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FOR FURTHER INFORMATION CONTACT: Mr. Tad Radzinski, U.S. Environmental Protection Agency, Region 3 (3WC11), Waste Chemical Management Division, 841 Chestnut Street, Philadelphia, PA, 19107-4431, (215) 566-2394.

List of Subjects in 40 CFR Parts 264 and 265

Environmental protection, Air pollution control, Control device, Hazardous waste, Monitoring, Reporting and recordkeeping requirements, Surface impoundment, Treatment storage and disposal facility, Waste determination.

Dated: April 16, 1998.

Carol M. Browner,
Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 980406085-8086-00; I.D. 031198C]

RIN 0648-AJ27

Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Management Measures for Nontrawl Sablefish

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement management measures recommended by the Pacific Fishery Management Council (Council) for the limited entry, fixed gear sablefish fishery north of 36° N. lat. These measures would provide a three-tiered management regime with three different cumulative landings limits for permit holders participating in the regular, limited entry, fixed gear sablefish fishery. The cumulative landings limit available to a permit holder would depend on the tier to which the permit

is assigned, and tier assignment would be based on historical participation in the fixed gear sablefish fishery. Both the limited entry and open access fixed gear sablefish fisheries would be closed for 48 hours immediately before and for 30 hours immediately after the regular fishery. The preamble to this proposed rule discusses how these recommendations fit within long-term changes to management of this fishery that were made in 1997. Provisional 1997 regulatory language also would be updated by this proposed rule. These actions are intended to recognize the historical and more recent participation and investment in the fixed gear sablefish fishery while eliminating the traditional "derby" style management system.

DATES: Comments must be received on or before May 22, 1998.

ADDRESSES: Comments may be mailed to William Stelle, Jr., Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Seattle, WA 98115-0070; or to William Hogarth, Administrator, Southwest Region, NMFS, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. Copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) may be obtained from the Pacific Fishery Management Council, 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201. Send comments regarding the burden estimate or any other aspect of the collection-of-information requirement, including suggestions for reducing the burden, to one of the NMFS addresses above and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20503 (ATTN: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT:

William L. Robinson at 206-526-6140, or Svein Fougner at 562-980-4000.

SUPPLEMENTARY INFORMATION: NMFS is proposing this rule based on recommendations of the Council, under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The background and rationale for the Council's recommendations are summarized below. More detail appears in the EA/RIR prepared by the Council for this action.

Background

Sablefish (*Anoplopoma fimbria*), also known as "black cod," is one of the

most valuable species in the groundfish fishery off Washington, Oregon, and California. Because sablefish is an important species in the Pacific Coast groundfish complex, there have been numerous allocation conflicts over sablefish between different sectors of the West Coast groundfish fleet. The Council has made several major decisions on dividing the available harvest, to resolve allocation issues that are inextricably linked to resource conservation.

Since 1987, the annual sablefish non-tribal harvest guideline has been allocated between trawl gear and nontrawl gear fisheries. In the nontrawl sector there have been two operationally distinct gear types, pot (or trap) and longline, that have been the primary gears competing for the nontrawl sablefish harvest allocation, and which now make up the fixed gear portion of the limited entry fleet. Historically, the trawl fishery has been managed with trip or cumulative trip limits, which means the amount of fish that may be harvested during a fishing trip or during a set time period. Trip or cumulative trip limits are mainly imposed to extend the fishery throughout most of the year by slowing the rate of harvest. Trip limits provide more stable employment in the fishery, but over time, have the effect of allocating the available resource from larger to smaller producers.

The advantage of trip limit management is that participants know exactly how much of a particular species is available to them during a set period, so there is no incentive for high-powered participants to upgrade their vessel or gear beyond what is required to catch the limit for that species. Conversely, there is an incentive for persons who initially participate in the fishery at low levels of effort to upgrade their gear and equipment until they are able to catch the available limits. As more fishery participants improve their harvesting ability over time, or if the available harvest declines, trip limits must be lowered to keep the total harvest within the annual harvest guideline, and participants find themselves with boats and gear that are far too powerful for the available trip limits.

For the health of the fish stocks, the major disadvantage of trip limits is that when fishers are able to easily attain their trip limits, they may overshoot a trip limit, and then must discard any fish that exceed that limit. These "regulatory discards" are particularly prevalent where fishers target on a mixed group of fish species, because trip limits must be set for each species

and it is difficult to predict the changing proportion of different fish stocks within that mixed group. Discard mortality is largely unmeasured, and thus is a danger to the long-term health of the fish stocks.

Following the 1987 sablefish allocation between trawl and fixed gear, the fixed gear fleet continued to take most of its sablefish allocation in an unrestricted fishery (a fishery without landings limits). In the early years of this unrestricted fishery, the price of sablefish was relatively low, so there were few incentives for many fishers to target on sablefish with any intensity. In 1987, 1988, and 1989, the unrestricted season was 9, 8, and 7.5 months long, respectively. Most of the sablefish target fishing occurred in the spring and summer, so it was reasonable to expect that the fishery would close at the end of the summer. The Council managed the fixed gear allocation so that there was just enough sablefish available for bycatch to other fisheries in the months after the closure of the unrestricted, primary fishery. This sablefish bycatch was available as trip limits of 250–500 lb (113–227 kg).

By 1992, sablefish prices had risen to more lucrative levels, and the Pacific Northwest salmon harvest had been greatly restricted. Fishers who had long targeted salmon with hook-and-line gear were turning to sablefish to make up their loss of salmon income. Fishers from other fisheries and new entrants were attracted to sablefish as well. The 1992 unrestricted, regular sablefish season was only 15 days long. By this time, it was evident that effort concentration in the fixed gear fleet had separated the sablefish fishery into an intense primary season coupled with a small, year-round bycatch allowance for the mixed species groundfish fishery.

In 1994, the Pacific Coast groundfish limited entry plan went into effect and limited the number of potential participants in this primary fishery. Although the limited entry program limits the number of participants in the overall groundfish fishery, it did nothing specifically to address the problem of the increasingly frenetic primary sablefish fishery. In fact, many fishers who had qualified for limited entry permits based on landings of groundfish other than sablefish began to turn to sablefish to supplement and then support their incomes.

The primary seasons of 1995 and 1996 were olympic derbies of 7 and 5 days in duration, respectively. A “derby” fishery is a short, intense open competition with no trip or cumulative landings limits. The history of this fishery had followed the classic pattern

of unrestricted fisheries, with intensifying effort by each participant and by the fleet as a whole, leading to a brief season when the fleet landed the bulk of the year's allocation in just a few days. The only trip limit during the open competition of the derby fishery was for small sablefish less than 22 inches (56 cm) in length. With seasons measured in days, the Council considered the derby to be hazardous, because it gave fishers strong incentives to stay on the ocean during bad weather, working at sea with heavy machinery and little or no sleep throughout the season.

Management Background

In 1991, when the primary fixed gear sablefish season was 3 months long, the Council began to discuss development of an individual fishing quota (IFQ) program for this fishery. IFQ discussions lasted 3 years, until the Council developed a fixed gear IFQ amendment, Amendment 8 to the FMP (now tabled). These discussions were long and divisive, primarily because the Council could not get agreement from within the industry on how heavily catch history should be weighted in calculating initial quota shares. Disagreements between different sectors of the fleet lengthened the public discussion process. The Council postponed action on Amendment 8 partly because of the controversy of the program, and partly in response to a request from some members of Congress that the Council defer action while important policy decisions were being made at the national level. After that postponement, Congress prohibited NOAA from funding the development of new IFQ programs. When Congress reauthorized the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) in October 1996, through passage of the Sustainable Fisheries Act, it included a moratorium on development of new IFQ programs until October 1, 2000. The Council's delay in adopting an IFQ program for the fixed gear fleet thus prevented it from using that management strategy to address the problems of a severely overcapitalized, short, and dangerous fishery.

In addition to the problems of managing the primary fishery, increasing numbers of vessels were treating the small daily trip limit fishery as a target fishery. Rather than catching a few pounds of sablefish as bycatch in trips targeting other deepwater groundfish, many fishers specifically began targeting the daily trip limits for sablefish. Sablefish caught with fixed gear in the daily trip limit fishery then

became subject to the problems of trip limit management, similar to those experienced by the trawl fishery. While nontrawl vessels targeting sablefish generally do not face trip limits on multiple species, discards due to highgrading for larger and more valuable fish remain a problem. As in the trawl fishery, these trip limit induced discards are unmonitored.

The derbies of 1995 and 1996 were especially controversial with the fishing fleet because vessel owners feared that the short season duration would lead to more risk-taking behavior among fleet participants, possibly resulting in danger to human life and safety. In addition to general concern about the dangers of the derby, the Council faced an allocation conflict between the two different sectors of the limited entry, fixed gear fleet. Long-term primary fishery participants who had managed their boats and gears with the expectation that there would be a brief, annual season where most of the fixed gear sablefish allocation would be taken were asking the Council for a management regime that would continue the historical sablefish catch distribution between fishery participants. Others who were better equipped to participate in and profit from the daily trip limit fishery were asking the Council to restructure the management regime so that the fixed gear sablefish allocation could be taken in small, monthly cumulative limits, as in the trawl fishery.

The Council began to address these problems by reducing effort in the fixed gear sablefish fishery in 1997 with Amendment 9 to the FMP, which requires limited entry permit owners to qualify for a sablefish endorsement in order to participate in the primary, fixed gear fishery. Sablefish endorsement qualifications were based on a single year of permit catch history in which the amount of Council-managed sablefish caught with longline or fishpot gear was at least 16,000 lb (7,257 kg) round weight, during the 1984 through 1994 qualifying period. The Council recognized that any program that would restrict access to the fishery would be controversial, yet saw a strong need both to reduce the number of potential participants in the primary fishery to constrain further capitalization, and to reduce the intensity of the competition for sablefish catch during the primary fishery to improve fishery safety.

Of the 231 limited entry, fixed gear permit owners, 162 now hold sablefish endorsements. The Council expected that by adopting the 16,000 lb (7,257 kg) qualification threshold that extended over an 11-year period, permit owners

with the greatest dependence on sablefish landings, including more recent landings, would receive endorsements. Further, the Council expected that persons who did not qualify for sablefish endorsements would be those who had more heavily relied on other groundfish species for their groundfish income, or on other sources of income, rather than on the primary sablefish fishery. During this time, the Council also looked for other ways to increase safety in the fishery by moving the opening to a time of year when weather conditions would likely be safer and by implementing an at-sea closure to end last minute, reckless rushes for port.

1997 Primary Fishery

Following the adoption of the sablefish endorsement program, the Council had two other issues to deal with for the 1997 limited entry, fixed gear fishery. First, the Council had to consider how to manage the 1997 primary fishery. While the number of potential derby participants had decreased, the Council was still concerned that the endorsed fleet's catching ability was significant enough to limit the season to another short derby fishery. The second issue arose in the spring of 1997, when it became apparent that the catch of the daily trip limit fishery was rapidly expanding. Many of the limited entry permit holders who were unsure of their past sablefish catch history, or who knew that they would not qualify for the sablefish endorsement as recommended by the Council, intensified their efforts for sablefish in the 1997 limited entry, daily trip limit fishery, pushing the 1997 catch rate far above historic catch rates for that fishery.

Council discussions of 1997 management measures for the primary fishery were prolonged and difficult. Within the affected fleet, fishers with different cumulative catch histories and different current catch strategies could not agree on a future management scheme. The traditionally lower producers, who make up the majority of the fishery participants, but a minority of the total sablefish catch, favored an end to the derby and a system of equal cumulative limits for all participants. While the traditionally higher producers did not necessarily wish to continue with derby-style management, many were dissatisfied with the available management options, and saw open competition as the best way to maintain past trends in income distribution between fishery participants. Nevertheless, even under open

competition, the share caught by higher producers had been declining over time.

For 1997 and beyond, the Council decided to separate fishery management actions at 36° N. lat. South of 36° N. lat., the Council recommended eliminating the primary fishery structure so that sablefish landed in that area by limited entry, fixed gear sablefish fishers is taken only in a daily trip limit fishery. For 1997 only, north of 36° N. lat., the Council recommended implementing a regular season of no more than 21 days, with each permit holder allowed to fish towards an equal cumulative landing limit. The Council's intent was to provide a safe period of time during which vessels would be able to harvest their limits. Council members expressed their preference for a system of tiered cumulative limits for 1997; however, there was insufficient time to develop and implement such a proposal prior to the 1997 season.

NMFS rejected the Council's initial recommendations finding that most vessels would likely be able to take the full cumulative limit, thus making the combination of the limited entry permit and sablefish cumulative limit function effectively as an IFQ program. As previously discussed, the Magnuson-Stevens Act placed a moratorium on implementing IFQ programs until October 1, 2000. Following the NMFS rejection, the Council reconsidered whether to allow the fishery to continue as a derby in 1997 or to shorten the regular season so that a sufficient number of vessels would not be able to take their cumulative limits in the allotted time in order to avoid a determination that the fishery was an IFQ. The Council recognized that, while the safety benefits of such a change would be somewhat reduced, cumulative limits would still provide some control over fishing rates and safety hazards. Therefore, the Council recommended a season of no more than 10 days, with each permit holder allowed to fish towards an equal cumulative landing limit. This recommendation significantly redistributed 1997 catch away from historically strong producers. Because the Council did not want to support an equal limits regime for long-term, fixed gear sablefish management, it recommended this regime for 1 year only and announced that it would consider a tiered cumulative limits system for 1998 and beyond. The 1997 limited entry, fixed gear regular fishery began on August 25, lasted for 9 days and gave each participant the opportunity to catch up to a cumulative limit of 34,100 lb (15,468 kg).

Members of the Council were forced to weigh the long-voiced anger over the continuing danger of the derby against the severe redistributive results of a management option to set equal cumulative limits for all of the eligible participating vessels. The Magnuson-Stevens Act's national standards recognize the importance of both these issues. National standard 10 recognizes the importance of the safety of human life at sea, yet national standard 4 requires that if allocation of fishing privileges among U.S. fishermen is necessary, then that allocation be fair and equitable. In the case of the Pacific Coast fixed gear sablefish fishery, the Council concluded that a long-term, equal allocation scheme that disregarded historical participation and dependence on the fishery would not be "fair and equitable."

1997 Daily Trip Limit Fishery

In the months before and after the primary fishery, many limited entry fishers caught sablefish in the daily trip limit fishery. As previously mentioned, although the daily trip limit fishery was originally conceived primarily as a bycatch fishery, the recent and heavy influx of small operations focusing on sablefish has changed the character of the daily trip limit fishery into a target fishery. At the beginning of 1997, this fishery was under landing limits of 300 lb (136 kg) per day, with no limit on the amount of fish that could be landed in a month. Landings receipts from the early part of the year showed that a number of permit holders were landing the 300 lb (136 kg) limit almost every day of each month.

At its March 1997 meeting, the Council discussed the daily trip limit fishery and expressed concern that the amount of catch taken in the daily trip limit fishery had continued to increase from year to year. To slow the rate of catch in that fishery, the Council recommended, and NMFS implemented, a monthly cap of 5,100 lb (2,313 kg), effective May 1, 1997. The Council decided to establish a policy of maintaining a 1997 daily trip limit fishery catch similar to that fishery's catch in 1996. The Council announced that it would try to manage the 1997 daily trip limit fishery so that it would also take a total of 850,000 lb (385 mt) over the entire year.

Catch estimates from the daily trip limit fishery for sablefish presented at the June 1997 Council meeting showed that by the end of June, an expected 780,000–800,000 lb (354–363 mt) of sablefish would be landed in the daily trip limit fishery. Updated 1996 landings information showed that

sablefish landings from the entire daily trip limit fishery in 1996 were 915,000 lb (415 mt). Consequently, the Council revised its management target for the 1997 daily trip limit fishery to 915,000 lb (415 mt). To try to constrain the daily trip limit fishery to the 1996 catch level, the Council had to make drastic changes in the monthly cap for this fishery. Effective July 1, 1997, NMFS implemented the Council's recommendation to drop the monthly cap in the daily trip limit fishery to 600 lb (272 kg). The Council expected that even this low cap could only constrain daily trip limit landings enough so that the 1997 fishery total would be about 15 percent higher (about 1,100,000 lb (499 mt)) than the 1996 total.

There is an open access sablefish daily trip limit fishery in addition to the limited entry fishery. The open access fishery has a specific sablefish allocation, and trip limits are set with the aim of maintaining a year-round fishing opportunity. Open access sablefish daily trip limits at the beginning of 1997 were 300 lb (136 kg) per day and 1,500 lb (680 kg) per month. Like the limited entry fishery, 1997 open access sablefish harvest in the daily trip limit fishery was proceeding at an accelerated rate over previous years. When the Council recommended restricting the limited entry monthly cap for fixed gear sablefish to 600 lb (272 kg), it also recommended lowering the open access monthly cap to 600 lb (272 kg). The Council was concerned that, if it recommended a more restrictive monthly cap in the limited entry daily trip limit fishery as compared to the open access daily trip limit fishery, limited entry vessels would then flood the open access fishery and force an early closure of that daily trip limit fishery.

The 600 lb (272 kg) caps restrained the two daily trip limit fisheries to moving at a pace slow enough to keep the fisheries within the harvest guidelines. However, at the September 1997 Council meeting, the Council saw data showing that the 600 lb (272 kg) cap had constrained the open access fishery to a degree that the fishery would not likely meet the open access allocation for the year. Data from the limited entry daily trip limit fishery showed that even with the 600 lb (272 kg) cap, the fishery would likely exceed the 915,000 lb (415 mt) target for 1997. Analysis for these fisheries suggested that, if the Council were to raise the monthly cap for both daily trip limit fisheries to 1,500 lb (680 kg) from October through December, the combined totals taken from the open access and limited entry daily trip limit

fisheries would likely meet the combined target amounts for the open access allocation and the limited entry daily trip limit fisheries. On October 1, 1997, NMFS implemented the Council's recommendation of a 1,500 lb (680 kg) monthly cap for the open access and limited entry daily trip limit fisheries, which remained in place for the rest of the year.

Three-Tier Cumulative Limit Management

At its June 1997 meeting, the Council adopted a recommendation for limited entry, fixed gear sablefish management measures for 1998 and beyond that is intended to maintain the basic structure of the fishery. The target amount of the fixed-gear allocation would be taken during the "regular" fishery, with a smaller amount taken in a mop-up fishery a few weeks later. A sablefish endorsement is required for participation in the regular and mop-up fisheries, which together constitute the "primary" fishery. The new proposal would divide limited entry permits with sablefish endorsements into three tiers. A permit's placement in a tier would be based on the cumulative sablefish catch associated with that permit from 1984 through 1994. Each tier would be associated with a different cumulative limit during the regular, limited entry, fixed gear fishery. These measures would apply only north of 36° N. lat.

The Council recommendation specifies qualifying criteria for assigning limited entry permits to one of the three tiers. To qualify for the highest tier, Tier 1, a permit would need to be associated with at least 898,000 lb (407.33 mt) of cumulative sablefish landings made from 1984 through 1994. To qualify for the middle tier, Tier 2, a permit would need to be associated with between 411,000 lb (186.43 mt) and 897,999 lb (407.33 mt) of cumulative sablefish landings made from 1984 through 1994. Permits with sablefish endorsements that are associated with less than 411,000 lb (186.43 mt) of cumulative sablefish landings from 1984 through 1994 would qualify for the lowest tier, Tier 3.

Analysts examined the distribution of sablefish cumulative catch histories over the 1984 through 1994 period to determine whether there were any large gaps between the cumulative catch histories of limited entry permits with sablefish endorsements that might serve as logical breakpoints between tiers. Such breakpoints did exist, and the Council selected a qualifying amount of 898,000 lb (407.33 mt) for Tier 1, which was the lowest large breakpoint in cumulative catch histories among a

series of high breakpoints. Below 898,000 lb (407.33 mt), there were no significant breaks in cumulative catch histories for many thousands of pounds. Similarly, a cumulative catch amount of 411,000 lb (186.43 mt) was selected as the qualifying level for Tier 2 because it was the lowest large breakpoint among a series of mid-range breaks in cumulative catch histories. Because all permit owners who will be in the tier system have qualified for sablefish endorsements, those permits in the lowest tier are known to have had at least one year with landings greater than 16,000 lb (7.26 mt) during the 1984 through 1994 period, but a cumulative catch history of less than 411,000 lb (186.43 mt) from 1984 through 1994. In the package sent out for public review, the Council included a four-tier option as well as options that allowed qualification based either on cumulative landings from 1984 through 1994 or on cumulative landings from 1994 and 1995. After reviewing the analysis and testimony of the public and its advisors, the Council chose the option associated with the qualifications described above.

The catch histories for tier qualification include only sablefish landed from the Pacific Coast fishery. However, the database used for the analysis described above inadvertently included some sablefish taken in waters off Alaska and later landed at a Pacific Coast port. Analysts discovered this mistake after the November 1997 Council meeting. Removal of Alaska sablefish data does not significantly change the breaks in cumulative catch histories already identified by the Council. The break for Tier 1, 898,000 lb (407.33 mt), actually became larger, and so is a more effective fleet-division indicator than it was when the Alaska data were included in the cumulative catch histories. The qualifying amount for Tier 2, 411,000 lb (186.43 mt), also occurs at a large break in cumulative catch histories, but it is no longer the lowest large breakpoint in its class. Once the Alaska data are removed, 398,000 lb (180.53 mt) becomes the lowest large breakpoint among mid-range breaks, and is also a larger break in cumulative catch histories than the break at 411,000 lb (186.43 mt). At the March 1998 meeting, the Council commented on this issue, stating that it prefers to retain its original logic and to use the lowest large breakpoint in the mid-range area. In order to cushion any further possible data mistakes, the Council recommended setting the Tier 2 qualifying poundage at 380,000 lb (172.37 mt). Qualifying poundage for Tier 3 would be less than 380,000 lb

(172.37 mt). If NMFS adopts this proposed rule as a final rule, the public comments and the Council recommendations on this issue would be considered in the final rule.

Permit catch history includes the catch history of the vessel(s) that initially qualified for the permit, and subsequent catch histories accrued when the limited entry permit or permit rights were associated with other vessels. Permit catch history also includes the catch associated with any interim permit held during the appeal of an initial NMFS decision to deny the initial issuance of a limited entry permit, but only if (1) the appeal for which an interim permit was issued was lost by the appellant, and (2) the owner's current permit was used by the owner in the 1995 limited entry sablefish fishery. The catch history of an interim permit where the full "A" permit was ultimately granted will also be considered part of the catch history of the "A" permit. Only sablefish catch regulated by the FMP that was legally taken with longline or fishpot gear will be considered for tier placement. Harvest taken in tribal sablefish set-asides will not be included in calculating permit catch histories.

If the current permit is the result of the combination of two or more permits, then the permit with the highest cumulative catch history will be used in tier placement for that permit. The Council specifically decided not to allow permit owners who had combined two permits to use the combined catch histories of both permits when determining tier placement. This is consistent with the endorsement program (Amendment 9), where the endorsement qualification was based only on the catch history of one of the combined permits, not on the total catch history of all combined permits. In addition, the analysis presented to the Council at the time it made a decision on this issue indicated that, based on the available data, no permit owner would be denied qualification to a higher tier if the cumulative catch history of the higher of two combined permits was used as the qualifying catch history for that permit, rather than the summed cumulative catch history of both permits that were used to create the currently held permit. However, upon a more detailed review of the database, analysts discovered that this statement was wrong and that a permit owner would be assigned to a higher tier if allowed to sum the cumulative catch histories of the permits that had been combined to create the current permit. At the March 1998 meeting, the Council recommended allowing owners of

permits that were combined prior to March 12, 1998, to aggregate their cumulative catch histories in qualifying for tier placement. If NMFS adopts this proposed rule as a final rule, public comments and the Council recommendations on this issue would be considered in the final rule.

In accordance with Amendment 9 to the FMP, if two limited entry, fixed gear permits are combined to generate a single permit with a larger length endorsement, the resulting permit will also have a sablefish endorsement only if all permits being combined have sablefish endorsements. After tier assignments are issued by NMFS, if permits are combined, the resulting permit will be assigned to the highest tier held by either of the original permits prior to combination. The Council concluded that because harvest would be restricted by the cumulative limits and that one permit's cumulative limit would be eliminated through the combination of permits, this approach was preferable. Other alternatives would have allowed persons combining permits to expand harvest, imposed an unfair restriction on the amount that could be harvested by combined permits, or would have functioned too much like an IFQ system.

The management option that the Council chose maintains a ratio that approximates the 1991–1995 catch relationships between permits assigned to each tier on a group average basis. Setting cumulative limits by ratios ensures that the long-term relationships between the cumulative limits for each tier will remain stable. With cumulative limits set by ratio, impacts from changes in the numbers of permits distributed to each tier will be shared by all vessels in the fleet. The cumulative limits ratio for the tiers would be 3.85 (Tier 1); 1.75 (Tier 2); and 1 (Tier 3). For example, if Tier 3 had a cumulative limit of 10,000 lb (4,536 kg), Tier 2 would have a corresponding cumulative limit of 17,500 lb (7,938 kg), and Tier 1 would have a corresponding cumulative limit of 38,500 lb (17,463 kg).

As with the 1997 equal cumulative limit fishery, the Council recommended using overhead guidelines in setting the cumulative limits for each tier and for the overall expected catch for the total fishery. "Overhead" is defined as the difference between the expected harvest level and the total harvest that would occur if each permitted vessel took its cumulative limit (maximum potential harvest). The concept of overhead is based on the premise that not all participants in this fishery will harvest the cumulative limit. NMFS considers a fishery where all participants have the

opportunity to catch a cumulative limit and they are all able to catch that limit to be an IFQ program.

The Council recommended setting cumulative limits and season lengths in 1998 and beyond to achieve a projected overhead, based on the most reasonable assumptions, of at least 25 percent and an overhead based on worst-case assumptions of at least 15 percent for the fleet as a whole. The goal overhead for any single tier would be at least 15 percent, based on the most reasonable assumptions. This recommendation is consistent with the 1997 fishery structure, where the equal cumulative limit and season length were set within parameters of a harvest overhead of at least 25 percent using the best estimate of projected harvest, and with an overhead of at least 15 percent using a reasonable worst-case scenario. The resulting season structure of a 9-day fishery with a cumulative limit of 34,100 lb (15,468 kg) was successful in both keeping the harvest within the allocation and in maintaining adequate overhead. In 1997, the regular fishery achieved an overhead of 61 percent, and the amount taken in that fishery was about 70 percent of the total available harvest for the primary fishery. Of the 163 potential participants in the 1997 limited entry, fixed gear regular fishery, about 60 vessels had landings within 90 percent of the full cumulative limit of 34,100 lb (15,468 kg).

1998 Fishery Season Structure

When the Council adopted its recommendation for a tiered access program, it retained most of the basic season structure requirements that were in place for 1997, as described below.

There would be a 48-hour closure before the start of the regular season, during which time all fixed gear north of 36° N. lat. must be out of the water and no sablefish may be landed by a fixed gear vessel. The existing regulation contains a 72-hour closure, with an allowance for pots to be set 24 hours before the start of the season.

At its November 1997 meeting, the Council recommended a 1998 season start date of August 1. The limited entry, fixed gear sablefish regulations contain a framework to allow NMFS to announce annually, in consultation with the Council, a season start on any day between August 1 and September 30.

Preliminary estimates at the November 1997 Council meeting showed that the 1998 limited entry, fixed gear regular sablefish season would be at least 5 days long. The Council recommended setting the season length as long as possible, while

maintaining a 25-percent overhead for the entire fleet and a 15-percent overhead for each tier within the fleet.

There would be a 30-hour closure after the end of the regular season, during which time no sablefish may be taken and retained with fixed gear north of 36° N. lat. During that 30-hour period, sablefish taken and retained during the regular season could be possessed and landed, and gear could remain in the water. However, fishers may not set or pull their gear from the water during this period. The existing regulation contains a 48-hour closure.

Once the landings from the regular season have been calculated, there would be a mop-up season to catch any sablefish left from the primary fishery (regular + mop-up seasons) that is not needed for the planned daily trip limit fishery. NMFS and the three states generally require 3 weeks from the end of the regular season to calculate the amount of sablefish, if any, available to the mop-up fishery.

At its November 1997 meeting, the Council recommended a 1998 commercial harvest guideline of 4,212 mt for all sablefish landed north of 36° N. lat., a significant reduction from recent years. The 1997 commercial harvest guideline for sablefish landed north of 36° N. lat. was 7,020 mt. At its September 1997 meeting, the Council recommended a policy for 1998 of maintaining recent-year sablefish catch ratios between different commercial sectors. Under this policy, the limited entry, fixed gear trip limit fishery will be managed with daily and monthly limits that keep the overall catch of the fishery to approximately 15 percent of the total sablefish available to the limited entry, fixed gear fleet in 1998. While the exact division between the primary fishery and the daily trip limit fishery is not specified in the current regulations governing this fishery or in Amendment 9, maintaining the recent ratio between these two fisheries is consistent with management practices in recent years.

NMFS and Council staff estimate that under a total harvest guideline of 4,212 mt for all gears and sectors, the 1998 limited entry, fixed gear, regular sablefish season would be 6 days in duration. At the March 1998 Council meeting, the Council recommended a method for setting the season length and the cumulative limits for each of the three tiers if the three-tier program is adopted as a final rule. At the April 1998 Council meeting, NMFS reported to the Council that under the Council's preferred method for setting season length and cumulative limits, and within the parameters for the three-tier

program described above, the 1998 season of 6 days in duration would have cumulative limits of 52,000 lb for Tier 1, 23,500 lb for Tier 2, and 13,500 lb for Tier 3. Overheads would be expected to be 30% overall, 16 percent overall under a worst-case scenario, 46 percent for Tier 1, 25 percent for Tier 2, and 21 percent

for Tier 3. All of these overheads exceed the Council's conservative overhead recommendations for the three-tier regime, as described above.

Biological Impacts

Marine biological background and biological impacts of the sablefish fishery are analyzed in "Status of the Pacific Coast Groundfish Fishery Through 1997 and Recommended Acceptable Biological Catches for 1998: Stock Assessment and Fishery Evaluation" (SAFE Document) and in the EA for the "Proposal to Change the Management of the Limited Entry Fixed Gear Sablefish Segment of the Groundfish Fishery for 1998 and Beyond." These documents may be obtained from the Council. (See ADDRESSES).

NMFS expects that the biological impacts of implementing a three-tier cumulative limit system would be negligible. The sablefish acceptable biological catch and harvest guideline would not be affected by this action.

Socio-economic Impacts

As previously mentioned, the primary fishery would be managed to maintain a 25-percent catch overhead, which would mean that some fleet participants would be expected to catch the entire cumulative limit within the time allotted for the fishery, but many would not be able to do this. If the fishery is managed to maintain a 25-percent overhead, it is expected that about one-third of the fleet participants (the larger sablefish producers) would be able to slow their rate of harvest over the rate at which they would have fished in a derby. For that one-third of the fleet, there would be increased safety benefits from implementing the three-tiered access system. An open competition derby fishery would be several days shorter than the three-tiered cumulative limit fishery. Individuals in the two-thirds of the fleet that would not be expected to slow their rates of harvest to achieve their cumulative limits would garner safety benefits from the three-tiered access system if they choose to fish at a slower rate because they would have more time available to them than in a derby fishery to catch a comparable amount of sablefish. However, it is reasonable to expect that

most fishery participants would fish at the fastest rate possible if they have any doubts about whether they will be able to catch their available cumulative limits. Smaller sablefish producers would be able to expand their harvest, while harvest by larger producers will likely be restricted.

The Council recommended keeping the 1997 management measures for the limited entry, fixed gear, regular sablefish fishery in place for 1 year only, and stated that a prolonged equal cumulative limit fishery would be too redistributive of sablefish catch and income. Analysts expected that the equal limit regime would result in a 29-percent redistribution of the harvest from traditionally high producers to traditionally low producers—a redistribution of ex-vessel revenue of about \$2.5 - 3.0 million. In designing the three-tiered access system, the Council intended to recommend management measures that would allow fleet participants to harvest sablefish at levels more closely aligned to their historical annual harvests than was possible under equal allocation.

The three-tiered regime still has redistributive effects as compared to the open competition derby, the management regime that the fishery would revert to if no action were taken for 1998. If the Council's recommended option is implemented, permit owners with sablefish endorsements would have their sablefish harvest limited by their tier assignments. Many of the larger producers would still see a reduction in their gross revenues, as compared to the revenues that they might have expected under a continued derby fishery, but a less significant revenue reduction than would have occurred under an equal limits regime. Fishery participants with strong harvest levels in 1995 and 1996, but with little cumulative catch prior to 1995 may also face a drop in harvest if their 1984 through 1994 cumulative harvest places them in Tier 2 or 3.

Under the three-tiered option that the Council recommended for 1998, 52 fishery participants can expect to catch less sablefish than they would have under a continued derby option, and 106 fishery participants can expect to catch more sablefish than they would have under a continued derby option. About 24 percent of the harvest would be redistributed away from the fishers who would be losing harvest shares under the three-tiered option recommended by the Council.

As a group, vessels in Tier 1 would be expected to take shares of harvest that are below their long-term and recent averages. As a group, vessels in

Tier 3 would be expected to take shares of harvest that are above their long-term averages and close to their recent averages. Estimates of changes in harvest shares are based on a comparison between what vessels are expected to catch under the different management options that could have been chosen by the Council for recommendation to NMFS. The potential impact of implementing the three-tiered access system would be separate from the impact of the decreased harvest guideline for 1998. The amount of sablefish that each vessel catches in 1998 is likely to be lower than the amounts they have caught in years past because the overall sablefish harvest guideline is lower than it has been in past years.

Tier Assignment

Tier assignments for limited entry permits with sablefish endorsements would be issued by NMFS, prior to the start of the regular 1998 limited entry, fixed gear sablefish season. NMFS would use landings records from the Pacific States Marine Fisheries Commission's Pacific Fisheries Information Network (PacFIN) to determine which limited entry permits meet the Council-recommended qualifications for each tier.

The Sustainable Fisheries Division (SFD), NMFS Northwest Region, would notify each limited entry permit owner with a sablefish endorsement by letter whether PacFIN records indicate that his or her permit qualifies for Tier 1, Tier 2, or Tier 3.

Permit owners who believe that their permit qualifies for a different tier than the tier indicated by PacFIN records would have 30 days to send supporting documentation, such as fish tickets, to the SFD to demonstrate how the qualifying criteria for a different tier have been met. A new tier assignment would be issued if the permit owner demonstrates that his or her permit met the qualifying criteria. If the SFD, after review of the information submitted by the permit owner, decides that the permit does not qualify for the tier requested by the owner, the owner would have 30 days to appeal the decision to the Regional Administrator, NMFS Northwest Region. Unlike the initial limited entry permitting process but similar to the sablefish endorsement issuance process, there would be no industry appeals board to review appeals of tier placement.

For the 1998 season only, permit owners with sablefish endorsements would be issued certificates of tier assignment that would need to be kept with, and considered part of, their

limited entry permits. When limited entry permit owners renew their permits for 1999, tier assignments for those limited entry permit owners with sablefish endorsements would be indicated directly on the limited entry permit.

Sablefish Endorsement Application Deadline

Amendment 9 to the FMP recommended at section 14.5: "NMFS will establish a reasonable application period for the fixed gear sablefish endorsement. Untimely applications will be rejected and no sablefish endorsement will be issued thereon * * *." When NMFS implemented the sablefish endorsement program, the agency sent letters of qualification status to each limited entry permit owner that told the permit owner whether PacFIN records indicated that his or her permit was associated with enough sablefish catch to qualify that permit for a sablefish endorsement. Where PacFIN records indicated that a permit did not qualify for an endorsement, that permit owner could apply for an endorsement by providing additional information on his or her sablefish landings for the qualifying years. Permit owners whose permits did qualify for sablefish endorsements according to PacFIN records were given no deadline to apply for sablefish endorsements. If NMFS finalizes this rule and implements a three-tier system for 1998, the agency will need to know how many limited entry permit owners meet the tier system qualification of having a sablefish endorsement. To implement section 14.5 of Amendment 9 and to facilitate possible implementation of the three tier system, NMFS is proposing a sablefish endorsement application deadline for those persons who were initially told that their permits qualified for sablefish endorsements based on PacFIN landing records. Sablefish endorsement applications will not be accepted after November 30, 1998, which is the limited entry permit renewal deadline for the 1999 fishing year.

Classification

This proposed rule has been determined to be not significant for the purposes of E.O. 12866.

The Council prepared an IRFA that describes the impact that this proposed rule, if adopted, would have on small entities. A copy of this analysis is available from the Council (see ADDRESSES). All of the permit owners and vessels in the Pacific Coast, limited entry, fixed gear fleet are considered small entities. NMFS considers an

impact to be "significant" if it results in a reduction in annual gross revenues by more than 5 percent, an increase in annual compliance costs of greater than 5 percent, compliance costs at least 10 percent higher for small entities than for large entities, compliance costs that require significant capital expenditures, or the likelihood that 2 percent of the small entities would be forced out of business. NMFS considers a "substantial number" of small entities to be more than 20 percent of those small entities affected by the regulation engaged in the fishery.

As indicated in the EA/RIR/IRFA for this action, there are 162 limited entry, fixed gear permit owners holding sablefish endorsements. All are small entities. Of these, 42 (26 percent) would suffer a greater than 5 percent loss in total gross annual revenue over what they would have been expected to earn if the open competition derby management had been continued in 1998.

The analysis of whether this action would reduce annual gross revenues of limited entry permit owners with sablefish endorsements was based on comparing estimates of each permit owners' sablefish-derived income to his or her total fishing income. There are members of this fleet who have non-fishing income sources that contribute to their annual gross revenues. However, NMFS and Council analysts have no access to information about the non-fishing revenues of these businesses. Thus, the following discussion on the number of businesses that would be expected to have reductions in annual gross revenues is based on information about the fishing revenues of these permit owners. As a result, the conclusions of this analysis are a "worst-case" scenario; those permit owners with non-fishing revenue sources may not be as severely impacted as indicated by this analysis.

There are 162 limited entry, fixed gear permit owners with sablefish endorsements. As indicated in the EA/RIR/IRFA for this action, 42 permit holders with sablefish endorsements (26 percent) would suffer a greater than 5 percent loss in total gross fishing income over what they would have been expected to earn if the open competition derby management had been continued for 1998.

The Council considered six different management options aside from status quo, open competition derby management. Of those six options, two options would have resulted in fewer than 26 percent of endorsement holders suffering a greater than 5 percent loss in gross annual revenue. An option to

continue the 1997 style fishery management of a single period equal cumulative limit regime would have resulted in 18 percent of endorsement holders suffering a greater than 5 percent loss in total gross annual revenue. Although this option would have resulted in fewer businesses with economic loss, those businesses that would have lost economically under this option would have lost revenue to a greater degree than those businesses losing revenue under any of the tier options. Thus, while the option chosen by the Council results in a greater number of businesses with losses, the impacts of that option are spread more evenly through the fleet. The Council also specifically decided when it recommended a single period equal cumulative limit for 1997 that it would not recommend continuing such an option for 1998.

The other option that would have resulted in fewer than 26 percent of permit owners suffering a greater than 5 percent loss in gross annual revenue was a four-tiered access system. This option was projected as leading to greater than a 5 percent loss in gross annual revenue for 22 percent of permit holders with sablefish endorsements. One major impediment to Council recommendation of a four-tiered option was that maintaining an overhead to prevent designation as an IFQ system would have been more difficult under a four-tiered option. The greater the number of tiers in a tiered access system, the more likely it is that fishers will be able to achieve a harvest share close to their historical harvest share. In an IFQ fishery, all fishers would be allowed to use as much time as necessary to catch whatever cumulative limits are available. The Council chose the option that would have the least impact on fishers' revenues while still maintaining enough overhead to avoid the NMFS IFQ classification criteria and eliminating derby management.

The IRFA indicates that this proposed action would not be expected to result in an increase in annual compliance costs of greater than 5 percent, compliance costs at least 10 percent higher for small entities than for large entities, compliance costs that require significant capital expenditures, or the likelihood that 2 percent of the small entities would be forced out of business.

This rule contains and refers to collection-of-information requirements subject to the Paperwork Reduction Act (PRA). These collections have been approved by OMB under OMB Control Number 0648-0203. Public reporting burden for appeals of permit determinations is estimated at 2 hours

per response; reporting burden for the renewal or transfer of limited entry permits is estimated at 20 minutes per response. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Public comment is invited regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 660

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaiian Natives, Indians, Northern Mariana Islands, Reporting and recordkeeping requirements.

Dated: April 17, 1998.

David L. Evans,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES AND IN THE WESTERN PACIFIC

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. Section 660.323 is amended by revising paragraph (a)(2) to read as follows:

§ 660.323 Catch restrictions.

(a) * * *

(2) *Nontrawl sablefish.* This paragraph (a)(2) applies to the regular and mop-up seasons for the nontrawl limited entry sablefish fishery north of 36° N. lat., except for paragraphs (a)(2)(ii), (iv), and (vii) of this section, which also apply to the open access fishery north of 36° N. lat. Limited entry and open access fixed gear sablefish fishing south of 36° N. lat.

is governed by routine management measures imposed under paragraph (b) of this section.

(i) *Sablefish endorsement.* In order to participate lawfully in the regular or mop-up season for the nontrawl limited entry fishery, the owner of a vessel must hold (by ownership or otherwise) a limited entry permit for that vessel, affixed with both a gear endorsement for longline or trap (or pot) gear, and a sablefish endorsement.

(ii) *Pre-season closure—open access and limited entry fisheries.* (A) Sablefish taken with fixed gear in the limited entry or open access fishery in the EEZ may not be retained or landed during the 48 hours immediately before the start of the regular season for the nontrawl limited entry sablefish fishery.

(B) All fixed gear used to take and retain groundfish must be out of EEZ waters during the 48 hours immediately before the opening of the regular season for the nontrawl limited entry sablefish fishery.

(iii) *Regular season—nontrawl limited entry sablefish fishery.* (A) The Regional Administrator will announce a season for waters north of 36° N. lat. to start on any day from August 1 through September 30, based on consultations with the Council, taking into account tidal conditions, Council meeting dates, alternative fishing opportunities, and industry comments.

(B) During the regular season, each vessel registered for use with a limited entry permit with a sablefish endorsement will be able to land up to the cumulative trip limit announced for the tier to which the permit is assigned. Each permit will be assigned to one of three tiers. A cumulative trip limit is the maximum amount of sablefish that may be taken and retained, possessed, or landed per vessel in a specified period of time, with no limit on the number of landings or trips.

(C) The Regional Administrator will annually calculate the length of the regular season and the size of the cumulative trip limit for each tier in accordance with the process specified in chapter 1 of the EA/RIR/IRFA for "Fixed Gear Sablefish Tiered Cumulative Limits," dated February 1998, which is available from the Council. The season length and the size of the cumulative trip limits will vary depending on the amount of sablefish available for the regular and mop-up fisheries and the projected harvest for the fishery. The season will be set to be as long as possible, under the constraints described in chapter 1 of the EA/RIR/IRFA, up to a maximum season length of 10 days.

(D) During the regular and mop-up season, limited entry nontrawl sablefish fishers may also be subject to trip limits to protect juvenile sablefish.

(E) There will be no limited entry, daily trip limit fishery during the regular season.

(iv) *Post-season closure—limited entry and open access.* No sablefish taken with fixed gear north of 36° N. lat. may be taken and retained during the 30 hours immediately after the end of the regular season for the nontrawl limited entry sablefish fishery. Sablefish taken and retained during the regular season may be possessed and landed during that 30-hour period. Gear may remain in water during the 30-hour post-season closure. Fishers may not set or pull from the water fixed gear used to take and retain groundfish during the 30-hour post-season closure.

(v) *Mop-up season—limited entry fishery.* A mop-up season to take the remainder of the limited entry nontrawl allocation will begin in waters north of 36° N. lat. about 3 weeks, or as soon as practicable, after the end of the regular season. During the mop-up fishery, a cumulative trip limit will be imposed. A cumulative trip limit is the maximum amount of sablefish that may be taken and retained, possessed, or landed per vessel in a specified period of time, with no limit on the number of landings or trips. The length of the mop-up season and the amount of the cumulative trip limit, will be determined by the Regional Administrator in consultation with the Council or its designees, and will be based primarily on the amount of fish remaining in the limited entry nontrawl allocation, the amount of sablefish needed for the remainder of the daily trip limit fishery, and the number of mop-up participants anticipated. The Regional Administrator may determine that too little of the nontrawl allocation remains to conduct an orderly or manageable fishery, in which case there will not be a mop-up season. There will be no limited entry daily trip limit fishery during the mop-up season.

(vi) *Other announcements.* The dates and times that the regular season starts and ends (and trip limits on sablefish of all sizes are resumed), the size of the cumulative trip limits for the three tiers in the regular fishery, the dates and times for the 30-hour post-season closure, the dates and times that the mop-up season begins and ends, and the size of the cumulative trip limit for the mop-up fishery will be announced in the **Federal Register**, and may be modified. Unless otherwise announced, these seasons will begin and end at 12 noon on the specified date.

(vii) *Trip limits.* Trip and/or frequency limits may be imposed in the limited entry fishery before and after the regular season, and after the mop-up season, under paragraph (b) of this section. Trip and/or size limits to protect juvenile sablefish in the limited entry or open-access fisheries also may be imposed at any time under paragraph (b) of this section.

3. In § 660.333, the first sentence of paragraph (c)(1), paragraphs (d) introductory text, (f)(2), and (h)(2)(iii) are revised to read as follows:

§ 660.333 Limited entry fishery—general.

(c) *Transfer and registration of limited entry permits and gear endorsements.*

(1) Upon transfer of a limited entry permit, the SFD will reissue the permit in the name of the new permit holder with such gear and, if applicable, species endorsements and tier assignments as are eligible for transfer with the permit.

(d) *Evidence and burden of proof.* A vessel owner (or person holding limited entry rights under the express terms of a written contract) applying for issuance, renewal, transfer, or registration of a limited entry permit has the burden to prove evidence that qualification requirements are met. The owner of a permit endorsed for longline or trap (or pot) gear applying for a sablefish endorsement or a tier assignment under § 660.336(c) or (d) has the burden to submit evidence to prove that qualification requirements are met. The following evidentiary standards apply:

(2) Gear endorsements, sablefish endorsements, and sablefish tier assignments may not be transferred separately from the limited entry permit.

(iii) Two or more limited entry permits with "A" gear endorsements for the same type of limited entry gear may be combined and reissued as a single permit with a larger size endorsement. With respect to permits endorsed for nontrawl limited entry gear, a sablefish endorsement will be issued for the new permit only if all of the permits being combined have sablefish endorsements. If two or more permits with sablefish endorsements are combined, the new permit will receive the same tier assignment as the tier with the largest

cumulative landing limit of the permits being combined. The vessel harvest capacity rating for each of the permits being combined is that indicated in Table 2 of this part for the LOA (in feet) endorsed on the respective limited entry permit. Harvest capacity ratings for fractions of a foot in vessel length will be determined by multiplying the fraction of a foot in vessel length by the difference in the two ratings assigned to the nearest integers of vessel length. The length rating for the combined permit is that indicated for the sum of the vessel harvest capacity ratings for each permit being combined. If that sum falls between the sums for two adjacent lengths on Table 2 of this part, the length rating shall be the higher length.

4. In § 660.336, the section heading, paragraphs (a)(1), (a)(2), (b) introductory text, (b)(1), (c) heading, and paragraph (c)(1), are revised; and paragraphs (b)(3), (d), and (e) are added to read as follows:

§ 660.336 Limited entry permits—sablefish endorsement and tier assignment.

(1) A sablefish endorsement with a tier assignment will be affixed to the permit and will remain valid when the permit is transferred.

(2) A sablefish endorsement and its associated tier assignment are not separable from the limited entry permit, and therefore may not be transferred separately from the limited entry permit.

(b) *Endorsement and tier assignment qualifying criteria.* A sablefish endorsement will be affixed to any limited entry permit that meets the sablefish endorsement qualifying criteria and for which the owner submits a timely application. Limited entry permits with sablefish endorsements will be assigned to one of three different cumulative trip limit tiers, based on the qualifying catch history of the permit.

(1) Permit catch history will be used to determine whether a permit meets the qualifying criteria for a fixed gear sablefish endorsement and to determine the appropriate tier assignment for endorsed permits. Permit catch history includes the catch history of the vessel(s) that initially qualified for the permit, and subsequent catch histories accrued when the limited entry permit or permit rights were associated with other vessels. The catch history of a permit also includes the catch of any interim permit held by the current owner of the permit during the appeal of an initial NMFS decision to deny the initial issuance of a limited entry permit, but only if the appeal for which

an interim permit was issued was lost by the appellant, and the owner's current permit was used by the owner in the 1995 limited entry sablefish fishery. The catch history of an interim permit where the full "A" permit was ultimately granted will also be considered part of the catch history of the "A" permit. If the current permit is the result of the combination of multiple permits, then for the combined permit to qualify for an endorsement, at least one of the permits that were combined must have had sufficient sablefish history to qualify for an endorsement; or the permit must qualify based on catch occurring after it was combined, but taken within the qualifying period. If the current permit is the result of the combination of multiple permits, the catch history to be used in calculating the tier assignment is the catch history of the permit with the largest catch history of those being combined, together with any catch history (during the qualifying period) of the combined permit. Only sablefish catch regulated by this part that was taken with longline or fish trap (or pot) gear will be considered for this endorsement. Sablefish harvested illegally or landed illegally will not be considered for this endorsement.

* * * * *

(3) Only limited entry, fixed gear permits with sablefish endorsements will receive cumulative trip limit tier assignments. The qualifying criteria for Tier 1 are: At least 898,000 lb (406,794 kg) cumulative round weight of sablefish caught with longline or trap (or pot) gear over the years 1984 through 1994. The qualifying criteria for Tier 2 are: At least 411,000 lb (186,183 kg), but no more than 897,999 lb (406,793 kg) cumulative round weight of sablefish caught with longline or trap (or pot) gear over the years 1984 through 1994. Fixed gear permits with less than 411,000 lb (186,183 kg) cumulative round weight of

sablefish caught with longline or trap (or pot) gear over the years 1984 through 1994 qualify for Tier 3. All catch must be sablefish managed under this part. Sablefish taken in tribal set aside fisheries does not qualify.

(c) *Issuance process for sablefish endorsements.* (1) The SFD has notified each limited entry, fixed gear permit holder by letter of qualification status whether Pacific States Marine Fisheries Commission's Pacific Fisheries Information Network (PacFIN) records indicate that his or her permit qualifies for a sablefish endorsement. A person who has been notified by the SFD by letter of qualification status that his or her permit qualifies for a sablefish endorsement will be issued a revised limited entry permit with a sablefish endorsement if, by November 30, 1998, that person returns to the SFD the endorsement application and pays the one-time processing fee. No new applications for sablefish endorsements will be accepted after November 30, 1998.

* * * * *

(d) *Issuance process for tier assignments.* (1) The SFD will notify each owner of a limited entry permit with a sablefish endorsement, by letter of qualification status, of the tier assignment for which his or her permit qualifies, as indicated by PacFIN records. The SFD will also send to the permit owner a tier assignment certificate.

(2) If a permit owner believes there is sufficient evidence to show that his or her permit qualifies for a different tier than that listed in the letter of qualification status, that permit owner must, within 30 days of the issuance of the SFD's letter of qualification status, submit information to the SFD to demonstrate that the permit qualifies for a different tier. Section 660.333(d) sets out the relevant evidentiary standards and burden of proof.

(3) After review of the evidence submitted under paragraph (d)(2) of this section, and any additional information the SFD finds to be relevant, the SFD will notify a permit owner whether the evidence submitted is sufficient to alter the initial tier assignment. If the SFD determines the permit qualifies for a different tier, the permit owner will be issued a revised tier assignment certificate once the initial certificate is returned to the SFD for processing.

(4) If a permit owner chooses to file an appeal of the determination under paragraph (d)(3) of this section, the appeal must be filed with the Regional Administrator within 30 days of the issuance of the letter (at paragraph (d)(3) of this section). The appeal must be in writing and must allege facts or circumstances, and include credible evidence demonstrating why the permit qualifies for a different tier assignment. The appeal of a denial of an application for a different tier assignment will not be referred to the Council for a recommendation under § 660.340(e).

(5) Absent good cause for further delay, the Regional Administrator will issue a written decision on the appeal within 30 days of receipt of the appeal. The Regional Administrator's decision is the final administrative decision of the Department of Commerce as of the date of the decision.

(e) *Tier assignment certificates.* For the 1998 season only, permit holders with sablefish endorsements will be issued certificates of tier assignment that are to be kept with and are considered part of their limited entry permits. When limited entry permit holders renew their permits for 1999, tier assignments for those limited entry permit holders with sablefish endorsements will be indicated directly on the limited entry permit.

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