

# Rules and Regulations

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 15 CFR Part 902

#### 50 CFR Part 270

[Docket No. 040720212-6238-02; 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:** Final rule.

**SUMMARY:** In response to renewed fishing industry support for marketing and promotion-related activities, NMFS enacts regulations to implement the Fish and Seafood Promotion Act (FSPA) of 1986 for the establishment, organization, and operation of Seafood Marketing Councils (Councils). Council marketing and promotion plans will 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. The intent of this rule is to increase benefits from domestic fisheries while maintaining consistency with NMFS' stewardship goals and mission statement.

**DATES:** Effective May 11, 2007.

**ADDRESSES:** Copies of this rule, its Regulatory Impact Review (RIR), and Initial Regulatory Flexibility Analysis (IRFA) are available from Christopher M. Moore, Chief, Federal-State Division,

Office of Sustainable Fisheries, NMFS, 1315 East West Highway, Silver Spring, MD 20910. The Final Regulatory Flexibility Analysis (FRFA) consists of the IRFA, public comments and responses, and the summary of impacts and alternatives contained in the Classification section of the preamble of this final rule.

Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule should be submitted to Christopher M. Moore at the address above or fax to (301) 713-0596 and to David Rostker 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, NMFS, telephone: (301) 713-2379 or E-mail:

[Gordon.J.Helm@noaa.gov](mailto:Gordon.J.Helm@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

#### Background

This final rule enacts regulations that implement the Fish and Seafood Promotion Act (FSPA) of 1986 (16 U.S.C. 4001 *et seq.*) to establish and operate Seafood Marketing Councils (Councils) in order to promote the consumption of domestically harvested seafood. A proposed rule requesting public comment on this action published in the **Federal Register** on January 24, 2006 (71 FR 3797). Public comments were accepted through February 23, 2006. A full discussion of the background of this rule was presented in the preamble to the proposed rule for this action and is not repeated here.

In summary, NMFS issued a final rule in 1989 enacting the FSPA, as it pertains to Councils, for one or more species of fish or fish products. The FSPA permitted the creation of Councils under a set of guidelines established by the Secretary of Commerce (Secretary), who delegated authority to NMFS, to establish a National Seafood Marketing Council (National Council). This National Council was authorized to fund applicants' 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 FSPA were removed from the Code of Federal Regulations (CFR) as part of the

government-wide Presidential regulatory reform effort. Although the implementing regulations were withdrawn from the CFR, the FSPA remains in effect.

The seafood promotion council rule addresses a market failure that reduces consumer demand for seafood as a result of the dissemination of partial, misleading or faulty information to consumers. In reality, no consumer can have perfect information about a seafood product. However, the dissemination of significantly incorrect information about a product can substantially lower consumer demand. In the case of seafood, this could reduce consumption of an important health-beneficial food. While the role of the federal government is not to promote seafood, it does have a responsibility to the consumer to ensure that the information presented to them is accurate and scientifically valid. The Secretary of Commerce or designee on the Seafood Promotion Council has the responsibility of approving or rejecting proposed marketing plans based on the accuracy and scientific validity of the information presented to the public.

An example of a case where partial information leads to a substantial reduction in the consumer demand for a seafood product includes recent marketplace confusion over contaminants such as mercury in seafood. The Food and Drug Administration and industry have promoted the health benefits of omega-3 fatty acids, but consumers also hear that many of the fish highest in omega-3 fatty acids also generally contain the higher levels of contaminants. This leads to consumer confusion over the degree to which the relative health benefits exceed the risk from contaminants and may result in consumers diverting their demand for protein to other products that may provide fewer health benefits or carry different health risks. While the seafood industry could tackle this imperfect information market failure on its own through promotional campaigns and consumer education, opponents could counter that the industry action is "self serving." To counter this perceived conflict of interest, the Federal government can offer, through the Seafood Promotion Act, a seal of approval to assure consumers that the

information being offered is accurate and reliable.

Industry has expressed to NMFS interest and support for seafood marketing and promotion-related activities. 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. In response to industry requests, NMFS promulgates regulations providing the foundation for the establishment, organization, and administrative practices of the Councils.

#### **Application to Establish A Council**

An application package submitted to NMFS to establish a Council must 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, Executive Order 12866, National Environmental Policy Act, and other information which may include, but is not limited to, an analysis of the primary, secondary, and tertiary effects of increasing demand for seafood. This information will be used by NMFS to determine if the proposed council or its marketing program is consistent with NMFS conservation goals, national standards, and other guidelines. The applicant will also have to demonstrate to NMFS that the council or its marketing program is consistent with Federal standards and guidelines on nutrition and health. For detailed information regarding application requirements, see the preamble to the proposed rule published January 24, 2006.

NMFS will determine if the application package is complete and complies with all of the requirements set forth in the implementing regulations, the FSPA of 1986, and other applicable law and make an initial decision on the application within 180 days of receipt.

#### **Referendum on Adoption of Proposed Charter and Council Appointments**

NMFS will conduct a referendum on the adoption of the proposed charter within 90 days of its initial affirmative decision. The referendum will 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. 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 will establish a Council and approve the proposed charter.

NMFS will initially pay all costs related to the conduct of the referendum to establish a Council. Once an application has been approved, NMFS will 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. After the referendum has been conducted, NMFS will inform the applicants of the exact cost. If the referendum is approved and the proposed charter is adopted, the Council will 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.

Within 30 days after a Council is established, NMFS will solicit nominations for Council members from the sector participants represented on the Council in accordance with the approved charter. The members of each Council should 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. NMFS will appoint the members of the Council from among the nominees within 60 days. The term for members would be 3 years. Council members will serve without compensation but would be reimbursed for their reasonable expenses incurred in performing their duties as members of the Council.

#### **Continued Operation of a Council**

Continued operation of a Council is 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 will not be the sole criteria for determining the effectiveness of a marketing program. The Council must demonstrate that the marketing plan will 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 should 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 NMFS 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, are programs that comply with this standard. NMFS retains the authority to determine if the continued operation of a Council would be in the public interest.

Councils will be required to: (1) meet performance standards approved by NMFS that demonstrate that marketing and promotion programs are effective in increasing consumer demand for species-specific seafood products; (2) conduct market assessments based on economic, market, social and demographic, and biological information as deemed necessary by NMFS; (3) submit annual plans and budgets for species-specific marketing and promotion plans; (4) submit progress reports on implementation of the marketing and promotion plans; and (5) submit financial reports with respect to the receipt and disbursement of funds entrusted to it. NMFS will require a complete audit report to be conducted by an independent public accountant and submitted to NMFS at the end of each fiscal year.

#### **Assessments**

Councils will be funded through voluntary assessment of the industry

represented on the Councils.

Assessments will be imposed on sector participants in the receiving sector or the importing sector or both as specified in the approved Council charter.

Assessment rates will 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 NMFS' concurrence, a Council will establish the applicable assessment for those seeking to rejoin or participate in a Council at a future time.

The Council will notify a sector participant subject to assessment that the assessment is due. The notification informs the participant 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. The notification also informs the participant of the right to request a refund of the assessment and provides deadlines for submission of the request.

Persons subject to an assessment will 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, a person who has 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.

Pursuant to 16 U.S.C. 4014, any sector participant who pays an assessment under the FSPA 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 will be established before any such assessment will be collected. Once a refund has been requested by a sector participant and paid by the Council, that sector participant will no longer participate in a referendum or other business of the Council during the remainder of the assessment rate period. However, if assessments are paid during a future assessment rate period and no refund is requested, that sector participant will 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 will 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 FSPA. 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. Furthermore, 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 will 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.

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.

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 (NOAA) or other recognized Federal standards and/or specifications for fish and fish products.

### Dissolution of a Council

In order to terminate a Council, at least three sector participants in any one sector must file a petition with NMFS. The petition should 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, will conduct a referendum for termination of the Council among all sector participants in that sector.

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 will by order terminate the Council effective as of a date by which the affairs of the Council should be concluded.

### Cost of Referendum

NMFS will initially pay all costs of this referendum. However, prior to conducting the 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.

If a Council is terminated, NMFS, after recovering all expenses incurred for the conduct of the referendum, will 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 will 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 will recover the balance of the expenses from the petitioners that posted a bond.

### Comments and Responses

Sixteen commenters provided 15 comments during the comment period for the proposed rule for this action. Commenters included commercial and recreational fishermen, processors, importers, distributors, marketers, senior scientists, environmental non-governmental organizations, and concerned citizens.

*Comment 1:* Several commenters were concerned that the establishment of Seafood Marketing Councils would promote over-fishing or favor the commercial industry at the expense of recreational fishing opportunities. Some of the species listed as candidates for a marketing program (e.g., some groupers,

snappers, cod, and flatfish) are already overexploited.

*Response:* Seafood Marketing Councils and their marketing plans are required to comply with NMFS' conservation and stewardship goals and objectives. Marketing Councils will not play any role in the management of fisheries through the setting of annual quotas, limitations on fishing effort or the allocation of fishery resources. Rebuilding plans for overexploited stocks will not be affected by this rule.

*Comment 2:* A number of commenters emphasized the importance of educating the public about the nutritional benefits of seafood and the risks associated with mercury and other contaminants.

*Response:* NMFS agrees that educating the public on the benefits and risks of eating seafood is important. The establishment of Seafood Marketing Councils is an opportunity to provide the public with accurate information about contaminant risks for vulnerable sub-populations and to document the health benefits associated with consuming seafood.

*Comment 3:* Several commenters were concerned that NMFS would intrude in the industry's marketing decisions. Commenters suggested that NMFS should not review or be expected to approve marketing plans developed by private sector experts. Additionally, they were concerned that Federal intervention in marketing efforts would strip away free market abilities.

*Response:* This rule is intended to create a voluntary program that operates under the control of its participants. NMFS' role is to ensure that scientifically accurate information is provided to consumers of seafood products and to ensure the smooth functioning of the Marketing Councils. Marketing Councils will improve the transmission of clear and accurate information about seafood products to consumers and thereby enhance free market capabilities to allocate and price seafood products.

*Comment 4:* Several non-governmental organizations emphasized the need for an Environmental Impact Statement (EIS).

*Response:* Based on preliminary analyses under the National Environmental Policy Act (NEPA), NMFS has concluded that preparation of an EIS is not necessary at this time because the effort is primarily educational and informational in nature. The promotional nature of the effort is such that it will not affect individually or cumulatively the quality of the human environment, or impact managed species, essential fish habitat, or species or their habitat protected

under the Endangered Species Act (16 U.S.C. 1531 *et seq.*). Further analysis under NEPA will be required before any Seafood Marketing Council is considered for approval by the Secretary. There is nothing in this action that would establish a precedent about future proposals.

*Comment 5:* Two non-governmental organizations were concerned that the Seafood Marketing Councils may raise seafood prices for U.S. consumers. Middle- to low-income families would be less likely to purchase seafood and receive its nutritional benefits.

*Response:* The market for fish products is diverse and complex. An increase in price for one commodity does not translate into an increase across all commodities. One commodity's price increase could result in a price decline for other seafood products. Many lower cost fish product alternatives will still exist for consumers even with a price increase in one product.

*Comment 6:* One commenter questioned why the regulations to create Seafood Marketing Councils were previously removed.

*Response:* The Fish and Seafood Promotion Act (FSPA) initially established a National Seafood Council funded by Congress. When the Congressional funds were exhausted, the seafood industry did not choose to continue the funding for the National Seafood Council, and it was deactivated. During that time, seafood product prices remained at premium levels and industry did not feel the need to fund generic marketing programs. Since the 1990s, the advance of aquaculture production worldwide has contributed to a decline in general prices for seafood products. Today, domestic commercial seafood harvesters are facing a financial crisis. Therefore, there is some renewed industry interest and support for seafood marketing and promotion-related activities.

*Comment 7:* Several commenters were concerned that the amount of required analytical documentation to apply is too burdensome for the industry, and that there would be little incentive for industry to participate in this program.

*Response:* The amount of analysis will vary according to the design and composition of each potential Seafood Marketing Council. NMFS staff will coordinate with applicants in the development of specific analysis requirements, subject to NMFS review and approval.

*Comment 8:* Some commenters were concerned about the associated costs to NMFS during a time when the agency struggles with meeting costs of

established programs. They requested that NMFS funds be allocated for issues like conservation and education, rather than seafood promotion.

*Response:* Expenses of operating the Marketing Councils are to be borne entirely by Council participants. These are voluntary, self-financed, industry-based, marketing programs that will not interfere with NMFS' ability to meet its mission goals.

*Comment 9:* One association suggested that the criteria for a referendum should be the participation of companies representing greater than fifty percent of the industry's revenue rather than the participation of more than half of the industry's participants.

*Response:* According to the FSPA, the majority of sector participants that vote in favor of establishing the Marketing Council must represent 66 percent of the value of the fish and fish products produced in the last six months by the sector petitioning to create a Marketing Council.

*Comment 10:* One commenter suggested that foreign seafood market development should not be among the responsibilities of the Marketing Councils, since this function is already filled by the U.S. Department of Agriculture.

*Response:* The focus of the Marketing Councils is on the domestic marketing of seafood. They are not intended to compete with other federal or state programs that have jurisdiction for international marketing of seafood products.

*Comment 11:* One commenter suggested that the rule include a provision that allows small, regional marketing organizations to organize under a Seafood Marketing Council if they so choose.

*Response:* Existing regional marketing organizations have a voice in the formation of any new Councils through the referendum process.

*Comment 12:* One commenting organization was concerned that the rule promotes a singular species message that may conflict with their broader multi-species message. Another commenter was concerned that the Marketing Councils would exclude some participants or finance the promotion of one type of seafood at the expense of another.

*Response:* Existing regional marketing councils can petition to form multi-species Councils. The merits of each potential Marketing Council will be considered on a case-by-case basis.

*Comment 13:* One commenting group was opposed to voluntary participation. If someone decides not to vote in the referendum, that person will not be

assessed even if the majority of other sector participants agree to the formation of a Seafood Marketing Council. In their view, if a Marketing Council is formed for a particular fish or fish product, assessments should be required of all sector participants.

*Response:* Recent decisions by the U.S. Supreme Court (*Johanns v. Livestock Marketing Association*; 544 U.S. 550; 2005 U.S. LEXIS 4343), while not specifically addressing voluntary participation in Seafood Marketing Councils, strongly indicated that a voluntary Marketing Council program would be preferable to mandatory participation in future councils.

*Comment 14:* One commenter suggested that the quality seal should not be used as an eco-label; this perception could be confusing to the public.

*Response:* The criteria supporting a quality seal will be subject to approval by the Secretary, and made known to the public. A quality seal will not be taken to mean environmentally friendly.

*Comment 15:* Several organizations believe the rule is inconsistent with NOAA's goal of decreasing the seafood trade deficit. They suggested that by allowing importers to participate in the Marketing Councils, NMFS would be providing an indirect subsidy for imported seafood, thus undermining a program such as offshore aquaculture that was intended to reduce U.S. dependence on seafood imports.

*Response:* The establishment of Seafood Marketing Councils will not be a Government subsidy to the commercial fishing industry, either foreign or domestic, since all costs will be funded by the Marketing Council's participants. It is not expected to contribute to the seafood trade deficit.

#### Changes From the Proposed Rule

Pursuant to the Paperwork Reduction Act (PRA), part 902 of title 15 CFR displays control numbers assigned to NMFS information collection requirements by the Office of Management and Budget (OMB). This part fulfills the requirements of section 3506(c)(1)(B)(I) of the PRA, which requires that agencies display a current control number assigned by the Director of OMB, for each agency information collection requirement. This final rule codifies OMB control numbers for 0648-0556 for § 270.

Under NOAA Administrative Order 205-11, 07/01, dated December 17, 1990, the Under Secretary for Oceans and Atmosphere has delegated authority to sign material for publication in the **Federal Register** to the Assistant Administrator for Fisheries, NOAA.

#### Classification

This final rule has been determined to be significant for purposes of Executive Order 12866.

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648-0556. The information collection requirements contained in this final 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. Public reporting burden for this portion of the collection requirement in 50 CFR part 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 final 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 are 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. The total time estimate is 1,127 hours. The total annual cost burden to respondents is expected to be

\$4,700 based on the need for outside auditing of Seafood Marketing Council financial records. Start up costs are \$3,200 and annual operating costs are \$1,500. Send comments regarding these burden estimates or any other aspects of the data collection to NMFS (see **ADDRESSES**) and by e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or fax to (202) 395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection-of-information displays a currently valid OMB control number.

#### Final Regulatory Flexibility Analysis

NMFS prepared this FRFA which incorporates the Initial Regulatory Flexibility Analysis (IRFA) published in the **Federal Register** on January 24, 2006 (71 FR 3797). The IRFA is not repeated here in its entirety. The need for and the objectives of the rule are explained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of the proposed rule and this final rule.

#### Description of and Estimate of the Number of Small Entities to Which the Final Rule Will Apply

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 \$4.0 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.

#### Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The information collection requirements contained in this final 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. The estimated reporting time for this portion of the collection requirement in 50 CFR part 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 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's submission of an objection petition 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.

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 final 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.

*A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments*

NMFS received 15 comments from 16 commenters on the proposed rule. Of these, seven comments were submitted either directly on the conclusions reached in the IRFA or on the economic viability of the rulemaking vis-a-vis small businesses.

*Comment A:* Several commenters believed that the promotion of fishery exports is already supported by the Foreign Agricultural Service (FAS), United States Department of Agriculture (USDA), and the proposed seafood marketing councils may overlap with rulemaking specific to the FAS.

*Response:* NMFS recognizes that there may be a slight overlap with rulemaking that may be specific to the functions of the FAS. However, NMFS believes that the overlaps are not significant and seafood marketing councils may provide additional benefits to constituents by providing unique services. Discussions between FAS and NMFS are ongoing to address any overlaps that could result from this rulemaking.

*Comment B:* One commenter believes that too much Federal involvement strips away free market abilities from any individual.

*Response:* The IRFA notes that the implementation of this final rule does not guarantee that all firms will benefit equally from a seafood promotion program. However, NMFS believes that increasing the demand for seafood products would only serve to enhance the markets for seafood via increased demand and increased pricing power.

*Comment C:* One commenter believes the Council should not give money to one seafood at the expense of a different type.

*Response:* NMFS is requiring seafood councils, as part of their planning process, to submit an economic analysis that would support Regulatory Flexibility Act (RFA) and Executive Order 12866 (E.O. 12866) analysis used for rulemaking to determine impacts to other seafood products. NMFS will not support marketing plans for one product that would significantly affect the profitability of firms operating in another seafood sector of the economy. If the analysis indicates potential impacts to small entities, the Agency will attempt to mitigate to the extent

practicable adverse impacts to other sectors that may accrue.

*Comment D:* One commenter disagreed with the Agency's assertion that the free rider problem would be less significant for fisheries than agricultural products.

*Response:* As noted in the IRFA, NMFS believes that relative price changes would be less severe in situations where increased supplies from the aggregate of firms respond to higher demand (also known as an elastic demand for most fishery products). However, NMFS did not state that a free rider problem would not exist and pointed out that product differentiation could alleviate much of the perceived problem.

*Comment E:* One commenter believed that requiring analyses that would support RFA or E.O. 12866 analyses would be burdensome.

*Response:* NMFS agrees that this would be time consuming but the benefits of performing these analyses would far outweigh the costs in regard to the ability to estimate the effects of marketing plans on small entities, producers of other seafood and agricultural products, and the general economy as well.

*Comment F:* One commenter representing a regional fisheries marketing council noted that direct competition from species-specific Federally-guided councils would directly compete against their products and dilute their position in the marketplace.

*Response:* See Response to Comment C.

*Comment G:* One commenter representing a fishing industry sector believes that all firms identified as part of a sector should pay a mandatory fee regardless of whether they desire to participate in a council or not and further asserts that voluntary or "de facto voluntary" formation of seafood promotion councils is not what the Fish and Seafood Promotion Act (FSPA) intended.

*Response:* NMFS specifically requested comments on whether the amount of funds collected through "de facto" voluntary assessments after considering administrative costs, program costs, the effect of free riders, and other economic considerations would enable Councils to develop and maintain marketing, assessment, and research programs sufficient to benefit both the industry and those firms choosing to pay "de facto" voluntary assessments. There were no comments received on this specific solicitation.

*Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes*

There are two major provisions of this final rule that will minimize economic impacts to small entities. Firstly, the Agency has provided a means for a small entity to forego a mandatory assessment fee even though they may be listed as a participant for a proposed Council. By making Council participation voluntary, small businesses that believe it will not be cost effective to participate in a Council would not be required to do so. Consequently, these businesses could avoid additional cost of sales that could reduce or squeeze their overall profit margin. Secondly, the provision that will require Councils to submit, to NMFS, economic analysis of the impacts to small entities of proposed marketing and promotion plans will allow the Agency to mitigate to the extent practicable any adverse impacts that may accrue to participants in a Council, other fishery sectors, or non-fishery sectors.

*Small Entity Compliance Guide*

Section 212 of the Small Business Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. There are no compliance issues directly associated with the implementation of this rule. However, when a petition to form a Council is received by the Agency, a copy of this published final rule with a cover letter informing the petitioners of administrative requirements for initiating the Council process including requirements for conducting a referendum will be provided to the petitioners. The cover letter will also list Agency contacts responsible the Seafood Marketing Council program. Copies of this final rule and cover letter are available from the Office of Sustainable Fisheries, NMFS (see ADDRESSES).

**List of Subjects**

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 270

Administrative practice and procedure, Fish, Marketing, Seafood.

Dated: April 4, 2007.

**William T. Hogarth,**

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

■ For the reasons set out in the preamble, 15 CFR Chapter IX and 50 CFR Chapter II are amended as follows:

**15 CFR Chapter IX**

**PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS**

■ 1. The authority citation for part 902 continues to read as follows:

**Authority:** 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, the table in paragraph (b) under "50 CFR" is amended by adding new entries to read as follows:

**§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act**

\* \* \* \* \*  
(b) \* \* \*

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
* * * * *	*
50 CFR	*
270.3	-0556
270.6	-0556
270.8	-0556
270.10	-0556
270.12	-0556
270.13	-0556
270.14	-0556
270.15	-0556
270.19	-0556
270.20	-0556
270.23	-0556
* * * * *	*

■ 3. A new subchapter H consisting of part 270 is added to Chapter II to read as follows:

**50 CFR Chapter II**

**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.
- 270.17 Authority to impose assessments.
- 270.18 Method of imposing assessments.
- 270.19 Notice of assessment.
- 270.20 Payment of assessments.
- 270.21 Petition of objection.
- 270.22 Refunds.
- 270.23 Dissolution of Councils.

**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 (Public Law 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, MD 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 of publication in the **Federal Register**, 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 paragraph (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 paragraph(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 part 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, persons 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 paragraph (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 paragraph (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 of publication 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 § 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. [FR Doc. E7-6751 Filed 4-10-07; 8:45 am] BILLING CODE 3510-22-S

**TENNESSEE VALLEY AUTHORITY**

**18 CFR Part 1310**

**Administrative Cost Recovery**

**AGENCY:** Tennessee Valley Authority (TVA).

**ACTION:** Final rule.

**SUMMARY:** TVA is amending its administrative cost recovery regulations by eliminating cost recovery exemptions for the following: Conveyances of land pursuant to Section 4(k)(d) of the Tennessee Valley Authority Act of 1933, as amended (16 U.S.C. 831c(k)(d)); TVA phosphate land transactions; and permits and licenses for use of TVA land by distributors of TVA power.

The implementation of this rule amendment will allow TVA to recover more of its administrative costs incurred in processing certain actions from those who directly benefit from the actions.

**EFFECTIVE DATE:** April 11, 2007.

**FOR FURTHER INFORMATION CONTACT:** Nancy Greer, Senior Manager, Process and Performance Management, (865) 632-3339.

**SUPPLEMENTARY INFORMATION:** In order to help ensure that TVA land management and permitting activities are self-sustaining to the full extent possible, the agency is amending its administrative cost recovery regulations by eliminating certain mandatory cost recovery exemptions. This determination is consistent with the objectives of increasing efficiency and recovering the cost of government services from those who most directly benefit from the services.

TVA is amending its administrative cost recovery regulation by eliminating the following exemptions: Conveyances of land pursuant to Section 4(k)(d) of the Tennessee Valley Authority Act of 1933, as amended (16 U.S.C. 831c(k)(d)); TVA phosphate land transactions; and permits and licenses for use of TVA land by distributors of TVA power.

TVA is also amending the rule to reflect new organizational changes within the agency. The terms "Vice President of Land Management" or "Manager of Power Properties" are to be amended to read "Senior Manager of the TVA organization that manages the land."

TVA published a proposed rule on April 14, 2006. TVA considers this final

rule to be a nonsubstantive rule relating to agency management and public property pursuant to 5 U.S.C. 553(a)(2). However, TVA provided a thirty day public comment period to hear from any interested parties. No comments were received. Since this rule relates to services provided by the agency, a regulatory flexibility analysis is not required.

**List of Subjects in 18 CFR Part 1310**

Government property, Hunting.

For the reasons set out in the preamble, TVA amends 18 CFR part 1310 as follows:

**PART 1310—ADMINISTRATIVE COST RECOVERY**

■ 1. The authority citation for part 1310 continues to read as follows:

**Authority:** 16 U.S.C. 831-831dd; 31 U.S.C. 9701.

■ 2. Revise paragraphs (a) introductory text and (b) of § 1310.2 to read as follows:

**§ 1310.2 Application.**

(a) *General.* TVA will undertake the following actions only upon the condition that the applicant pay to TVA such administrative charges as the Senior Manager of the TVA organization that administers the land or permit being considered (hereinafter "responsible land manager"), as appropriate, shall assess in accordance with § 1310.3; provided, however, that the responsible land manager may waive payment where he/she determines that there is a corresponding benefit to TVA or that such waiver is otherwise in the public interest.

\* \* \* \* \*

(b) *Exemption.* An administrative charge shall not be made for the following actions:

(1) Releases of unneeded mineral right options.

(2) TVA mineral transactions.

\* \* \* \* \*

**Authority:** 16 U.S.C. 831-831dd (2000 & Supp. III 2003).

Dated: March 2, 2007.

**Kathryn J. Jackson,**  
*Executive Vice President, River System Operations & Environment and Environmental Executive, Tennessee Valley Authority.*

[FR Doc. 07-1702 Filed 4-10-07; 8:45 am]

**BILLING CODE 8120-08-M**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 524**

**Ophthalmic and Topical Dosage Form New Animal Drugs; Mupirocin Ointment**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of an abbreviated new animal drug application (ANADA) filed by Altana, Inc. The ANADA provides for veterinary prescription use of mupirocin ointment for the treatment of bacterial skin infections in dogs.

**DATES:** This rule is effective April 11, 2007.

**FOR FURTHER INFORMATION CONTACT:** John K. Harshman, Center for Veterinary Medicine (HFV-104), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-827-0169, e-mail: [john.harshman@fda.hhs.gov](mailto:john.harshman@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Altana, Inc., 60 Baylis Rd., Melville, NY 11747, filed ANADA 200-418 that provides for veterinary prescription use of MURICIN (mupirocin) Ointment 2% for the treatment of bacterial skin infections in dogs. Altana, Inc.'s MURICIN Ointment 2% is approved as a generic copy of Pfizer, Inc.'s BACTODERM Ointment approved under new animal drug application (NADA) 140-839. The ANADA is approved as of March 8, 2007, and the regulations are amended in 21 CFR 524.1465 to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because