25	3	2
Jan – Jul 2012	20	3	2

The data were similar for 2011 and 2012. In 2011, 25 businesses in Area 2C reported at least one instance of an angler harvesting two halibut (Table 6). Twenty businesses reported the same through July of 2012. In both years, only three businesses reported instances of anglers harvesting two halibut that made up more than 5% of all angler-days.

Of the two businesses in 2012 that routinely reported clients harvesting two halibut per person, one does not hold CHPs. In this business, anglers fish from skiffs without a guide on board. Guides assist and direct the anglers for compensation, but from separate “chase boats” with no clients on board. ADF&G requires that only the chase boats be registered as guide vessels. All logbook data for anglers in the skiffs are recorded in logbooks assigned to the chase boats. Therefore, from logbook data it appears this business has only two vessels, whereas the anglers are fishing on more than two skiffs.

The second business has two vessels and holds a single CHP that was issued in 2011. It appears from the data that, although this business holds an Area 2C CHP, it sometimes assists anglers in catching halibut in a manner that does not meet the Federal definition of guiding (but does meet the State definition) in order to allow anglers to harvest two halibut of any size per day (in excess of the charter halibut daily bag and size limits).

Across all years, logbook data indicate that three individual businesses may have routinely offered guide-assisted halibut fishing that did not meet the Federal definition. These businesses reported that a substantial percentage of anglers harvested two halibut (20-48% in 2010 and 2011), and two of these businesses had frequent communication with ADF&G staff regarding their business model and reporting requirements. For all other businesses, either the number of anglers that harvested two halibut was small ( $\leq 9$ ) or the proportion of anglers that harvested two halibut was small (less than 6%). Some of these reports could be guide-assisted fishing, but is too rare to be called “routine.” Although some unknown portion of these instances could also be bag limit violations, many are probably data recording errors such as reporting other species in the halibut column, or incorrectly reporting the statistical area. One business with a CHP for Area 3A often reported statistical areas in Area 2C. This was not necessarily a regulatory violation or reporting error because ADF&G logbooks only require reporting the ADF&G statistical area where most of the bottomfish were caught or targeted. A charter vessel with an Area 3A CHP could take anglers to Area 3A to harvest two halibut, but then fish in Area 2C for other bottomfish species for the majority of the trip. In that case, the vessel would correctly report an ADF&G statistical area that was in Area 2C, even though the halibut were harvested from Area 3A.

ADF&G examined the 2007-2009 SWHS responses from clients of one of these businesses. Over these three years, 41% to 62% of the halibut harvest was reported by clients as charter, with the remainder reported as unguided. All of the harvest by such businesses is reported in charter logbooks and would presumably be considered charter under the proposed CSP, at which time for accounting for charter halibut harvests transitions from SWHS to logbooks. Under either the GHF or CSP charter businesses would not report unguided harvest.

For Area 3A, harvest data could not be used to identify businesses that may have exploited the guide on board provision because bag limits were identical for guided and unguided anglers. Instead, these businesses were identified using logbook data where halibut were reported harvested but no CHP number was reported. The logic behind this was that harvest reporting was required under State regulations, but no CHP would have been needed under Federal regulations if the guide was not on board the same vessel as the anglers. In 2011, 14 businesses made at least one trip with halibut harvested and no CHP number recorded. Of these 14 businesses, 12 made only one trip with halibut harvest and no CHP reported. All but one of those businesses had CHPs and recorded the CHP number on all other trips with halibut harvest. Of the 14 total businesses, two appeared to not have CHPs, but combined they comprised only six trips with halibut harvest. In summary, logbook data for Area 3A did not clearly identify any businesses that routinely reported trips in which halibut were harvested but no CHP number was recorded.

There also are businesses that provide both guided halibut fishing (with a CHP) and unguided halibut fishing. If the unguided halibut fishing does not involve guides physically directing the anglers on where or how to fish for compensation, such fishing does not meet either the State or Federal definition of guiding<sup>7</sup>, and there are no logbook or other data to indicate the magnitude of that practice.

While logbook data may be used to identify some operators that have exploited the onboard requirement, it cannot identify the number of operators that are exploiting the onboard requirement but not reporting those halibut harvests in the logbook. Therefore the logbook data analysis provides a minimum estimate of cases that may be of concern to the Council.

It is not possible to use SWHS data to estimate the numbers of anglers that harvested halibut. Survey responses are by household, and while the number of anglers in each household is reported, the number that caught halibut on any given trip is not. In addition, many households harvested halibut on both guided and unguided trips, so the counts by sector can't be separated. ADF&G can provide the number of licensed guided anglers that harvested a halibut, by year and IPHC area, using charter logbook data if the Council believes that this information would be helpful in selecting its preferred alternative. This number will be less than the number of guided anglers that harvested halibut because individual youth anglers are not identifiable in the logbook data.

The SWHS accounts for estimates of all sport halibut harvest in terms of numbers of fish. It does not account for all removals in terms of biomass since some unguided harvest is assigned the charter average weight and some charter harvest is assigned the unguided average weight. Using the logbook upon implementation of the CSP, unguided harvest (no guide on board) under Alternative 2 would be counted as charter harvests and assigned the charter average weight. The SWHS estimate of unguided harvest would likely still be slightly lower because some of the harvest by guides who are not onboard is reported as charter harvest. All participants would benefit from clearly articulated rules regarding fishing behavior and reporting requirements.

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<sup>7</sup> Some examples may include: 1) vessels that serve or carry one or more smaller unguided boats. They also recover the smaller craft but do not assist the anglers after releasing the craft. No compensation for guiding occurs; 2) land-based or floating lodges that provide boats without guides, with no compensation specifically for guiding. In some cases, the angler may fish on a charter boat the first day, and then fish from an unguided skiff on subsequent trips; and 3) outfitters that may provide boats, gear, remote lodging, and fishing advice, but not fishing assistance for compensation during the fishing trip.

#### 1.4.2.2 Option 2. Add Federal definition for “compensation”

##### 1.4.2.2.1 Federal regulations

Federal regulations under the status quo do not define “compensation” for the charter halibut fishery. The lack of such a definition creates challenges for Federal enforcement staff and for the public. NMFS recognizes that compensation for sport fishing guide services can take many forms. For purposes of applying the regulations at §§ 300.61, 300.66, and 300.67, NMFS evaluates the specific circumstances of a fishing trip to determine if a charter vessel guide is receiving compensation for providing persons with assistance to take or attempt to take halibut.

Compensation is generally defined as something given or received as payment or remuneration, as for a service. For purposes of the definition of “sport fishing guide services” at § 300.61, compensation is not strictly limited to a monetary exchange and can include a trade of goods or services in exchange for taking someone fishing. Therefore, assistance for compensation is not limited to situations where persons are directly compensating someone for sport fishing guide services. The definition of “sport fishing guide services” at § 300.61 does not require any person on board the vessel to be individually compensating the person providing assistance for this definition to be applicable. If the charter vessel guide is compensated in any way to provide assistance, then that charter vessel guide is providing sport fishing guide services under § 300.61.

Federal staff considers Federal regulations to include third party compensation (i.e., the compensator does not have to be part of the fishing trip) as compensation to a charter vessel guide for purposes of determining whether halibut fishing activities are subject to charter fishery restrictions.

The analysis includes two suboptions for the Council to consider; Suboption 1 is the State definition and Suboption 2 contains a single word substitution of “reasonable” for “actual” expenses. The State text listed in Section 1.3 and below (see bold text for where the substitution of *reasonable* for *actual* would occur).

##### 1.4.2.2.2 State regulations

While ADF&G and the Department of Public Safety consider third-party compensation to be “guided,” current State regulations do not explicitly state this. ADF&G and the Department of Public Safety jointly submitted a proposal to the Board of Fisheries for the 2012/2013 proposal cycle to clarify that the intent is to include all types of remuneration. The proposed language defines compensation for sport fishing to include third party compensation as well as non-monetary compensation (remuneration), but excludes reimbursement for fuel, supplies, etc.

The Board unanimously adopted the following language<sup>8</sup> during its March 2013 statewide meeting:

- 5 AAC 75.995(b) In AS 16.40.299 and this chapter, unless the context requires otherwise, “compensation”*
- (1) means direct or indirect payment, remuneration, or other benefits received in return for services, regardless of the source; in this paragraph “benefits” includes*
    - (A) wages and other employment benefits given directly or indirectly to an individual or organization; and*
    - (B) dues, payments, fees, and other remuneration given directly or indirectly to a fishing club, business, organization, or individual who provides sport fishing guide services;*
  - (2) does not include reimbursement for the actual daily expenses for fuel, food, or bait.*

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<sup>8</sup> Not yet implemented, as the Board of Fisheries action is under review by the Department of Law

#### 1.4.2.2.3 Analysis of Impacts

Federal enforcement staff has not identified an inability to enforce current regulations; therefore the Council must determine whether action under Alternative 2 reflects its intent for management of the charter halibut sector.

The Board of Fisheries was advised by ADF&G and Department of Public Safety to use 'actual' expenses because they can be documented with a receipt, whereas 'reasonable' was deemed more subjective. Federal enforcement staff identified that the State's proposed definition of compensation as it relates to sport fishing guide services places the burden on enforcement staff to determine "actual" daily expenses. Federal staff advised replacing "actual" with "reasonable" in order to provide more flexibility to enforcement staff (See Section 1.6.4). The Council's adoption of Option 2 for inclusion in this analysis is consistent with this suggestion. Both the State definition (using "actual" under Option 2a) and the proposed staff recommendation (using "reasonable" under Option 2b) are included in the analysis for Council consideration.

#### 1.4.2.3 Option 3. Assistance

##### 1.4.2.3.1 Federal regulations

Federal regulations do not define "assistance" for the charter halibut fishery. The lack of a Federal definition for "assistance" results in challenges for Federal enforcement staff and for the public. Federal, State, and Council staffs spent considerable time debating which activities might constitute assistance, but could not reach consensus. To pursue a definition of assistance, the staffs agreed that further clarification from the Council is needed about the precise activities it would like to constrain. Many services offered by businesses that provide bare boat rentals could be considered "assistance" and it is difficult to distinguish between the target business model and other acceptable models.

Some examples of assistance that could be considered guiding activities may be useful for the Council to review in its determination of whether to proceed with Option 3. For example, a quick internet search of bare boat rentals in Southeast Alaska found that many offered a GPS unit, fishing gear, radios, etc. If an angler fishing aboard a self-guided bare boat rental were to call back to the lodge for advice, one might question whether the anglers would be receiving "assistance for compensation...to take or attempt to take a fish." If the Council were to adopt such a definition it also likely would restrict the bare boat unguided sport fishing industry. If that is not the Council's intent, it should provide a list of services under a definition of assistance that only would apply to guided anglers and not to bare boat rentals.

Such services further would be constrained as the Federal definition of sport fishing guide services specifies that assistance must occur *during* any part of a fishing trip. A "charter vessel fishing trip" is defined in Federal regulations at § 300.61 as follows:

*Charter vessel fishing trip, for purposes of §§ 300.65(d), 300.66, and 300.67, means the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is onboard and the offloading of one or more charter vessel anglers or any halibut from that vessel.*

Therefore, activities that might be considered assistance under Option 3 must occur after gear is deployed and before fish or charter anglers are offloaded.

A variety of activities were examined by interagency staffs to determine if the Council could identify specific fishing activities that could be incorporated into Federal regulations to define assistance (Table 7). They are offered for Council review. One problem that is easily identified in attempting to catalogue a finite list of fishing activities that define assistance is how complete that list might be, and whether specifying such activities results in numerous amendments to the regulations as previously unlisted activities could be considered for inclusion, thus necessitating a new regulatory amendment and rulemaking process. Federal and State enforcement staff noted that determination of guided assistance

would often not depend on a single activity or factor, but rather a combination of factors that taken together would indicate that a guide was compensated for providing assisting to the client in a manner intended to result in the taking of halibut.

**Table 7. List of compensated activities that could be considered to define assistance in Federal regulations.**

- Prepping gear/tackle (repairing reels/rods, tying leaders/hooks on line)
- Renting boat with operator or crew
- Operating (driving, navigating) boat
- Providing fishing gear
- Providing instruction on how to drive boat
- Providing instruction on how to catch halibut
- Baiting fishing gear
- Choosing fishing location(s)
- Recommending fishing location(s)
- Providing electronic devices or printed material with halibut fishing location(s) marked
- Setting fishing gear
- Hooking halibut
- Fighting, playing, reeling halibut in
- Gaffing, shooting, bleeding, clubbing, harpooning halibut
- Preventing halibut from swimming away (using a shark hook, tying tail, stringing through gills, holding in live tank, etc.)
- Filleting, gutting, heading halibut onboard vessel

#### **1.4.2.3.2 State regulations**

The State does not have a definition specifically for “assistance.” However, the definition of assistance is embedded in the definition for sport fishing guide services as “accompanying or physically directing the sport fisherman in sport fishing activities during any part of a sport fishing trip.” The Council could adopt this language in the Federal definition of sport fishing guide services, potentially without creating a new inconsistency.

Although the State would consider provision of GPS coordinates as a form of assistance, this type of assistance, by itself, would likely not compel the State to seek prosecution. However, provision of GPS coordinates could be included and weighed in concert with other types of assistance when considering charges for guiding-related offenses.

#### **1.4.2.3.3 Analysis of Impacts**

Federal enforcement staff has not identified an inability to enforce current regulations; therefore the Council must determine whether action under Alternative 2 reflects its intent for management of the charter halibut sector. Implementation of a Federal definition of assistance, particularly in the example used under the Council’s current text under Option 3, could create additional inconsistency between State and Federal definitions, which is contrary to the Council’s problem statement.

In general, State regulations require that charter logbooks be filed whenever anglers receive guide services from adjacent vessels or shore, because the State definition of “sport fishing guide services” does not require the guide to be aboard the vessel with clients. As long as bag limits for the charter and unguided sector differ, State staff can use logbook data to identify businesses whose clients routinely harvest under Federal rules for the unguided sector.

The State has a criminal enforcement system where the burden of proof is “beyond a reasonable doubt.” The MSA enforcement scheme is based primarily on civil administrative enforcement proceedings where the burden of proof is “by a preponderance” of evidence. The civil administrative “preponderance” proof burden is significantly easier to meet than the criminal proof burden. So, the State may be more constrained in how they interpret their regulations. Different standards of proof are required for litigation by Federal and State enforcement agencies.

In addition, it may be easier for a State regulation to be undercut by a criminal court decision, since the State magistrate/judge can determine that the State regulation is unclear or has some other infirmity. Conversely, the Administrative Law Judges in the civil administrative system do not have authority to rule on the validity of a regulation. So, those are two very good reasons why - even if we could use precisely the same words in both the State and Federal regulations – the way those regulations are enforced may differ.

Also, State and Federal enforcement mentioned that while some activities may not be considered assistance by themselves, officers look at the sum of all the activities that might be considered assistance and make a subjective decision based on those particular circumstances.

#### **1.4.2.4 Creation of new conflicts with other Federal regulations**

Removing the on board requirement from the Federal definition would affect several regulations at 50 CFR part 300.

Regulations at §300.65(d) describe ADF&G saltwater charter logbook reporting requirements for charter halibut operators. The affected paragraphs are listed below:

(d)(iv) *Recordkeeping and reporting requirements in Area 2C.* Each charter vessel angler and charter vessel guide onboard a vessel in Area 2C must comply with the following recordkeeping and reporting requirements (see paragraphs (d)(2)(iv)(A) and (B) of this section) by the end of the day or by the end of the charter vessel fishing trip, whichever comes first:

(d)(iv)(A) *Charter vessel angler signature requirement.* Each charter vessel angler who retains halibut caught in Area 2C must acknowledge that his or her information and the number of halibut retained (kept) are recorded correctly by signing the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook data sheet on the line number that corresponds to the angler's information.

(d)(iv)(B)(3) *Angler sport fishing license number and printed name.* Before a charter vessel fishing trip begins, record for each charter vessel angler the Alaska Sport Fishing License number for the current year, resident permanent license number, or disabled veteran license number, and print the name of each paying and nonpaying charter vessel angler onboard that will fish for halibut. Record the name of each angler not required to have an Alaska Sport Fishing License or its equivalent.

(d)(iv)(B)(6) *Angler signature.* The charter vessel guide is responsible for ensuring that charter vessel anglers comply with the signature requirements at paragraph (d)(2)(iv)(A) of this section.

If the guide on board requirement were removed, the Council would need to decide who would be required to hold and complete the ADF&G saltwater charter logbook, and when and how the anglers would sign the logbook confirming their catch. Additionally, guides are currently required to record the numbers of halibut caught and kept, as well as the regulatory area where the majority of fish were caught or targeted. Anglers would need to record, remember, or somehow relay this information to the person with the logbook.

Two current prohibitions at § 300.66 would be affected by Alternative 2. Paragraph 300.66(r) states that it is prohibited to

“be an operator of a vessel with one or more charter vessel anglers on board that are catching and retaining halibut without an original valid charter halibut permit for the regulatory area in which the vessel is operating.”

If the guide onboard requirement were removed, charter anglers could be on a vessel without a guide and, presumably, without a charter halibut permit. Regulations would need to be changed to specify which vessels are required to carry a charter halibut permit.

Similarly, paragraph 300.66(v) prohibits being

“an operator of a vessel in Area 2C or Area 3A with one or more charter vessel anglers on board that are catching and retaining halibut without having on board the vessel a State of Alaska Department of Fish and Game Saltwater Charter Logbook that specifies the following: (1) The person named on the charter halibut permit or permits being used on board the vessel; (2) The charter halibut permit or permits number(s) being used on board the vessel; and (3) The name and State issued boat registration (AK number) or U.S. Coast Guard documentation number of the vessel.”

This paragraph would need to be changed to agree with the changes to the logbook reporting requirements at paragraph 300.65(d). Also, currently a CHP is for use on a single vessel, but the proposed change would presumably allow a single CHP to be used for several satellite vessels. It is not clear how these vessels would be associated administratively with the CHP.

Regulations at § 300.67 govern the Charter Halibut Limited Access Program. Under the general permit requirements at paragraph 300.67(a)(1),

“In addition to other applicable permit and licensing requirements, any operator of a vessel with one or more charter vessel anglers catching and retaining Pacific halibut on board a vessel must have on board the vessel an original valid charter halibut permit or permits endorsed for the regulatory area in which the vessel is operating and endorsed for at least the number of charter vessel anglers who are catching and retaining Pacific halibut. Each charter halibut permit holder must insure that the operator of the permitted vessel complies with all requirements of §§ 300.65 and 300.67.”

If the definition of sport fishing guide services were changed so that the vessel operator was no longer necessarily the guide, then the “operator of a vessel with one or more charter vessel anglers” could also be a charter vessel angler. Would the charter angler then be required to hold the CHP? Would the angler therefore be responsible for complying with the requirements at §§ 300.65 and 300.67, as stated? Or would the guide holding the permit from shore or an adjacent vessel be responsible? How would the vessel(s) holding the charter anglers be linked to the vessel holding the logbook and the CHP?

Paragraph 300.67(a)(3) states that a charter halibut permit is valid for up to the maximum number of charter vessel anglers for which the charter halibut permit is endorsed. Under the change proposed in Alternative 2 Option 1, would the charter halibut permit holder be limited to renting gear and vessels to the number of anglers endorsed on the permit?

Proposed regulations for a charter halibut catch sharing plan in Areas 2C and 3A would also be affected by Alternative 2. The proposed CSP has a component that would allow charter operators to lease commercial IFQ as guided angler fish (GAF) for use in the charter fishery. As proposed, the GAF program would require that GAF permits be on board the vessel used to harvest GAF. Charter vessel guides would be required to mark GAF halibut by clipping the lobes of the tail fin, and complete reporting requirements in the ADF&G saltwater charter logbook, on the GAF permit, and electronically. If the Council adopts Alternative 2, they would need to decide if GAF would be allowed for use on “guide-assisted” vessels, and if so, how to modify the proposed GAF regulations to ensure that GAF are

properly accounted for. NMFS staff suggests that GAF use would not be allowed unless a guide were on board the vessel with the angler catching and retaining that GAF halibut.

### 1.4.3 Conclusions

None of the alternatives are likely to change fishing patterns or harvest amounts to an extent that would result in an impact on the halibut stock or other environmental impacts. A small but unquantifiable amount of sport halibut removals would be affected by the proposed action after implementation of the CSP under any of the options under Alternative 2.

If businesses are no longer allowed to guide anglers from a separate boat, these businesses will have to become bare boat rentals (unguided) or purchase CHPs (guided). If they become bare boat rentals, it is possible that more of the business clients will report their harvest as unguided in the SWHS. If they become *bona fide* charter operators, it is likely that more of the clients will report their harvest as guided harvest in the SWHS and harvests reported in logbooks will represent harvest that meets the Federal definition of charter harvest.

Data are scarce to quantify potential impacts of the alternatives. Positive impacts are expected to occur from a clear, articulated policy by the Council so that all charter halibut fishery participants are treated fairly and are abiding under consistent State and Federal regulations. These positive impacts however could be diminished if Council action results in new, unintended inconsistencies with State regulations or other Federal regulations or unintentionally creates more public confusion.

If the Council demonstrates a clear benefit for Alternative 2, Option 1, then the Council may select it as its Preferred Alternative, even if benefits do not outweigh the costs of implementation, enforcement, litigation, or even potential costs of a few businesses choosing to purchase CHLAPs. The Council also may adopt Alternative 2, Option 1 with or without preferred alternatives for definitions for compensation and assistance (Alternative 2, Options 2 and 3). The Council may determine that Alternative 2, Option 1 may still offer an improvement in clarifying Council intent for management of the charter halibut sector.

## 1.5 Preparers

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<b>Table 11. Summary of the effects of the Proposed Action.</b>				
	<b>Alternative 1. No Action</b>	<b>Alternative 2. Revise Federal regulations that define sport fishing guide services</b>		
		<b>Option 1. Sport fishing guide services</b>	<b>Option 2. Compensation</b>	<b>Option 3. Assistance</b>
<b>Who may be affected?</b>	Baseline	All Pacific halibut guides and anglers have the potential to be affected by clarification of Council intent and revisions to Federal regulations; however currently small, but potentially increasing, number of charter halibut guides and anglers may be affected by adhering to more restrictive size and bag limits in Area 2C upon implementation of the CSP and use of State logbooks to estimate charter halibut removals. Some Area 3A guides and anglers may be affected in the future if more restrictive limits under the CSP are implemented on the charter sector.		
<b>Impacts to the resource</b>	Baseline	<p>When used to account for charter halibut removals upon implementation of the CSP, all logbook data would meet the Federal definition of charter harvest. Therefore there is no conservation concern regarding unaccounted halibut removals.</p> <p><i>A de minimus</i>, number of halibut pounds would be unharvested by restricting indirectly assisted halibut harvests. This small amount would be the difference (in pounds) between the harvest by guided anglers (under bag limit of one fish <math>\leq</math> 45 inches or <math>\geq</math> 68 inches) and unguided anglers (under a bag limit of two fish of any size) by an unknown (but believed to be small) number of anglers who engage in indirectly assisted fishing activities that are currently legal, but may circumvent Council intent.</p>		
<b>Benefits</b>	Baseline	Creates greater consistency between State and Federal regulations; enhances enforcement; reduces public confusion.		
		Currently limited to just a few businesses, this practice may grow in the future therefore the Council may decide whether action now is warranted to implement its policy.  Decreased incentives to take indirectly assisted fishing trips instead of guided trips decreases safety concerns that less experienced boaters take themselves fishing.		

<b>Table 11. Summary of the effects of the Proposed Action.</b>				
	<b>Alternative 1. No Action</b>	<b>Alternative 2. Revise Federal regulations that define sport fishing guide services</b>		
		<b>Option 1. Sport fishing guide services</b>	<b>Option 2. Compensation</b>	<b>Option 3. Assistance</b>
<b>Costs</b>	Baseline	<p>Indirectly assisted fishing practices witnessed in Area 2C would no longer allow an angler to fish under more liberal bag limits and size limits for unguided anglers in Area 2C.</p> <p>Incentives for indirectly assisted fishing practice to expand would be reduced.</p> <p>Businesses might need to purchase CHPs, or if they decide to become bare boat rentals, might lose clients because the clients are no longer provided with the same level of assistance.</p> <p>Problem is limited in scope and may not be worth Council and agency time to pursue as is a legal business model, not a loophole, and does not need to be restricted.</p> <p>Creating and maintaining consistency between State and Federal regulations is not necessary because we are managing different fisheries.</p> <p>May create new inconsistencies with other Federal regulations implementing the CHLAP and CSP</p>	Difficult to define in a way that would not also restrict bare boat rentals	<p>May increase public confusion if a list of legal forms of assistance is added to Federal regulations in the absence of similar State regulations<sup>9</sup></p> <p>Difficult to define in a way that would not also restrict bare boat rentals</p> <p>May create inconsistency between State and Federal regulations<sup>8</sup></p>
<b>Net benefits</b>	Baseline	Would mitigate any incentive to expand the use of this fishing practice in Area 2C or in Area 3A if more restrictive bag or size limits are implemented in the future.	May enhance objectives of Option 1	May enhance objectives of Option 1 or Option 2.
<b>Action objectives</b>	Does not meet problem statement	Best meets the problem statement for the proposed action.	May enhance the objectives of the problem statement <sup>8</sup>	May enhance the objectives of the problem statement <sup>8</sup>

<sup>9</sup> Depending on the text selected by the Council

## **Appendix 1. February 2013 Council motion**

The Council approves the following problem statement and alternatives for analysis.

The Council has received information highlighting halibut fishing practices in Area 2C that allow anglers to circumvent guided daily bag and size limits, and allows operators to provide sport fishing guide services without required Charter Halibut Permits (CHPs) for the Pacific halibut charter sector. It may be necessary to revise and clarify Federal definitions of terms including 'sport fishing guide services,' 'compensation,' and 'assistance,' to meet Council intent to define guided halibut fishing. The current loopholes not only affect the CHP program but, as long as differential bag and size limits exist in Area 2C, and if they expand to Area 3A in the future, have the potential to increase the overall removals of halibut and affect other sectors that use the halibut resource.

Alternative 1. No action

Alternative 2. Revise and clarify the Federal definition of sport fishing guide services.

Option 1. Revise the definition to remove the language "by being onboard a vessel with such person".

Option 2. Define 'compensation' within the definition of sport fishing guide services.

Suboption 1. The definition of 'compensation' would be aligned with the proposed State of Alaska definition, if the proposed State definition is amended to replace "actual" daily expenses with "reasonable" daily expenses.

Option 3. Define 'assistance' within the definition of sport fishing guide services.

Suboption 1. Examples of assistance include, but are not limited to, providing a handheld GPS unit containing coordinates for halibut fishing locations.

## Appendix 2. Federal Definitions

A complete list of definitions relevant to this management program can be found at 50 CFR 300.61 or 300.67(f).

**Angler Endorsement:** the maximum number of charter vessel anglers that may catch and retain halibut onboard the vessel. It is the number of *authorized anglers* on your CHP.

**Change (ownership):** NMFS considers a change in business structure, such as new shareholders or partners, to be a new business entity and requires CHPs to be transferred to the new entity. For a CHP holder, "change" also occurs when the individual dies or business entity dissolves. "Change" invalidates a non-transferable CHP.

**Charter halibut permit (CHP):** a permit issued by NMFS to owners of charter vessel businesses, bearing endorsements for operating in Areas 2C or 3A, and for the number of charter vessel anglers authorized to catch and retain Pacific halibut during a charter vessel fishing trip.

**Charter vessel angler:** a person, paying or nonpaying, using the services of a charter vessel guide.

**Charter vessel fishing trip:** the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is onboard and the offloading of one or more charter vessel anglers or any halibut from that vessel.

**Charter vessel guide:** a person who holds an annual sport guide license issued by ADF&G; or a person who provides sport fishing guide services.

**Charter vessel operator:** the person in control of the vessel during a charter vessel fishing trip.

**Community Quota Entity (CQE):** a nonprofit organization that (1) did not exist prior to April 10, 2002; (2) represents at least one eligible community that is listed below; and (3) has been approved by the Regional Administrator (50 CFR 679.2). A nonprofit may apply at any time and is required to submit an annual report to NMFS. Communities currently eligible to form a nonprofit to receive a community CHP under (50 CFR 300.67(k)(2)) are listed below:

*Area 2C:* Angoon, Coffman Cove, Edna Bay, Hollis, Hoonah, Hydaburg, Kake, Kasaan, Klawock, Metlakatla, Meyers Chuck, Pelican, Point Baker, Port Alexander, Port Protection, Tenakee Springs, Thorne Bay, Whale Pass.

*Area 3A:* Akhiok, Chenega Bay, Halibut Cove, Karluk, Larsen Bay, Nanwalek, Old Harbor, Ouzinkie, Port Graham, Port Lyons, Seldovia, Tatitlek, Tyonek, Yakutat.

**International Pacific Halibut Commission (IPHC):** A public international organization established in 1923 by a convention between the United States and Canada, originally called the International Fisheries Commission. The IPHC is responsible for conservation of Pacific halibut in waters off Canada and the United States.

**National Marine Fisheries Service (NMFS, a.k.a NOAA Fisheries):** Responsible for managing the fisheries and enforcing regulations under authority of the Secretary of Commerce and the National Oceanic and Atmospheric Administration (NOAA). NMFS is the permitting body that maintains the Official Record.

**North Pacific Fishery Management Council (NPFMC):** is responsible for allocating resources to fisheries programs. NPFMC and NMFS work together to manage Federal fisheries off Alaska; NPFMC makes recommendations to NMFS, and NMFS approves, implements, and administers them.

**Official Record:** the information prepared by NMFS on participation in charter halibut fishing in Areas 2C and 3A that NMFS used to implement the Charter Halibut Limited Access Program and evaluate applications for CHPs.

**Sport fishing guide services:** assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being onboard a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.