

of the rule that are not the subject of an adverse comment.

**DATES:** Written comments must be received on or before February 23, 2006.

**ADDRESSES:** Submit your comments, identified by Docket ID No. R08-OAR-2005-CO-0002, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *Agency Web site:* <http://docket.epa.gov/rmepub/>. On November 28, 2005, Regional Material in EDOCKET (RME), EPA's electronic public docket and comment system, was replaced by an enhanced Federal-wide electronic docket management and comment system located at <http://www.regulations.gov>. Therefore, you will be redirected to that site to access the docket EPA-R08-OAR-2005-CO-0002 and submit comments. Follow the on-line instructions for submitting comments.

- *E-mail:* [long.richard@epa.gov](mailto:long.richard@epa.gov) and [platt.amy@epa.gov](mailto:platt.amy@epa.gov).

- *Fax:* (303) 312-6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).

- *Mail:* Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 999 18th Street, Suite 200, Denver, Colorado 80202-2466.

- *Hand Delivery:* Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 999 18th Street, Suite 200, Denver, Colorado 80202-2466. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:55 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Amy Platt, Environmental Protection Agency, Region 8, 999 18th St., Suite 200, Denver, Colorado, 80202, 303-312-6449, [platt.amy@epa.gov](mailto:platt.amy@epa.gov).

**SUPPLEMENTARY INFORMATION:** See the information provided in the Direct Final action of the same title which is located in the Rules and Regulations section of this **Federal Register**.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: December 7, 2005.

**Kerrigan G. Clough,**

*Acting Regional Administrator, Region 8.*

[FR Doc. 06-631 Filed 1-23-06; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 239, 257, and 258

[FRL-8024-1]

#### Maine: Proposed Determination of Adequacy for the State Municipal Solid Waste Landfill (MSWLF) Permitting Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing to approve the State of Maine's permit program for municipal solid waste landfills (MSWLF's) and to approve the State's approach of not allowing conditionally exempt small quantity generator (CESQG) hazardous waste to be sent to non-municipal, non-hazardous waste disposal units. Elsewhere in today's **Federal Register**, EPA is publishing a direct final rule that determines the adequacy of the State of Maine's municipal solid waste permitting program without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we get relevant written comments which oppose this determination of adequacy during the comment period, the decision will take effect. If we receive comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect and this separate document in this proposed rules section of the direct final **Federal Register** will serve as the proposal to determine the adequacy of the State Municipal Solid Waste Landfill permitting program.

**DATES:** Send your written comments by February 23, 2006.

**ADDRESSES:** Send any written comments to Chuck Franks, EPA Region 1, One Congress Street, Suite 1100 (CHW), Boston, MA 02114-2023; telephone: (617) 918-1554; e-mail: [franks.chuck@epa.gov](mailto:franks.chuck@epa.gov).

Documents related to EPA's decision regarding the Determination of Adequacy (the "Administrative Record") are available for inspection and copying during normal business hours at the following locations: (1) Monday through Thursday, 8:30 a.m. to 4:30 p.m. and Friday, 8:30 a.m. to 12:30 p.m., Maine

Department of Environmental Protection (ME DEP), State House Station 17, Hospital Street, Augusta, Maine 04333. For review of Maine's application at the Maine Department of Environmental Protection, (ME DEP), one day advance notice is requested by ME DEP and may be made by calling (207) 287-2651; and (2) EPA New England—Region 1 Library, One Congress Street—11th Floor, Boston, MA 02114-2023, business hours: 10 a.m. to 3 p.m., Monday through Thursday, telephone number: (617) 918-1990.

**FOR FURTHER INFORMATION CONTACT:** Chuck Franks, Hazardous Waste Unit, Office of Ecosystems Protection, EPA New England—Region 1, One Congress Street, Suite 1100 (CHW), Boston, MA 02114-2023; telephone: (617) 918-1554; e-mail: [franks.chuck@epa.gov](mailto:franks.chuck@epa.gov).

**SUPPLEMENTARY INFORMATION:** For additional information, please see the direct final rule published in the "Rules and Regulations" section of this **Federal Register**.

Dated: December 27, 2005.

**Robert W. Varney,**

*Regional Administrator, EPA New England.*

[FR Doc. 06-626 Filed 1-23-06; 8:45 am]

**BILLING CODE 6560-50-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 270

[Docket No. 040720212-4212-01; I.D. 040204A]

RIN 0648-AS09

#### Fish and Seafood Promotion Act Provisions; Seafood Marketing Councils

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** In 1989, NMFS issued a final rule enacting the Fish and Seafood Promotion Act of 1986 (Act), as it pertains to Seafood Marketing Councils (Councils), for one or more species of fish or fish products. That rule, along with a large number of other rules and regulations unused or little used, was stricken from the Code of Federal Regulations (CFR) as part of a government-wide Presidential regulatory reform effort. Although the implementing regulations were

withdrawn from the CFR, the Act remains in effect. In response to renewed industry support for marketing and promotion-related activities, NMFS proposes regulations implementing the Act governing the establishment and operation of marketing Councils. Therefore, the intent of the proposed rule is to responsibly implement the Act to be consistent with NMFS' goals and mission statement. That is, to ensure that NMFS stewardship goal is not jeopardized while increasing benefits from domestic fisheries. Several revisions to the 1989 implementing regulations are proposed in this document in order to comply with new regulatory and/or legal requirements.

**DATES:** Comments on this proposed rule are requested, and must be received no later than 5 p.m., local time, February 23, 2006.

**ADDRESSES:** Written comments on this proposed rule should be sent by any of the following methods:

- E-mail: [SMCcomments@noaa.gov](mailto:SMCcomments@noaa.gov).

Include in the subject line the following: "Comments on the Proposed Rule for Seafood Marketing Councils;"

- Federal e-Rulemaking Portal: <http://www.regulations.gov>;

- Mail: Paper, disk, or CD-ROM comments should be sent to Gordon J. Helm, Acting Director, Office of Constituent Services, Room 9553, SSMC3, 1315 East-West Highway, Silver Spring, MD 20910; and

- Fax: (301) 713-2384.

Copies of the Regulatory Impact Review are available from Gordon Helm. The Initial Regulatory Flexibility Analysis (IRFA) is contained in the Classification section of this proposed rule.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to Gordon Helm (see **ADDRESSES**) and to David Rostker, Office of Management and Budget (OMB), by e-mail at [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or fax to (202) 395-7285.

**FOR FURTHER INFORMATION CONTACT:**

Gordon J. Helm, Office of Constituent Services, telephone: (301) 713-2379 or E-mail: [Gordon.J.Helm@noaa.gov](mailto:Gordon.J.Helm@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Fish and Seafood Promotion Act of 1986 (16 U.S.C. 4001 *et seq.*), enacted November 14, 1986, authorizes the creation of Seafood Marketing Councils. The Act provides authority to the Secretary of Commerce (Secretary) to: Establish Councils that would develop

strategies and implement measures to better inform consumers; promote the utilization of one or more species of fish or fish products; enter into agreements with eligible members of the seafood industry; fund referenda to establish and terminate species-specific Councils; and establish quality standards, attend Council meetings, and approve seafood marketing plans.

In 1986, when Congress enacted the Act, it found that: (1) The commercial fishing industry of the United States significantly contributed to the national economy, and could make a great contribution if fish resources within the United States Exclusive Economic Zone were more fully utilized; (2) the commercial fisheries of the United States provided significant employment in coastal areas and in processing and distribution centers; (3) fish contributed an important nutritional component to the American diet; (4) increased consumption of seafood in the United States could significantly lower the risk of many cardiovascular diseases; (5) Federally supported development programs for commercial fisheries were unable to meet present and future marketing needs; (6) many fish species were underutilized by the United States fishing industry because of underdeveloped markets; and (7) the United States fishing industry had the potential to expand greatly its contribution to interstate and foreign commerce, favorably affecting the balance of trade.

A final rule implementing the Act was published in the **Federal Register** on December 7, 1989 (54 FR 50504). A National Seafood Marketing Council (National Council) was established under the Act. The National Council was authorized to enter into agreements with applicants to fund referenda to establish and terminate species-specific marketing councils. However, no species-specific marketing councils were established and the National Council was disbanded. In 1996, the regulations implementing the Act were removed from the CFR as part of the government-wide Presidential regulatory reform effort.

The 1986 Congressional findings and statement of purpose (16 U.S.C. 4001 & 4002) concerning the value of the commercial fisheries to the United States may still apply today.

Furthermore, industry interest and support for seafood marketing and promotion-related activities has been expressed. Niche marketing programs have been initiated by both the Pacific salmon harvesters in Alaska and by the Wild American Shrimp organization in the southern Atlantic and Gulf of

Mexico states. Additional interest has been expressed by U.S. tuna processors who are also facing declining market shares due to foreign competition. The accompanying IRFA and RIR indicate that at least twelve fish species could benefit from the development of organized marketing programs. Marketing and promotion plans prepared by a Council would be designed to increase the general demand for fish and fish products by encouraging, expanding, and improving the marketing and utilization of fish and fish products both in domestic or foreign markets, through consumer education, research, and other marketing and promotion activities. Therefore, NMFS proposes to implement regulations that would provide the foundation for the establishment, organization, and practices of the Councils. This proposed rule identifies the role of the Secretary of Commerce, who has delegated authority to NMFS, in the establishment and administration of the Council process. Also provided are guidelines for preparation of the application package including specific requirements for proposed charters, identification of sector participants who are eligible to vote in the referendum, descriptions of how a referendum would be conducted, and determination of payment and/or refunding of assessment fees. Also addressed are petitions of objection related to assessment fees and petitions for the dissolution of a Council. NMFS suggests that interested persons also read the Act along with this document for additional information.

*Content and Submission of Application Package to Establish A Council*

An application package submitted to NMFS to establish a Council would consist of the following information: (1) An application requesting NMFS to establish a Council; (2) a list of sector participants who are eligible to vote in the referendum; (3) a proposed charter under which the proposed Council would operate; and (4) an IRFA and/or other analytical documentation addressing the requirements of the Regulatory Flexibility Act, E.O. 12866, the National Environmental Policy Act, and other information NMFS considers necessary or appropriate for the review and approval of the application.

One signed original and two copies of the completed application package should be submitted to the Assistant Administrator for Fisheries, 1315 East-West Highway, Silver Spring, MD 20910. NMFS would acknowledge receipt of the application package and

contact the applicant if further information is required.

#### 1. Application.

The application should be comprised of the signatures or corporate certifications of no less than three sector participants in each sector who collectively accounted for, in the previous 12-month period, not less than 10 percent of the value of the fish or fish products that were handled by each such sector during that period. For purposes of the Act and this proposed rule, "sector" means: (A) The sector consisting of harvesters; (B) the sector consisting of importers; (C) the sector consisting of marketers; (D) the sector consisting of processors; (E) the sector consisting of receivers; or (F) the consumer sector consisting of persons professionally engaged in the dissemination of information pertaining to the nutritional benefits and preparation of fish and fish products.

Persons who meet these minimum requirements would be eligible to submit an application to NMFS to establish a Council. The application should include a statement that, if established, the Council would have sufficient resources, e.g., cash, donated office space, services, supplies, etc., available for initial administrative expenditures pending collection of assessments.

#### 2. List of Sector Participants Eligible to Vote in the Referendum.

The applicant would provide a list of sector participants, to the extent practicable, identifying the business name and address of all sector participants that the applicant believes meet the requirements for eligibility to vote in the referendum on the adoption of the proposed charter. The list would include all sectors in which a sector participant meets the eligibility requirements. If the sector participant has more than one place of business located within the geographic area of the Council, all such places would be listed and the primary place of business should be designated. At the time of submission of the application the referendum list of sector participants would also contain the list of required signatures or corporate certifications.

NMFS acknowledges that development of the list of sector participants meeting the minimum requirements stated in the proposed charter may be difficult. The Act requires the applicant, to the extent practicable, to develop such a list. NMFS would, to the extent practicable, verify the validity of the applicant's list, which may require adding or deleting names provided by applicant. At the request of an applicant, NMFS would

provide available information in its possession of a non-proprietary nature to assist in developing this list.

The Council, if approved, would be required to maintain a list of sector participants. The Council would need a current list of sector participants in each sector represented on the Council, particularly for the purposes of collecting assessments and voting in referenda.

#### 3. Charter.

At a minimum the text of the proposed charter would contain the following information:

(1) The name of the Council and a provision proclaiming its establishment;

(2) A declaration of the purposes and objectives of the Council;

(3) A description of the species of fish and fish products, including the scientific and common name(s), for which the Council would implement marketing and promotion plans under the Act;

(4) A description of the geographic area (state(s)) within the United States covered by the Council;

(5) The identification of each sector and the number and terms of representatives for each sector that would be voting members on the Council;

(6) The identification of those sectors (which would be required to include a sector consisting of harvesters, a sector consisting of receivers, and, if subject to assessment, a sector consisting of importers) eligible to vote in the referendum to establish the Council;

(7) For each sector a threshold level specifying the minimum requirements, as measured by income, volume of sales, or other relevant factors, that a person engaging in business in the sector would be required to meet in order to participate in a referendum;

(8) A description of the rationale and procedures for determining assessment rates based on a fixed amount per unit of weight or measure, or on a percentage of value of the product handled;

(9) The proposed rate or rates that would be imposed by the Council on receivers and, if subject to assessment, importers during its first year of operation;

(10) The maximum amount by which an assessment rate for any period may be raised above the rate applicable for the immediately preceding period;

(11) The maximum rate or rates that would be imposed by a Council on receivers or importers during the operation of the Council;

(12) The maximum limit on the amount any one sector participant would be required to pay under an assessment for any period;

(13) The procedures for providing refunds to sector participants subject to assessments who request refunds in accordance with the time limits;

(14) A provision setting forth the voting procedures by which votes would be cast by proxy;

(15) A provision that the Council would have voting members representing the harvesting, receiving and, if subject to assessment, importing sectors;

(16) A provision setting forth the definition of a quorum for making decisions on Council business and the procedures for selecting a chairperson of the Council;

(17) A provision that members of the Council would serve without compensation, but would be reimbursed for reasonable expenses incurred in performing their duties as members of the Council;

(18) A provision containing a requirement for submission of documentation as requested by NMFS for purposes of evaluating the performance of proposed marking plans and the Council's related performance;

(19) A provision containing the minimum number of participants that would be needed for sustained operations that cannot receive assessment refunds;

(20) A provision acknowledging that NMFS would have the right to participate in Council meetings;

(21) A provision that NMFS would have final approval authority over proposed marketing plans and Council actions;

(22) A provision containing a requirement for the Council to arrange for a complete audit report to be conducted by an independent public accountant and submitted to NMFS at the end of each fiscal year;

(23) A provision containing a requirement for the Council to conduct a market assessment based on economic, market, social and demographic, and biological information as deemed necessary by NMFS; and

(24) A provision containing a requirement for the Council to update the list of sector participants eligible to vote in a referendum on an annual basis.

#### 4. Analytical Documentation.

Analytical documentation would be required as part of the application package in order to determine the impacts of the proposed Council under applicable law. Individual Councils, once established, may impact on small entities, but the impacts could not be determined until the charter is drafted with ranges of assessments based on volume, income, etc., of sector participants to be involved in the

Council. Specifically, the imposition of assessments on certain members of the industry would have an effect on a firm's financial situation. Any other costs or requirements which the Council would impose on industry would also have to be considered and analyzed. Since these parameters would vary with each application, a determination of impact would be made on a case-by-case basis. Therefore, the applicant would provide an IRFA and/or other analytical documentation addressing the requirements of the Regulatory Flexibility Act, E.O. 12866, the National Environmental Policy Act, and other information NMFS considers necessary or appropriate for the review and approval of the application. This other necessary and appropriate information required for the review of the application includes, but is not limited to, an analysis of the primary, secondary, and tertiary affects of increasing demand for seafood. This information would have to be incorporated into the NEPA analysis to determine if a proposed council or its marketing program is consistent with NMFS conservation goals, national standards, other national guidelines, and would have to be demonstrated to be consistent with Federal standards and guidelines on nutrition and health.

#### *Initial Decision*

NMFS would make an initial decision on the application, list of sector participants eligible to vote in the referendum, charter, and other required analytical documentation such as the IRFA within 180 days of receipt. NMFS would determine if the application package is complete and complies with all of the requirements set forth in the implementing regulations, the Act, and other applicable law.

If a negative determination is made, NMFS would advise the applicant in writing of the reasons for the negative determination, such as missing documentation. The applicant may submit a revised application package for reconsideration. NMFS would then have 180 days from receipt of the revised application package to make a determination.

If an affirmative decision is made, the Act requires NMFS to publish (by such means as will result in wide publicity in regions affected by the proposed charter) the text of the proposed charter and a list of those sector participants eligible to vote in the referendum and provide for public comment, including the opportunity for public meeting and to amend the list of sector participants. NMFS intends to publish notification in the **Federal Register** and provide a

formal comment period. That notice would serve as a proposed rule thus triggering the requirements of the Regulatory Flexibility Act. As is standard practice, NMFS in the **Federal Register** document would announce availability of the IRFA and/or other analytical documents for review and comment.

#### *Referendum on Adoption of Proposed Charter*

##### 1. Sector Participant Vote

NMFS would conduct a referendum on the adoption of the proposed charter within 90 days of its initial affirmative decision. The referendum would be conducted among all sector participants that meet the requirements for eligibility to participate in the referendum, as identified in the proposed charter. The vote may be made by any responsible officer, owner, or employee representing a sector participant.

A vertically integrated seafood company may qualify to vote in more than one sector, depending on the requirements established for each sector by the Council. However, only one vote may be cast by each sector participant who is eligible to vote, regardless of the number of individuals that make up the "sector participant" and how many sectors the participant is engaged in. Therefore, it is requested that petitioners specify in the list of sector participants all sectors for which a sector participant meets the eligibility requirements to vote in a referendum. The ballot for each referendum would request that each person voting certify in which sector he/she is voting in that particular referendum. This certification by sector participants voting in a referendum will be important to NMFS and the Council in order to determine the success or failure of a referendum, since the percentage of sector participants voting favorably and the value of fish products they handled in a sector will determine the outcome.

The referendum to establish a Council would pass if votes cast in favor of the proposed charter constitute a majority of the sector participants voting in each and every sector. Further, the majority must collectively account for, in the preceding 12-month period, at least 66 percent of the value of the fish and fish products described in the proposed charter that were handled during this period, in that sector, and by those who met the eligibility requirements to vote in the referendum. If the referendum passes, NMFS could establish a Council and approve the proposed charter. If a referendum fails to pass in any sector of the proposed Council, NMFS would not establish the Council or approve the

proposed charter. NMFS would notify the applicants of the results of the referendum and publish the results of the referendum in the **Federal Register**.

##### 2. Costs of Conducting a Referendum

NMFS would initially pay all costs related to the conduct of the referendum to establish a Council. Once an application has been approved, NMFS would estimate the cost of conducting the referendum, notify the applicants, and request that they post a bond or provide other applicable security, such as a cashier's check, to cover costs of the referendum. Although the cost of each referendum would vary according to the size of the Council, there would be some cost categories that would be common to the conduct of all referenda, e.g., verification of the list of sector participants, publication of the application, charter, and list of sector participants in the **Federal Register**, printing and postage costs for the ballots, etc. In the event a public hearing is requested, this would also add to the cost.

After the referendum has been conducted, NMFS would inform the applicants of the exact cost. If the referendum is approved and the proposed charter is adopted, the Council would be required to reimburse NMFS for the total actual costs of the referendum within 2 years after establishment of the Council. This amount would be paid for from assessments collected by the Council. If a referendum fails to result in establishment of a Council, NMFS would immediately recover all expenses incurred from the bond or security posted by applicants. In either case, such expenses would not include salaries of government employees or other administrative overhead, but would be limited to those additional direct costs incurred in connection with conducting the referendum to establish a Council.

#### *Appointments, Terms, Vacancies, and Removal of Council Members*

Within 30 days after a Council is established, NMFS would solicit nominations for Council members from the sector participants represented on the Council in accordance with the approved charter. The members of each Council would be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable with regard to the activities of the sector which the individual would represent on the Council. To the extent practicable, the nominations should result in equitable representation for the constituent regions.

NMFS would appoint the members of the Council from among the nominees within 60 days. The term for members would be 3 years. Initially, to ensure continuity, half of the members' terms would be 2 years and half would be 3 years. Reappointments would be permissible.

Vacancies on a Council would be filled within 60 days after the vacancy occurs, in the same manner in which the original appointment was made. A member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed would be appointed only for the remainder of that term.

Council members would serve without compensation but would be reimbursed for their reasonable expenses incurred in performing their duties as members of the Council.

NMFS would remove a member of a Council if the Council recommended, by not less than two-thirds of its members, removal for cause. Such a recommendation of a Council should be in writing and accompanied by a statement of the reasons upon which the recommendation would be based.

#### *Continued Operation of the Council*

Continued operation of a Council would be at the discretion of NMFS and subject to NMFS' annual review of a market assessment prepared by the Council and evaluation of Council performance. Increases in product prices would not be the sole criteria for determining the effectiveness of a marketing program. The Council must demonstrate that the marketing plan would not adversely impact those fisheries for which conservation and management measures are necessary to prevent overfishing and rebuild overfished stocks, i.e., the market plan would be designed to increase profits rather than increase harvest. The marketing plan should also demonstrate that conservation and management efforts in other fisheries are not adversely affected, but the Secretary may use the primary, secondary, or tertiary impacts in evaluating whether the Council should be allowed to continue operating. Where measures have been implemented to reduce the overall harvest in a fishery, the marketing plan should clearly identify how stock conservation harvest capacity reduction would not be adversely impacted. Council support of the regional fishery management council's adoption of dedicated or controlled access programs, for example but not limited to programs such as Individual Fishing Quota, moratorium on new

entrants into a fishery, and other effort control measures, would be programs that comply with this standard. In addition, NMFS would retain the authority to determine if the continued operation of a Council would be in the public interest. Councils would be required to meet performance standards approved by NMFS that demonstrate that marketing and promotion programs are effective in increasing consumer demand for species-specific seafood products. Councils would also be required to conduct market assessments based on economic, market, social and demographic, and biological information as deemed necessary by NMFS. This information and data would be provided to NMFS with the market assessment for review and verification of results and analysis and may be used by NMFS subject to normal rules and guidelines for industry generated data and information.

#### *Reports and Marketing Plans*

Councils would be required to submit annual plans and budgets for species-specific marketing and promotion plans, including when applicable consumer education, research, and other activities of the Councils. Councils would also be required to submit progress reports on implementation of the marketing and promotion plans and a financial reports with respect to the receipt and disbursement of funds entrusted to it. NMFS would require a complete audit report to be conducted by an independent public accountant and submitted to NMFS at the end of each fiscal year.

The Council must maintain reports, books, and records for a minimum of 3 years, even if the Council is terminated in less than 3 years. The purpose of this requirements is to enable NMFS to ensure that all remaining business of the terminated Council is included in an orderly manner. The 3-year time limit is in accordance with the Office of Management and Budget guidelines for implementing the Paperwork Reduction Act.

#### *Assessments*

Councils would be funded through voluntary assessment of the industry represented on the Councils. Assessments would be imposed on sector participants in the receiving sector or the importing sector or both as specified in the approved Council charter. Assessment rates would be based on value that may be expressed in monetary units or units of weight or volume. Once a participant declines to pay an assessment, or elects not to participate in a Council, no future

assessments will be imposed. With the concurrence of the Secretary, a Council would establish the applicable assessment for those seeking to rejoin or participate in a Council at a future time.

#### 1. Sector Participant and Related Assessment.

An assessment on sector participants in the receiving sector would be in the form of a percentage of the value or a fixed amount per unit of weight or volume of the fish described in the charter when purchased by receivers from fish harvesters.

An assessment on sector participants who own fish processing vessels and harvest the fish described in the charter would be in the form of a percentage of the value or on a fixed amount per unit of weight or volume of the fish in the charter that is no less than the value if such fish had been purchased by a receiver other than the owner of the harvesting vessel.

An assessment on sector participants in the importing sector would be in the form of a percentage of the value that an importer pays to a foreign supplier, as determined for the purposes of the customs laws, or a fixed amount per unit of weight or volume, of the fish or fish products described in the charter when entered or withdrawn from warehouse for consumption, in the customs territory of the United States by such sector participants.

#### 2. Notice of Assessment to Sector Participant

The Council would provide notice to a sector participant subject to assessment that the assessment is due. The notice of assessment would contain:

- a. A specific reference to the provisions of the Act, regulations, charter, and referendum that authorize the assessment;
- b. The amount of the assessment;
- c. The period of time covered by the assessment;
- d. The date the assessment would be due and payable, which would not be earlier than 30 days from the date of the notice;
- e. The form(s) of payment; and
- f. To whom and where the payment would be made.
- g. Notification of the right to seek review of the assessment by filing a written petition of objection with NMFS at any time during the time period to which the assessment applies in accordance with the procedures in § 270.19.
- h. Notification of the right to request a hearing on the petition of objection.
- i. Notification of the right to request a refund of the assessment; the request for a refund may be submitted for not less than 90 days from the date of the

assessment; and the Council would make the refund within 60 days from the date of the receipt.

Persons subject to an assessment would be required to pay the assessment on or before the date due, unless they have demanded a refund or filed a petition of objection with NMFS under § 270.21. However, person who have demanded a refund under § 270.22 or filed a petition of objection under § 270.21 may submit proof of these actions in lieu of payment. In the case of a petition of objection, NMFS will inform the Council and the petitioner of its finding at which time petitioner must pay the revised assessment if applicable.

### 3. Petition of Objection

Requests for NMFS to modify or take other appropriate action regarding the assessment may be made by filing with NMFS a written petition of objection. Any sector participant subject to an assessment may file a written petition with NMFS alleging that the assessment, the plan approved upon which the assessment is based, or any obligation imposed under the plan, is not in accordance with the law. A petition of objection may request NMFS to modify or take other appropriate action regarding the assessment or plan. A petition may be filed only during the time period to which the assessment applies. The petitioner may also request a formal hearing. Following the hearing, or if no hearing is held, as soon as practicable, NMFS would decide the matter and serve written notice of the decision to the petitioner and the Council. NMFS's decision would be based on a consideration of all relevant documentation and other evidence submitted, and would constitute the final administrative decision and order of the agency.

### 4. Refund of Assessment

Pursuant to 16 U.S.C. 4014, any sector participant who pays an assessment under the Act may demand and must promptly receive from the Council a refund of the assessment. A demand for refund must be made in accordance with procedures in the approved charter and within the time limits prescribed by the Council and approved by NMFS. Procedures to provide such a refund would be established before any such assessment would be collected. The refund procedures would allow the sector participant to request a refund for not less than 90 days from the date of the assessment and the Council would make the refund within 60 days from the date of the receipt of the request for the refund. Once a refund has been requested by a sector participant and paid by the Council, that sector participant would no longer participate

in a referendum or other business of the Council during the remainder of the assessment rate period. However, if assessments should be paid during a future assessment rate period and no refund is requested, that sector participant would be able to again participate in a referendum or other business of the Council.

### Quality Standards

Each Council may develop and submit to NMFS for approval, or upon the request of a Council, NMFS would develop quality standards for the species of fish or fish products described in the approved charter. Any quality standard developed should be consistent with the purposes of the Act. A quality standard should be adopted by a Council by a majority of its members following a referendum conducted by the Council among sector participants of the concerned sector(s). In order for a quality standard to be brought before Council members for adoption, the majority of the sector participants of the concerned sector(s) must vote in favor of the standard. Further, according to the best available data, the majority must collectively account for, in the preceding 12-month period, not less than 66 percent of the value of the fish or fish products described in the charter that were handled during such period in that sector by those who meet the eligibility requirements to vote in the referendum. Councils may develop quality standards establishing the criteria for the fish or fish products being promoted. The Council would submit a plan to conduct the referendum on the quality standards to NMFS for approval at least 60 days in advance of such referendum date. The plan would consist of the following:

- (1) Date(s) for conducting the referendum;
- (2) Method (by mail or in person);
- (3) Copy of the proposed notification to sector participants informing them of the referendum;
- (4) List of sector participants eligible to vote;
- (5) Name of individuals responsible for conducting the referendum;
- (6) Copy of proposed ballot package to be used in the referendum; and
- (7) Date(s) and location of ballot counting.

An official observer appointed by NMFS would be allowed to be present at the ballot counting and any other phase of the referendum process, and may take whatever steps NMFS deems appropriate to verify the validity of the process and results of the referendum.

Quality standards developed must meet or exceed the U.S. Food and Drug

Administration's minimum requirements for fish and fish products for human consumption and must be consistent with applicable standards of the U.S. Department of Commerce (National Oceanic and Atmospheric Administration) or other recognized Federal standards and/or specifications for fish and fish products.

The intent of quality standards must not be to discriminate against importers who are not members of the Council. Quality standards must not be developed for the purpose of creating non-tariff barriers. Such standards must be compatible with U.S. obligations under the General Agreement on Tariffs and Trade, or under other international standards deemed acceptable by NMFS.

No quality standard adopted by a Council can be used in false or misleading advertising or promotion of fish or fish products. A quality standard may be adopted which requires sector participants to be in the U.S. Department of Commerce voluntary seafood inspection program.

With respect to a quality standard adopted under this section, the Council would develop and file with NMFS an official identifier in the form of a symbol, stamp, label or seal that would be used to indicate that a fish or fish product meets the quality standard at the time the official identifier is affixed to the fish or fish product, or is affixed to or printed on the packaging material of the fish or fish product. The use of such identifier would be governed by § 270.15.

### Dissolution of a Council

#### 1. Petition for Termination

No less than three sector participants in any one sector may file a petition to terminate a Council. The petition would be accompanied by a written document explaining the reasons for the petition. If NMFS initially determines that the petition is accompanied by the signatures, or corporate certifications, of no less than three sector participants in the sector who collectively accounted for, in the preceding 12-month period, not less than 20 percent of the value of the fish or fish products that were handled by that sector during the period, NMFS within 90 days after the initial determination, would conduct a referendum for termination of the Council among all sector participants in that sector.

NMFS would publish notification in the **Federal Register** of the referendum, including an explanation of the reasons for the petition for termination and any other relevant information NMFS considers appropriate. The notification

would be published at least 30 days prior to the referendum.

## 2. Referendum Vote on Termination

If the referendum votes which are cast in favor of terminating the Council constitute a majority of the sector participants voting and the majority, in the preceding 12-month period, collectively accounted for not less than 66 percent of the value of such fish and fish products that were handled during that period by the sector who filed the petition, NMFS would by order terminate the Council effective as of a date by which the affairs of the Council would be concluded.

## 3. Cost of Referendum

NMFS would initially pay all costs of this referendum. However, prior to conducting the referendum, NMFS would require petitioners to post a bond or other security acceptable to NMFS in an amount which NMFS determines to be sufficient to pay any expenses incurred for the conduct of the referendum.

If a Council is terminated, NMFS, after recovering all expenses incurred for the conduct of the referendum, would take action as is necessary and practicable to ensure that moneys remaining in the account established by the Council are paid on a prorated basis to the sector participants from whom those moneys were collected. If a referendum fails to result in the termination of the Council, NMFS would immediately recover the amount of the bond posted by the petitioners.

If the amount remaining in the Council account is insufficient for NMFS to recover all expenses incurred for the conduct of the referendum, NMFS would recover the balance of the expenses from the petitioners that posted a bond.

### *Proprietary Business Data or Commercial Information*

Commercial or financial information submitted to NMFS in compliance with any requirement or regulation related to the Act, implementing regulations, or other applicable law would be treated as proprietary or confidential and protected from public disclosure to the extent possible under applicable law (see 16 U.S.C. 4012(f)). However, NMFS may release or make public general or statistical statements based upon reports of a number of persons (in aggregate or summary form) which does not directly or indirectly disclose the identify or business of any individual or business who submits the information.

### **Classification**

The proposed rule has been determined to be significant for the

purposes of Executive Order 12866. The primary concern is that the market may have failed to provide information on the quality, safety, and availability of fishery products that is accurate and easily available to consumers. NMFS requests comments from the public on what market failures justify creation of seafood marketing councils, the degree to which industry structure affects these market failures, and whether this program is narrowly tailored to remedy those market failures.

NMFS prepared an IRFA that describes the economic impacts of this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** section of the preamble. This proposed rule does not duplicate, overlap, or conflict with other Federal rules.

### *Recordkeeping and Reporting Requirements*

In addition to recordkeeping and reporting requirements required to create a Council, small entities could also be required to complete forms required to administer assessment fees, petition for a refund of assessment fees, or participate in any referendum under a specific Council's charter. NMFS believes the number of burden hours to small entities to meet Council obligations could range between 5 and 20 hours annually. This proposed rule does not implement a seafood marketing program, therefore, the Paperwork Reduction Act requirements are not triggered. However, there may be a need for additional burden hours once a Council's charter is accepted.

### *Description of Small Entities Affected by this Proposed Rule*

The potential universe of entities affected by this action includes all harvesters, importers, marketers, and processors of seafood. With the exception of a small number of catcher-processor vessels, most harvesters are identified as small entities under the Regulatory Flexibility Act meeting a size standard of less than \$3.5 million in gross receipts. Importers and marketers are characterized as small if the number of employees working in a typical pay period number are 100 or fewer while seafood processors employing 500 people or less are considered small. A Council could be made up of any combination of small or large firms depending upon the sector or sectors of a particular fishery the Council is representing. NMFS statistics indicate that there are approximately 17,679

harvesters, 935 processing plants, and 2,446 wholesale and marketing establishments that could be affected by this proposed rule.

### *Economic Impact Analysis*

#### *Overview*

Despite a strong U.S. demand for fish and shellfish, the domestic seafood industry is faced with a number of challenges. The industry has been experiencing declining prices, sales, and earnings; increased input costs, particularly fuel; increasingly restrictive management; strong competition from imports and aquaculture; loss of access to supporting infrastructure (e.g., dock space); and numerous health advisories regarding seafood consumption. The nominal price of canned tuna, for example, declined from \$2.55 in 1980 to \$1.78 in 2004. Between 1979 and 2003, the real or deflated (2004 constant dollar value) ex-vessel price of all finfish and shellfish combined declined from \$0.76 to \$0.35 per pound. The domestic seafood industry is experiencing problems in the form of competition from imports and increased fuel prices, and established generic marketing programs have been shown to be effective in improving the demand for some food commodities. The RIR analysis summarized below indicates that similar marketing programs, if effective in raising prices, could generate positive net benefits and provide for increased national economic impacts.

The economic analysis performed in support of this action examined 12 species complexes: (1) Grouper (all species of grouper), (2) snapper (all species of snapper), (3) roundfish (cod, haddock, and pollock), (4) tuna (all species of tuna), (5) halibut, (6) flatfish (all species of flatfish), (7) salmon (all wild caught species of salmon), (8) scallops (all species of scallops), (9) Dungeness and snow crab, (10) all other species of crabs, (11) lobster (spiny and North American), and (12) all species of shrimp. Per capita consumption was defined as per-capita landings between 1950 and 2003. A synthetic inverse demand system (SIDS) model was specified and estimated following Park et al. (2004). The SIDS model was used to estimate changes in ex-vessel revenues and compensating variation or economic value, which might be induced by a successful generic marketing program. Economic impacts were estimated using a national input/output model, which was developed for NOAA Fisheries in 2004. The estimation of impacts also did not include the potential impacts of other

meat producing and consuming sectors (e.g., cattle producers and consumers of beef).

Based on the potential changes in sales of Alaska's, Maryland's, and the Tilapia Marketing Association's marketing campaigns for salmon, blue crabs, and tilapia, the analysis of economic impact prepared by NMFS assumed that a marketing campaign could promote a 10 percent increase in demand. These relatively small, homogeneous groups with common goals were successful in reaching agreement on developing a marketing strategy. During the Alaskan salmon campaign, sales (quantity demanded) increased by 19.6 percent; sales of blue crabs in Maryland increased by 52.2 percent; and sales of Tilapia increased by more than 54.5 percent between 2001 and 2003. As much as 40% of Alaskan salmon wild landings are based on hatchery production and tilapia is a fresh water aquaculture product; both products can be increased to respond to increases in demand. Maryland blue crab while a substantial part is still only a single component of a much larger market allowing for the reallocation of sales between different markets due to real or perceived quality differences. Larger, heterogeneous groups with different goals and objectives could

have substantially higher costs of reaching agreement on a marketing strategy; preventing an effective strategy from being developed. The Federal government can assist in reducing these costs, but its involvement must be limited in these TAC-limited, marine, wild-capture fisheries to the extent that an increase in demand would not jeopardize conservation goals and objectives.

NOAA stewardship of fisheries resources under the Magnuson-Stevens Act, Endangered Species Act, and other applicable laws in managing U.S. fisheries ensures that conservation and management goals and objectives are not jeopardized. As part of this process, NMFS must submit annually a Status of Fisheries Stocks report to Congress reporting on the status of overfished fisheries and fisheries where overfishing is continuing. Seafood Council actions established under this rule may not interfere with the continued management and conservation of fisheries required under other statutes.

The analysis estimated potential changes in revenues and welfare and was limiting since: it considered only the harvesting sector; the processing and final retail sectors were not included; the analysis considered a marketing program, which increased the per capita quantity demanded; no attention was

given to whether or not a marketing program would shift out the demand or change the various quantity coefficients, which would be an expected effect of a marketing campaign. Alternatively, a marketing program would be expected to increase the demand for a given price, and thus, shift the demand curve out from the origin so that at every price, consumers would demand more seafood. Without detailed information on the relationship between advertising and seafood demand, it is difficult to even state the magnitude of bias from assuming that a marketing program increases the quantity demanded.

As illustrated in Tables 1, a 10 percent increase in the demand for seafood generates considerable economic activity for the U.S. economy. If the demand for all 12 species or species grouping were to increase by 10 percent (or \$108.1 million ex-vessel), this would, in turn, generate total sales of \$500.7 million in the U.S. economy and \$172.3 million in income (which includes profits). Those species with the potential greatest level of economic impacts are shrimp, salmon, and tuna. Combined, they account for nearly 60 percent of the total potential output, 58 percent of the total potential income, and 59 percent of the total potential employment.



TABLE 1. CHANGES IN OUTPUT (1,000\$ OF 2004 CONSTANT DOLLARS) GENERATED BY A 10% INCREASE IN THE DEMAND FOR SEAFOOD

| Harvesting Sector       |                              | Harvesting Sector Impacts |          |         |         | Processor, Wholesaler, and Dealer Impacts |          |         |         | Impacts for All Sectors |          |         |         |
|-------------------------|------------------------------|---------------------------|----------|---------|---------|---|----------|---------|---------|-------------------------|----------|---------|---------|
| Species                 | Change In Ex-vessel Revenues | Direct                    | Indirect | Induced | Total   | Direct                                    | Indirect | Induced | Total   | Direct                  | Indirect | Induced | Total   |
| Grouper                 | 561.1                        | 335                       | 228      | 745     | 1,308   | 389                                       | 272      | 871     | 1,532   | 724                     | 500      | 1,616   | 2,840   |
| Snapper                 | 1,391.3                      | 830                       | 566      | 1,846   | 3,242   | 966                                       | 673      | 2,159   | 3,797   | 1,796                   | 1,239    | 4,005   | 7,040   |
| Roundfish               | 8,018.8                      | 4,088                     | 2,840    | 11,204  | 18,132  | 5,569                                     | 3,876    | 12,442  | 21,887  | 9,657                   | 6,716    | 23,646  | 40,019  |
| Tuna                    | 15,920.5                     | 10,135                    | 6,956    | 14,519  | 31,610  | 9,966                                     | 7,899    | 25,399  | 43,264  | 20,101                  | 14,855   | 39,918  | 74,874  |
| Salmon                  | 23,620.2                     | 17,173                    | 12,499   | 27,314  | 56,985  | 16,404                                    | 11,418   | 36,650  | 64,473  | 33,577                  | 23,917   | 63,964  | 121,458 |
| Halibut                 | 3,555.7                      | 2,045                     | 1,445    | 4,777   | 8,267   | 2,469                                     | 1,719    | 5,517   | 9,705   | 4,514                   | 3,164    | 10,294  | 17,972  |
| Flatfish                | 6,518.5                      | 3,891                     | 2,808    | 8,563   | 15,262  | 4,447                                     | 3,166    | 10,165  | 17,778  | 8,338                   | 5,974    | 18,728  | 33,040  |
| Sea Scallop             | 3,362.6                      | 1,991                     | 1,576    | 4,380   | 7,947   | 2,335                                     | 1,625    | 5,217   | 9,178   | 4,326                   | 3,202    | 9,597   | 17,125  |
| Dungeness and Snow Crab | 2,995.3                      | 2,102                     | 1,338    | 3,737   | 7,178   | 2,080                                     | 1,448    | 4,647   | 8,176   | 4,182                   | 2,786    | 8,385   | 15,353  |
| All Other Crabs         | 10,984.6                     | 7,709                     | 4,908    | 13,706  | 26,332  | 7,629                                     | 5,310    | 17,043  | 29,981  | 15,338                  | 10,218   | 30,749  | 56,313  |
| Lobster                 | 2,393.1                      | 1,875                     | 1,456    | 2,678   | 6,009   | 1,221                                     | 1,239    | 3,995   | 6,455   | 3,096                   | 2,695    | 6,674   | 12,464  |
| Shrimp                  | 28,756.5                     | 19,681                    | 15,987   | 32,489  | 68,157  | 8,450                                     | 5,916    | 19,631  | 33,998  | 28,131                  | 21,903   | 52,120  | 102,155 |
| Total harvesters        | 108,078.2                    | 71,853                    | 52,607   | 125,960 | 250,430 | 61,927                                    | 44,561   | 143,736 | 250,223 | 133,781                 | 97,169   | 269,696 | 500,653 |

A generic marketing campaign, if successful, would be expected to increase sales of seafood. Using the estimated changes in revenues associated with a generic marketing campaign, which is assumed to generate at least a 10 percent increase in sales, and the national I/O model, changes in output or sales and income are estimated. The analysis, however, ignores potential changes in other sectors of the economy, which might result from increased sales in seafood (e.g., the impacts on beef, pork, and poultry producers and processors). The impacts do, however, explicitly consider changes in demand from supporting or related seafood sectors (e.g., fuel and gear for vessels, purchases of supplies by processors, etc.).

It was estimated that a successful generic commodity program for all 12 species could generate up to \$108.1 million (2004 constant dollar value) in addition ex-vessel revenues, and \$115.5 million in consumer welfare or compensating variation; i.e., net benefits. The largest gains were determined to be associated with shrimp, salmon, and tuna. In terms of the potential changes in economic impacts, it was estimated that generic commodity programs for the 12 species or species groupings could increase sales and income by, respectively, \$500.7 million and \$172.3 million. Shrimp, salmon, and tuna were determined to be the largest beneficiaries of generic commodity programs, which successfully increased consumption by 10 percent. In addition to the limitations already discussed, the analysis excludes the costs of generic commodity programs. Existing programs in the U.S., regardless of whether or not the program promotes seafood or beef, pork, or poultry, typically impose charges on producing and/or marketing companies. These costs, if known, would have to be deducted from the estimated benefits.

The analysis also does not consider the distribution of potential benefits or economic welfare; that is, it remains unknown whether or not a generic commodity program would benefit fishers, processors and dealers, retailers, all, or one group more than the other. The analysis also does not consider the possibility that generic commodity programs will potentially benefit importers and foreign producers of seafood. Most U.S. fisheries are heavily regulated, and there has been an increasing reliance on imports, and thus, it is unlikely that in the near future, domestic producers would be able to satisfy an increased demand for seafood. Alternatively, a generic

commodity program, which resulted in increased supplies of imports, could drive domestic ex-vessel and retail prices down. Producers would experience declining revenues and profits, but consumers might experience increased welfare. Although the RIR indicates that the potential exists for the generation of positive net benefits from a marketing program, the merits of a specific proposed council would have to be judged on a case by case basis.

Unfortunately, data necessary for conducting an economic analysis of the potential benefits and impacts of generic marketing campaigns or generic commodity programs are not available. There is insufficient information to statistically examine the relationship between advertising expenditures for seafood and the demand for seafood. Data are not available on retail prices and consumption, by species, or mode of sale (e.g., fish markets, grocery stores, and restaurants). Cost and earnings data are highly inconsistent over time, and thus it is not possible to consider returns to the various producing and marketing sectors--harvesters, processors, wholesalers, retail outlets, and restaurants. Moreover, no seafood entity has yet proposed a generic commodity program.

A review of the scant empirical data available on generic commodity programs reveals mixed evidence about the success of generic marketing campaigns, particularly relative to seafood. One study suggests that generic advertising to promote the sales of seafood either had no effect on sales or depressed sales. Another study concluded that advertising and health awareness significantly affected the demand for seafood; these studies, however, were restricted to one retail firm in Houston, and used inches of print in fliers and newspapers as a measure of advertising. The Alaska Seafood Marketing Institute (ASMI), the Maryland Seafood Marketing Advisory Commission, and the Tilapia Marketing Institute have stated that they implemented successful marketing campaigns, respectively, for salmon, blue crabs, and tilapia. Up to 40 percent of the wild-capture, Alaskan salmon starts its life in hatcheries and tilapia is a product of fresh-water aquaculture product, both of which can be increased in supply to match market pressures. Per capita consumption of tilapia increased by nearly 55.0 percent between 2001 and 2003; they initiated the marketing campaign in 1999. Total landings of Alaskan salmon increased 21.8 percent between 2001 and 2002; the years the ASMI conducted a generic marketing program for salmon.

Maryland blue crab, on the other hand, is a wild-capture fishery that needs to be carefully monitored to ensure that overfishing does not occur. Large increases in sales were also found to characterize Maryland blue crabs following their implementation of a marketing program for blue crabs. While a significant part, Maryland blue crab landings are only a portion of the total fishery and these increases in landings could represent a reallocation of demand from one segment of the market to another in response to changes in perceived product quality. While promotional programs involving homogeneous and species-specific products have been for the most part successful, an attempt to form a national seafood Council to promote an increase in consumption of all seafood failed because of difficulty in getting agreement among fishermen, processors, and marketing firms over funding, program thrusts, and other elements required to make a program successful. In addition, increases in generic seafood demand in times prior to the large scale availability of imported seafood products created concerns among managers that increased prices at the dockside might create additional harvesting pressure for already overexploited fish stocks.

While data are not available to measure the direct effects of advertising on seafood demand, over the last two decades agricultural economists have estimated rates of return from promotional programs under the Department of Agriculture's checkoff programs developed for beef, pork, and soybeans. In a checkoff program, producers are required to pay a fee based on a fraction of their production to commodity marketing and development boards. The fees are used to promote consumption and support production and utilization research. A 2000 study to measure effects of the pork checkoff program on demand estimated returns to advertising investment as measured by a net benefit cost ratio (NBCR) to be 15 to 1, while in 2001, the NBCR for advertisement and research investment for soybeans was estimated at 8 to 1. These large benefit to cost ratios need to be tempered when applied to fishery products because agricultural product supplies can be increased when prices rise creating additional benefits in the form of producer and consumer surplus. Fish product supplies are generally fixed by regulation and increases in prices can cause the dissipation of rents in a command and control managed fishery. In a rationalized fishery, such as

halibut/sablefish or wreck fish, such rent dissipation would not occur and net benefits could increase substantially as was demonstrated in recent studies of proposed rationalization programs for the Gulf of Mexico shrimp fishery.

### Potential Economic Impact to Small Entities

Agricultural commodity promotional programs have yielded aggregate profitability of varying degrees as measured by several studies using econometric techniques. Furthermore, as indicated through referenda for beef, poultry, and pork, agricultural producers have in large part supported checkoff programs in their respective commodities. The few studies involving seafood marketing programs indicate that they have been, for the most part, successful when involving a specific product. Based on the results of these studies NMFS has concluded that marketing boards that are species and or product specific are likely to be successful in increasing demand and, hence, profitability for the sector or sectors of the fishery represented by the Council. Therefore, small entities, on average, would likely profit, at least in the short term, from a well-run and managed Council. While the typical fishery may profit from increased demand through advertising and other promotions, there would be no guarantee that all fisheries and all sectors of fisheries and the firms comprising those sectors would profit equally. This would depend on individual firm's profit margins, the assessment fee, and price effects caused by advertising (positive) and the ability of non-participants to profit from free advertising (negative) by increasing supply and driving down prices (also known as the free rider problem). There is also the mandatory versus voluntary participation or the "under-advertising" argument.

### Profit Margins

NMFS recognizes that profit margins will vary largely by fishery sector and individual firms within fishery sectors. There are examples of small firms with larger profit margins within a fishery or sector of a fishery than their larger counterparts, e.g., small-vessel groundfish harvesters in the Northeast. Producers of specialty products for niche markets such as fancy canned albacore, smoked mussels, shrimp cocktail, etc. are assumed to have higher profit margins than their large volume counterparts. Nevertheless, direct impacts to the profit margins of individual firms from seafood marketing programs would depend on the increase

in gross receipts attributable a Council's marketing efforts versus the amount of fees they are assessed. Increased demand would increase revenues to the aggregate of firms comprising any one market, but this does not guarantee that individual firms would have similar increases in gross receipts measured in magnitude or as a percentage of the total increase. Therefore, there could be marginal firms whose profit margins are smaller than the representative sector that would not benefit greatly from an increased demand yet be saddled with an assessment fee. The number of these firms, if they exist, is indeterminate. However, it is unlikely that business failures would occur as a result of creating a Council.

### Assessment Fees

Assessment fees exacted by agriculture marketing programs have a commonality in that the fees are based on relative levels of production, e.g., the fees for the dairy, soybean, and beef marketing programs are 2 cents per gallon, 0.5 percent of sales price, and 1 dollar per head of live weight, respectively. This rule would implement a fee similar to those specified for agriculture programs based on a percentage or a fixed amount per unit of weight or volume based on gross sales receipts for producers or product costs for importers. Either way, these methods of imposing fees should minimize any disproportionate impacts on profitability for small firms versus large firms from the assessment of fees within fisheries or sectors of fisheries. If the fee were not based on a relative assessment, small firms could be negatively impacted by large blanket fees. This rule would allow individual firms to request and collect a refund of fees ninety-days after an assessment. The methods and the timing of refunds would need to be specified in a Council's charter.

### Price Effects and the Free Rider Problem

The magnitudes of price changes relative to increased demand or supply depend on price elasticities of demand or supply in a given product market. With the exception of a few species of seafood, most notably American lobster, seafood markets exhibit an elastic or flat demand and an inelastic supply because many substitute commodities exist for fishery products. As a result, prices would remain relatively stable with large increases in fishery products supplies. With relatively fixed supplies of fish, at least in the short run, changes in seafood demand could result in large changes in price. Therefore, an increase in demand would most likely exhibit

relatively higher returns to individual and aggregate firms than agricultural firms. The "free rider" problem would occur if a demand induced increase in price caused by a marketing program triggers an appreciable amount of supply onto the market from non-participants, i.e., entities who paid no fee for the promotion of the product but benefitted from the marketing campaign. The use of quality seals or ecolabels such as "dolphin free" tuna create easily identifiable quality differences between essentially homogeneous products and prevent the "free rider" problem from occurring and the associated dissipation of benefits generated by the initial marketing efforts. As a result, if the "free rider" problem did exist for fishery products, it would likely not be as severe as the situation facing other commodity markets since domestic supplies are relatively fixed under the present management regime and the creation of seals or labels would, in most cases, create a differentiated product for consumers in domestic markets.

### Voluntary Versus Mandatory Participation

Agricultural marketing programs conceived under various legislation incorporate mandatory participation programs based on the economic premise that -- if the majority of potential participants accept, through referenda, the idea that additional profits could be earned through a marketing program, then it would be profitable for all firms to participate. The economic reality faced by the agricultural marketing programs is that if only the firms voting in the affirmative in a given referendum were subject to assessment there might not be enough operating funds to carry out the mandates of the legislation imposed, i.e., increase wealth by increasing demand and/or introducing better products. If NMFS, through its authority to waive fees, did not impose mandatory participation in a particular Council, i.e., voluntary participation, it is safe to assume that those firms voting in the affirmative in a referendum had determined a priori that it would be economically advantageous to pay an assessment fee through a Council to promote their products. Therefore, it would be difficult to make the case that implementation of a voluntary Council would have adverse impacts on those participants who voted in the affirmative. However, a voluntary program would face two obstacles. Firstly, there could be a level of funding through voluntary assessments that would not allow a Council to create a

promotional program that would meet the objective of increasing demand for a particular product(s). Secondly, the level of funding may not be optimal to achieve maximum benefits of a marketing program. In the case of voluntary participation, fisheries, in general, would be less affected by the free rider problem when compared to other commodity markets due to the different price elasticities of demand and supply, use of labels and quality standards, and the regulatory control of supplies.

#### *Paper Work Reduction Act*

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. The information collection requirements contained in this rule can be broadly categorized into two categories: (1) Information required of an individual or organization applying for consideration to form a Council, and (2) information required of a formed and operating Council. Information required of an individual or organization applying for consideration to form a Council, consists of an "application for charter" that is composed of three sections: petition, proposed charter, and a list of eligible referendum participants. Based on discussions with the tuna industry, (the seafood industry group most likely to first apply for formation of a Council), the estimated reporting time for this portion of the collection requirement in 50 CFR 270 is 320 hours in total, with an average of 80 hours to develop a petition, 200 hours to develop a proposed charter, and 40 hours to develop a list of eligible referendum participants. All other information requirements in the proposed rule are imposed on the Councils, once they are established. The estimated reporting time for these information requirements varies from 1 to 120 hours per response. Council submission of an annual plan, an annual budget, and an annual financial report are estimated at 120 hours each for a total of 360 hours. Council submissions of semi-annual progress reports is estimated at 40 hours twice a year, notice of assessments at 20 hours once a year, list of Council nominations following a favorable referendum at 20 hours once a year, and meeting notices at 1–2 hours once a year. Other submissions are optional and are dependent upon the operation of a particular Council and its participants. For instance, Council submission of a plan to conduct a referendum on development of quality

standards is estimated at 40 hours with no more than annual frequency. Additionally, assessed participants of a Council submission of a petition of objection and/or request for refund is estimated at 2 hours each no more than 6 times a year. These estimated reporting times 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 sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have 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. Send comments on these or any other aspects of the collection of information to NMFS and OMB (see **ADDRESSES**).

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 Paperwork Reduction Act, unless that collection-of-information displays a currently valid OMB control number.

#### **List of Subjects in 50 CFR Part 270**

Administrative practice and procedure, Fish, Marketing, Seafood.

Dated: January 17, 2006.

**William T. Hogarth,**

*Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

For the reasons set out in the preamble, NMFS proposes to amend title 50 chapter II as follows:

1. A new subchapter H consisting of part 270 is added to read as follows:

#### **SUBCHAPTER H—FISH AND SEAFOOD PROMOTION**

#### **PART 270—SPECIES-SPECIFIC SEAFOOD MARKETING COUNCILS**

Sec.

- § 270.1 Scope.
- § 270.2 Definitions.
- § 270.3 Submission of application.
- § 270.4 Review of application.
- § 270.5 Conduct of referendum.
- § 270.6 Sector participants eligible to vote.
- § 270.7 Results of referendum.
- § 270.8 Nomination and appointment of Council members.

- § 270.9 Terms, vacancies, and removal of Council members.
- § 270.10 Responsibilities of a Council.
- § 270.11 Responsibilities of NMFS.
- § 270.12 Notice of Council meetings.
- § 270.13 Books, records and reports.
- § 270.14 Update of sector participant data.
- § 270.15 Quality standards.
- § 270.16 Deposit of funds.
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**Authority:** 16 U.S.C. 4001–4017.

#### **§ 270.1 Scope.**

This part 270 describes matters pertaining to the establishment, representation, organization, practices, procedures, and termination of Seafood Marketing Councils.

#### **§ 270.2 Definitions.**

The following terms and definitions are in addition to or amplify those contained in the Fish and Seafood Promotion Act of 1986:

*Act* means the Fish and Seafood Promotion Act of 1986 (Pub. L. 99–659) and any subsequent amendments.

*Consumer education* means actions undertaken to inform consumers of matters related to the consumption of fish and fish products.

*Council* means a Seafood Marketing Council for one or more species of fish and fish products of that species established under section 210 of the Act (16 U.S.C. 4009).

*Expenditure* means monetary or material worth of fishery products. Expenditure is determined at the point a receiver obtains product from a harvester or an importer obtains product from a foreign supplier. Value may be expressed in monetary units (the price a receiver pays to a harvester or an importer pays to a foreign supplier).

*Fiscal year* means any 12-month period as NMFS may determine for each Council.

*Fish* means finfish, mollusks, crustaceans, and all other forms of aquatic animal life used for human consumption; the term does not include marine mammals and seabirds.

*Harvester* means any person in the business of catching or growing fish for purposes of sale in domestic or foreign markets.

*Importer* means any person in the business of importing fish or fish products from another country into the United States and its territories, as defined by the Act, for commercial purposes, or who acts as an agent, broker, or consignee for any person or

nation that produces, processes or markets fish or fish products outside of the United States for sale or for other commercial purposes in the United States.

*Marketer* means any person in the business of selling fish or fish products in the wholesale, export, retail, or restaurant trade, but whose primary business function is not the processing or packaging of fish or fish products in preparation for sale.

*Marketing and promotion* means any activity aimed at encouraging the consumption of fish or fish products or expanding or maintaining commercial markets for fish or fish products.

*Member* means any person serving on any Council.

*Participant* means a member of a sector or business identified in an application for a Council charter as being subject to the referendum or assessment process.

*Person* means any individual, group of individuals, association, proprietorship, partnership, corporation, cooperative, or any private entity of the U.S. fishing industry organized or existing under the laws of the United States or any state, commonwealth, territory or possession of the United States who meets the eligibility requirements as defined in a proposed charter to vote in a referendum.

*Processor* means any person in the business of preparing or packaging fish or fish products (including fish of the processor's own harvesting) for sale in domestic or foreign markets.

*Receiver* means any person who owns fish processing vessels and any person in the business of acquiring (taking title to) fish directly from harvesters.

*Research* means any type of research designed to advance the image, desirability, usage, marketability, production, quality and safety of fish and fish products.

*Secretary* means the Secretary of Commerce, or the Secretary's designee.

*Sector* means

- (1) The sector consisting of harvesters;
- (2) The sector consisting of importers;
- (3) The sector consisting of marketers;
- (4) The sector consisting of processors;
- (5) The sector consisting of receivers;
- or
- (6) The consumer sector consisting of persons professionally engaged in the dissemination of information pertaining to the nutritional benefits and preparation of fish and fish products;

*Sector participant* means any individual, group of individuals, association, proprietorship, partnership, corporation, cooperative, or any private

entity of the U.S. fishing industry organized or existing under the laws of the United States or any state, commonwealth, territory or possession of the United States who meets the eligibility requirements as defined in a proposed charter to vote in a referendum.

*Species* means a fundamental category of taxonomic classification, ranking after genus, and consisting of animals that possess common characteristic(s) distinguishing them from other similar groups.

*Value* means monetary or material worth of fishery products. Value is the difference between what a receiver is willing to pay for a product provided by a harvester and its market price or an importer is willing to pay for a product from a foreign supplier and its market price. Value may be expressed in monetary units representing consumer surplus or producer surplus.

### § 270.3 Submission of application.

(a) Persons who meet the minimum requirements for sector participants as described in the proposed charter may file an application with NMFS for a charter for a Seafood Marketing Council for one or more species of fish and fish products of that species. One signed original and two copies of the completed application package must be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, NOAA, 1315 East-West Highway, Silver Spring, Maryland 20910. Applications should not be bound.

(b) The application consists of four parts:

- (1) A document requesting NMFS to establish a Council;
- (2) A proposed charter under which the proposed Council will operate;
- (3) A list of eligible referendum participants; and
- (4) Analytical documentation addressing requirements of applicable law.

(c) *Content of application*—(1)

*Application or requesting document.*

The application or requesting document submitted by the applicants to NMFS requesting that the Council be established, to the extent practicable, must include the signatures or corporate certifications, of no less than three sector participants representing each sector identified in accordance with paragraph (c)(2)(v) of this section and who, according to the available data, collectively accounted for, in the 12-month period immediately preceding the month in which the application was filed, not less than 10 percent of the value of the fish or fish products

specified in the charter that were handled during such period in each sector by those who meet the eligibility requirements to vote in the referendum as defined by the application. The application must also include a statement that, if established, the Council will have sufficient resources (e.g., cash, donated office space, services, supplies, etc.) available for initial administrative expenditures pending collection of assessments.

(2) *Proposed charter.* A proposed charter must contain, at a minimum, the following information:

(i) The name of the Council and a provision proclaiming its establishment;

(ii) A declaration of the purposes and objectives of the Council;

(iii) A description of the species of fish and fish products, including the scientific and common name(s), for which the Council will implement marketing and promotion plans under the Act. (The American Fisheries Society's "List of Common and Scientific Names of Fishes from the United States and Canada" (latest edition) or where available, an appropriate volume of its "List of Common and Scientific Names of Aquatic Invertebrates of the United States and Canada" (latest edition) should be used as the authority for all scientific and common names.);

(iv) A description of the geographic area (state(s)) within the United States covered by the Council;

(v) The identification of each sector and the number and terms of representatives for each sector that will be voting members on the Council. (The number of Council members should be manageable, while ensuring equitable geographic representation. The term for members will be 3 years. Initially, to ensure continuity, half of the members' terms will be 2 years and half will be 3 years. Reappointments are permissible.);

(vi) The identification of those sectors (which must include a sector consisting of harvesters, a sector consisting of receivers, and, if subject to assessment, a sector consisting of importers), eligible to vote in the referendum to establish the Council;

(vii) For each sector described under paragraph (c)(2)(v) of this section, a threshold level specifying the minimum requirements, as measured by income, volume of sales, or other relevant factors, that a person engaging in business in the sector must meet in order to participate in a referendum;

(viii) A description of the rationale and procedures for determining assessment rates as provided in § 270.18, based on a fixed amount per

unit of weight or measure, or on a percentage of value of the product handled;

(ix) The proposed rate or rates that will be imposed by the Council on receivers and, if subject to assessment, importers during its first year of operation;

(x) The maximum amount by which an assessment rate for any period may be raised above the rate applicable for the immediately preceding period;

(xi) The maximum rate or rates that can be imposed by a Council on receivers or importers during the operation of the Council;

(xii) The maximum limit on the amount any one sector participant may be required to pay under an assessment for any period;

(xiii) The procedures for providing refunds to sector participants subject to assessment who request the same in accordance with the time limits specified § 270.22;

(xiv) A provision setting forth the voting procedures by which votes may be cast by proxy;

(xv) A provision that the Council will have voting members representing the harvesting, receiving and, if subject to assessment, importing sectors;

(xvi) A provision setting forth the definition of a quorum for making decisions on Council business and the procedures for selecting a chairperson of the Council;

(xvii) A provision that members of the Council will serve without compensation, but will be reimbursed for reasonable expenses incurred in performing their duties as members of the Council;

(xviii) A provision containing a requirement for submission to NMFS the criteria and supporting data for evaluating the annual and/or multi-year performance of proposed marketing plans and the Council's performance;

(xix) A provision containing a requirement for submission of documentation as requested by NMFS for purposes of evaluating performance of proposed marketing plans and the Council's related performance;

(xx) Where adequate funds are not available, a provision containing the minimum number of participants needed for sustained operations that cannot receive assessment refunds;

(xxi) A provision acknowledging that NMFS will have the right to participate in Council meetings;

(xxii) A provision that the Council will conduct its activities in accordance with applicable NMFS requirements and that NMFS has final approval authority over proposed marketing plans and Council actions;

(xxiii) A provision containing a requirement for the Council to arrange for a complete audit report to be conducted by an independent public accountant and submitted to NMFS at the end of each fiscal year;

(xxiv) A provision containing a requirement for the Council to conduct a market assessment based on economic, market, social and demographic, and biological information as deemed necessary by NMFS; and

(xxv) A provision containing a requirement for the Council to update the list of referendum participants on an annual basis.

#### (3) *List of referendum participants.*

The list of referendum participants, to the extent practicable, must identify the business name and address of all sector participants that the applicants believe meet the requirements for eligibility to vote in the referendum on the adoption of the proposed charter.

(i) The list should include all sectors in which a sector participant meets the eligibility requirements to vote in a referendum. If a sector participant has more than one place of business located within the geographic area of the Council, all such places should be listed and the primary place of business should be designated. The agency will provide appropriate information in its possession of a non-proprietary nature to assist the applicants in developing the list of sector participants.

(ii) [Reserved]

(4) *Analytical documentation.* The applicant must address the requirements of the Act, implementing regulations, and other applicable law, i.e., E.O. 12866, Regulatory Flexibility Act, National Environmental Policy Act, and other law as NMFS determines appropriate.

#### § 270.4 Review of application.

Within 180 days of receipt of the application to establish a Council, NMFS will:

(a) Determine if the application is complete and complies with all of the requirements set out in § 270.3 and complies with all provisions of the Act and other applicable laws.

(b) Identify, to the extent practicable, those sector participants who meet the requirements for eligibility to participate in the referendum to establish the Council. NMFS may require additional information from the applicants or proposed participants in order to verify eligibility. NMFS may add names to or delete names from the list of sector participants believed eligible by the applicants until the time of the referendum based on additional information received.

(c) If NMFS finds minor deficiencies in an application that can be corrected within the 180-day review period, NMFS will advise the applicants in writing of what must be submitted by a specific date to correct the minor deficiencies.

(d) If NMFS makes a final negative determination, on an application, NMFS will advise the applicant in writing of the reason for the determination. The applicant may submit another application at any time thereafter. NMFS then has 180 days from receipt of the new application to render a final determination on its acceptability.

#### § 270.5 Conduct of referendum.

(a) Upon making affirmative determinations under § 270.4, NMFS, within 90 days after the date of the last affirmative determination, will conduct a referendum on the adoption of the proposed charter.

(b) NMFS will estimate the cost of conducting the referendum, notify the applicants, and request that applicants post a bond or provide other applicable security, such as a cashier's check, to cover costs of the referendum.

(c) NMFS will initially pay all costs of a referendum to establish a Council. Within two years after establishment, the Council must reimburse NMFS for the total actual costs of the referendum from assessments collected by the Council. If a referendum fails to result in establishment of a Council, NMFS will immediately recover all expenses incurred for conducting the referendum from the bond or security posted by applicants. In either case, such expenses will not include salaries of government employees or other administrative overhead, but will be limited to those additional direct costs incurred in connection with conducting the referendum.

(d) No less than 30 days prior to holding a referendum, NMFS will:

(1) Publish in the **Federal Register** the text of the proposed charter and the most complete list available of sector participants eligible to vote in the referendum; and

(2) Provide for public comment, including the opportunity for a public meeting.

#### § 270.6 Sector participants eligible to vote.

(a) Any participant who meets the minimum requirements as measured by income, volume of sales or other relevant factors specified in the approved charter may vote in a referendum.

(b) Only one vote may be cast by each participant who is eligible to vote, regardless of the number of individuals

that make up such "participant" and how many sectors the participant is engaged in. The vote may be made by any responsible officer, owner, or employee representing a participant.

#### § 270.7 Results of referendum.

(a) *Favorable vote to establish a Council.* NMFS will, by order, establish the Council and approve an acceptable proposed charter, if the referendum votes which are cast in favor of the proposed charter constitute a majority of the sector participants voting in each and every sector. Further, according to the best available data, the majority must collectively account for, in the 12-month period immediately preceding the month in which the proposed charter was filed, at least 66 percent of the value of the fish and fish products described in the proposed charter handled during such period in each sector by those who meet the eligibility requirements to vote in the referendum as defined by the applicants.

(b) *Unfavorable vote to establish a Council.* If a referendum fails to pass in any sector of the proposed Council, NMFS will not establish the Council or approve the proposed charter. NMFS will immediately recover the cost of conducting the referendum according to § 270.5(c).

(c) *Notification of referendum results.* NMFS will notify the applicants of the results of the referendum and publish the results of the referendum in the **Federal Register**.

#### § 270.8 Nomination and appointment of Council members.

(a) Within 30 days after a Council is established, NMFS will solicit nominations for Council members from the sectors represented on the Council in accordance with the approved charter. If the harvesters and receivers represented on the Council are engaged in business in two or more states, but within the geographic area of the Council, the nominations made under this section must, to the extent practicable, result in equitable representation for those states. Nominees must be knowledgeable and experienced with regard to the activities of, or have been actively engaged in the business of, the sector that such person will represent on the Council. Therefore, a resume will be required for each nominee.

(b) In accordance with 16 U.S.C. 4009(f), NMFS will, within 60 days after the end of the 30-day period, appoint the members of the Council from among the nominees.

#### § 270.9 Terms, vacancies and removal of Council members.

(a) A Council term is for 3 years, except for initial appointments to a newly established Council where:

(1) Half of the Council member terms will be 2 years; and

(2) Half of the Council member terms will be 3 years.

(b) A vacancy on a Council will be filled, within 60 days after the vacancy occurs, in the same manner in which the original appointment was made. A member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed will be appointed only for the remainder of such term.

(c) Any person appointed under the Act who consistently fails or refuses to perform his or her duties properly and/or participates in acts of dishonesty or willful misconduct with respect to responsibilities under the Act will be removed from the Council by NMFS if two-thirds of the members of the Council recommend action. All requests from a Council to NMFS for removal of a Council member must be in writing and accompanied by a statement of the reasons upon which the recommendation is based.

#### § 270.10 Responsibilities of a Council.

(a) Each Council will:

(1) Implement all terms of its approved charter;

(2) Prepare and submit to NMFS, for review and approval under § 270.11(a)(1), a marketing and promotion plan and amendments to the plan which contain descriptions of the projected consumer education, research, and other marketing and promotion activities of the Council;

(3) Implement and administer an approved marketing and promotion plan and amendments to the plan;

(4) Determine the assessment to be made under § 270.18 and administer the collection of such assessments to finance Council expenses described in paragraph (b) of this section;

(5) Receive, investigate and report to NMFS accounts of violations of rules or orders relating to assessments collected under § 270.20, or quality standard requirements established under § 270.15;

(6) Prepare and submit to NMFS, for review and approval a budget (on a fiscal year basis) of the anticipated expenses and disbursements of the Council, including

(i) All administrative and contractual expenses;

(ii) The probable costs of consumer education, research, and other

marketing and promotion plans or projects;

(iii) The costs of the collection of assessments; and

(iv) The expense of repayment of the costs of each referendum conducted in regard to the Council.

(7) Comply with NMFS requirements, and prepare and submit to NMFS for review, evaluation, and verification of results and analysis an annual market assessment and related analytical documentation that is based on economic, market, social, demographic, and biological information as deemed necessary by NMFS;

(8) Maintain books and records, prepare and submit to NMFS reports in accordance with respect to the receipt and disbursement of funds entrusted to it, and submit to NMFS a completed audit report conducted by an independent auditor at the end of each fiscal year;

(9) Reimburse NMFS for the expenses incurred for the conduct of the referendum to establish the Council or any subsequent referendum to terminate the Council that fails;

(10) Prepare and submit to NMFS report or proposals as the Council determines appropriate to further the purposes of the Act.

(b) Funds collected by a Council under § 270.17 will be used by the Council for--

(1) Research, consumer education, and other marketing and promotion activities regarding the quality and marketing of fish and fish projects;

(2) Other expenses, as described in § 270.10(a)(1);

(3) Such other expenses for the administration, maintenance, and functioning of the Council as may be authorized by NMFS; and

(4) Any reserve fund established under § 270.10(e)(4) of this section and any administrative expenses incurred by NMFS specified as reimbursable under this Part.

(c) Marketing and promotion plans and amendments to such plans prepared by a Council under § 270.10(a)(2) of this section will be designed to increase the general demand for fish and fish products described in accordance with § 270.3(c)(2)(iii) by encouraging, expanding, and improving the marketing, promotion and utilization of such fish and fish products, in domestic or foreign markets, or both, through consumer education, research, and other marketing and promotion activities.

(d) Consumer education and other marketing and promotion activities carried out by a Council under a marketing and promotion plan and amendments to a plan may not contain

references to any private brand or trade name and will avoid the use of deceptive acts or practices in promoting fish or fish products or with respect to the quality, value, or use of any competing product or group of products.

(e) *Authority of a Council.* A Council may:

- (1) Sue and be sued;
- (2) Enter into contracts;

(3) Employ and determine the salary of an executive director who may, with the approval of the Council employ and determine the salary of such additional staff as may be necessary;

(4) Establish a reserve fund from monies collected and received under § 270.17 to permit an effective and sustained program of research, consumer education, and other marketing and promotion activities regarding the quality and marketing of fish and fish products in years when production and assessment income may be reduced, but the total reserve fund may not exceed the amount budgeted for the current fiscal year of operation.

(f) *Amendment of a charter.* A Council may submit to NMFS amendments to the text of the Council's charter. Any proposed amendments to a charter will be approved or disapproved in the same manner as the original charter was approved under § 270.4 and § 270.5 with the exception of § 270.4(b).

#### **§ 270.11 Responsibilities of NMFS.**

(a) In addition to the duties prescribed under 16 U.S.C. 4009, NMFS will:

(1) Participate in Council meetings and review, for consistency with the provisions of 50 CFR 270 and other applicable law, and approve or disapprove, marketing and promotion plans and budgets within 60 days after their submission by a Council;

(2) Immediately notify a Council in writing of the disapproval of a marketing and promotion plan or budget, together with reasons for such disapproval;

(3) Issue orders and amendments to such orders that are necessary to implement quality

standards under § 270.15;

(4) Promulgate regulations necessary to carry out the purposes of this chapter;

(5) Enforce the provisions of the Act;

(6) Make all appointments to Councils in accordance with § 270.8 and the approved Council charter;

(7) Approve the criteria and time frames under which a Council's performance will be evaluated; and

(8) Implement the provisions of 16 U.S.C. 4001 *et seq.* in accordance with the available financial and management resources NMFS determines can be utilized.

(b) NMFS may provide, on a reimbursable or other basis, such administrative or technical assistance as a Council may request for purposes of the initial organization and subsequent operation of the Council. However, a Council is responsible for the cost of preparing and submitting information (e.g., reports, evaluation data, etc.) requested by NMFS.

#### **§ 270.12 Notice of Council meetings.**

The Council will give NMFS the same notice of its meetings as it gives to its members. NMFS will have the right to participate in all Council meetings.

#### **§ 270.13 Books, records and reports.**

(a) The Council must submit to NMFS the following documents according to the schedule approved in the Council's charter:

(1) A marketing assessment and promotion plan;

(2) A financial report with respect to the receipt and disbursement of funds;

(3) An audit report conducted by an independent public accountant; and

(4) Other reports or data NMFS determines necessary to evaluate the Council's performance and verify the results of the market assessment and promotion plan..

(b) All Council records, reports, and data must be maintained by the Council for a minimum of 3 years, even if the Council is terminated.

#### **§ 270.14 Update of sector participant data.**

The Council will submit to NMFS at the end of each fiscal year an updated list of sector participants who meet the minimum requirements for eligibility to participate in a referendum as stated in the approved charter.

#### **§ 270.15 Quality standards.**

(a) Each Council may develop and submit to NMFS for approval or, upon the request of a Council, NMFS will develop quality standards for the species of fish or fish products described in the approved charter. Any quality standard developed under this paragraph must be consistent with the purposes of the Act.

(b) A quality standard developed under paragraph (a) of this section may be adopted by a Council by a majority of its members following a referendum conducted by the Council among sector participants of the concerned sector(s). In order for a quality standard to be brought before Council members for adoption, the majority of the sector participants of the concerned sector(s) must vote in favor of the standard. Further, according to the best available data, the majority must collectively

account for, in the 12-month period immediately preceding the month in which the referendum is held, not less than 66 percent of the value of the fish or fish products described in the charter that were handled during such period in that sector by those who meet the eligibility requirements to vote in the referendum as defined by the petitioners.

(c) The Council must submit a plan to conduct the referendum on the quality standards to NMFS for approval at least 60 days in advance of such referendum date. The plan must consist of the following:

(1) Date(s) for conducting the referendum;

(2) Method (by mail or in person);

(3) Copy of the proposed notification to sector participants informing them of the referendum;

(4) List of sector participants eligible to vote;

(5) Name of individuals responsible for conducting the referendum;

(6) Copy of proposed ballot package to be used in the referendum; and

(7) Date(s) and location of ballot counting.

(d) An official observer appointed by NMFS will be allowed to be present at the ballot counting and any other phase of the referendum process, and may take whatever steps NMFS deems appropriate to verify the validity of the process and results of the referendum.

(e) Quality standards developed under this section of the regulations must, at a minimum, meet Food and Drug Administration (FDA) minimum requirements for fish and fish products for human consumption.

(f) Quality standards must be consistent with applicable standards of the U.S. Department of Commerce (National Oceanic and Atmospheric Administration) or other recognized Federal standards and/or specifications for fish and fish products.

(g) No quality standard adopted by a Council may be used in the advertising or promotion of fish or fish products as being inspected by the United States Government unless the standard requires sector participants to be in the U.S. Department of Commerce voluntary seafood inspection program.

(h) The intent of quality standards must not be to discriminate against importers who are not members of the Council.

(i) Quality standards must not be developed for the purpose of creating non-tariff barriers. Such standards must be compatible with U.S. obligations under the General Agreement on Tariffs and Trade, or under other international standards deemed acceptable by NMFS.



(j) The procedures applicable to the adoption and the operation of quality standards developed under this subchapter also apply to subsequent amendments or the termination of such standards.

(k) With respect to a quality standard adopted under this section, the Council must develop and file with NMFS an official identifier in the form of a symbol, stamp, label or seal that will be used to indicate that a fish or fish product meets the quality standard at the time the official identifier is affixed to the fish or fish product, or is affixed to or printed on the packaging material of the fish or fish product. The use of such identifier is governed by § 270.15.

#### § 270.16 Deposit of funds.

All funds collected or received by a Council under this section must be deposited in an appropriate account in the name of the Council specified in its charter. Funds eligible to be collected or received by a Council must be limited to those authorized under the Act.

(a) Pending disbursement, under an approved marketing plan and budget, funds collected through assessments authorized by the Act must be deposited in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States Government.

(b) The Council may, however, pending disbursement of these funds, invest in risk-free, short-term, interest-bearing instruments.

(1) *Risk-free.* All investments must be insured or fully collateralized with Federal Government securities. In the absence of collateral, accounts established at financial institutions should, in aggregate, total less than \$100,000 to assure both principal and interest are federally insured in full.

(2) *Short-term.* Generally, all investments should be for a relatively short time period (one year or less) to assure that the principal is maintained and readily convertible to cash.

(3) *Collateralization.* Investments exceeding the \$100,000 insurance coverage level must be fully collateralized by the financial institution.

(i) Collateral must be pledged at face value and must be pledged prior to sending funds to the institution.

(ii) Government securities are acceptable collateral. Declining balance, mortgage backed securities such as Government National Mortgage Association (GNMA) and Federal National Mortgage Association (FNMA) are not acceptable collateral.

(iii) If an account has been established, collateral may be held at the local Federal Reserve Bank. Otherwise, another depository must hold the collateral.

#### § 270.17 Authority to impose assessments.

A Council will impose and administer the collection of the assessments that are necessary to pay for all expenses incurred by the Council in carrying out its functions under 50 CFR part 270.

#### § 270.18 Method of imposing assessments.

Assessments will be imposed on sector participants in the receiving sector or the importing sector or both as specified in an approved Council charter. Assessment rates will be based on value that may be expressed in monetary units or units of weight or volume.

(a) An assessment on sector participants in the receiving sector will be in the form of a percentage of the value or a fixed amount per unit of weight or volume of the fish described in the charter when purchased by such receivers from fish harvesters.

(b) An assessment on sector participants who own fish processing vessels and harvest the fish described in the charter will be in the form of a percentage of the value or on a fixed amount per unit of weight or volume of the fish described in the charter that is no less than the value if such fish had been purchased by a receiver other than the owner of the harvesting vessel.

(c) An assessment on sector participants in the importing sector will be in the form of a percentage of the value that an importer pays to a foreign supplier, as determined for the purposes of the customs laws, or a fixed amount per unit of weight or volume, of the fish or fish products described in the charter when entered or withdrawn from warehouse for consumption, in the customs territory of the United States by such sector participants.

(d) A Council may not impose an assessment on any person that was not eligible to vote in the referendum establishing the Council by reason of failure to meet the requirements specified under unless that person, after the date on which the referendum is held, meets the requirements of section.

(e) Any person may make voluntary payments or in-kind contributions to a Council for purposes of assisting the Council in carrying out its functions.

#### § 270.19 Notice of assessment.

(a) The Council must serve each person subject to assessment with notice

that the assessment is due. The notice of assessment must contain:

- (1) A specific reference to the provisions of the Act, regulations, charter and referendum that authorize the assessment;
- (2) The amount of the assessment;
- (3) The period of time covered by the assessment;
- (4) The date the assessment is due and payable, which will not be earlier than 30 days from the date of the notice;
- (5) The form(s) of payment; and
- (6) To whom and where the payment must be made.

(b) The notice must advise such person of his or her right to seek review of the assessment by filing a written petition of objection with NMFS at any time during the time period to which the assessment applies, including the right to request a hearing on the petition. The notice must state that the petition of objection must be filed in accordance with the procedures in § 270.21.

(c) The notice must also advise such persons of his or her right to a refund of the assessment as provided in § 270.22. The notice must state that a refund may be requested for not less than 90 days from such collection, and provide that the Council will make the refund within 60 days after the request for the refund is requested.

#### § 270.20 Payment of assessments.

Persons subject to an assessment would be required to pay the assessment on or before the date due, unless they have demanded a refund or filed a petition of objection with NMFS under § 270.21. However, person who have demanded a refund under § 270.22 or filed a petition of objection under § 270.21 may submit proof of these actions in lieu of payment. In the case of a petition of objection, NMFS will inform the Council and the petitioner of its finding at which time petitioner must pay the revised assessment if applicable.

#### § 270.21 Petition of objection.

(a) *Filing a petition.* Any person issued a notice of assessment under § 270.19 may request that NMFS modify or take other appropriate action regarding the assessment or promotion plan by filing a written petition of objection with NMFS. Petitions of objection may be filed:

- (1) Only if the petitioner determines one or more of the following criteria is not in accordance with the law:
  - (i) The assessment;
  - (ii) The plan upon which the assessment is based; or
  - (iii) Any obligation imposed on the petitioner under the plan.

(2) Only during the time period to which the assessment applies.

(b) *Contents of the petition of objection.* A petition must be addressed to Assistant Administrator for Fisheries, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, and must contain the following:

(1) The petitioner's correct name, address, and principal place of business. If the petitioner is a corporation, this must be stated, together with the date and state of incorporation, and the names, addresses, and respective positions of its officers; if a partnership, the date and place of formation and the name and address of each partner;

(2) The grounds upon which the petition of objection is based, including the specific terms or provisions of the assessment, the marketing and promotion plan, or obligation imposed by the plan, to which the petitioner objects;

(3) A full statement of the facts upon which the petition is based, set forth clearly and concisely, accompanied by any supporting documentation;

(4) The specific relief requested; and

(5) A statement as to whether or not the petitioner requests a hearing.

(c) *Notice to Council.* NMFS will promptly furnish the appropriate Council with a copy of the petition of objection.

(d) *Opportunity for informal hearing.*

(1) Any person filing a petition of objection may request an informal hearing on the petition. The hearing request must be submitted with the petition of objection.

(2) If a request for hearing is timely filed, or if NMFS determines that a hearing is advisable, NMFS will so notify the petitioner and the Council. NMFS will establish the applicable procedures, and designate who will be responsible for conducting a hearing. The petitioner, the Council, and any other interested party, may appear at the hearing in person or through a representative, and may submit any relevant materials, data, comments, arguments, or exhibits. NMFS may consolidate two or more hearing requests into a single proceeding.

(3) *Final decision.* Following the hearing, or if no hearing is held, as soon as practicable, NMFS will decide the matter and serve written notice of the decision on the petitioner and the Council. NMFS's decision will be based on a consideration of all relevant documentation and other evidence submitted, and will constitute the final administrative decision and order of the

agency. NMFS will have the discretion to waive collection of a contested assessment or revise, modify, or alter the assessment amount based on a Council method of assessment.

#### § 270.22 Refunds.

(a) Notwithstanding any other provision of the Act, any person who pays an assessment under the Act may demand and must promptly receive from the Council a refund of such assessment. A demand for refund must be made in accordance with procedures in the approved charter and within such time as will be prescribed by the Council and approved by NMFS. Procedures to provide such a refund must be established before any such assessment may be collected. Such procedures must allow any person to request a refund 90 days or more from such collection, and provide that such refund must be made within 60 days after demand for such refund is made.

(b) Once a refund has been requested by a sector participant and paid by the Council, that sector participant may no longer participate in a referendum or other business of the Council during the remainder of the assessment rate period. Future assessments will only be sent to such a sector participant at the request of the sector participant. If assessments are paid during a future assessment rate period and no refund is requested, that sector participant may again participate in a referendum or other business of the Council.

#### § 270.23 Dissolution of Councils.

(a) *Petition for termination.* (1) A petition to terminate a Council may be filed with NMFS by no less than three sector participants in any one sector. Any petition filed under this subsection must be accompanied by a written document explaining the reasons for such petition.

(2) If NMFS determines that a petition filed under paragraph (a)(1) of this section is accompanied by the signatures, or corporate certifications, of no less than three sector participants in the sector referred to in paragraph (a)(1) of this section who collectively accounted for, in the 12-month period immediately preceding the month in which the petition was filed, not less than 20 percent of the value of the fish or fish products described in § 270.3(c)(2)(iii) that were handled by that sector during the period, NMFS within 90 days after the determination, will conduct a referendum for termination of the Council among all sector participants in that sector.

(3) Not less than 30 days prior to holding a referendum, NMFS will publish an announcement in the **Federal Register** of the referendum, including an explanation of the reasons for the petition for termination filed under (a)(1) of this section and any other relevant information NMFS considers appropriate.

(4) If the referendum votes which are cast in favor of terminating the Council constitute a majority of the sector participants voting and the majority, in the period in (a)(2) of this section, collectively accounted for not less than 66 percent of the value of such fish and fish products that were handled during such period by the sector in paragraph (a)(1) of this section, NMFS will by order terminate the Council effective as of a date by which the affairs of the Council may be concluded on an orderly basis.

(5) NMFS initially will pay all costs of a referendum conducted in section § 270.23. Prior to conducting such a referendum, NMFS will require petitioners to post a bond or other security acceptable to NMFS in an amount which NMFS determines to be sufficient to pay any expenses incurred for the conduct of the referendum.

(6) If a referendum conducted under § 270.23 fails to result in the termination of the Council, NMFS will immediately recover the amount of the bond posted by the petitioners under § 270.23(a)(5).

(7) If a referendum conducted under this subsection results in the termination of the Council, NMFS will recover the expenses incurred for the conduct of the referendum from the account established by the Council. If the amount remaining in such account is insufficient for NMFS to recover all expenses incurred for the conduct of the referendum, NMFS will recover the balance of the expenses from the petitioners that posted a bond under paragraph (a)(5) of this section.

(b) *Payment of remaining funds.* If a Council is terminated under section § 270.23(a)(4), NMFS, after recovering all expenses incurred for the conduct of the referendum under paragraph (a) of this section, will take such action as is necessary and practicable to ensure that moneys remaining in the account established by the Council under § 270.17 are paid on a prorated basis to the sector participants from whom those moneys were collected under § 270.20.

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