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Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod Allocations in the Bering Sea and Aleutian Islands Management Area; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

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[Docket No. 0612242903–7445–03; I.D. 112006I]

RIN 0648–AU48

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod Allocations in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to implement Amendment 85 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) as partially approved by NMFS, and to implement recent changes to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This final rule modifies the current allocations of Bering Sea and Aleutian Islands management area (BSAI) Pacific cod total allowable catch (TAC) among various harvest sectors and seasonal apportionments thereof, establishes a hierarchy for reallocating projected unharvested amounts of Pacific cod from certain sectors to other sectors, revises catcher/processor (CP) sector definitions, modifies the management of Pacific cod incidental catch that occurs in other groundfish fisheries, eliminates the Pacific cod nonspecified reserve, subdivides the annual prohibited species catch (PSC) limits currently apportioned to the Pacific cod hook-and-line gear fisheries between the catcher vessel (CV) and CP sectors, and modifies the sideboard restrictions for American Fisheries Act (AFA) CP vessels. In addition, this final rule increases the percentage of the BSAI Pacific cod TAC apportioned to the Community Development Quota (CDQ) Program. The proposed rule for Amendment 85 included regulations that would have subdivided the annual PSC limits currently apportioned to the Pacific cod trawl fisheries among trawl sectors. However, NMFS disapproved these regulations. Therefore, this final rule does not subdivide the annual PSC limits for Pacific cod trawl fisheries among trawl sectors. This final rule is necessary to implement Amendment 85 and reduce uncertainty about the availability of yearly harvests within sectors caused by reallocations and maintain stability among sectors in the BSAI Pacific cod fishery. This final rule also is necessary to partially implement recent changes to the Magnuson-Stevens Act that require a total allocation of 10.7 percent of the TAC of each directed fishery to the CDQ Program starting January 1, 2008. This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Act, the FMP, and other applicable laws.

DATES: Effective January 1, 2008.

ADDRESSES: Copies of Amendment 85 and the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this action are available by mail from NMFS, Alaska Region, P. O. Box 21668, Juneau, AK 99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK; or via the Internet at the NMFS Alaska Region website at *http://www.fakr.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Becky Carls, 907–586–7228 or *becky.carls@noaa.gov*.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fisheries in the exclusive economic zone of the BSAI under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600 and 679.

Background

Amendment 85 was adopted by the Council in April 2006 to modify the current allocations of BSAI Pacific cod among various harvesting sectors. Currently, the BSAI Pacific cod non-CDQ TAC is fully distributed among the following eight competing harvest sectors: jig, fixed gear (pot and hook-and-line gear) CVs less than 60 ft (<18.3 m) length overall (LOA), hook-and-line CVs greater than or equal to 60 ft (≥18.3 m) LOA, hook-and-line catcher/processor vessels (CPs), pot CVs less than 60 ft (≥18.3 m) LOA, pot CPs, trawl CPs, and trawl CVs. Several FMP amendments, implemented beginning in 1994, have allocated Pacific cod among these sectors. Additional background on the prior history of Pacific cod allocations among different fishery sectors and the development of Amendment 85 is contained in the preamble to the proposed rule (72 FR 5654; February 7, 2007).

Amendment 85 modifies the non-CDQ sector allocations currently in place to better reflect historical dependency and use by sector of the Pacific cod resource. The allocations were based in part on each sector's historical retained catch in addition to socioeconomic and community concerns. One of the fundamental issues identified in the Council's problem statement was the need to revise the existing allocations to better reflect historical retained catch by sector, thus reducing the need for frequent and significant reallocations of quota toward the end of the year from sectors that are unable or otherwise do not intend to harvest their entire allocation. However, the allocations to the small boat sectors are intended to expand entry-level, local opportunities in the BSAI Pacific cod fishery. Other than providing for this expansion, the allocations of Pacific cod non-CDQ TAC are intended to formally institutionalize the historical pattern of utilization of this resource.

Amendment 85 and the proposed rule to implement Amendment 85 as originally submitted by the Council included provisions for the CDQ Program that allocated 10 percent of the Pacific cod TAC to the CDQ Program as a directed fishing allocation, created an incidental catch allowance of Pacific cod for the CDQ Program, and referred to the Coast Guard and Maritime Transportation Act of 2006, Public Law 109–241 (Coast Guard Act) as the basis for changes to the CDQ Program Pacific cod allocation. These provisions were consistent with requirements set forth in the Magnuson-Stevens Act, as amended by the Coast Guard Act, at the time Amendment 85 was submitted by the Council for Secretarial review. The Notice of Availability (NOA) for Amendment 85 was published in the **Federal Register** on December 7, 2006 (71 FR 70943), with a 60–day comment period that ended February 5, 2007.

During review by the Secretary of Commerce (Secretary) of Amendment 85, the CDQ provisions in the Magnuson-Stevens Act were amended once again by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, Public Law 109–479 (Magnuson-Stevens Reauthorization Act), enacted on January 11, 2007. The Magnuson-Stevens Act now requires that allocations to the CDQ Program, including Pacific cod, increase to ''a total allocation (directed and nontarget combined) of 10.7 percent effective January 1, 2008,'' and that the total allocation may not be exceeded. As a result of the Magnuson-Stevens Reauthorization Act, the portions of Amendment 85 to the FMP that addressed the CDQ Program provisions were no longer consistent with the

Magnuson-Stevens Act. On March 7, 2007, the Secretary partially approved Amendment 85, disapproving the CDQ Program provisions as inconsistent with the Magnuson-Stevens Act. As approved, Amendment 85 revised the current BSAI Pacific cod allocations of TAC among various non-CDQ harvest sectors (Table 1), changed incidental catch allowances, removed the groundfish reserve for Pacific cod, and added a new appendix to the FMP.

Shortly after enactment of the Magnuson-Stevens Reauthorization Act, NMFS determined that the CDQ portions of the proposed rule as submitted by the Council were inconsistent with the newly amended Magnuson-Stevens Act, and returned the rule to the Council for revision pursuant to section 304(b) of the Magnuson-Stevens Act. The Council revised the CDQ portions of the proposed rule for Amendment 85 to incorporate the changes brought about by the Magnuson-Stevens Reauthorization Act, including a 10.7–percent allocation of Pacific cod to the CDQ Program. The Council submitted the revised proposed rule to NMFS, and it was published in the **Federal Register** on February 7, 2007 (72 FR 5654). The 45–day comment period on the proposed rule ended March 26, 2007. NMFS received a total of 16 letters on Amendment 85 and the proposed rule that contained 79 unique comments. A summary of these comments and the responses by NMFS are provided under Response to Comments below.

Elements of the Final Rule

A detailed review of the provisions of Amendment 85 and its implementing rule is provided in the preamble to the proposed rule (72 FR 5654; February 7, 2007), and is not repeated here. The proposed rule is available via the Internet and from NMFS (see ADDRESSES). The following provides a list and brief review of the regulatory changes made by this final rule to the management of the BSAI Pacific cod fishery. NMFS' rationale for approving portions of Amendment 85 and the regulatory provisions in this final rule is contained in the agency's response to comments.

- Increase the percentage of the BSAI Pacific cod TAC apportioned to the CDQ Program to 10.7 percent;
- Revise the allocations of BSAI Pacific cod non-CDQ TAC among various gear sectors;
- Modify the management of Pacific cod incidental catch that occurs in other groundfish fisheries;
- Eliminate the Pacific cod nonspecified reserve;
- Establish a hierarchy for the reallocation of projected unused sector allocations to other ectors;
- Adjust the seasonal allowances of Pacific cod to various sectors;
- Subdivide among sectors the annual PSC limits apportioned to the Pacific cod hook-and-line gear fisheries;
- Modify the sideboard restrictions for Pacific cod that are applied to the CP vessels listed as eligible under the AFA; and
- Revise the definition for AFA trawl CP and add definitions for hook-and-line CP, non-AFA trawl CP, and pot CP.

As described above, the Magnuson-Stevens Act now requires that 10.7 percent of the annual Pacific cod TAC be allocated to the CDQ reserve for directed and nontarget fishing combined, effective January 1, 2008. The 10.7 percent Pacific cod allocation to the CDQ reserve will be established annually in the harvest specifications process required under § 79.20(c). The CDQ reserve will continue to be deducted from the Pacific cod TAC before the remaining Pacific cod TAC is allocated to the other fishing sectors. All catch of Pacific cod by any vessel that is groundfish CDQ fishing, and by any vessel ≥60 ft (18.3 m) LOA that is halibut CDQ fishing, will continue to accrue against the CDQ group's annual allocation of Pacific cod and the CDQ groups will continue to be prohibited from exceeding their annual allocations of Pacific cod.

Nine individual non-CDQ sectors will receive separate BSAI Pacific cod allocations. The allocations to the identified sectors were selected using retained legal catch history, including fishmeal, from 1995 through 2003, and other socioeconomic and community considerations. The allocations better reflect historical dependency and use by each sector, with specific consideration to allow for additional growth in the small boat, entry-level sectors. These allocations are listed in Table 1. Because Pacific cod has been harvested by the current sectors since the beginning of 2007 under the current allocation scheme, and the number of sectors and the overall amount of Pacific cod available to those sectors as an allocation and by season will change with this amendment, the Amendment 85 sector allocations cannot be implemented mid-year. Therefore, the allocations, and the final rule implementing Amendment 85, will be effective January 1, 2008. NMFS will amend the 2007–2008 harvest specifications to reflect the changes to the Pacific cod TAC allocations.

TABLE 1. PERCENT SECTOR ALLOCATIONS OF PACIFIC COD NON-CDQ TAC

Sector	% Allocation
Jig vessels	1.4
Hook-and-line/pot CV <60 ft (18.3 m) LOA	2.0
Hook-and-line CV ≥60 ft (18.3 m) LOA	0.2
Hook-and-line CP	48.7
Pot CV ≥60 ft (18.3 m) LOA	8.4
Pot CP	1.5
AFA trawl CP	2.3
(8) Non AFA trawl CP	13.4
Trawl CV	22.1

Currently, NMFS sets aside an amount of Pacific cod from some sectors' allocations as an incidental catch allowance for use by those sectors when they are directed fishing for groundfish other than Pacific cod. NMFS establishes an incidental catch allowance either through the annual harvest specifications process or inseason. Under this final rule, an incidental catch allowance for the fixed gear sectors will continue to be established at the beginning of the fishing year by the Regional Administrator during the annual harvest specifications process. The incidental catch allowance for the fixed gear sectors typically has been set at 500 mt. The trawl sectors currently do not have an incidental catch allowance established at the beginning of the fishing year. NMFS has not specified an incidental catch allowance for Pacific cod in the trawl fisheries in the recent past because the trawl sectors typically do not catch an amount of Pacific cod that would necessitate a directed fishing prohibition. Also, the seasonal apportionments to the trawl sectors have ensured that a sufficient amount of Pacific cod is left for incidental catch in groundfish trawl fisheries other than Pacific cod later in the year. However, because NMFS anticipates that the trawl sectors will fully harvest the Pacific cod allocations under Amendment 85, NMFS also anticipates it will need to establish an incidental catch allowance for each trawl sector. Under this final rule, each trawl sector will have a separate incidental catch allowance so that no trawl sector can erode another trawl sector's total allocation and NMFS will develop incidental catch

allowances for the trawl sectors on an inseason basis, rather than through the annual harvest specification process. Determining incidental catch needs inseason as fisheries progress will provide NMFS with more flexibility to adjust incidental catch needs for each trawl sector as a trawl sector's needs change.

Current regulations for the annual harvest specifications process require that 15 percent of the BSAI TAC for Pacific cod be placed in the nonspecified reserve. Half of the nonspecified reserve, or 7.5 percent of TAC, is apportioned to the groundfish CDQ reserve. NMFS typically apportions the remainder of the Pacific cod reserve back to the non-CDQ Pacific cod TAC because U.S. fishing vessels have demonstrated the capacity to catch the full TAC allocation. The Council and NMFS determined that the Pacific cod reserve is no longer needed because a direct allocation to the CDQ reserve is specified, and because the Pacific cod TAC is fully allocated among CDQ and non-CDQ harvesting sectors and is fully harvested. Therefore, this final rule removes regulations requiring that 15 percent of the Pacific cod TAC be placed in the nonspecified reserve during a fishing year.

Under current regulations, if the Regional Administrator determines that a sector will be unable to harvest the entire amount of Pacific cod allocated to that sector, NMFS reallocates the projected unused amount of Pacific cod to other sectors to obtain optimum yield from the BSAI Pacific cod fishery. This procedure will continue under this final rule, but reallocation decisions will be based in part on the new reallocation hierarchy established in this final rule, and also will take into account the capability of a sector to harvest an additional amount of Pacific cod. The reallocation hierarchy is fully described in the proposed rule and in the regulatory text below; therefore, that description is not repeated here. In general, NMFS will reallocate projected unused allocations in any inshore sector (i.e., CV sectors) primarily to other inshore sectors before reallocating that amount to any offshore sector (i.e., CP sectors) and, secondarily, within a gear type before reallocating that amount to another gear type. This reallocation hierarchy is consistent with the Council's decision to increase harvest opportunities for fleets delivering shoreside and represents a reasonable balance of National Standard 4, that allocations should be fair and equitable to all fishermen, and National Standard 8, to consider the importance of fishery resources to fishing communities. Although the intent of Amendment 85 is to revise sector allocations to better reflect historic dependence and use by sector and thus reduce the frequency and amount of inseason reallocations, the Council and the public noted that some reallocations are likely to continue.

Under existing regulations, Pacific cod allocations are further apportioned by season for most gear sectors to protect prey availability for Steller sea lions (SSLs). The overall BSAI Pacific cod fishery is limited to seasonal percentages of TAC of no more than 70 percent between January 1 and June 10, and 30 percent between June 10 and December 31. Because this final rule modifies non-CDQ sector allocations, this final rule also modifies the seasonal allowances applicable to these sectors to maintain the overall 70/30 seasonal split for all gear types combined and to maintain, to the extent possible, the current percentage of the Pacific cod TAC harvested in the first half of the year by the non-CDQ sectors. Therefore, this final rule adjusts the seasonal allowances for each sector in response to the changes in sector allocations. This final rule also changes the jig sector seasonal allowances from 40–20–40 to 60–20–20. For the Pacific cod allocation to the CDQ Program, this final rule adds a prohibition to § 679.7(d) to clarify the current management measure that the CDQ groups are prohibited from exceeding the seasonal allowances of Pacific cod that are appropriate for the gear types that they use to catch Pacific cod CDQ. Also, the regulations regarding CDQ trawl seasonal allowances are revised to maintain the division between trawl CP and trawl CV that exists in the current regulations. The BSAI Pacific cod sector allowances for each sector, including CDQ, by season, as those seasons are specified under § 679.23(e)(5), are listed in Table 2.

TABLE 2. SEASONAL ALLOWANCES OF BSAI PACIFIC COD EXPRESSED AS A PERCENTAGE OF EACH SECTOR=S TOTAL ALLOCATION

Gear Type	A season	B season	C season
CDQ Trawl	60%	20%	20%
CDQ Trawl CV	70%	10%	20%
CDQ Trawl CP	50%	30%	20%
Non-CDQ trawl CV	74%	11%	15%
Non-CDQ trawl CP	75%	25%	0%
CDQ Hook-and-line CP, and hook-and-line CV ≥60 ft (18.3 m) LOA	60%	40%	no C season
Non-CDQ hook-and-line CP, hook-and-line CV ≥60 ft (18.3 m) LOA, pot CP, and pot CV ≥60 ft (18.3 m) LOA	51%	49%	no C season
CDQ jig vessels	40%	20%	40%
Non-CDQ jig vessels	60%	20%	20%
All other nontrawl vessels	no seasonal allowance	no seasonal allowance	no seasonal allowance

Total non-CDQ percentage	1/1 - 6/10 = 68%	6/10 - 12/31 = 32%
Total CDQ and non-CDQ percentage	1/1 - 6/10 = 67%	6/10 - 12/31 = 33%

Any unused portion of a seasonal allowance of Pacific cod from any sector other than the jig sector will continue to be reallocated to that sector's remaining seasons during the current fishing year. The Regional Administrator will continue to reallocate any projected unused portion of a seasonal allowance of Pacific cod from the jig sector to the <60 ft (18.3 m) LOA fixed gear CV sector. Under this final rule, NMFS will reallocate a projected unused portion of the seasonal allowance for the jig sector C season on or about September 1 of each year, if possible, to provide the last rollover from the jig sector when the <60 ft (18.3 m) LOA fixed gear CV sector may still be on the fishing grounds.

The total amount of nontrawl halibut PSC for the non-CDQ fisheries currently is 833 mt of mortality. Typically, 775 mt is apportioned to the hook-and-line Pacific cod fishery and 58 mt to other nontrawl groundfish fisheries. This final rule does not change the total amount of nontrawl halibut PSC mortality allocated to the hook-and-line Pacific cod sectors or to the other nontrawl groundfish fisheries.

Currently, the annual Pacific cod hook-and-line halibut PSC allowance is apportioned among three seasons. A seasonal halibut PSC allowance in the second season has not been specified in recent years; thus, a hook-and-line directed fishery for Pacific cod has not operated in the summer months. Halibut bycatch rates are typically high during the second season. The hook-and-line CP sector generally supports not providing a halibut PSC limit in the second season because the high halibut bycatch rates could close the directed Pacific cod fishery prior to the allocation being fully harvested. However, the hook-and-line CV sector, which is constrained by the same PSC limit, is comprised of smaller vessels with slower catch rates and a relatively small Pacific cod allocation compared to the hook-and-line CP sector. To enable the hook-and-line CVs to fish for Pacific cod in the summer months when the weather is more favorable for these smaller vessels, this final rule divides the halibut PSC allowance annually specified for the hook-and-line Pacific cod fishery between two fishery sectors: the hook-and-line CP sector and the hook-and-line CV sector (CVs ≥60 ft (18.3 m) LOA and CVs <60 ft (18.3 m) LOA combined). NMFS can provide varying amounts of halibut PSC by season to each sector, tailoring PSC limits to suit the needs and timing of each sector. NMFS decision to disapprove the proposed subdivision of annual PSC limits apportioned to the Pacific cod trawl gear fisheries is explained below.

Sideboards are harvesting and processing restrictions that were placed on AFA trawl CVs and AFA trawl CPs operating in the BSAI pollock fishery to protect the interests of other fishermen and processors that did not benefit directly from the AFA. This final rule removes the sideboard limits of BSAI Pacific cod for the AFA trawl CPs. The establishment of a separate Pacific cod allocation to this sector negates the need for the BSAI Pacific cod sideboard which protects the historic share of the non-AFA trawl CP sector from being eroded by the AFA trawl CP vessels. For the same reason, BSAI Pacific cod is added to the list of exceptions to the groundfish species or species groups for which sideboard harvest limits are calculated for the listed AFA trawl CPs. The halibut and crab PSC sideboard limits for both AFA sectors are maintained as currently specified in regulations.

This final rule modifies or adds definitions for CPs in accordance with the Consolidated Appropriations Act, 2005 (Public Law 108–447). This final rule revises the definition for AFA trawl CP and adds new definitions for hook-and-line CP, non-AFA trawl CP (also known as the head-and-gut sector), and pot CP. The new definition for hook-and-line CP is substantively consistent with the Consolidated Appropriations Act's definition for the longline CP subsector. Also, the definition for ''CDQ reserve'' is revised to change and update terms and to generalize the cross reference. All of the various housekeeping revisions described in the proposed rule also are made by this final rule.

Element of the Proposed Rule Not Approved

NMFS did not approve one regulatory change recommended by the Council and included in the proposed rule. For reasons explained below, NMFS did not approve the Council's recommendation to further apportion the Pacific cod trawl fishery crab and halibut PSC allowances among the trawl sectors.

PSC regulations pertain to certain species caught in the process of fishing for groundfish that must be accounted for, but cannot be retained unless the vessel participates in the halibut and salmon donation program at § 679.26. Regulations at § 679.21 establish PSC limits for Pacific halibut, three species of crab, salmon, and herring in the BSAI trawl groundfish fisheries, and a separate Pacific halibut PSC limit for nontrawl gear. These regulations also establish allocations of each PSC limit between the CDQ and non-CDQ fisheries and a process for apportioning PSC among non-CDQ fisheries.

Currently, the total amount of halibut PSC mortality for trawl gear in the non-CDQ fisheries is apportioned in the annual harvest specifications process among four fisheries, including the Pacific cod fishery. The current process of fishery apportionment will continue under this final rule. Generally, about 1,400 mt of halibut PSC mortality is apportioned annually to the BSAI Pacific cod trawl fishery, but this amount and actual use can vary from year to year. Crab PSC limits fluctuate as resource abundance fluctuates.

In recent years, the trawl CV and trawl CP sectors' directed Pacific cod fisheries have closed most often (1) due to reaching the seasonal TAC, (2) to avoid exceeding specified halibut PSC allowances, or (3) because a fishing season has ended. Reaching a crab PSC limit results in closure of a specific area to directed fishing. Unlike reaching a halibut PSC limit, reaching a crab PSC limit typically does not close BSAI Pacific cod trawl fisheries, although occasional crab PSC closures have occurred in the past.

The Council recommended that the amount of halibut and crab PSC that would be apportioned to each trawl sector for the Pacific cod trawl fishery under this action be proportional to each sector's percentage of Pacific cod harvested in the Pacific cod target fishery from 1999 through 2003, including Pacific cod retained for meal production. Accordingly, the proposed rule divided the annual PSC allowance of halibut and crab specified for the Pacific cod trawl fishery category among the trawl sectors as follows: 70.7 percent for trawl CVs; 4.4 percent for AFA trawl CPs; and 24.9 percent for non-AFA trawl CPs. Because the AFA and non-AFA trawl CVs would share a Pacific cod allocation, the Council decided that this sector also should receive combined halibut and crab PSC allowances.

The Council intended the apportionment of halibut and crab PSC among the trawl gear sectors that target Pacific cod to allow each sector to better plan its operations by being able to manage its PSC use during the fishing year without its PSC being eroded by another sector. Because the Council's apportionment of halibut and crab PSC was proportional to a trawl sector's harvest of Pacific cod in a target fishery, those sectors that harvested Pacific cod primarily as a target species, rather than as a species caught incidentally in other groundfish fisheries, would have received proportionally higher PSC allowances. Under this apportionment,

the trawl CV and AFA trawl CP sectors would have received higher PSC allowances than they have historically used or needed, and the non-AFA trawl CP sector would have received significantly less PSC than it has historically used or needed to optimize groundfish harvest under current PSC limits.

During its deliberation on adoption of Amendment 85, the Council understood and acknowledged that the percentage of halibut and crab PSC apportioned to the non-AFA trawl CP sector could be constraining compared to average historic use, but chose not to modify its decision. The Council determined that the amount of PSC that would be apportioned to the non-AFA trawl CP sector would fall within the range of what this sector has caught historically.

Under the Council's recommendation and the proposed rule, the non-AFA trawl CP sector would have received 22 percent less halibut PSC and 37 percent less Zone 1 bairdi (*Chionoecetes bairdi*) crab PSC than it has used historically to prosecute its directed Pacific cod fishery and only about the average amount of opilio (*Chionoecetes opilio*) crab PSC. Conversely, the AFA trawl CP and the trawl CV sectors would have received about 200 percent and 40 percent more halibut PSC, 19 percent and 116 percent more bairdi crab PSC, and 3,144 percent and 20,904 percent more opilio crab PSC, respectively, than these sectors have used historically.

Regulations implementing the FMP must be consistent with the Magnuson-Stevens Act, including the national standards, and other applicable law. NMFS determined that further apportionment of halibut and crab PSC among Pacific cod trawl sectors as proposed by the Council is inconsistent with National Standards 1, 4, and 9 of the Magnuson-Stevens Act. National Standard 1 requires that fishery management measures prevent overfishing while maintaining optimum yield from each fishery, National Standard 4 requires allocations to be fair and equitable among affected fishermen, and National Standard 9 requires that bycatch and the mortality of any bycatch be minimized to the extent practicable. Under the existing open access management of the non-AFA Pacific cod trawl fishery, NMFS determined that the non-AFA trawl CP sector is unlikely to be able to harvest its entire allocation of Pacific cod with the significant reductions in the proposed amount of halibut and crab PSC as detailed above. This would result in a de facto reduction in the non-AFA trawl CP Pacific cod allocation and would likely reduce this sector's ability to harvest other targeted species. The Council did not provide any explanation as to why an additional reduction in this sector's harvest of Pacific cod and other target species not the subject of this final rule is appropriate or consistent with National Standard 4 or other applicable law. Additionally, because the amount of PSC allocated to the AFA trawl CP and the trawl CV sectors is so much greater than their historical needs, the proposed PSC allocations to these sectors may create a disincentive for these sectors to minimize their bycatch of prohibited species, which is not consistent with National Standard 9. Finally, because the non-AFA trawl CP sector harvests a significant majority of species other than pollock and Pacific cod, an inconsistency with National Standard 1 exists. The non-AFA trawl CP sector would likely not have PSC remaining from its Pacific cod fishery that could then be used to achieve optimum yield from its other BSAI groundfish fisheries.

Based on the reasons discussed above, therefore, NMFS disapproved the apportionment of the annual PSC allowances of halibut and crab mortality among the Pacific cod trawl gear sectors. Regulations pertaining to this element are not included in this final rule. These apportionments will continue to be specified during the annual harvest specifications process.

NMFS notes that a separate amendment to the FMP, Amendment 80, was approved by the Secretary on July 26, 2007. Amendment 80 primarily allocates several BSAI non-pollock trawl groundfish fisheries, halibut PSC, and crab PSC among fishing sectors, and facilitates the formation of harvesting cooperatives in the non-AFA trawl CP sector. The proposed rule to implement Amendment 80 was published in the **Federal Register** on May 30, 2007 (72 FR 30052) and was available for public comment until June 29, 2007.

Changes in Regulations from the Proposed Rule to the Final Rule

NMFS made several changes to the proposed regulatory text in this final rule. First, NMFS has removed proposed § 679.21(e)(3)(v) from the final rule. Proposed § 679.21(e)(3)(v) included the proposed PSC allowances for the trawl sector which NMFS disapproved for the reasons explained above. Proposed § 679.21(e)(3)(vi) reverts back to § 679.21(e)(3)(v) in this final rule as a result of removing proposed § 679.21(e)(3)(v). NMFS also has removed references to proposed § 679.21(e)(3)(v) from the final rule.

Second, the proposed regulatory text at § 679.20(a)(7)(i)(B)(1) regarding CDQ seasonal allowances combined all CDQ trawl vessels into one group. This final rule revises the proposed regulatory text to maintain the division between trawl CP and trawl CV that exists in the current regulations. No changes to the CDQ Program seasonal allowances were intended by the Council.

Last, the proposed regulatory text at § 679.20(a)(7)(iii)(B) inadvertently included the heading ''trawl catcher/processor sectors.'' This heading is changed in this final rule to ''trawl gear sectors'' because this part of the reallocation hierarchy applies to all trawl gear sectors, not just the trawl CP sectors.

Response to Comments

As mentioned above, NMFS received 16 letters containing 79 unique comments during the public comment periods. Two non-industry letters were received and 14 letters were received from the fishing industry. A summary of those comments, grouped by subject matter, and NMFS' responses follow.

Comment on the Intent of Amendment 85

Comment 1: One commenter supports the intent of Amendment 85 to modify the allocations of Pacific cod by codifying the fishery as it is actually occurring with the goal of reducing inseason adjustments (reallocations) from the trawl sectors to the hook-and-line sectors. Another commenter supports the intent of Amendment 85 to modify the allocations of Pacific cod to various sectors to better reflect historic usage.

Response: NMFS notes the support for Amendment 85 and clarifies that one intention of this action is to better reflect historic use, not current use, as noted in this excerpt from the Council's problem statement: ''To reduce uncertainty and provide stability, allocations should be adjusted to better reflect historic use by sector. The basis for determining sector allocations will be catch history as well as consideration of socio-economic and community factors.''

Comments on Data Used

Comment 2: The catch history information used in Amendment 85 was based on the best scientific information available (1995–2003 WPR (Weekly Production Report) and fish ticket data for retained catch). Preliminary data from 2004 and 2005 were also considered. It is appropriate to use WPR data to calculate catch history by sector for the CPs because it is the only data set common to all CP vessels. The use of WPR data was well noticed to the

public. The non-inclusion of fishmeal was consistent with all previous Council actions involving allocation.

Response: NMFS agrees that the catch history information used to develop Amendment 85 and presented in the proposed rule was based on the best scientific information available, consistent with National Standard 2 of the Magnuson-Stevens Act. Only legally retained catch was used in determining harvest history to avoid rewarding sectors with a high discard rate of Pacific cod. However, data presented in the EA/RIR/initial regulatory flexibility analysis (IRFA) and considered by NMFS in its decision to approve the non-CDQ allocations in Amendment 85 did include cod destined for fishmeal production because it is legally retained catch. The analysis used data from Federal WPRs, which include fishmeal data, and the Alaska Department of Fish and Game (ADF&G) fish tickets to calculate sector specific harvest history. These databases were used because they are consistent across all sectors and every sector's production of Pacific cod is weighed and reported on WPRs and/or fish tickets.

Total harvest was calculated based on retained legal harvest (including Pacific cod that was turned into fishmeal as the primary product) from WPRs and ADF&G fish tickets. In addition, total harvest (retained and discarded cod, including fishmeal) from NMFS blend data, and the catch accounting database was provided in Section 3.3.5 (Table 3–24) of the analysis. The NMFS blend data and data from the catch accounting database (used since 2003) utilize observer data, shoreside processor landings data, and fish tickets. In the cod target fishery, blend data are calculated from partial haul samples, including discards. Observer estimates are extrapolated for some sectors because of varying levels of observer coverage. Because the AFA trawl CP sector is 100 percent observed, the best information available for that sector would be the blend data. However, not all sectors would be treated equally if blend data were used because not all sectors are 100 percent observed. Therefore, the decision by NMFS to use WPR data and ADF&G fish tickets, and to include cod destined for fishmeal in the determination of harvest history is fair and equitable, and is consistent with National Standards 2 and 4 of the Magnuson-Stevens Act.

Comment 3: The range of dates selected seriously over-weighted the pre-Amendment 46 period, an inept historical analogue to the current fishery and a period of time for which Amendment 85 was explicitly designed to supersede in order to better reflect current use and dependence. The express purpose of Amendment 85 is to conform allocations to existing realities. The years most relevant to existing realities are the most recent years and the Council failed to consider those years.

Current allocations are based on historical usage prior to 1997, and the Council's problem statement seeks to address the fact that ''the current allocations do not correspond with actual dependency and use by sectors.'' Allocations set in 1997 closely tracked actual usage at that time to determine what are now the current allocations. Therefore, any history prior to 1997 should not be used because it is different from the ''actual use'' which Amendment 85 is intended to reflect.

Beginning in 1998, Pacific cod had to be retained by all vessels as long as directed fishing was open; no sector should be penalized for discarded fish that were legally discarded prior to that. Comparing sectors that only target cod with sectors that both target and have incidental catches of cod is not comparing apples to apples. The Council considered data that contained only retained catch, so they understate the amount of Pacific cod the non-AFA trawl CPs needed to prosecute other fisheries in the years prior to 1998. Under the current regulatory scheme that fish would be retained and counted.

In 1999, the AFA identified a number of AFA vessels and granted them exclusive access to BSAI pollock. The non-AFA trawl CPs were excluded from targeting pollock and increased their harvest share of Pacific cod. All but one of the AFA trawl CPs ceased to target Pacific cod.

Rewarding one sector over the other for legal discard activity from 10 years prior to final Council action does not correspond to dependencies developed in light of the current management era, which began with a new cod allocation in 1997, 100 percent mandatory retention in 1998, and the AFA in 1999 which preempted the head-and-gut (H&G) fleet from the largest groundfish fishery in North America. Therefore, earlier years do not indicate ''present participation'' or ''actual use.''

Response: As stated in the response to Comment 1, the allocations established by Amendment 85 and this final rule are intended to better reflect a sector's historic use, not current use. In referencing the Council's problem statement, the commenter appears to equate ''actual'' with current, but this is not what the Council meant by ''actual.'' The problem statement also states, ''The basis for determining sector allocations will be catch history as well as consideration of socio-economic and community factors.'' One year or just a few recent years is not reflective of catch history and dependence over time. No one year in the history from 1995 to 2003 was given more weight than any other.

The Council had several options available in setting the allocation percentages, including the harvest histories from several specific set of years, and an option to select direct allocation percentages from within the range of analyzed percentages. The Council chose to select allocations for the non-CDQ sectors that were within the range of analyzed percentages, and that more closely represent an average of retained catch for most sectors from 1995 through 2003.

Harvest history for each sector was based on annual retained catch. The data presented in the EA/RIR/FRFA include historic harvest from 1995 through 2003 as the primary basis for determining historic use of Pacific cod by sector, although data from 2004 to 2005 are provided as well. The starting year of 1995 was chosen because it includes data from the early years of sector allocations of Pacific cod TAC that began in 1994 with the implementation of BSAI Amendment 24 to the FMP (59 FR 4009, January 28, 1994). This set of years also includes changes in Pacific cod harvest due to impacts beginning in 1998 from implementation of improved retention/improved utilization measures to reduce discards, from AFA legislation in 1999, and from Steller sea lion protection measures beginning in 2001, all of which had impacts on all sectors to varying degrees. Pacific cod has been a valuable species for a long time, therefore, it is important to also consider the time period before these major legislative and regulatory programs to determine historic dependence and use. Also, consideration of just three or four recent years does not show dependency by the sectors over time and may be unduly biased because of increased market demand for Pacific cod in recent years for some products, potential decreased participation due to BSAI crab rationalization, and the likelihood of competition for Pacific cod among sectors in anticipation of this action.

At the time the Amendment 85 analysis was initiated by the Council in late 2004, the data from 2003 were the most recent available. Rather than continually adding years as the action progressed, the data analyzed for the allocation options stopped with the data from 2003. The Council and NMFS

considered more recent (2004 and 2005) harvest data from the NMFS catch accounting database in reviewing harvest history to illustrate recent harvest trends as that information became available, but it was not available in the same format as the data from 1995 through 2003. However, for the reasons stated above, this two-year data set was not used as the sole basis for the allocations. Additionally, the data showed that some sectors increased their harvest of Pacific cod during the recent past, compared to their 1995 through 2003 harvest, and were not constrained by their allocation in doing so because they did not harvest their entire allocation. Not all sectors had the advantage of such flexibility. Therefore, based upon all these reasons, focusing on more recent years does not provide an equitable standard upon which to assess the dependence of Pacific cod by all sectors. The use of data from 1995 through 2003 provides a more appropriate basis to determine historic harvest share.

In 1994 under Amendment 24, the trawl sectors were allocated 54 percent of the Pacific cod TAC, the fixed gear sectors received 44 percent, and the jig gear sector received 2 percent. This allocation was approximately equal to the average percent of Pacific cod taken with trawl gear or fixed gear between 1991 and 1993. In 1997 under Amendment 46, the allocation to the trawl sector was reduced to 47 percent and then equally divided between trawl CPs and trawl CVs. The reduced allocation to the trawl sector was determined by an industry negotiating committee and closely represented the harvest percentages taken by trawl and fixed gear at that time while retaining the 2–percent allocation for jig gear. The split between trawl CVs and trawl CPs was agreed upon by a separate negotiation between representatives of the trawl sectors to maintain a directed fishery for trawl CVs which were more dependent on directed fishing for Pacific cod. These basic trawl and fixed gear percentage allocations of Pacific cod TAC have remained unchanged since 1997. The fixed gear sectors were divided in 2000 and the pot sectors in 2004, but the overall split between trawl and fixed gear sectors and between trawl CPs and trawl CVs did not change.

The high discard rates of Pacific cod is an issue that the Council has been addressing for some time. The problem statement for Amendment 46 states: ''Management measures are needed to ensure that the Pacific cod TAC is harvested in a manner which reduces discards in the target fisheries, reduces PSC mortality, reduces nontarget bycatch of Pacific cod and other groundfish species, takes into account the social and economic aspects of variable allocations and addresses impacts of the fishery on habitat.''

The Council's intent under Amendment 85 was to calculate historic catch by using retained harvest of Pacific cod, because Pacific cod is required to be retained (in both the directed fishery, and up to the maximum retainable allowance when the directed Pacific cod fishery is closed) and it was not the intent to ''reward'' sectors that have higher discards of Pacific cod. This is why discarded Pacific cod was not included in the harvest history data. All of the harvest data provided were considered in the allocation decision by the Council and by NMFS. Most sectors have incidental catch of Pacific cod in their fisheries. The exceptions are the jig and pot gear sectors. By using historic catch over the same set of years and using the same data set for all sectors (see response to Comment 2), all sectors were treated fairly and equitably, consistent with National Standard 4 of the Magnuson-Stevens Act.

Comment 4: The use of WPRs to calculate the round weight of cod harvested by the AFA trawl CP sector for the years after 1998 is a significant source of error in the catch history tables set forth in the draft analysis. The use of observer reports and scale weights is universally recognized as a more accurate way of calculating a vessel's total catch than the somewhat antiquated WPR approach. The use of WPR data as a basis for the AFA trawl CP catch history is inconsistent with the requirement that management measures be based on ''the best scientific evidence available.'' The draft analysis should be revised to clarify that observer data (not WPRs) represent the best available data for the post–1998 catch history of the AFA trawl CP sector.

Response: The Council's and NMFS' use of WPR data rather than NMFS blend data and the catch accounting database, which both use observer data as one component, is explained in the response to Comment 2. WPR data and blend data estimate catch using different methods. WPR data represents a consistent database across all sectors; every sector's product is weighed, and landed weights are converted to round weights. The blend data estimate catch based on vessel catch reports augmented by observer data, and are used for in-season management. The blend data use observer estimates of discards, which affect the total catch estimates. In the cod target fishery, observer estimates are based primarily on partial haul sampling. In general, CPs <125 ft (38.1 m) LOA are observed 30 percent of the time, and blend data use WPR data when there are no observer data available. Finally, during the years considered to establish allocations (1995 2003), the more accurate flow scales were used more extensively in the AFA CP sector than in other sectors. Because the AFA trawl CP sector is 100 percent observed, the best information available for that sector would be the blend data. However, blend data are not available by vessel length for the CV sectors, which primarily affects the <60 ft (18.3 m) fixed gear CVs. Also, the non-AFA trawl CPs <125 ft (38.1 m) LOA are observed 30 percent of the time, so WPR data are used when there are no observer data available. These two datasets rely on different estimation methods and do not provide identical estimates of catch by sector. Use of blend data for some sectors and WPR data for other sectors would be problematic because any estimation error among sectors could be exacerbated if different datasets are used to determine sector specific allocations. Therefore, the best available data when comparing Pacific cod harvests among all sectors for the determination of harvest history is WPR data and ADF&G fish tickets (see response to Comment 2). Acknowledging that observer data are used to monitor catch for this one sector because it is 100 percent observed would not change the decision on the amendment. Therefore, no changes will be made to the analysis concerning this subject.

Comment 5: The data used in the draft analysis excludes Pacific cod utilized in the production of meal from the AFA trawl CP's catch history. It is inappropriate for the draft analysis to exclude or otherwise discount Pacific cod used for meal production from any of the tables used to depict catch history for the AFA trawl CP sector. There is no justification for excluding the official catch data from an analysis that purportedly reflects the catch history of this sector. The combined effect of using WPR-based catch accounting to calculate the AFA trawl CP catch history and excluding the catch used to make meal results in an inaccurate estimate of the sector's catch history that understates the AFA trawl CP sector's historic use and dependency on cod. The draft analysis should be revised to clarify that meal is a ''legally retainable product'' insofar as that term is used in connection with Amendment 85 and other regulations governing the BSAI groundfish fishery; and that all legally retained cod taken as bycatch in

the directed pollock fishery will be included in the AFA trawl CP sector's catch history for purposes of Amendment 85.

Response: The concern about fishmeal not being included in calculations of harvest history was a result of some commenters relying on a draft analysis distributed prior to the April 2006 Council meeting. As explained in the response to Comment 2, WPR data represent the best available information for comparing Pacific cod catch across and among sectors. WPR data include Pacific cod destined for fishmeal. However, in the early development of the Amendment 85 analysis, data for Pacific cod destined for fishmeal were removed from the WPR data and Council analytical documents up to the April 2006 Council meeting continued to exclude fishmeal data. At the April 2006 Council meeting, in light of public comment, WPR data that included fishmeal data was provided for Council consideration. As explained in response to Comment 2, the history considered in setting non-CDQ allocation percentages in Amendment 85 included Pacific cod that was turned into fishmeal as the primary product. Several tables that incorporated fishmeal in the harvest history were presented to the Council in April 2006 for its consideration and similar tables were included in the Secretarial review draft analysis issued in January 2007. The analysis was not revised in light of this comment because the data on fishmeal were considered and included in setting the Pacific cod allocation to the AFA trawl CP sector and the historic catch data including fishmeal are presented in the analysis.

Comment 6: The H&G sector allocation of 13.4 percent is 0.2 percent less than the sector's straight 95–03 average. The action was taken in 2006, however the last year considered was 2003. This sector's ''historic use'' and ''actual dependency'' are not adequately reflected if 2004 and 2005 are not taken into consideration for a final action taken in 2006. The Magnuson-Stevens Act instructs that recency must be considered as well. By allocating the H&G sector an amount of cod less than its average harvest for the historical period of 1995 to 2003, the Council simply ignored the present participation consideration.

Response: NMFS disagrees that the non-AFA trawl CP sector was allocated an amount of Pacific cod that is less than its average historic harvest for the period 1995 to 2003 (average historic harvest). NMFS believes that the commenter's reference to 13.6 percent is likely based on data in the analysis that excludes fishmeal in the calculation of average sector harvest share (see Table 3–11 in the EA/RIR/FRFA). The Council and NMFS included fishmeal in determining historic harvest. When fishmeal is included in the calculation, the head-and-gut (non-AFA trawl CP) sector average historic harvest from 1995 to 2003 is 13.4 percent. The non-AFA trawl CP sector received exactly its 1995 to 2003 average historic harvest as its allocation under Amendment 85. The Council and NMFS also considered more recent participation in 2004 and 2005, but for reasons provided in the response to Comment 3, chose not to include more recent participation in determining historic use and dependence.

Comment 7: The draft analysis should be revised to include at least one table (based on official catch data and including fish utilized in meal production) that clearly shows the total retained catch of cod by the AFA trawl CP sector during the period following adoption of the AFA (e.g., the years 1999–2003).

Response: Appendix G of the analysis prepared for Amendment 85 and this rulemaking (see **ADDRESSES**) includes Pacific cod catch data, including fishmeal, for the AFA trawl CP sector for the years 1995 through 2003. Therefore, NMFS does not need to revise the analysis to include this table.

Comment 8: Neither the EA/RIR/IRFA before the Council nor the Secretarial draft had simply one table which showed the complete picture of each sectors' history. It takes three tables to complete the 1995–2005 picture.

Response: Table 3–24 in the Secretarial review draft of the EA/RIR/IRFA gives the data for BSAI Pacific cod non-CDQ allocations, catch and reallocations by sector from 1995 through 2005. The proposed rule purposely used two tables and the Secretarial review draft analysis used three to present the historical catch data as the average share of the retained Pacific cod harvest over various time periods. Table 3–9 in the EA/RIR/IRFA was used to show the complete picture of each sector's history for the years under consideration for allocations (1995 - 2003), and Table 3–12 shows the catch history for 2004 and 2005 in a two-part table. The data from 1995 through 2003 used in Table 3 in the proposed rule were from a different source than the data for 2004 and 2005 used in Table 4. Separate tables were used to help draw attention to this fact in the proposed rule and for the same reason in the EA/RIR/FRFA.

Comment 9: The proposed allocation to the H&G sector cannot be justified by the fact that the H&G sector had a lower harvest share in 1995–1998, nine to twelve years ago and prior to the implementation of several significant regulatory changes culminating in the AFA that fundamentally changed the dynamics of the fishery, and that as a result its ''average historical'' retained catch was 13.4 percent. The sector's performance in those earlier years is of no relevance to the goal that the Council was seeking to achieve.

Response: NMFS disagrees. The reasons why data from 1995 through 1998 are included in the calculation of average historic harvest are explained in the response to Comment 3. While the data may represent a period of time when the non-AFA trawl CP sector was not maximizing its retained harvest of Pacific cod, it does represent a period of time when other sectors were maximizing their harvest. The Council's goal was to adjust allocations ''to better reflect historic use by sector.'' NMFS determined that the years selected by the Council are consistent with that goal.

Comment 10: The Council was not required to use one particular set of ''correct'' years in conforming the allocations to existing reality, but the allocation to the non-AFA trawl CP sector was clearly beyond any rational assessment of ''actual use.'' Within the range of options presented to the Council in the Amendment 85 document (April draft), the period from 2000 to 2003 clearly was most reflective of actual current participation in the fishery. Under that approach, the non-AFA trawl CP sector averaged 16.2 percent. At the other extreme, under the option least reflective of actual current participation, from 1995 to 2002, the non-AFA trawl CP sector average 13.2 percent. Incredibly, the Council chose to allocate an even smaller share to the non-AFA trawl CP sector than the 1995–2003 average of 13.6 percent. The Council's proposal of 13.4 percent does not reflect the non-AFA trawl CP sector's current or even its relevant recent participation in this fishery. This reduction was not part of an across-the-board cut that treated all sectors equitably. Some sectors received an increase above their actual use and the non-AFA trawl CP sector received the largest decrease.

Response: See the response to Comment 3 for a discussion of the years considered to determine average historic harvest. The non-AFA trawl CP sector catch history from 1995 through 2003 is 13.6 percent only if fishmeal is not included. However, the Council's allocation recommendation included Pacific cod that was turned into fishmeal as the primary product when

developing the Pacific cod sector allocations because Pacific cod destined for fishmeal production is legally retained catch (see response to Comment 2). Table 3–119 of the EA/RIR/FRFA shows that when fishmeal is included in the calculation, which the Council did in taking final action, the non-AFA trawl CP sector's average from 1995 through 2003 matches exactly the new allocation: 13.4 percent of the non-CDQ Pacific cod TAC. Some sectors received allocations that are greater than their historic harvest during 1995 through 2003 and others less, but the non-AFA trawl CP sector was the only sector to receive exactly its average share of the retained harvest from 1995 through 2003.

Comment 11: Comparing the harvest information from 2004 and 2005 with the Amendment 85 allocations reveals that the non-AFA trawl CP sector suffered nearly an order of magnitude loss greater than any other sector (most of which received allocations at or above their 2004–2005 average). Comparing the Amendment 85 allocation to the average of 1998–2003 (a range from when cod became a 100–percent retention species to the last year of data the Council had when making their decision), the non-AFA trawl CP fleet still lost far more than any other sector going from an average of 15.7 percent to 13.4 percent (relative loss of 14.5 percent).

Response: The Council had harvest data from 2004 and 2005 available when it took final action on Amendment 85. It was not available in the same format as the years from 1995 through 2003, but it was considered by the Council. The non-AFA trawl CP sector allocation is exactly its catch history from 1995 through 2003. As stated previously (see responses to Comments 2 and 3), the Council chose to look at history and dependency over a number of years, not just one or two recent years. Although the non-AFA trawl CP sector's retention of Pacific cod has increased over the last several years, that sector always had the opportunity to retain Pacific cod in higher amounts than they historically did. For various reasons, the sector chose to focus on other species as a business decision. The Council determined that the new allocations were needed to better reflect historic use and chose not to define historic use as just the last two or three years.

Comments on Allocation Issues

Comment 12: The increase in allocation percentage to fixed gear from trawl gear is consistent with the historic trend in the way the BSAI cod fishery is prosecuted as well as with previous Council actions regarding BSAI cod allocations in Amendments 24 and 46. Stabilizing the increased historic proportion of fixed gear harvest via allocation of BSAI Pacific cod in Amendment 85 will ensure the continued experience of reduced halibut and crab bycatch, improved product quality, and reduced benthic impacts associated with fixed gear cod fisheries as compared to trawl cod fisheries.

Response: Amendment 85 is intended to better reflect historic usage by the various harvest sectors while addressing coastal community needs. The Pacific cod allocations to the trawl and fixed gear sectors set in 1994 under Amendment 24 (54 percent and 44 percent, respectively), were approximately equal to the average percentage of Pacific cod taken with these gear types during 1991 through 1993, with a 2–percent allocation for jig gear. The Pacific cod allocations set in 1996 under Amendment 46 were arrived at by industry negotiation and were chosen to represent more closely the harvest percentage taken by trawl and fixed gear sectors at that time (47 percent and 51 percent, respectively), while maintaining the 2–percent allocation for jig gear. Under Amendment 85, if the harvest sectors were similarly grouped, the allocations would be 37.8 percent for trawl gear, 60.8 percent for fixed gear, and 1.4 percent for jig gear. NMFS has determined that the sector allocations proposed under Amendment 85 better reflect the historic use by the various harvest sectors as a whole than do the current sector allocations, and has approved them. NMFS notes the second comment.

Comment 13: All sectors received amounts that reflect recent participation, except the AFA CPs which received more, and the small boat fleets which also received much more than their history, as a policy decision. Only the H&G fleet has suffered a set back so large that both its directed fishery and its non-cod directed fisheries are jeopardized, while the other sectors' annual fish plans were not affected.

Response: NMFS approved the non-CDQ sector allocation percentages in Amendment 85. The following is NMFS' rationale for that decision. Amendment 85 will separate trawl CPs into two sectors, AFA and non-AFA, for purposes of Pacific cod allocations. The AFA trawl CP fleet will be restricted to a separate allocation slightly greater than its historic catch from 1995 through 2003, but 62.3 percent below its current sideboard limit for catch of Pacific cod. Separating the two sectors will protect the historic catch of the non-AFA trawl CPs better than leaving these two sectors combined with a lower shared allocation that reflects their combined history, but with the same AFA sideboard limit. Although the AFA trawl CP sector decreased its average harvest share between 2000 and 2003, this fleet is a cooperative that more likely will catch its Pacific cod allocation in a manner that minimizes the bycatch of non-target species. Bycatch is a consideration under National Standards 4, 5, and 9 of the Magnuson-Stevens Act. Because the allocation to the AFA trawl CP sector is slightly higher than this sector's historic catch, it should be sufficient for this sector to cooperatively manage its allocation and maintain a directed fishery, in addition to meeting its needs for incidental catch in its pollock and yellowfin sole fisheries. This ability to maintain the opportunity for these few directed fisheries is important because AFA sideboard provisions restrict this sector's ability to participate in other BSAI fisheries and AFA trawl CPs are prohibited from fishing in the Gulf of Alaska.

Only the non-AFA trawl CP sector will receive an allocation equal to its exact average historic harvest share from 1995 through 2003. The allocation to this sector is reflective of its dependence on the Pacific cod fishery over many years. About half of its historic Pacific cod harvest occurs as incidental catch in flatfish (primarily yellowfin sole and rock sole), Atka mackerel, and rockfish fisheries. The BSAI flatfish fisheries are the primary revenue source for this sector and often incur high incidental catches of Pacific cod. Note that the trawl CP sectors combined have contributed 49.1 percent on average to the total annual reallocations of Pacific cod to other non-trawl sectors between 2000 and 2004. Based on environmental considerations, the nature of these sectors' fisheries, average historic harvest, and to protect the non-AFA trawl CP harvest, NMFS determined that the allocations under Amendment 85 to the trawl CP sectors are a reasonable balance of the National Standards under the Magnuson Act.

The hook-and-line CV ≥60 ft (18.3 m) LOA sector will receive an allocation above its average historic harvest, and this allocation will no longer be shared with the hook-and-line CV <60 ft (18.3 m) LOA sector. This will allow Pacific cod to remain open to directed fishing for a longer period of time. Existing regulations governing bycatch require that all Pacific cod be retained when directed fishing is open. Thus, discard of Pacific cod by the hook-and-line CV

≥60 ft (18.3 m) LOA sector should be reduced when targeting other species, particularly Pacific halibut, and to a lesser extent in its sablefish and rockfish fisheries, an important consideration under National Standards 4, 5, and 9.

The allocations are not based solely on historic harvest share, but also are based on socioeconomic considerations, consistent with National Standard 8. For this reason, the allocations are higher than the average historic harvest for the jig sector and the fixed gear CV <60 ft (18.3 m) LOA sector. Under National Standard 8, NMFS must take into account the importance of fishery resources to fishing communities to provide for the sustained participation of such communities. By maintaining allocations above the average harvest history for these two entry level sectors, Amendment 85 maintains and expands local opportunities for resident fishermen in small, coastal communities near the fishing grounds to participate in the BSAI Pacific cod fishery.

The increase in the allocation to the fixed gear CV <60 ft (18.3 m) LOA sector from 0.7 to 2.0 percent of the non-CDQ Pacific cod TAC is fair and equitable. This sector has been successfully harvesting part of the allocation to the general hook-and line CV and pot CV allocations, all of its allocation since 2002, and reallocations from the jig sector since 2004. Its share of the harvest in 2004 and 2005 averaged 1.7 percent. The small CV sectors have been favored in previous allocation measures for BSAI Pacific cod to encourage growth in this entry level sector. Such actions have been successful as illustrated by the steadily increasing harvests by this small boat sector. The allocation of 2.0 percent to the fixed gear CV <60 ft (18.3 m) LOA sector is necessary to provide sufficient Pacific cod for this sector to harvest under its own direct allocation, separate from the hook-and-line and pot CV ≥60 ft (18.3 m) LOA sector allocations these small boats currently may fish under, and to allow continued growth in this small boat sector.

Although the jig sector allocation of 1.4 percent of the Pacific cod TAC is 14 times higher than its historic harvest share, it is a reduction from it current allocation of 2.0 percent. The intent of this allocation is to provide for an entry level fishery. The reduced allocation to the jig sector still allows for growth in this sector and is closer to its historic harvest share than its current allocation. Additionally, this allocation serves as a ''bank'' for anticipated growth in the harvest of Pacific cod in all catcher vessel sectors given that unused portions of the jig gear allocation are annually reallocated first to the fixed gear <60 ft (18.3 m) LOA sector (another small boat, entry-level sector), and then to other CV fleets that deliver to fishing communities. Also, under Amendment 85, reallocations from the jig sector will be available to the fixed gear <60 ft (18.3 m) LOA sector earlier in the year. Being able to harvest the fish earlier in the year when the weather is preferable for these small boats (safety is a consideration under National Standard 10), should enable this sector to harvest more of the reallocated fish than it does currently. Therefore, in light of the likelihood of reallocations of any unused allocations to the <60 ft (18.3 m) LOA fixed gear sector, and to other CV fleets that deliver shoreside to fishing communities, the allocation of 1.4 percent of the Pacific cod TAC to the jig sector is fair and equitable and meets the purpose and need of the action to consider socio-economic and community factors.

For the small boat sectors to receive allocations above their average historic harvest, some sectors must receive less than their average historic harvest. The four sectors that will receive lower allocations than their average historic harvests are the pot CV ≥60 ft (18.3 m) LOA, hook-and-line CP, pot CP, and trawl CV sectors. Their allocations represent a reasonable balancing of Magnuson-Stevens Act National Standard requirements while also meeting the purpose and need of the action. The pot CV ≥60 ft (18.3 m) LOA sector and the hook-and-line CP sector will receive allocations that are closer to their average historic harvests than are their current allocations and are only slightly less than their average historic harvests. Because the small boat sectors will receive allocations above their historic harvest it is expected that the pot CV ≥60 ft (18.3 m) LOA sector and the hook-and-line CP sector also may receive reallocations toward the end of the fishing year, which will make their share of the TAC closer to their historic share of the harvest. Additionally, the pot CV ≥60 ft (18.3 m) LOA and trawl CV sectors may receive reallocations of Pacific cod from other CVs or from CPs of the same gear type. Also, the pot sectors are primarily dependent on crab fisheries rather than on the Pacific cod fishery. The pot CP and trawl CV sectors are the only sectors, other than the fixed gear <60 ft (18.3 m) LOA sector, that will receive allocations that are less reflective of their average historic harvests between 1995 and 2003. Recent trends demonstrate that the pot CP and the trawl CV sectors' harvest shares have decreased in recent years, such that the allocations under Amendment 85 better reflect these sectors' average harvest shares between 2000 and 2003 than do the current allocations. The AFA trawl CP sector was the only other sector that decreased its average harvest share between 2000 and 2003, but was not selected to fund the increases in other sector allocations for the reasons stated above. The allocation to the pot CP sector is fair and equitable because of its more recent decreased harvest share and its greater dependence on the crab fisheries. Although the trawl CV sector allocation is reduced, a combined allocation of Pacific cod to the AFA and non-AFA trawl CVs will take advantage of the existing AFA inshore cooperative structure for discussion and agreement concerning access to fishing grounds and harvesting activities in a manner that optimizes the allocation to this sector for all CVs. Additionally, public testimony at the April 2006 Council meeting requested that the two trawl CV sectors remain combined. A combined allocation also is larger than separate allocations to either the non-AFA or AFA CVs, thus providing some protection in the event that trawl vessels that have not historically participated in the fishery choose to do so.

Comment 14: The AFA trawl sectors would receive the largest aggregate increased share of the Pacific cod fishery under the Council proposal – 1.2 percent over the combined AFA trawl CP and trawl CV history from 1999 through 2005.

Response: The data presented in the analysis include historic harvest from 1995 through 2003 as the primary basis for determining historic use of Pacific cod by sector, although data from 2004 to 2005 are presented as well. The Council did not make its proposal based on catch history from 1999 through 2005 based on reasons given in response to Comment 3. The trawl CV and AFA trawl CP sectors do not receive a combined allocation. The AFA trawl CP sector will receive a share of the non-CDQ Pacific cod TAC that is 0.1 percent higher than its historic share from 1995 through 2003. The AFA trawl CV sector will receive an allocation in combination with the non-AFA CV sector. That allocation will be 1.9 percent less than its historic share from 1995 through 2003. Combining the AFA trawl CP sector with the trawl CV sector results in a combined decreased share of 1.8 percent of the non-CDQ Pacific cod TAC.

Comment 15: The proposed allocation of 13.4 percent to the non-AFA trawl CP sector is significantly less than this sector's actual dependence and use. The allocation scheme proposed by

Amendment 85 will put the H&G sector in an economically precarious position, slashing its recent usage of cod by up to 30 percent based on its harvest in 2004. The APA requires agency actions, such as Amendment 85, to bear a rational relationship to the problems they are intended to address. Reducing the non-AFA trawl CP's allocation so substantially below its actual harvest levels over the past seven years does not serve the Council's ''primary objective'' of reducing the need for annual reallocations. The Notice of Proposed Rulemaking relies upon figures that clearly demonstrate this point. The Notice of Proposed Rulemaking specifically points out that the non-AFA trawl CP sector's retained harvest ''has not been less than 15.3 percent since 2000.'' There is no rational basis in the record to justify the reduction in cod TAC suffered by the H&G sector in this Council recommendation.

Response: The allocations were based on long-term dependence and catch history over many years. The harvest history was not based on just one or two years of harvest by a particular sector (see responses to Comments 3 and 13). The Council had the option to select from six sets of specific years or to select percentages for the Pacific cod allocations that fall within the range of percentages analyzed. The Council chose the latter course of action. Thus, as the information was presented in the analysis, the focus was on Pacific cod harvest history from the years 1995 through 2003. NMFS recognizes that the selection of certain year sets will be more beneficial to some sectors than the selection of other year sets. In setting the percentages, the Council made a reasonable balance of the National Standards under the Magnuson-Stevens Act, particularly National Standards 4 and 8 which deal with allocations and community considerations respectively. In examining the Council's action, NMFS determined that the allocations reasonably reflect the historic harvest of Pacific cod by each sector between 1995 and 2003. NMFS determined that consideration of the earlier years (1995 through 1998) is reasonable and that calculating harvest history through 2003, rather than 2004 or 2005, is reasonable for the reasons given in response to Comment 3.

As stated in the proposed rule, the primary objective of the Council was to reduce the level and frequency of annual reallocations, and thus enhance stability so each sector may better plan its fishing year and operate more efficiently. Annual reallocations are expected to be reduced under Amendment 85, and are thus related to the revised allocations to each sector that more closely reflect historic use by most sectors than do current allocations, while considering socioeconomic and community factors. As noted in the response to Comment 13, nearly half of the annual reallocations between 2000 and 2004 have come from the trawl CP sectors and those reallocations averaged 19.4 percent of the initial trawl CP sector allocation.

Comment 16: National Standard 4 provides that ''If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be...fair and equitable to all such fishermen...'' Elaboration of this requirement under § 600.325(c)(3)(i)(A) requires that the particular allocation chosen be ''rationally connected to the achievement of OY [optimum yield] or the furtherance of a legitimate FMP objective...'' and that ''the motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause.'' In this case, the objective to conform allocations to current usage (to reduce late-year reallocations of unharvested fish) and dependency cannot be rationally served by reducing the non-AFA trawl CP sector allocation to one-quarter to one-fifth below its actual recent harvest levels or by allocating more than recent harvest levels to other sectors. Under National Standard 4, an allocation may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. The Council would have had to make an estimate of the benefits and hardships imposed by the allocation and compare them to those of alternative allocation schemes, including the status quo. The Council did not do that.

Response: NMFS has determined that the allocations are fair and equitable to all sectors. Between the two quotes from the Code of Federal Regulations is the sentence ''Inherent in an allocation is the advantaging of one group to the detriment of another.'' This action also is designed to increase the Pacific cod allocation to the small boat sectors which is a legitimate FMP objective. The management objectives in the FMP include promoting sustainable fisheries and communities. Because the small boat sectors deliver to fishing communities, increasing allocations to these sectors should promote these fishing communities. This action also will decrease the amount of Pacific cod that is reallocated to other sectors later in the season, facilitating these sectors' ability to achieve optimum yield by better planning their fishing year and operating more efficiently. The response to Comment 3 provides NMFS' rationale for why the years 1995 through 2003 are a reasonable, fair, and equitable set of years for determining the average historic share of the retained Pacific cod harvest. Using that set of years, the non-AFA trawl CP sector received a fair and equitable allocation which is exactly its average historic harvest share from 1995 through 2003. Please see the response to Comment 13 for a discussion of all sectors' allocations.

Comment 17: Every sector was allocated its target and incidental cod needs, except the H&G sector. This discrepancy is not specifically highlighted in the draft Secretarial Review. The H&G fleet was allocated an insufficient amount for accommodating both a directed fishery and incidental catch needs and, by inference, was given a choice: target or bycatch, but not both. This violates National Standard 4, that allocations be fair and equitable to all fishermen. When one sector must decide between its target fishery and its other groundfish fisheries, while others have been allocated in excess of or close to their recent harvests, it is neither fair nor equitable, particularly in light of the fact that it was never addressed in the EA/RIR/IRFA.

In economic terms, NMFS' inseason manager estimates that under Amendment 85, the H&G sector would lose about 10,000 metric tons of cod in 2007 compared to expected harvest under the status quo. NMFS' in-season manager also estimates that in order to account for the incidental catch needs of the fleet for its flatfish and other fisheries, the agency will only be able to allow for a directed fishery of 10 or 11 days, whereas currently, the directed cod fishery is seldom closed. Owners, employees, observer providers, support companies, and the ports the vessels call on may suffer economic hardship under Amendment 85. We respectfully request that the Secretary disapprove the allocations.

Response: NMFS has approved the non-CDQ allocations of Pacific cod under Amendment 85. Every sector, except the small boat sector, was allocated an amount of Pacific cod that reflects its average historic harvest and dependence over many years that included target and incidental catch to the extent that incidental catch was retained. Information on the historic harvest share for the non-AFA trawl CP sector was provided in the EA/RIR/FRFA, just as it was for all the other sectors. The non-AFA trawl CP sector's allocation of 13.4 percent of the Pacific cod non-CDQ TAC is 100 percent of its average historic harvest between 1995

and 2003, an exact reflection of its historic use and reflective of this sector's dependence on the resource over many years. Its recent increase in directed fishing for Pacific cod does not reflect a long-term dependence on the fishery. NMFS acknowledges that accommodating target and incidental catch may be more difficult for the non-AFA trawl CP sector when compared to its most recent few years' harvest.

The economic impacts of Amendment 85 were analyzed in the RIR and IRFA. Because this action is principally designed to reapportion access to the Pacific cod resource among current user groups, it represents tradeoffs (i.e., some entities are negatively affected while others are positively affected). The estimates referred to by the commenter were provided by NMFS a few weeks after the April 2006 Council meeting as a worst case scenario using lower acceptable biological catch (ABC) and TAC levels than actually were established for 2007 and assuming that the non-AFA trawl CP sector would continue conducting its fisheries as it does currently. Revising the estimates for 2007 based on the actual TAC and with a CDQ allocation of 10.7 percent would yield an estimate of 19 to 20 days of directed fishing under current non-AFA trawl CP fishing practices. If incidental catch rates of Pacific cod in other groundfish fisheries are reduced below the current rates, the non-AFA trawl CP sector should be able to maintain a directed fishery for Pacific cod for an even longer period of time. As stated in the EA/RIR/FRFA on pages 294 and 295: ''With a lower potential allocation compared to recent years, this sector will likely need to determine how much of its cod allocation will be used as incidental catch to other target fisheries versus to fund the directed cod fishery,'' and ''Absent a cooperative structure as approved [by the Council] in [proposed] Amendment 80, it is expected that compliance with the groundfish retention standards and management of a lower Pacific cod allocation to serve both directed and incidental catch needs, will be substantially more difficult.'' See response to Comment 16 regarding consistency of Amendment 85 and this final rule with National Standard 4.

Comment 18: The loss of a directed cod fishery leaves the H&G fleet with no fishery from the end of the yellowfin sole fishery (which ended in mid-April of 2006) until July, when the ''B'' season starts. No other fleet will see its current operations disrupted by Amendment 85 the way that the H&G sector will.

Response: Under existing regulations, Pacific cod allocations are further apportioned by season for most gear sectors to protect prey availability for Steller sea lions. Currently, the trawl CPs, AFA and non-AFA combined, receive 50 percent of their allocation in the A season, 30 percent in the B season, and 20 percent in the C season. See the proposed rule for more details on seasonal allowances. Beginning in 2004, the trawl CP sector Pacific cod fishery has closed in mid-March due to reaching it's a season allowance. The B season for trawl CPs opens on April 1 and closes on June 10. More than half the incidental catch of Pacific cod by trawl CPs occurs after March. Amendment 85 changed the seasonal allowances for the trawl CP sectors so that 75 percent of the allocation may be harvested in the A season, with the remaining 25 percent harvested in the B season. This was done to maintain to the extent possible the current percentage of non-CDQ Pacific cod TAC available for harvest in the early part of the year when fishing for Pacific cod is more advantageous. If incidental catch rates of Pacific cod in other fisheries are kept low, the non-AFA trawl CP sector should be able to maintain a directed fishery for Pacific cod.

Comment 19: The AFA trawl CP sector was funded with more than their recent (99–05) usage of 1.9 percent. That sector has its pollock fishery cod bycatch needs met at the all time high 1.5 million mt pollock TAC level, even as the pollock biomass and TAC are on a downward trend. With a 2.3–percent allocation, and lower pollock TAC, more cod can be used to enhance their directed fishery, which is essentially an IFQ [individual fishing quota] since only one vessel is used in the fleet to directed fish on cod. That vessel is also an AFA eligible CP, and while on the record it was stated that it has nowhere to go other than cod, the vessel has access to the yellowfin sole sideboard and the directed pollock fishery of the AFA CPs. It is the vessel owner's decision not to fish pollock or yellowfin sole with that vessel.

Response: The AFA trawl CP sector will receive an allocation that is 0.1 percent above its average historic share of 2.2 percent of the Pacific cod harvest. NMFS provided the agency's explanation for approving the AFA trawl CP Pacific cod allocation in the response to Comment 13. NMFS agrees that it is each vessel owner's decision whether or not to harvest fish in the fisheries open to that particular vessel. However, it is a goal of this amendment to allocate Pacific cod to specific sectors based on average historic harvest, not to determine what fisheries are open to specific vessels or to establish other vessel-specific provisions for access to Pacific cod or other groundfish. Also, the AFA trawl CP sector allocation is less than its current sideboard limit for harvesting Pacific cod (see response to Comment 13).

Comment 20: The reduced ability to target Pacific cod during the A season for the CP trawl sector has resulted in more rollovers to fixed gear; the cod that would have been caught in March when the fish are most aggregated, has not been caught. The fishery in the last two years has closed in early-mid March due to the 50 percent season limit and reduced cod TACs. This has benefitted the fixed gear sector which gets the rollover in the C season, at the end of the year. The Steller sea lion management measures drastically altered cod fishing patterns and harvests. The patterns were altered because of the seasonal apportionments, not because of changed priorities or reduced dependency on the part of the harvesters.

Response: Almost all gear types, excluding <60 ft (18.3 m) LOA fixed gear, are restricted in their amount of Pacific cod catch in the first half of the year because of SSL protection measures, not just the trawl CP sector. A goal of Amendment 85 is to reduce the amount of reallocations due to unharvested Pacific cod left toward the end of the fishing year. The trawl CP sectors have not harvested their entire allocation in any year since that sector began receiving a separate Pacific cod allocation in 1997. The jig sector is the only other sector that has also had Pacific cod reallocated from it in every year it has received a Pacific cod allocation. Beginning in 2004, NMFS has closed the trawl CP sector Pacific cod fishery in mid-March due to reaching its ''A'' season allowance. The B season opens on April 1 and closes on June 10. In 2005, NMFS closed the trawl CP sector Pacific cod directed fishery on August 18 because it had reached its halibut PSC mortality limit. In 2006, NMFS closed the trawl CP sector Pacific cod directed fishery on June 8 (just before the end of the B season), opened it on July 19, and closed it on August 31 due to halibut PSC mortality considerations. So in the last two years, the trawl CP sector Pacific cod directed fishery has been closed during the C season due to reaching its halibut PSC mortality limit. Halibut PSC mortality limits and seasonal allowances to protect SSLs have affected most sectors to varying degrees. It is up to each sector to try to keep its Pacific cod incidental catch rates and PSC catch rates low if it wants to maintain a directed fishery for Pacific cod. Also note that the seasonal

allowance percentages have changed under Amendment 85 (see response to Comment 22).

Comment 21: The State waters Pacific cod fishery has taken 3 percent of the Pacific cod ABC for the past two years, to fund a fishery in Adak which is closed to trawl CPs over 100 ft. This reduces the BSAI Pacific cod TAC by 3 percent. While this is calculated by NMFS to be taken ''off the top,'' if one looks at the allocations to each sector, it can be argued that it's really the H&G sector that took the hit. The H&G sector's 2004–2005 harvest (Table 3–12 - retained, incl. meal) was 17.7 percent. The H&G allocation is 13.4 percent. The cumulative effect of the increased CDQ and State waters fishery, is a further reduction in TAC of 6.2 percent. The original ITAC was 92.5 percent of TAC, now it will be 86.3 percent of TAC. This reduction is spread disproportionately among sectors.

Response: NMFS disagrees. The Council is free to choose how much of the Federal Pacific cod TAC it allocates to small vessels regardless of the existence of a State of Alaska-managed Pacific cod fishery in State waters. The State waters Pacific cod fishery is not within the Council's or NMFS' jurisdiction and can be modified by the State at any time. The amount of Pacific cod set aside for the State waters fishery has not and will not come from the non-AFA trawl CP sector allocation alone. Additionally, all trawl CPs ≤100 ft (≤ 30.5 m) do not have access to the State waters Pacific cod fishery, not just the non-AFA trawl CPs.

The process followed by NMFS in setting the allocations for Pacific cod each year in the annual specifications process is to first deduct the amount of Pacific cod for the State waters fishery from the ABC. The remainder is the TAC for a particular year. NMFS then deducts the amount of Pacific cod allocated to the CDQ Program. Finally, the remaining non-CDQ TAC is divided among the sectors. The reductions are taken before allocations are made to the non-CDQ sectors and, thus, affect all sectors proportionately.

Comment 22: The EA/RIR/IRFA analyzed the impact of reallocating cod from trawl to fixed gear and determined that the trawl CP sector would have no C season cod, unless it rolled from within the sector's B season. Even with no cod TAC reductions, the trawl CPs will be severely constrained with the 50 percent limit for the A season, and this will filter through to the end of the year. The other trawl and fixed gear fleets that were well funded are in no worse position than they were prior to the Amendment 85 action.

Response: The Council directed that allocations for the A and B seasons for trawl gear and the A season for fixed gear sectors be calculated to maintain the current seasonal percentage of the non-CDQ TAC that is allocated to those sectors. This was done to allow directed fishing for Pacific cod earlier in the year when there is less PSC bycatch, Pacific cod harvest rates are highest, and to maintain SSL protection measures. Under this action, the A season allowance for the non-CDQ trawl CP sectors will increase from 50 percent to 75, with the remaining 25 percent seasonal allowance available in the B season. That is why there would be a C season harvest only if seasonal allowances roll over from the A or B seasons to the C season.

Comment 23: The non-AFA trawl CP fleet makes important economic contributions to remote Alaskan communities that the Council's reduced allocation to that sector may well jeopardize. The non-AFA trawl CP fleet fishes year round, using support services and relying on vendors which would normally be closed in the late spring/summer months were it not for this fleet's activities. The State of Alaska assesses all fish landed in Alaska, regardless of gear or sector designation. Whether harvested by CVs or CPs, the same landing taxes would be generated, and given back to the communities in which the fish would be offloaded. Any suggestion that community impacts support imposing the burden of funding the increased small-boat allocations solely (or even primarily) upon the non-AFA CP fleet is not based in fact or supported by the record.

Response: NMFS acknowledges that the non-AFA trawl CP fleet makes economic contributions to the communities visited by vessels in that sector. Based on the EA/RIR/FRFA, NMFS does not expect a significant impact on remote Alaskan communities due to the non-AFA trawl CP allocation under Amendment 85. Any potential negative effects on remote Alaskan communities are likely to be outweighed by the positive impacts of the increased allocations to the small boat sectors, which are based primarily out of Alaskan communities. See response to Comment 13 regarding the ''funding'' of the allocations to the small boat sectors.

Comment 24: A separate section of the Magnuson-Stevens Act, 16 U.S.C. 1853(b)(6) requires the Council and the Secretary to consider a certain set of relevant factors as a condition to establishing a limited access system for a fishery.

Response: NMFS agrees that section 303(b)(6) of the Magnuson-Stevens Act (16 U.S.C. 1853(b)(6)) requires the Council and NMFS to take into account several factors when establishing a limited access system. However, Amendment 85 does not establish a limited access system for the Pacific cod fishery because it does not affect existing participation requirements for the BSAI Pacific cod fishery. Therefore, section 303(b)(6) is not applicable to Amendment 85.

Comment 25: NMFS should approve Amendment 85 with a Pacific cod allocation for the AFA trawl CP sector significantly greater than the 2.3 percent proposed by the Council. Appropriately calculated, the retained legal catch of the AFA trawl CP sector averaged approximately 2.5 percent of the total retained legal catch of BSAI cod between 1999 and 2003, the relevant years following passage of the AFA in 1998. The 2.3–percent allocation recommended by the Council and contained in the proposed amendment represents the absolute minimum amount necessary to fund both the bycatch needs of the AFA trawl CP pollock fishery and the relatively small directed fishery that at least one of the AFA trawl CP vessels has been conducting in the BSAI for many years. Ultimately, the way the incidental catch allowance is established and managed will determine the extent to which these objectives can be accomplished.

Response: The AFA trawl CP sector will receive an allocation that is slightly higher than its average historic harvest from 1995 to 2003, one of only two non-small boat sectors to do so. About 44 percent of the Pacific cod harvested by the AFA trawl CP sector during that time period was taken incidentally when these vessels were targeting BSAI pollock. See the response to Comment 3 for why these years of historical harvest are appropriate. The allocation to the AFA trawl CP sector should be sufficient for this sector to cooperatively manage its allocation and maintain a directed fishery in addition to meeting its incidental catch needs in other fisheries. The incidental catch allowance for the AFA trawl CPs will be established inseason with the intent of maintaining a directed Pacific cod fishery.

Comment 26: We support the proposed rule's plan to manage each of the trawl sector incidental catch allowances on an inseason basis. The proposed amendment should be revised to direct NMFS to manage any incidental catch allowance established in connection with the AFA trawl CP sector's Pacific cod allocation to

facilitate, to the maximum extent practicable, the prosecution of an early season directed Pacific cod fishery without jeopardizing the need to retain sufficient Pacific cod for bycatch in the directed pollock fishery later in the year.

Response: NMFS notes the support for establishing trawl sector incidental catch allowances on an inseason basis. NMFS' existing policy for establishing incidental catch allowances is to facilitate, to the extent practicable, directed fisheries while retaining amounts needed as incidental catch in other directed fisheries. NMFS does not need regulatory authority to continue this policy, so no regulatory changes are necessary.

Comment 27: Tables 3 and 8 of the proposed rule are inaccurate and understate the legally retained BSAI Pacific cod catch history of the AFA trawl CP sector. Table 3 does not use the ''best available data'' to calculate the AFA trawl CP sector's catch history for the years after 1998. In Table 8, the range for the AFA trawl CP sector includes a lower end point of 0.9 percent. That number is misleading for several reasons: first, it is derived by excluding fish utilized in the production of meal; and second, it is generated by using a WPR approach to calculate retained catch. This is inaccurate and prejudicial in that it suggests a level of usage and dependency that is significantly lower than accurately calculated catch would indicate.

Response: Regarding Table 3 in the proposed rule, the response to Comment 2 explains why WPR data were used instead of observer data to calculate catch history. The purpose of including Table 8 was to demonstrate the wide range of allocations that were considered by the Council. The allocation to the AFA trawl CP sector is slightly above its catch history as calculated from WPR data from 1995 through 2003. Also see responses to Comments 13 and 25.

Comment 28: We prefer to purchase all of the Pacific cod for our restaurant chain from a particular AFA trawl CP because of the high quality of the product. If the amount of Pacific cod available for that vessel to harvest were to decline, we would likely be forced to purchase lower quality processed cod from foreign commodity markets.

Response: Under Amendment 85 and this final rule, the AFA trawl CP sector will receive an allocation of Pacific cod that is slightly above its historic harvest. Because the AFA trawl CP sector operates as a cooperative and has the ability to control its harvest, NMFS anticipates that the amount of Pacific cod allocated to the AFA trawl CP sector will be sufficient to maintain the sector's directed fishery while meeting its incidental catch needs in other fisheries.

Comments on Dependency on the Pacific Cod Fishery

Comment 29: The non-AFA trawl CP sector asserted that the Pacific cod allocation they received will be insufficient to prosecute their flatfish fisheries. However, that does not appear to be the case. From 1999 to 2003, the non-AFA trawl CP sector took 54 percent of their Pacific cod in directed Pacific cod fishing and 46 percent incidentally while targeting other species (flatfish, etc.). In 2003, 63 percent of the non-AFA trawl CP sector Pacific cod was taken in directed Pacific cod fishing and 37 percent was taken incidentally. The allocation the non-AFA trawl CP sector received is 90 percent of its 1997 to 2003 average catch history. For comparison, the pot CP sector received an allocation that is 88 percent of its 1997 to 2003 catch history. The trawl CV sector allocation was 97 percent of its 1997 to 2003 catch history. The hook-and-line CP sector received an allocation that is 97 percent of its 1997 to 2003 catch history. However the hook-and-line CP sector's dependency on BSAI Pacific cod is four times that of the non-AFA trawl CP sector and more than twice that of the pot CP sector and the trawl CV sector.

Response: Please see the EA/RIR/FRFA for the best available data on the BSAI Pacific cod fishery. All the sectors are dependent on the BSAI Pacific cod resource, albeit to varying degrees. Based on the average annual estimated total first wholesale revenue from groundfish products between 1999 and 2003, the hook-and-line CP sector is more dependent than the other sectors on the BSAI Pacific cod resource.

Comment 30: The proposed allocations do not correlate with actual dependency and use by sector. The non-AFA trawl CP sector is highly dependent on Pacific cod as a directed fishery and as an incidentally caught species in every target fishery the sector prosecutes. The H&G fleet will lose most of its directed cod fishery under the Amendment 85 allocation because almost half of the cod harvested by the H&G fleet is incidental cod in other groundfish fisheries. This fishery now represents over a quarter of all non-AFA trawl CP sector revenues. This aggregate figure, as large as it is, masks the fact that Pacific cod accounts for well over half of the revenues for particular non-AFA trawl CP vessels, particularly the smaller vessels in the fleet. If the Amendment 85 allocation and CDQ increases took place in 2007, and assuming a harvest equal to that of 2005, the fleet would shut down in late May due to insufficient cod. The sector would lose 34 percent of its annual 1999 to 2004 average revenues for the fleet.

Response: NMFS acknowledges that the non-AFA trawl CP sector Pacific cod allocation under Amendment 85 is less than the percentage harvested by the sector in very recent years and that this sector's harvest has increased in recent years. However, the allocation is not based on one or two recent years, but is reflective of long-term dependence as evidenced by harvest over a longer period of time. The Council decided that long-term dependence was appropriate and NMFS determined that the record supports this approach (see response to Comment 15). Based on recent fishing practices by the fleet, NMFS has determined that this sector will maintain a directed Pacific cod fishery and will be able to prosecute other fisheries (see response to Comment 17).

Comment 31: The analysis does not address the issue of lost revenue from low allocations on either the H&G fleet's other groundfish fisheries or from loss of the target fishery itself. Stating that 21 percent of the annual revenues of the fleet are from cod oversimplifies the picture. The information before the Council on Amendment 80 (June 2006 C–1 Supplemental to Amendment 80) states that the H&G sector's revenues from cod are actually 25 percent (99–04 avg). However, we are more realistically 100 percent dependent on cod because it is critical to all our target fisheries. Not only will we lose some percentage revenue from loss of a directed cod fishery, but we can lose the value of the non-cod groundfish target fishery as well. The Council and the analysis for Amendment 85 also failed to consider that the non-AFA trawl CP sector is dependent on Pacific cod for incidental catch in its flatfish, mackerel, and rockfish fisheries. The first real analysis of the impact of the Council's decision upon the non-AFA trawl CP sector was made by NMFS only several weeks later, and it found that impact to be severe. Substantial bycatch of Pacific cod in these fisheries is inevitable. This bycatch amounts to almost half of the non-AFA trawl CP sector's harvest of Pacific cod. We are no less dependent on our cod revenue than a cod longliner which does not engage in any other groundfish fisheries. The reduction in the Pacific cod allocation to the non-AFA trawl CP sector will affect its entire BSAI fishing effort. Without cod, no one

in the H&G fleet can fish in any BSAI target.

Response: NMFS believes that the non-AFA trawl CP sector has a sufficient Pacific cod allocation for a directed Pacific cod fishery. The size of the directed Pacific cod fishery will depend on the sector's need for Pacific cod as incidental catch in its other directed groundfish fisheries. The EA/RIR/IRFA examined this issue and concluded that the sector's directed fishery is likely to be affected by the allocation. The EA/RIR/FRFA acknowledges the need for the allocation to include incidental catch needs on page 279: ''The problem statement for this amendment emphasizes that the Pacific cod allocations should be adjusted in order to reduce uncertainty in, and provide stability to, the sectors. Allocating appropriate amounts of incidentally caught cod, so that each sector's directed fisheries can be harvested, is an important concern when creating stability.'' Also stated on page 293: ''As mentioned above, the non-AFA trawl CP sector harvests a significant portion of its BSAI Pacific cod as incidental catch in a non-Pacific cod target fishery. Table 3–101 shows that the non-AFA trawl CP sector harvested about 54 percent of its total retained cod harvest in the target cod fishery on average during 1999 to 2003; the remaining 46 percent was harvested as incidental to all other target fisheries, primarily the flatfish fisheries (yellowfin sole, rock sole, flathead sole, Atka mackerel, and Pacific ocean perch). With a lower potential allocation compared to recent years, this sector will likely need to determine how much of its cod allocation will be used as incidental catch to other target fisheries versus to fund the directed cod fishery.'' Also, see response to Comment 17.

What this sector is ''losing'' is the opportunity to harvest an amount of Pacific cod that is larger than its historic use and dependence. The trawl CP sector has not harvested its entire allocation of Pacific cod since allocations began in 1994. The trawl CP sector has been the largest contributor to the yearly reallocations that this amendment is designed to reduce, therefore, the allocation to the trawl CPs is justified. Also see response to Comment 30.

The commenter may be assuming there is hard cap management under Amendment 85, but Amendment 85 does not include this provision (see response to Comment 77).

Comment 32: Incidental catch of Pacific cod allows harvesters to maximize the value of the other target species because it is in large part the highest valued species in each of those non-AFA trawl CP target fisheries.

Response: NMFS acknowledges that Pacific cod is a valuable species. The non-AFA trawl CP sector will have to manage its Pacific cod allocation to accommodate target and nontarget needs to optimize the value of its harvest of BSAI groundfish.

Comment 33: Non-AFA vessels are excluded from any access to the pollock fishery and now the Council is proposing to take away from them a significant portion of the Pacific cod fishery that, over a demonstrated period of years, they have used and are dependent upon, while at the same time augmenting the fishing privileges of AFA trawl CP vessels that have neither been using nor depending upon the cod fishery at more than a minimal level during that same relevant period. That proposal does not comport with this Council's obligation to ''protect other fisheries . . . and the participants in those fisheries . . . from adverse impacts caused by [the AFA] or fishery cooperatives in the directed pollock fishery.''

One final noteworthy recognition by the Notice of Proposed Rulemaking is that the Council decided to ''maximize the opportunity for a directed Pacific cod fishery'' for the AFA trawl CP sector, 72 FR 5662 (col. 1, top), but was content to underfund the non-AFA trawl CP sector to such an extent that it ''may be constrained in its ability to conduct a directed fishery for Pacific cod in order to have sufficient Pacific cod available for incidental catch in its other fisheries.'' Id. (col. 1, bottom). This turns upside down the Council's obligations under the AFA.

Response: Sideboards are intended to prevent a sector from using advantages gained from a rationalized fishery in a fishery that is not rationalized. The current AFA CP Pacific cod sideboard prevents AFA trawl CPs from harvesting a larger share of Pacific cod than the sector harvested before the AFA. Amendment 85 will separate the trawl CPs that currently share one allocation into two sectors, AFA and non-AFA. The AFA trawl CP sector will receive 0.1 percent of non-CDQ TAC above its average harvest history under Amendment 85 and the non-AFA trawl CP sector will receive exactly its average historic harvest. The AFA trawl CP fleet will be restricted to a separate allocation slightly greater than its historic catch from 1995 through 2003, but 62.3 percent below its current sideboard limit for catch of Pacific cod. Although the non-AFA vessels are excluded from the pollock fishery in the BSAI, AFA sideboard provisions will continue to restrict those vessels from participating in other BSAI fisheries, and AFA trawl CPs will continue to be prohibited from fishing in the Gulf of Alaska. Therefore, NMFS has determined that the AFA trawl CP allocation of Pacific cod under Amendment 85 is consistent with the AFA. Also, separating the two sectors will protect the historic catch of the non-AFA trawl CPs better than leaving these two sectors combined with a lower shared allocation that reflects their combined history, but with the same AFA sideboard. NMFS believes the allocations of Pacific cod to the AFA and non-AFA trawl CP sectors are sufficient for each sector's directed Pacific cod fishery and for their incidental catch needs and that the allocation for the non-AFA trawl CP sector will be better protected under Amendment 85 than leaving the sectors combined.

Comment 34: To whatever extent the sector's total catch history is not reflected in the initial allocation made under Amendment 85, there will be insufficient fish in the AFA trawl CP sector's allocation to meet the bycatch needs of the pollock fishery without depleting, at least to some extent, the allocation that would otherwise be available to our directed cod vessel. As a consequence, the directed cod fishery that vessel has traditionally conducted during the early part of the fishing year will likely be curtailed, if not eliminated.

Response: Given that the allocation to the AFA trawl CP sector under Amendment 85 is slightly higher than its average historic harvest, that allocation should be sufficient for this sector to cooperatively manage its allocation and maintain a directed fishery in addition to meeting its needs for incidental catch in its pollock and yellowfin sole fisheries.

Comment 35: The Council increased the allocation to the AFA trawl CP sector so that Pacific cod would not be a limiting factor in prosecuting the BSAI pollock fishery. From 1999 to 2003, the AFA trawl CP sector took 84 percent of its Pacific cod in directed Pacific cod fishing and only 15 percent in the pollock fishery. The proposed rule states that 44 percent of the Pacific cod taken by this sector occurs incidentally in the pollock fishery. This is in contrast to the analysis (15 percent), therefore the proposed rule must be including fishmeal and other factors. Either way, it does not appear that the allocation this sector received under Amendment 85 will be constraining in the pollock fishery.

Response: As stated in the proposed rule, the allocation to the AFA trawl CP sector was chosen to ''maximize the opportunity for a directed Pacific cod fishery and to minimize the potential for an increase in discards of Pacific cod if catch exceeds the MRA.'' The commenter apparently relied on the April 2006 draft analysis and used Table 3–105 which excluded fishmeal. However, the information was revised before submission to the Secretary. The EA/RIR/FRFA includes fishmeal in the revised information in Table 3–101 and states on page 294 that, ''the AFA CP sector harvested about 56 percent of its total retained cod harvest in the target cod fishery on average during 1999–2003, the remaining 44 percent was harvested as incidental to other target fisheries, primarily pollock.'' Additionally, in the final Council motion from April 2006, the Council explicitly noted that in order to determine PSC, the percentage of Pacific cod harvested in the Pacific cod target fishery by the trawl sectors should be calculated on the basis of all cod catch from 1999 through 2003, including that designated for fishmeal production.

Comment 36: Only the hook-and-line CP sector has a large and primary dependence on BSAI Pacific cod; it is the sector with the most dependence on the BSAI Pacific cod resource. Over 80 percent of the wholesale revenues of the hook-and-line CP sector come from BSAI cod.

Response: NMFS agrees that the hook-and-line CP sector is the sector that has the highest portion of its income from its Pacific cod fishery. However, other sectors also depend on Pacific cod for a significant portion of their income.

Comment 37: The H&G sector's Pacific cod use and dependence must be considered and accommodated by Amendment 85, just as was that of the hook-and-line CP sector.

Response: The non-AFA trawl CP sector will receive exactly its 1995 to 2003 average historic harvest under Amendment 85. The hook-and-line CP sector will receive 48.7 percent of the non-CDQ Pacific cod TAC under Amendment 85, which is closer to its average historic harvest than its current allocation of 40.8 percent. The hook-and-line CP sector's new allocation is less in all cases than its share of the retained harvest under various year groupings: from 1995 through 2003, from 2000 through 2003, and from 2004 and 2005 (see Amendment 85 proposed rule Tables 3 and 4). However, its history is much larger than its current allocation due to reallocations of unused Pacific cod from other sectors, primarily the trawl CP sector. Amendment 85 was designed to reduce the amount and frequency of these reallocations to increase stability for all sectors.

Comment 38: Amendment 85 will provide increased stability to the sectors with the most dependence on Pacific cod by removing the uncertainty of the amount of the potential annual harvest for each sector (i.e., reduce annual rollovers). This stability will promote efficiency and planning for those same sectors. For example, the increased stability of the BSAI Pacific cod allocation may facilitate the formation of a hook-and-line CP cooperative that can result in increased utilization and efficiency.

Response: NMFS agrees that Amendment 85 will increase stability in the BSAI Pacific cod fishery.

Comment 39: The Council was consistent with past allocation actions by not including fishmeal when considering dependency on the resource.

Response: Contrary to the commenter's conclusion, the record for Amendment 85 and this final rule clearly demonstrate that the Council not only considered fishmeal data, but included fishmeal in the calculation of catch history for the AFA trawl CP sector allocation. When vessels directly affected by a proposed allocation action process fishmeal, it has been considered. It depends on what sectors or vessels are affected by an action as to whether fishmeal has been included or excluded. Fishmeal was not particularly relevant other past allocation actions. In current and proposed actions, fishmeal was excluded in the preliminary analysis for Gulf rationalization, which has been tabled. There is now an option to exclude fishmeal in the Gulf of Alaska Pacific cod sector-split analysis. However, these actions exclude the AFA trawl CPs, which are the primary producers of fishmeal. Therefore it is consistent to include fishmeal in considering a sector's dependency on Pacific cod under Amendment 85.

Comments on Groundfish Retention Standard Under Amendment 79

Comment 40: The allocation to the H&G fleet affects the Amendment 79 groundfish retention standard (GRS) which the H&G fleet must meet, starting in 2008. Once Pacific cod is closed to directed fishing, and is taken as an incidental catch in other fisheries, it is subject to a maximum retainable amount of 20 percent of the total groundfish catch aboard a vessel. This will make compliance with the groundfish retention standards of Amendment 79 very difficult for most vessels. The Aleutian Island cod fishery is a very high retention fishery, and it essentially is no longer an option for us. According to NMFS inseason managers, the fleet will only have enough fish to fund an early directed cod fishery, which is essential as it occurs simultaneous to the rock sole fishery. The loss of our Aleutian Islands cod target is going to pose a retention hardship for two reasons: one, we lose our March cod target fishery in lieu of bycatch needs for the rest of the year, and two, the H&G fleet's cod will be on bycatch status for the majority of the year. So the reduced allocation has put the fleet in a position of mandatory discards of a mandatory retention species, until or unless the sector is able to form cooperatives under Amendment 80.

Response: As explained in the response to Comment 17, based on the actual TAC for 2007, but with the larger CDQ allocation of 10.7 percent, NMFS estimates there would be 19 to 20 days of directed fishing under the current practices of the non-AFA trawl CP sector. If the sector reduces its incidental catch needs for Pacific cod in its other directed fisheries, its Pacific cod directed fishery could last longer. Typically, the non-AFA trawl CP sector targets Atka mackerel, rock sole, yellowfin sole and Pacific cod in January and the Pacific cod fishery peaks in March. The non-AFA trawl CP sector usually catches 80 percent of its Pacific cod allocation in the first two seasons, which is its seasonal allowance. To meet the GRS after their directed Pacific cod fishery is closed, the non-AFA trawl CPs will need to fish in a manner that maintains incidental catch rates at levels that minimize regulatory discards. Therefore, meeting the GRS under Amendment 85 may be more difficult for the non-AFA trawl CP sector.

If directed fishing for Pacific cod has not been closed to the non-AFA trawl CP sector, then this sector has had to keep their entire catch of Pacific cod, which improves their retention rate. But if the non-AFA trawl CP Pacific cod directed fishery will now be closed most of the year, the non-AFA trawl CP sector must retain up to the MRA. Any catch over the MRA must be discarded and those discards will count in the retention calculation under the GRS, potentially making it more difficult to comply with the GRS.

However, compliance with the GRS should be easier for the vessels that join a cooperative under Amendment 80, which was approved by the Secretary on July 26, 2007. The non-AFA trawl CPs may form harvesting cooperatives by the

start of 2008 if Amendment 80 is implemented by January 1, 2008, which also is the effective date for this final rule to implement Amendment 85. Additionally, the Council has adopted a regulatory amendment that would adjust the accounting period for MRA amounts for particular species including Pacific cod. If approved by the Secretary, this adjustment also would be effective by January 1, 2008, and would reduce regulatory discards and facilitate compliance with the GRS under Amendment 79 to the FMP.

Comment 41: The revised Secretarial review EA/RIR/IRFA (October 2006) merely references the Groundfish Retention Standard (GRS) in one sentence that acknowledges that Pacific cod, as a highly retained species, is important to the non-AFA trawl CP sector in meeting the GRS. Neither Section 2.3.9 (Cumulative Effects) nor Section 2.3.9.1 (Past and Present Actions) mentions the Amendment 79 GRS in relation to the sector's cod allocation and what the loss of its directed fishery and lowered allocation will do to the sector's ability to meet the retention standard. There is no attempt to estimate the impact of a reduced allocation on the ability of the sector, or small vessels in particular, to meet the GRS scheduled for implementation in 2008. The analysis should have considered the impact of the non-AFA trawl CP sector's Amendment 85 allocation on the ability of this sector to function under status quo management (no harvesting cooperatives) when the GRS is imposed in 2008. The tipping point on meeting the GRS with regard to this action is the reduced cod allocation, not the open access race for fish.

Response: The Secretarial review draft EA/RIR/IRFA does discuss the cumulative effects of Amendment 85 in conjunction with the GRS and Amendment 80 in Section 2.3.9 ''Cumulative Effects'' under section 2.3.9.2 ''Recent and Reasonably Foreseeable Future Actions.'' Improved retention rates are the intended effect of the GRS action under Amendment 79. Implementation of Amendments 79, 80, and 85 are planned for 2008. The GRS would be phased in over a four-year period.

The reduced allocation to the non-AFA trawl CP sector likely will reduce its directed fishery, but the vessels still will be retaining Pacific cod to comply with improved retention/improved utilization requirements up to the 20 percent MRA percentage established for Pacific cod after the directed fishery is closed. The catch of Pacific cod beyond the 20 percent MRA threshold must be discarded. However, a vessel's total catch of Pacific cod still would be included in the calculation used by NMFS to assess compliance with the annual GRS ratio of retained catch to total catch. Thus, NMFS expects the GRS program would provide an incentive for the sector to fish for its other targeted groundfish species in a manner that reduces the incidental catch of Pacific cod to the extent practicable. In 2008, the GRS will be at a relatively low level to reflect fleet-wide status quo. As the GRS ratio steps up over the next four years, NMFS anticipates that it will parallel other new proposed management measures that provide additional opportunity for retention of groundfish, including proposed adjustments to the MRA accounting period for some species and Amendment 80.

The EA/RIR/FRFA recognizes that compliance with the GRS by the non-AFA trawl CP fleet with its new Pacific cod allocation under Amendment 85 will be more difficult. However, the purpose of Amendment 85 was to allocate Pacific cod based on historical retained catch in addition to socioeconomic and community concerns, not to allocate Pacific cod in a manner that would facilitate compliance with the GRS. There are other ways the fleet can improve its retention rates of Pacific cod without the allocation it has had in the past. For example, by avoiding fishing in areas with high bycatch rates of Pacific cod.

Regarding the estimation of economic impacts, the Secretarial review draft analysis stated ''The Groundfish PSEIS [Programmatic Supplemental Environmental Impact Statement] noted that the availability and consistency of data limits the ability to analyze the effects of past actions on the economic condition of selected sectors of the Alaska groundfish fishery. According to the Groundfish PSEIS, analyses are also limited by the difficulty of delineating the cause-and-effect relationships between multiple factors and the resultant economic effects. Many factors substantially affect the economic status of the Alaska groundfish fishery. Changes in markets, biological conditions and fishery management regulations can result in changes in the revenues and operating costs of firms participating in the fisheries and changes in fleet size and composition. Isolating the effects of a single factor is seldom possible.''

Amendment 80 will provide target allocations of Atka mackerel, flathead sole, Pacific ocean perch, rock sole, and yellowfin sole to the non-AFA trawl CP sector and allows the formation of harvest cooperatives. Sector allocations and associated cooperatives will allow participants to focus less on harvest maximization and more on optimizing harvest. The Secretarial review draft analysis further notes that, ''Absent a cooperative structure as approved (by the Council) in Amendment 80, it is expected that compliance with the groundfish retention standards and management of a lower Pacific cod allocation to serve both directed and incidental catch needs, will be substantially more difficult.'' Note that the GRS pertains only to non-AFA trawl CP vessels that are ≥125 ft (38.1 m) LOA, not to smaller vessels. However, under Amendment 80, the GRS will apply to all non-AFA trawl CP vessels regardless of length.

Comments on Cumulative Effects

Comment 42: By applying the 13.4–percent allocation to, and deducting the 3 percent State water set-aside and 10.7 percent CDQ allocation from, the 2005 TAC for Pacific cod, the H&G fleet allocation would have been 23,911 mt, a loss of 6,000 mt from the H&G actual harvest in 2005. This represents a loss of $11 million in Pacific cod alone. The H&G fleet fully harvested 23,911 mt of Pacific cod by mid-June in 2005. The fleet would have been unable to harvest its other directed fisheries after June 11th and lost $43 million in its second half of the year target fisheries. In comparing the losses of different fleets, if the longline fleet lost 6,095 mt, that would be a loss of $11 million. The same fish represents a loss of $54 million to the H&G fleet, or, roughly 35 percent of its annual revenues. This was not analyzed in any Amendment 85 document.

Response: The non-AFA trawl CP fleet will have less Pacific cod available than it does under the current allocations, however, this scenario would not happen under Amendment 85. Because NMFS anticipates that the trawl sectors will fully harvest the Pacific cod allocations under Amendment 85, NMFS also anticipates it will need to establish an incidental catch allowance for each trawl sector. Under this final rule, NMFS will develop incidental catch allowances for each trawl sector on an inseason basis, rather than through the annual harvest specification process. The directed fishery for the non-AFA trawl CP sector will likely be shorter than in the past, thus the possible loss, but under Amendment 85 the other non-AFA trawl CP fisheries will be managed with the intent of avoiding closures for lack of sufficient Pacific cod. Also, under this final rule, the non-AFA trawl CP

sector will continue to be managed under a soft cap for incidental catch of Pacific cod.

Comment 43: The non-AFA CP fleet has not received representative allocations. We see that if these allocations were in effect in 2005, the fleet would have shut down in June, losing 35 percent of its annual revenues. This incurs economic harm not only to our fleet but also to remote communities that depend on the activities of the non-AFA CP fleet. As the sole harvesters of target fisheries that will be left in the water because of an inadequate cod allocation, communities will not receive landing tax revenues from that fish, and support service revenues from that fleet. Amendment 80 allocates 90 percent of the Atka mackerel and Pacific ocean perch to the H&G fleet. However, we saw that if Amendment 85, the State water fishery and the increased CDQ were in effect in 2005, half of the Atka mackerel would have been left in the water and all of the Pacific ocean perch, from a June 11th closure. This directly harms the residents of Atka and Adak. Stranding fish is not obtaining optimum yield.

Response: Under this action, an incidental catch allowance of Pacific cod will be established for use in the other non-AFA trawl CP sector directed fisheries. See response to Comment 42.

Comment 44: Effective 2007, the Central Gulf of Alaska Rockfish Pilot Program goes into effect. Originally a two-year program, it was recently extended to five years under the Magnuson-Stevens Act reauthorization. That program limits participation in the Central Gulf rockfish fisheries to 15 H&G vessels. As with Gulf cod, and BSAI pollock, entry into other fisheries by the H&G fleet, and therefore other options, is becoming more restricted. These fisheries would have provided relief in the event that the lowered cod allocation shuts down the H&G fisheries prematurely.

Response: Amendment 85 does not contain measures that would prevent the non-AFA trawl CP sector from prosecuting its target fisheries. NMFS agrees that participation in Gulf of Alaska and BSAI fisheries is becoming more restricted as participation in these fisheries becomes more restricted. See response to Comment 42.

Comments on Small Boat Sector Allocations

Comment 45: The allocation process was reasonably fair and equitable. The jig and <60 ft (18.3 m) LOA fixed gear CV sectors received allocations larger than their respective catch histories. Accordingly, the majority of the other sectors then received allocations smaller than their respective catch histories to offset and ''fund'' those increases. However, the allocations in Amendment 85 were the result of a fair and equitable process and did not discriminate by residency.

Response: Comment noted.

Comment 46: Other considerations given to the small boat sectors under Amendment 85 include (1) adjusting the jig trimester apportionment to put more fish in the A season, (2) establishing a new hook-and-line CV halibut PSC category that enables longline CVs to fish in the summer months, and (3) a new hierarchy of potential rollovers. The Council felt these considerations and the resulting allocations in Amendment 85 amply addressed National Standard 8.

Response: Comment noted.

Comment 47: We support the principle of adequately funding small boat, entry-level fisheries.

Response: Comment noted.

Comment 48: Allocations to the jig and <60 ft (18.3 m) LOA fixed gear sectors were made without consideration of either the Alaska State waters fishery in which such vessels could participate or the likelihood that those Pacific cod allocations will, in fact, be utilized. A result of this over-allocation is that much of the cod non-CDQ TAC allocated to these sectors will rollover, first through various inshore fisheries, including to the trawl catcher vessel fleet; none, however, will likely ever roll back to the H&G sector. Such a result is at odds with the Amendment 85 goal of minimizing rollovers.

Response: NMFS disagrees. The State waters Pacific cod fishery was considered by the Council when the allocations to sectors were made. This fishery was established by the State to meet local needs in the area of Adak, Alaska, in the Aleutian Islands and is not readily accessible to small boat operators fishing in other coastal areas of the Bering Sea. Additionally, the purpose of Amendment 85 is to revise the allocations to the various sectors to more closely reflect historic harvest; a goal of the amendment is to decrease rollovers, not eliminate them. The Council's purpose in giving the small boat sectors allocations greater than their histories was to encourage the growth of these entry-level sectors in accordance with National Standard 8. Since 2001, the <60 ft (18.3 m) LOA fixed gear CV sector has harvested all of its allocation and since 2002 has harvested increasing amounts of rollovers from the jig sector, including in 2006, the first year of the State waters fishery. The allocation to the jig sector is reduced under Amendment 85. Also, the amount of the reallocations from the small boat sectors is historically much smaller than the amount of the reallocations from the trawl sectors, thus supporting the Council's goal of increasing stability.

Comment 49: The non-AFA trawl CP sector was cut in order to fund a 4 percent small boat fishery. When asked by another Council member what was the rationale for the H&G allocation of 13.2 percent (as originally introduced) rather than the mid-point years' average, the maker of the motion stated ''It was really how to fund that 4 percent and make the numbers work and that is my rationale for that number.'' While creating room and incentives for growth in the small hook-and-line and pot catcher vessel and jig fisheries was a goal of Amendment 85, the cost for doing so should not fall on only one of the most cod-dependent sectors. Shifting of cod from one of the most dependent sectors (non-AFA trawl CP) to perhaps the least runs counter to the objective of matching cod allocations with use and historical dependence.

During Council discussion on Amendment 85, the maker of the motion stated that the trawl sector should fund the jig set-aside since the fixed gear sector had been doing that in the past. This was given as the justification for so dramatically decreasing the non-AFA trawl catcher-processor allocation (from recent use above 18 percent to an allocation of only 13.4 percent). The record does not support the assertion that the fixed gear fleet and not the trawl fleet had historically funded increases for the small boat sector. It is not clear from the record that the (proposed) jig allocation actually came from any one sector; however, if the assumption was that the new allocation percentages represented a shift in the responsibility for the jig set-aside from fixed gear to the trawl sector, then all trawl sectors should have been similarly assessed.

There was no consideration or analysis of the possibility, appropriateness, or impact of imposing the burden of funding those increases unequally. The Secretarial review draft analysis expressly acknowledges this, stating that the extra allocations to the small sector were ''deducted . . . principally from the non-AFA sector amounts.'' It is not fair and equitable to impose the burden on the non-AFA sectors and not on the AFA sectors, particularly given the AFA's mandate to the Council to protect the non-AFA fleet from AFA encroachment in fisheries other than pollock. There was no separate analysis, or vote, on spreading

the burden of the small boat incentives unequally. What is clear is that no rationale has ever been given for disadvantaging either the non-AFA sectors generally (which the Secretarial review draft analysis asserts is the group that the Council disadvantaged) or the H&G sector in particular.

The estimated cost, at 2007 TAC and 2005 harvest rates, to the H&G fleet of an estimated $46 million, or 34 percent of their annual revenues, far outweighs the benefit to a small boat fleet which has historically never harvested its allocation. We have no quarrel with the Council's decision to make those adjustments. There is no justification, however, for imposing the burden of funding them entirely or primarily upon the H&G sector.

Response: Neither the non-AFA trawl CP sector nor any other sector exclusively funded the allocation to the small boat sectors. Despite the remarks made by the Council member and based on the average historic harvest from 1995 to 2003, it would appear that neither the AFA trawl CP sector nor the non-AFA trawl CP sector funded the small boat sector allocations because the former will receive slightly above its average historic harvest and the latter will receive exactly its average historic harvest. There is nothing in the Secretarial review draft analysis addressing the impact on other sectors because there were no specific amounts taken from any particular sector to fund the small boat sectors.

For the small boat sectors to receive allocations above their average historic harvest, four sectors will receive less than their 1995 to 2003 average historic harvests: pot CV ≥60 ft (18.3 m) LOA, hook-and-line CP, pot CP, and trawl CV (see paragraph seven of the response to Comment 13). The trawl CV sector is comprised of AFA and non-AFA vessels, so considering all the sectors that will receive an allocation below their average historic harvest, most of them are non-AFA sectors. The non-AFA sectors are not disadvantaged, they merely outnumber the AFA sectors by a ratio of eight to one.

Comment 50: The Council made a policy decision to deviate from its stated goal of conforming actual use and dependency by allocating to the jig and <60 ft (18.3 m) LOA fixed gear CV sectors a combined 2.4 percent above their historic harvest of the Pacific cod TAC. Assuming that the Council would be justified in shifting that 2.4 percent to those sectors because of the predicted salutary impact on coastal communities and related economic and social consequences, it is not legitimate to take that 2.4 percent entirely from other non-AFA sectors. In the analysis for Amendment 85, the potential impact of providing the small boat sectors with an allocation above their actual use and dependency was limited to a scenario in which the extra shares needed to fund that incentive were taken from all other sectors proportionally; no analysis was made of the disproportionate impacts that would result from the scenario, eventually chosen by the Council, of taking that extra 2.4 percent exclusively from non-AFA sectors.

Response: The Pacific cod allocations for the jig and <60 ft (18.3 m) LOA fixed gear sectors did not come exclusively from any particular sectors. As explained in the response to Comment 49, several sectors received less than their 1995 to 2003 average historic harvest of Pacific cod to fund the small boat sectors.

Comments on Reallocations

Comment 51: Amendment 85 will not resolve the reallocation issues raised in the problem statement created by the Council for the action. By over-allocating cod to small, shore-based fisheries that have a history of under-fishing current allocations, and ignoring the important aspect of Alaska's creation of a state waters fishery, this action insures continued rollovers at or above current levels.

Response: The problem statement does not seek to eliminate inseason reallocations, but to decrease them by adjusting Pacific cod allocations to better reflect historic use by sector. Historically, 76.6 percent of the reallocations between 2000 and 2004 resulted from the trawl sectors not harvesting their entire allocations, with a much smaller amount of unharvested Pacific cod coming from the small, shore-based fisheries. Based on this information, NMFS determined that the new allocations to the sectors will reduce reallocations in the future. Also, see response to Comment 48.

Comment 52: NMFS will likely set the incidental catch allowance for the non-AFA trawl CP sector higher than the anticipated need, to ensure that there is enough Pacific cod available to fund other sector fisheries. The cod which is not used in the incidental catch allowance will probably not be enough to fund a separate (late-season) directed fishery, so will roll over to another sector. This will continue the very situation (rollovers) which Amendment 85 was supposed to fix. In effect, the H&G sector loses cod allocation well beyond the amounts that were rolling over in the past, and the allocation scheme ensures that more fish will roll over in the future.

Response: As explained in response to Comment 48, Amendment 85 was not intended to eliminate rollovers. Under this final rule, NMFS will create an incidental catch allowance for the non-AFA trawl CP sector to use for Pacific cod caught incidentally in its other directed fisheries. Because the non-AFA trawl CP sector tends to target Pacific cod early in the year, NMFS will estimate an incidental catch allowance early in the year in order to close the sector's directed fishery while there is enough of the sector's Pacific cod allocation remaining for incidental catch in the other non-AFA trawl CP groundfish fisheries. Whether the allowance is set too high will depend on how well the non-AFA trawl CP sector can avoid Pacific cod incidental catch in its other fisheries. If the sector can lower its incidental catch rate, the directed fishery will have more Pacific cod available for its target fishery. Pacific cod still may be harvested and retained once the directed fishery is closed, albeit at the lower rate of 20 percent under MRA regulations. A large portion of the Pacific cod harvest in this sector historically has been taken as incidental catch. This trend is expected to continue until vessels are able to form cooperatives and opportunities to change fishing strategies present themselves.

The commenter presents only one scenario. NMFS anticipates that without cooperatives, the Pacific cod fishery will be prosecuted much as it has been in the past. NMFS will do its best to ensure that each trawl sector can fully harvest its allocation. If the non-AFA trawl CP sector can reduce its incidental catch of Pacific cod, it may be that the incidental catch amount will be greater than the sector's needs, but not large enough for another directed fishery.

A goal of Amendment 85 is to reduce reallocations, not eliminate them. NMFS has determined that the allocations will result in lower amounts of reallocations from all sectors. If Amendment 80 is implemented by January 1, 2008, NMFS will manage Pacific cod for the non-AFA trawl CP sector in accordance with Amendment 80.

Comment 53: The current allocations (from the 1995 action) do not reflect actual catch by sectors of BSAI Pacific cod, principally due to rollovers of uncaught allocations from the trawl and jig sectors. The trawl sectors consistently have not caught their allocation which has resulted in rollovers from the trawl sectors to the fixed gear sectors every year since 1995 - both before and after SSL mitigation measures. The average rollover from the trawl sectors has been 16,765 mt per

year (1995 - 2005). At the same time, the freezer-longliners are the only sector that consistently caught their entire allocation on an annual basis. Since 1995, the freezer-longliners have also been catching the majority of the rollover from the trawl sectors and uncaught allocations from other sectors as well (jig, pot, etc.).

Response: The EA/RIR/FRFA contains the data concerning this issue in Table 3–24 and it represents the best scientific information available on the subject.

Comment 54: The increasing trend in the fixed gear allocation is a reflection of trawl rollovers. Trawl sectors have not caught their allocations for a number of reasons, one of which is halibut PSC mortality. From 1995 to 2005, the combined trawl sectors caught a decreasing amount of Pacific cod while increasing the rate of halibut PSC mortality by 47 percent (mt halibut PSC per mt Pacific cod). During the same time period, the hook-and-line sectors were catching an increasing amount of Pacific cod while decreasing the rate of halibut PSC mortality by 31 percent. In 2005, the trawl rate was 3.4 times higher than the hook-and-line rate (mt halibut PSC per mt Pacific cod).

Response: The EA/RIR/FRFA examines reallocation among gear types in Section 3.3.5.7 and it represents the best scientific information available on the subject.

Comment 55: NMFS should disapprove the rollover (reallocation) hierarchy contained in the proposed rule because the inshore sectors already have healthy allocations and would be first in line for the rollovers. NMFS should send this portion of Amendment 85 back to the Council with instructions to give non-AFA trawl CPs priority access to the rollovers from the jig and <60 ft (18.3 m) LOA fixed gear sectors.

Response: NMFS has determined that the reallocation hierarchy proposed by the Council is consistent with the purpose and need for Amendment 85 and that it is consistent with the Magnuson-Stevens Act and other applicable law and has approved it with this final rule. This reallocation hierarchy is consistent with the Council's decision to increase the harvest opportunities for the fleets that deliver shoreside to coastal fishing communities, a consideration under National Standard 8.

Comment 56: Prioritizing rollovers to the AFA trawl CP sector would help accomplish the Council's goal of ''maximizing to the extent practicable'' the opportunity for the AFA trawl CP sector to conduct its directed cod fishery at the beginning of the year. Knowing that the surplus ''C season'' cod that has traditionally rolled over from the AFA trawl CP sector during the last half of the fishing year would be available to support nontarget needs in the AFA trawl CP sector during the pollock A and B seasons would help facilitate inseason incidental catch management so as to permit full funding of the directed cod fishery that one AFA trawl CP vessel conducts early in the year.

Response: See response to Comment 55 which is applicable to the AFA CP sector as well as the non-AFA CP sector. Also see the responses to Comments 13 and 25 for more information regarding the AFA trawl CP sector allocations.

Comments on Process Followed for Adoption of Amendment 85

Comment 57: The Council's action was taken too quickly for the regulated community to provide informed public comment. The process for consideration of Amendment 85 made it difficult, if not impossible, for the public to comment effectively on, or the Council to understand the impacts of, the decisions it was making. The Magnuson-Stevens Act generally prescribes that a regional fishery management council will hold public hearings in conjunction with the FMP amendment process. See 16 U.S.C. 1852(h)(3). The law also provides for a separate opportunity for ''interested persons'' to make comment at ''business meetings of a Council.''

Response: The public was provided ample notice and opportunity to comment on Amendment 85 in accordance with APA and Magnuson-Stevens Act procedures. The public had several opportunities to comment on Pacific cod sector allocations at Council meetings prior to the Council's final action in April 2006 and during the comment period on the FMP amendment. The December 2004 Council meeting was the first opportunity the public had to comment specifically on Amendment 85 at the first presentation of the discussion paper for Amendment 85. Amendment 85 was on the agenda of every Council meeting from December 2004 until final action in April of 2006, for a total of eight Council meetings. The **Federal Register** notice for the April 2006 Council meeting included a statement that final action would be taken on Amendment 85. A draft analysis of Amendment 85 was prepared by the Council and made available for public review prior to the Council taking action. The analysis was then further refined to reflect the effects of the Council's action prior to submission for Secretarial review.

Comment 58: The non-AFA trawl CP sector lacked the opportunity to discern and explain the implications of the Council's actions before the Council's final decision making. As a result, the non-AFA trawl CP fleet focused its public testimony in support of options that best mirrored the sector's recent use and dependence. The first indication that the Council was developing an option that included a non-AFA trawl CP sector allocation that was at the lowest end of the range under consideration and heavily weighted pre-full retention and pre-AFA years, came when the Council began their deliberations. No further public comment was allowed before final action, however. The non-AFA trawl CP sector has no representation on the Council. Without the benefit of an H&G representative on the Council to participate in the deliberations, the Council members cannot and clearly did not fully realize the impact of their actions. The result was the non-AFA trawl CP fleet was denied a reasonable opportunity to discern and explain the implications of the Council's proposed action before final action was taken.

Response: There were many opportunities for the public to comment on Amendment 85 (see the response to Comment 57). Several allocation options were presented in the draft analysis that was released to the public in March 2006. These options included allocations to the non-AFA trawl CP sector that ranged from 12.7 to 16.2 percent of the non-CDQ BSAI Pacific cod TAC. The April draft of the EA/RIR/IRFA presented the Council with the information it needed to make the allocation decisions in various tables, with more information on fishmeal presented to the Council and the public at the April Council meeting before public testimony and final action by the Council. After receiving public comment, the Council chose the option to select percentages for Pacific cod allocated to each sector that fell within the range of percentages analyzed. Please see the response to Comment 3 for an explanation of the consideration of catch history from 1995 through 2003. No year was weighted more heavily than any other. Only the first three years of history out of a total of nine years considered were before full retention and the AFA. Not having a representative on the Council should not negatively impact a sector. The Council members take a sworn oath to manage in the best interests of all and are to act impartially.

Comment 59: No preliminary preferred alternative was identified by the Council. As a result, the analysts,

public, and the Council did not have the opportunity to fully understand, comment on, and evaluate the impacts of Amendment 85. Identifying a preliminary preferred alternative before final action may not be required, but for complicated actions it should be.

Response: As the commenter notes, the Council was not required to identify a preliminary preferred alternative before taking final action on Amendment 85. The analysis before the Council in April 2006 provided the Council and the public with the information necessary for final action on Amendment 85. Each option under consideration for each component was fully analyzed and when an option in one component may have affected options under consideration in another component, those impacts were identified and explained in such a way that the Council and the public could understand the impacts of its decision. For example, seasonal allowances were changed to maintain to the extent possible the current percentage of non-CDQ Pacific cod TAC available for harvest in the early part of the year when fishing for Pacific cod is more advantageous. NMFS notes the commenter's statement that a preliminary preferred alternative should be identified by the Council prior to taking final actions that are complicated.

Comment 60: The Amendment 85 decision making process was rushed, its analyses were inadequate, and the impacts of the Council decision were not well understood. When the Council chose the ''mix and match'' approach instead of a ''packaged alternative'' and moved directly to final action, rather than selecting its desired allocation as a preliminary preferred alternative for further analysis and public comment, the Council basically acted without understanding the impacts of this decision. When one aggrieved stakeholder was able to convince Council members that it suffered from certain unintended consequences, the Council took the matter up again to institute a discrete fix for one vessel. However, the law requires that all members of the public have an opportunity to understand the impacts of a proposed action and an equal opportunity to be heard in the process.

As originally passed, the Council recommended that Amendment 85 allocate the H&G sector an amount of Pacific cod that was just over its average harvest, 13.7 percent during the 1995–2003 period. The telling fact that this process devolved into a matter of political compromise rather than informed decision making, in violation of National Standard 2, was that the Council decided to reconsider final action upon discovery of an ''unintended consequence.'' Expressing concern that the 1.5–percent allocation chosen for the AFA catcher-processor sector might disproportionately impact the one vessel in that sector that targets cod (notwithstanding the recent use of that sector in the range of 1 percent), the Council voted to increase the AFA catcher-processor sector's allocation to 2.3 percent. Part of the Pacific cod that went to ''fund'' that increase came from the H&G sector, which ended up with a reduced allocation of just 13.4 percent.

This action should also have been analyzed in light of the statutory protections the American Fisheries Act grants to non-pollock fisheries. Such weighing and analysis was lacking in this instance. There was no opportunity for public input during the reconsideration and the Amendment 85 allocation was made without the Council having made a reasonable record of how the allocation it chose for the AFA sector ''protects'' the non-AFA fleets. Further, this allocation exceeds the AFA catcher-processor sector's current use (i.e., since 2001) by as much as 90 percent. It was incumbent upon the Council to make a good-faith effort to examine and fulfill its duties to the non-AFA sectors that funded this reallocation. That was not done. The stated rationale for the revision was the (highly questionable) bycatch needs of the AFA trawl CP sector. At the very least the non-AFA trawl CP fleet had far greater bycatch needs that were ignored not only in Amendment 85 and in Council discussion but were exacerbated once a table using fishmeal was presented during the Council discussion, but not analyzed in the EA/RIR/IRFA, surfaced. But no opportunity was allowed for public comment at that point, and there is no non-AFA trawl CP sector representative on the Council who would have been in a position to alert Council members to the disparity.

We support full Secretarial disapproval of the amendment based on lack of adequate analysis which resulted in the Council not fully understanding the impact of their actions, and based on the fact that the Council action did not take the non-AFA trawl CP recent history into consideration. The ultimate impact has been to jeopardize the viability of the H&G fleet, in particular, the vessels which are heavily reliant on cod.

Response: The public was notified that final action on Amendment 85 would be taken at the April 2006 Council meeting (see response to Comment 57). A draft analysis was prepared prior to that meeting. Because there were questions about including Pacific cod that was turned into fishmeal as the primary product in the calculations of retained legal harvest, tables showing that information were passed out at the Council meeting (see response to Comment 2) prior to public testimony and the Council's deliberation, so the public had an opportunity to respond to the information. The fishmeal data were included in the Secretarial review draft analysis. The Council and NMFS consider fishmeal to be part of the retained legal harvest for Pacific cod. Fishmeal is the primary product from the AFA trawl CP sector's incidental catch of Pacific cod. To exclude it from the AFA sector's history would be equivalent to excluding the non-AFA trawl CP's sector's incidental catch history from its other fisheries. Excluding fishmeal from the AFA trawl CP sector's harvest would result in a harvest share of 0.8 percent, or 65 percent below this sector's new allocation, not 90 percent. Catch history was calculated over a number of years, not just one or two recent years. The Council chose allocations from the within the range of percentages analyzed to balance catch history with consideration of socioeconomic and community factors, including allocations to the small boat sectors that were above their average historic harvest. Members of all sectors and the public at large have had an equal opportunity to comment on the Council's allocation decision, and their opinions have been considered, as evidenced by this response to comments section of the final rule. No procedural irregularity occurred during the development of Amendment 85. The information presented in the Secretarial review draft analysis for this action represents the most current, comprehensive set of information available, recognizing that some information, such as operational costs, is unavailable.

The original proposal before the Council was to allocate 13.2 percent of the non-CDQ Pacific cod TAC to the non-AFA trawl CP sector. In a later motion, the jig sector allocation was cut from 2.0 percent to 1.5 percent and the non-AFA trawl CP sector allocation was increased to 13.7 percent, partly in consideration of the State waters Pacific cod fishery. This clearly shows that there were advocates on the Council for the allocation needs of the non-AFA trawl CP sector. The following day, the Council voted to reconsider its action because the AFA trawl CP ''allocation of

1.5 percent was not reflective of the historic usage and that it would better lie somewhere between 2 and 2.5 percent'' and ''not to provide for a directed fishery for any one vessel because there is no guarantee that there will be ongoing directed fishing by any one vessel with these allocations.'' The increased allocation to the AFA trawl CP sector this second day resulted in a deduction from several sectors: 0.3 percent from the non-AFA trawl CP sector, 0.3 percent from the hook-and-line CP sector, 0.1 percent from the jig sector, and 0.1 percent from the pot CV sector. As explained in previous responses, NMFS has determined that these allocations are fair and meet the goals of the problem statement.

Council members are to act impartially and in the best interests of all. In fact, several members of the Council spoke on behalf of the non-AFA trawl CP sector during the Council deliberations on Amendment 85. This is one reason the original proposal of a 13.2–percent allocation to the non-AFA trawl CP was initially increased to 13.7 percent. Again, the final allocation of 13.4 percent is exactly the non-AFA trawl CP sector's average historic harvest from 1995 through 2003. Amendment 85 ''protects'' the non-AFA trawl CP fleet in part by separating the trawl CPs into two sectors. Also see responses to Comments 13, and 33, and 58.

Comment 61: No detailed or legally sufficient impacts analysis of the alternatives was ever prepared. Amendment 85 and its supporting analyses were simply not ready for final decision at the April 2006 meeting. Rather, they should have been further developed and a preliminary preferred alternative specified. By choosing a set of percentages in the manner that the Council did, and taking final action in the same meeting, there was no opportunity for development of a legally sufficient analysis of the likely impacts of the hybrid alternative.

The Council reserved itself the option of simply setting allocations for each sector within the range of percentages correlated with one of the baseline periods for a particular sector. However, the RIR and IRFA contained no detailed analysis of the tangible, practical impacts of these proposed allocations on the H&G fleet's fisheries and fishing strategies as they are legally required to be, and that NMFS inseason management was able to ascertain after the Council's vote on Amendment 85. The Council's deliberations regarding the factors the Magnuson-Stevens Act requires it to consider in allocation decisions was not (nor could it have been), informed by objective analysis.

The allocation and its management to the H&G sector does not meet the objectives of the Problem Statement, and the effects were not adequately analyzed in either the Amendment 85 EA/RIR/IRFA (March draft) or the Secretarial Review Draft. Nowhere is the impact of any allocation, under any year option, analyzed as to its real operational impact on the sector: the sector's need to balance target versus incidental cod, and loss of the ability to target cod or prosecute flatfish fisheries with such a reduced allocation. With the H&G sector receiving such different treatment than other sectors, or different from what was presented in the analysis, it was virtually impossible for the sector to provide appropriate public comment. Council members did not realize the impact that such a low allocation had or the instability placed on the fleet from losing their directed fishery. Nor did they know the effect on the sector's ability to attain certain groundfish retention levels. These changes happened in the Council deliberations, so the sector could not comment. Without such analysis, and without H&G representation on the Council, Council members did not make an informed decision.

The CDQ Pacific cod allocation increase from 7.5 percent to 10.7 percent and the State of Alaska 3 percent share of the ABC will affect Amendment 85's ability to minimize reallocations, and to correlate each sector's allocation with dependency and use. The amendment should be only partially approved or there should be a mandate to review the action in the near future to determine how well the problem statement was addressed.

Response: As is the normal procedure, a draft EA/RIR/IRFA was prepared prior to the April Council meeting and was made available to the Council and the public prior to the Council taking action on Amendment 85. The analysis was then further refined to reflect the effects of the Council's action prior to submission for Secretarial review. Impacts on the non-AFA trawl CP sector and all the other sectors were well analyzed prior to Council's final action and expanded upon in the analyses that were released for public comment with the FMP and the proposed rule. The analysis and other materials provided to the Council before it took final action were more than adequate and the Secretarial review draft analysis is legally sufficient. As stated in the IRFA, ''Because this action is principally designed to 'reapportion' access to the cod resource among current user groups (at the 'sector level'), by definition, it represents tradeoffs.''

The Secretarial review draft analysis expects that ''management of a lower Pacific cod allocation [to the non-AFA trawl CP sector] to serve both directed and incidental catch needs, will be substantially more difficult,'' without a cooperative structure as approved in Amendment 80. The non-AFA trawl CP sector will receive exactly its average historic harvest. This is lower than its more recent harvests, so if the sector reduces incidental catch of Pacific cod in other directed fisheries, it will have more Pacific cod available for its directed fisheries. However, the non-AFA trawl CP sector did not receive ''different treatment than other sectors, or different from what was presented in the analysis'' beyond dealing with issues unique to its sector, all of which was presented in the Secretarial review draft analysis. In determining the average historic harvest of the AFA trawl CP sector, the Council chose not to include the history of nine AFA vessels (AFA 9) that were bought out under the AFA, the history of which was included when its Pacific cod sideboard was created. Therefore, under Amendment 85, the AFA trawl CP sector will have an allocation that is substantially below its former Pacific cod sideboard allocation that included AFA 9 history. By excluding from consideration the AFA 9 history, which was extinguished by section 209 of the AFA, and by separating the two sectors, Amendment 85 protects the non-AFA trawl CPs. These two sectors will no longer be sharing a single allocation that would be lower under Amendment 85 if the sectors were left together with the same sideboard for the AFA trawl CPs.

The Council took note of a possible legislated increase in the Pacific cod allocation to the CDQ Program (see response to Comments 74 and 75) and of the State waters Pacific cod fishery (see response to Comment 48) when it took final action. NMFS has determined that the problem statement was well addressed by the Council.

Comment 62: Because the analytical and public comment processes were short-circuited, the Council's decision was uninformed and arbitrary, based more on compromise than a reasoned consideration of the relevant Magnuson-Stevens Act factors and the purposes which the Amendment was intended to serve. The analysis available to the Council at the time of decision making, as well as the decision making record, is devoid of any empirical, analytical linkage between the allocation scheme chosen and the Magnuson-Stevens Act standards Congress requires a council to

consider when allocating fishing privileges. The Magnuson-Stevens Act and Amendment 85 itself specify goals and requirements for this Pacific cod allocation scheme but the Council's cursory and flawed deliberative process on Amendment 85 failed to connect the Council's choices with these goals and requirements. Accordingly, the action taken by the Council on Amendment 85 represents arbitrary and capricious decision making, in violation of the Magnuson-Stevens Act and the APA. The Magnuson-Stevens Act establishes standards with respect to the relevant criteria a fishery management council must consider when, as here, it makes resource allocations. Specifically that sectors of industry are treated equally, that residents of different States are treated equally, that socioeconomic concerns are taken into consideration, that fisheries are managed to optimum yield, that allocations are for the net benefit of the Nation, current participation, historical use, dependence on the fishery, and other factors. The APA requires that the impacts of Federal regulations be understood and considered at the time decisions are made. The Council's cursory and flawed deliberative process on Amendment 85 failed to connect the Council's choices with these goals and requirements (under administrative law precepts). Accordingly, the action taken by the Council on Amendment 85 would be arbitrary and capricious decision making if implemented.

Response: The analytical and public comment processes for Amendment 85 and this final rule were not short-circuited, as explained in response to Comment 57. The Council discussed its action in some depth with various allocation amounts presented before final action was taken, including how the Magnuson-Stevens Act National Standards were met by Amendment 85. The impacts of Amendment 85 were discussed in the analysis available to the Council and to the public before the April 2006 Council meeting. The Council's decisions were guided by its problem statement which specified the factors that would be considered in its allocation decisions. The draft EA/RIR/IRFA addressed the Magnuson-Stevens Act requirements and the Council fulfilled these requirements. The allocations chosen were within the options considered in the draft analysis. Decisions by NMFS on FMP amendments and proposed regulations recommended by the Council must be consistent with the Magnuson-Stevens Act and APA. NMFS has determined that Amendment 85 meets all APA and Magnuson-Stevens Act requirements (see response to Comment 57).

Comment 63: The EA/RIR/IRFA states that the non-AFA trawl CP fleet does not target on pollock because the headed and gutted pollock sells for less than the cost of production. This is inaccurate. While the price of H&G pollock has been low in the past, there were several H&G vessels that had a viable pollock target and market prior to the AFA. Since the AFA, the value of H&G pollock has increased dramatically and the fleet has suffered from not having access to this vast and valuable resource, which comprised 75 percent of the total allowable 2 million mt catch in the BSAI in 2006.

Response: The statement in the EA/RIR/IRFA was in reference to the fleet in the GOA. Given the comment, NMFS determined the statement was confusing and revised the final analysis by removing the statement.

Comment 64: The Amendment 85 package provided for Secretarial review not only inadequately estimates the impact on the non-AFA trawl CP fleet of its dramatically reduced allocation but primarily cites Amendment 80 cooperative provisions as the tool that will help mitigate the adverse impacts of Amendment 85 and allow the sector to gain the most value out of its reduced Pacific cod allocations. This seems to violate the principal of evaluating the impacts and providing the rationale for the current proposed amendment without relying on a future action not yet implemented.

Response: NMFS cannot find support for the commenter's assertion that the Amendment 85 package submitted to the Secretary primarily cites Amendment 80 cooperative provisions as justification for approval of Amendment 85. The response to Comment 13 explains how the analysis for Amendment 85 and this final rule adequately present information concerning the impacts of the action on all sectors, including the non-AFA trawl CP sector. NMFS partially approved Amendment 85 based on the record for Amendment 85 and not on any possible future actions that might mitigate its impacts.

Comment 65: NMFS cannot now substitute post hoc rationalizations for the absent Council deliberation based on informed public participation on these central issues. The Council's decisional record for Amendment 85 lacks the required support for the recommendations the Council made.

Response: NMFS is required to examine and consider the entire record before making a decision whether to approve, disapprove, or partially approve an action recommended by a council. After considering the entire record developed for Amendment 85 and the proposed rule, NMFS decided to partially approve Amendment 85 and partially approve the proposed rule for reasons provided in this preamble.

Comment 66: By allocating cod based on rates of harvest that stretch back as far as 1995, while ignoring current use and dependence of the H&G sector, Amendment 85, as recommended by the Council, violates the substantive provisions of the Magnuson-Stevens Act (factors to take into account when allocating fishing privileges).

Response: National Standard 4 requires allocations to be (1) fair and equitable, (2) reasonably calculated to promote conservation, and (3) carried out in such manner than no particular individual, corporation, or other entity acquires an excessive share. In compliance with the requirement that the allocation be fair and equitable, the Council used catch history from 1995 through 2003. The Council also considered more recent catch history from 2004 and 2005, but chose not to develop allocations including that history. (See response to Comment 3.) The Council took into account current use and dependence of the non-AFA trawl CP sector, and all other sectors, in making its allocation recommendations, but ultimately did not use them exclusively. Nothing in the Magnuson-Stevens Act or other applicable law requires the Council or NMFS to develop allocations that include present participation, just that the information be considered and a reasonable explanation provided if it is excluded. Socioeconomic considerations and community factors, such as favoring the small boat fisheries, also were considered. Also see responses to Comments 3 and 48.

Comment 67: The commenter believes that Amendment 85 is consistent with the National Standards of the Magnuson-Stevens Act and other applicable law. The resulting sector allocations from Amendment 85 take into account the catch history, historic dependence, and ability to engage in other fisheries by each of the sectors. Consideration was also given to the potential impacts and sustained participation of coastal communities and small-boat fishermen.

Response: NMFS agrees that Amendment 85 as partially approved by NMFS is consistent with the Magnuson-Stevens Act and other applicable law. The remaining comments are noted.

Comment 68: The allocations in Amendment 85 were the result of a fair

and equitable process and did not discriminate by residency.

Response: Comment noted.

Comment 69: Amendment 85 is consistent with the Problem Statement and purpose of the action.

Response: Comment noted.

Comment 70: Keep the proposed rule/final rule process moving forward on the regulatory track so that Amendment 85 can be implemented prior by January 1, 2008 (i.e., in place for the 2008 season), because revisions to the allocations are long overdue.

Response: This final rule will be published in sufficient time to be effective on January 1, 2008.

Comments on Prohibited Species Catch Allowances

Comment 71: The Secretary should disapprove the PSC allocation portion of Amendment 85. Amendment 85 would allocate PSC for Pacific cod separately to each trawl sector for use only in the Pacific cod fishery. Any sector which has PSC remaining after the cod fishery is completed will be unable to use it anywhere else. Sectors with sufficient PSC to harvest their cod allocation will have no incentive to use it carefully; there would be little incentive for minimizing bycatch rates in other sectors and could result in increased PSC use, in violation of National Standards 1 and 9 of the Magnuson-Stevens Act. After the H&G sector prosecutes its Amendment 85 directed cod fishery, which NMFS estimates will last only about 10 or 11 days, there still may not be enough cod and associated prohibited species catch (PSC) of halibut and crab for the H&G sector to fully prosecute its other directed groundfish fisheries. Non-AFA trawl CPs will not be able to fund their PSC needs from other PSC allocations (e.g., from the yellowfin sole fishery group) because there will not be enough available. NMFS inseason management could re-allocate unused PSC to other sectors, but that would occur late in the year when it clearly was not going to be used, and would likely be too late for it to be effectively used by other trawl sectors. NMFS can simply continue to manage PSC in the trawl sectors as it does now to optimize the total catch in all trawl fisheries.

Response: NMFS did not approve the proposed apportionment of Pacific cod trawl fishery halibut and crab PSC allowances among the trawl sectors for the reasons discussed above under the section ''Element of Proposed Rule Not Approved.'' NMFS did approve the hook-and-line PSC apportionment. Additionally, a detailed response to comments regarding the non-AFA trawl CP sector's directed Pacific cod fishery and incidental catch of Pacific cod is provided in response to Comments 13, 42, and 52.

Comment 72: The PSC sideboard allocation specified for the AFA trawl CP sector's Pacific cod fishery should be treated as a ''cap'' or ''limit'' on PSC usage in the sector's directed Pacific cod fishery--not as an allocation to that particular fishery. AFA CP sideboards on PSC species are not currently apportioned among target species. None of the AFA trawl CP PSC should be allocated in a way that might result in any of that PSC allocation being ''stranded'' in a particular fishery and unavailable to support other non-pollock target fisheries in which the AFA trawl CP sector's vessels may want to participate (e.g., yellowfin sole).

Response: NMFS did not approve the proposed halibut and crab PSC apportionments for the trawl sectors. Additional explanation for this decision is provided earlier in the preamble under the section ''Element of Proposed Rule Not Approved.''

Comment 73: The Secretary should disapprove the PSC allocation method contained in Amendment 85, instead allocating PSC using current methodology or the allocation method contained in Amendment 80, depending on the implementation date for Amendment 80.

Response: NMFS did not approve the proposed trawl PSC apportionments. PSC will be allocated under the current regulatory method until that method is changed by future rulemaking as described in response to Comment 72. NMFS notes that the proposed rule for Amendment 80 includes new provisions for PSC apportionments among trawl sectors.

Comments on CDQ Allocation

Comment 74: After Amendment 85 was passed by the Council, the CDQ allocation was modified by the Coast Guard Bill and subsequently by the Magnuson-Stevens Reauthorization Act. The commenter assumes that the 10.7 percent total allocation to the CDQ Program will be analyzed in the proposed rule.

Response: The 10.7–percent allocation to the CDQ Program was analyzed in the EA/RIR/IRFA for the proposed rule and the EA/RIR/FRFA for this final rule.

Comment 75: The Magnuson-Stevens Act now requires an allocation to the CDQ Program of 10.7 percent. The Council's final action on Amendment 85 adhered to the prior 7.5 percent CDQ allocation, and the Council has taken no further action since that time. Accordingly, it is not accurate to say that the ''Council'' proposed a 10 percent directed fishing CDQ allowance in submitting Amendment 85 to NMFS. The only proposal upon which the Council has voted chose to leave the CDQ allowance at 7.5 percent. Council staff cannot revise the CDQ allocation proposed by the Council to bring it into compliance with existing law. The Magnuson-Stevens Act requires the Secretary under such circumstances to remand the proposal to the Council, with an explanation, so that the Council may consider what appropriate corrective action to take. The proper course at this point to resolve the problem is to decline to adopt the proposed rule and to remand the sector and CDQ Program allocations to the Council for its consideration and action pursuant to the law. A remand would permit the Council to undertake a proper analysis of the unanalyzed impact of taking a larger CDQ share, before the Council finalizes new allocations.

Response: The Council determined that no further action on Amendment 85 was needed by the Council after the Coast Guard and Maritime Transportation Act of 2006 (Public Law 109–241; Coast Guard Act) was passed because its decision in April 2006 contemplated a Congressional adjustment to the allocations of Pacific cod to the CDQ Program. The Council's intent was that the CDQ allocation under Amendment 85 would be either 7.5 percent of the Pacific cod TAC or whatever allocation was Congressionally legislated when Amendment 85 was submitted to the Secretary for review. The Council voted to maintain the status quo level of a 7.5 percent CDQ Pacific cod allocation as its preferred alternative, but inherent in that vote was the Council's acknowledgment that legislation likely would be enacted in the coming months that would overrule whatever action the Council took on the CDQ Program allocation at its April 2006 meeting. The Council clearly recognized that legislation affecting the CDQ Program was imminent and could be enacted subsequent to its decision but before Secretarial review of Amendment 85. It was recognized during Council discussion that the proposed rule would need to accommodate any legislated increase in the CDQ allocation. The President signed the Coast Guard Act into law on July 11, 2006, after the Council selected a final preferred alternative for Amendment 85. The Coast Guard Act amendments to the Magnuson-Stevens Act included a

change to make the CDQ Program Pacific cod allocation a directed fishing allocation of 10 percent upon the establishment of sector allocations (Section 305(i)(1)(B)(ii)(1)). NMFS notified the Council at its October 2006 meeting that the increased CDQ allocations required under the Coast Guard Act would have to be incorporated into Amendment 85 for it to be consistent with the Magnuson-Stevens Act, and that the changes were being incorporated into the regulations implementing Amendment 85. The Council asked about its ability to review the changes being made to Amendment 85 to comply with the Coast Guard Act, and was advised by NOAA General Counsel that because Amendment 85 had not yet been submitted to the Secretary for review, the Council could request further review it if desired. The Council did not request further review of Amendment 85 at this meeting or at any other time prior to its submission of Amendment 85 to the Secretary.

Subsequent to the Coast Guard Act, the Magnuson-Stevens Act was reauthorized and signed into law on January 12, 2007. These more recent changes to the Magnuson-Stevens Act increase the CDQ Program's Pacific cod allocation to 10.7 percent (directed and nontarget combined) effective January 1, 2008. (Note: A provision was also included to trigger this increase in 2007 if a sector of the BSAI Pacific cod fishery forms a fishing cooperative in 2007.) In accordance with section 304(b)(1)(B) of the Magnuson-Stevens Act, NMFS determined that the originally submitted proposed rule for Amendment 85 that contained a 10 percent Pacific cod CDQ Program allocation with an additional amount for incidental catch was inconsistent with the Magnuson-Stevens Act, and returned it to the Council to be revised. Thus, the proposed rule was revised to contain regulatory amendments to increase the CDQ Pacific cod allocation to 10.7 percent to be consistent with the Magnuson-Stevens Act. The increased allocation of Pacific cod to the CDQ Program was within the allocations to the Program analyzed in the March draft of the EA/RIR/IRFA.

Although the revised submission from the Council of the proposed rule for Amendment 85 incorporated these new changes, the FMP language could not be changed because it had already been published and was available for public comment. Therefore, NMFS did not approve those parts of the FMP amendment that are now inconsistent with the Magnuson-Stevens Act and refer to a 10–percent allocation of Pacific cod TAC as a directed fishing allowance to the CDQ Program, specify the creation of an incidental catch allowance of Pacific cod for the CDQ Program, or reference changes to the CDQ Program Pacific cod allocations through the Coast Guard Act. Amendment 85 as approved by NMFS and the regulations in this final rule rely on the Magnuson-Stevens Act requirement for a 10.7–percent allocation of Pacific cod TAC to the CDQ Program rather than a specific FMP provision.

See response to Comment 74 regarding the analysis of the 10.7–percent allocation of Pacific cod to the CDQ Program.

Comment 76: The loss of Pacific cod TAC to the CDQ Program is felt by all sectors, but it is not felt proportionately to recency or dependency. Additionally, 93 percent of the CDQ cod is directed to their freezer longline partners, and half of that fleet is involved in harvesting CDQ. Therefore they get the bulk of it back as a sector, and half the sector benefits.

Response: Because the CDQ Program allocation of Pacific cod is subtracted from the Pacific cod TAC before any allocations are made to the non-CDQ sectors, all non-CDQ sectors are affected proportionately by the CDQ Program allocation. NMFS acknowledges that many of the same hook-and-line CP vessels that fish the non-CDQ BSAI Pacific cod fishery partner with the CDQ groups to prosecute the BSAI Pacific cod CDQ fishery. While some participants in the hook-and-line CP sector will have access to the increased CDQ cod quota and receive some benefit from the harvest of CDQ cod, the cost of the royalty payment to the CDQ groups, and other program requirements, such as 200 percent observer coverage, reduce the benefit to the non-CDQ hook-and-line CP sector.

Comments on Hard Cap Management of Pacific Cod Incidental Catch Allowances

Comment 77: We support NMFS's management of the trawl sector's incidental catch allowance as outlined in the proposed rule, which is that inseason management manages each trawl sector to a soft cap. The non-AFA trawl CP sector testified in support of hard cap management, however it did so in a truly different context. It was inconceivable that the fleet would be so disenfranchised from its last seven years of catch history share. We respectfully request disapproval of hard cap management for the non-AFA trawl CP fleet and soft cap management of Pacific cod H&G incidental catch allowance under both Amendment 85 and Amendment 80.

Response: Although representatives of the non-AFA trawl CP sector may have testified in support of hard cap management of their Pacific cod allocation, the Council did not include such a requirement in their final action on Amendment 85. Therefore, Amendment 85 and this final rule do not include such a provision. NMFS will continue soft cap management of incidental catch of Pacific cod for the non-AFA trawl CP sector under this final rule. However, NMFS notes that Amendment 80 as approved by the Secretary includes hard cap management requirements.

Comment 78: The non-AFA trawl CP sector allocation will be managed more conservatively than other sector allocations, i.e., a ''hard cap'' allocation that when reached will prohibit further fishing in the BSAI. The action on Amendment 85 should not be predicated on mitigation from Amendment 80. The Secretary should disapprove that portion of Amendment 85 that specifies that the non-AFA trawl CPs will be managed under a hard cap.

Response: Neither Amendment 85 nor this final rule require that the non-AFA trawl CP sector's Pacific cod allocation be managed as a hard cap. See response to Comment 77. Also see response to Comment 64 that NMFS' Amendment 85 decision did not rely on Amendment 80 for mitigation.

Comment on Commercial Fisheries

Comment 79: All quotas allocated should be cut in half this year and all quotas should continue to be cut by 10 percent in each succeeding year. The figures that show healthy stocks gained from the commercial fishing profiteers are a conflict of interest for them because they financially gain from telling this agency everything is great. Ban bottom trawling entirely now.

Response: NMFS conservatively manages the BSAI Pacific cod fishery based on the best scientific information available. To ensure conservation of the resource, the status of the Pacific cod stock is reviewed by NMFS and the Council each year through a public scientific review process before the TAC is allocated. The commercial fishing industry does not set the harvest levels. This action is intended to allocate Pacific cod TAC among various gear groups. NMFS reviewed the impacts of Amendment 85 in the EA/RIR/FRFA and concluded that it would not result in a significant impact on the human environment. This action is not intended to ban specific gear types. Banning trawling or reducing harvests

are not the goals of this action and would need to be addressed in a separate regulatory action developed through the Council process.

Classification

The Acting Administrator, Alaska Region, NMFS, determined that Amendment 85 is necessary for the conservation and management of the Pacific cod fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

A FRFA was prepared. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS' responses to those comments, and a summary of the analyses completed to support the action. The need for and objectives of this action are contained at the beginning of the preamble and in the SUMMARY section of the preamble. The legal basis for this action is also contained in the preamble. A summary of the FRFA follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

No comments were received that raised significant issues in response to the IRFA specifically, therefore, no changes were made to the rule as a result of comments on the IRFA. However, several comments were received on the economic impacts of Amendment 85 on different sectors of the industry. For a summary of the comments received, refer to the section above titled ''Comments and Responses.'' In response to public comment, one sentence was removed from the RIR regarding the non-AFA trawl CP sector targeting pollock because it was an ambiguous statement that related to activity in the Gulf of Alaska and the statement has no bearing on any decision in the analysis. Additionally, NMFS did not approve the proposed regulatory change that would have subdivided among trawl sectors the annual PSC limits apportioned to the Pacific cod trawl gear fisheries. The reasons are discussed above under the section ''Element of Proposed Rule Not Approved'' and include: (1) the Council did not provide any explanation as to why an additional reduction in this sector's harvest of Pacific cod and other target species that would result from a reduction in its halibut and crab PSC is appropriate or consistent with National Standard 4 or other applicable law, (2) the amount of PSC allocated to the AFA trawl CP and the trawl CV sectors is much greater than their historical needs and may create a disincentive for these sectors to minimize their bycatch of prohibited species, which is not consistent with National Standard 9, and (3) the non-AFA trawl CP sector harvests a significant majority of species other than pollock and Pacific cod, and would likely not have PSC remaining from its Pacific cod fishery to use to achieve optimum yield from its other BSAI groundfish fisheries, an inconsistency with National Standard 1.

Description and Estimate of Number of Small Entities to which the Rule will Apply

For purposes of the Regulatory Flexibility Act, the Small Business Administration (SBA) has established that a business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual gross receipts not in excess of $4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

Because the SBA does not have a size criterion for businesses that are involved in both the harvesting and processing of seafood products, NMFS has in the past applied and continues to apply SBA's fish harvesting criterion for these businesses because CPs are first and foremost fish harvesting businesses. Therefore, a business involved in both the harvesting and processing of seafood products is a small business if it meets the $4.0 million criterion for fish harvesting operations. NMFS currently is reviewing its small entity size classification for all CPs in the United States. However, until new guidance is adopted, NMFS will continue to use the annual receipts standard for CPs. NMFS plans to issue new guidance in the near future.

The FRFA used the most recent year of data available to conduct this analysis (2003). As stated previously, the commercial entities directly regulated by the action are divided into nine sectors for the purpose of (non-CDQ) BSAI Pacific cod allocations, and the CDQ allocation is considered a separate sector. A description of the participants in, and the eligibility requirements for, each non-CDQ sector and a description of the CDQ sector is provided in detail in the RIR.

Vessels that were considered large entities, for purposes of the FRFA, were those with individual annual gross receipts greater than $4.0 million, or those affiliated under owners of multiple vessels, contractual relationships, and/or affiliated through fishing cooperative membership (e.g., AFA) that, when combined with earnings from all such affiliated operations, had aggregate annual gross revenues greater than $4.0 million. Insufficient documentation of multiple and joint-ownership structures, contractual affiliations, interlocking agreements, etc., among vessels in the various fleets of interest, herein, exist with which to confidently estimate the number of directly regulated small (and large) entities. Thus, the FRFA is understood to likely overestimate the actual number of directly regulated small entities subject to this action.

The majority of the CVs in all gear sectors can be considered small entities under a conservative application of the existing threshold criterion. In 2003 only the AFA trawl CVs were considered large entities, as they are known to be party to a harvest cooperative system. The remaining 138 CVs of all gear types appear to meet the criterion for a small entity, as applied by evaluating the 2003 gross revenue data on a per vessel basis. However, as just noted, little is known about the ownership structure of the vessels in the fleets. Thus, based on the best available data, the following vessels appear to meet the application of the criterion above for a small entity in 2003: 25 hook-and-line and pot CVs <60 ft (18.3 m) LOA; 22 non-AFA trawl CVs; 15 jig CVs; 6 hook-and-line CVs ≥60 ft (18.3 m) LOA; and 70 pot CVs ≥60 ft (18.3 m) LOA.

In the CP sector, the available data indicate that fewer than half meet the threshold for a small entity, as applied by evaluating the 2003 gross revenue on a per vessel basis. Thirty-one of the 81 participating vessels in 2003 had gross receipts not in excess of $4.0 million. Again, because little is known about the ownership structure of the vessels in the fleets, it is likely that the FRFA overestimates the number of small entities. Thus, based on the best available data, the following vessels meet the application of the criterion above for a small entity in 2003: 24 hook-and-line CPs; 4 non-AFA trawl CPs; and 3 pot CPs. In sum, of the 310 vessels participating in 2003, 169 vessels are estimated to be small entities directly regulated by the action.

The six CDQ groups participating in the CDQ Program are not-for-profit entities that are not dominant in the

overall BSAI fishing industry. Thus, the six CDQ groups directly regulated by the action are considered small entities or ''small organizations'' under the RFA. Therefore, under a conservative application of the SBA criterion and the best available data, the total number of small entities directly regulated by the action is estimated as 175.

Recordkeeping and Reporting Requirements

This regulation does not impose new recordkeeping or reporting requirements on the directly regulated small entities.

Description of Significant Alternatives

A FRFA should contain ''a 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, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.''

The FRFA analyzed the ''no action'' alternative (Alternative 1) and the selected action (Alternative 2). Each of these alternatives was comprised of the same set of eight components, or issues. The eight components are discussed in detail in the RIR. Alternative 1 would continue the following: (1) the current overall gear allocations in the BSAI Pacific cod fishery that were established under Amendment 46 in 1997; (2) the current CDQ allocation of 7.5 percent of the BSAI Pacific cod TAC; and (3) the current apportionment of the fixed gear portion of the BSAI Pacific cod non-CDQ TAC established under Amendment 77 in 2004. Alternative 1 also would continue a shared halibut PSC allowance to the BSAI hook-and-line Pacific cod fishery category.

Before the Council made its decisions for Amendment 85, thus forming Alternative 2, it considered several options under each of the eight components. These many options are analyzed in the RIR. The combination of these options resulted in the evaluation of a multitude of potential alternatives. Amendment 85 is thus one derivation of many possible options, reflecting an effort to balance the economic and social objectives for the action against the potential burden placed on directly regulated entities (especially those which are ''small''). One option was selected under each of the eight components to comprise the Council's final preferred alternative, or Alternative 2. Alternative 2 is described in detail in the RIR.

Alternative 2 was selected because it accomplishes the objective of revising allocations of BSAI Pacific cod among various harvest sectors that in general more closely reflect historical use by sector than do current allocations, thus reducing the need for reallocations during the fishing year. Alternative 2 also increases the allocation of Pacific cod to the CDQ Program as required by recent changes in the Magnuson-Stevens Act. The revised allocations will reduce uncertainty about the availability of yearly harvests within sectors that is caused by reallocations, and maintain stability among sectors in the BSAI Pacific cod fishery.

Alternative 1, no regulatory change, would have no direct impact on small entities. However, it also would not have increased the allocation to the <60 ft (18.3 m) LOA fixed gear sector, one of the smallest of the small entities, whose allocation is increased under Alternative 2. Alternative 1 would not revise allocations of BSAI Pacific cod among various harvest sectors that more closely reflect historical use by sector than do current allocations, thus the need for reallocations during the fishing year would not be reduced. Alternative 1 also would not increase the allocation of Pacific cod to the CDQ Program, contrary to new requirements in the Magnuson-Stevens Act. Therefore, Alternative 1 would not meet the objectives of this action and was rejected.

Steps Taken to Minimize the Significant Economic Impact on Small Entities

Several measures are included in the rule that will reduce impacts on small entities. Economic opportunity and stability are facilitated for small entities participating in the Pacific cod fisheries by establishing BSAI Pacific cod allocations for the smallest of the small entities (jig vessels and the <60 ft (18.3 m) LOA hook-and-line and pot CVs) that represent a net increase over their catch history. This provides for potential growth in those sectors. On average during 1995 to 2003, the combined harvest history by these sectors was about 0.5 percent of the retained BSAI Pacific cod harvest. However, in recent years it appears that the <60 ft (18.3 m) LOA fixed gear CV sector has increased its participation in the BSAI Pacific cod fishery and could benefit from additional quota, if it were made available.

The BSAI Pacific cod fisheries are currently managed through a complex series of permits, gear and area endorsements, and licenses. Many are predicated on historical participation and/or performance thresholds (e.g., meeting or exceeding a specific threshold landing in a specific series of seasons, etc.). Many of these requirements result in extremely high entry costs and physical barriers for small vessels and entry level operations. To relieve these burdens and obstacles to participation, an important means of accommodating small entities can be ''exemptions'' from these requirements such as acquiring some specific permits, and/or meeting historical catch and participation thresholds, that are extended to particularly vulnerable or disproportionately burdened classes of smaller vessels. For example, the <60 ft (18.3 m) LOA fixed gear CV sector does not need a valid licence limitation program licence to fish Pacific cod and is not required to have a Pacific cod endorsement. Recognizing the opportunity to facilitate and sustain small entity participation, the Council incorporated a number of exemptions for small entities in the final preferred action. Treatment of these provisions is provided in the RIR.

This final rule maintains the current reallocation process whereby any unused jig quota is first considered for reallocation to the <60 ft (18.3 m) LOA fixed gear CV sector before being reallocated to any other sector. The rule also changes the jig sector seasonal allowance such that 20 percent more of the jig allocation is allowed to be harvested in the first half of the year. Thus, more Pacific cod may potentially be harvested by the <60 ft (18.3 m) LOA fixed gear CV sector earlier in the year, when the weather is preferable for this small boat sector. The rule also specifies that the third trimester of the jig allocation, if it is to be reallocated, should be available to the <60 ft (18.3 m) LOA fixed gear CV sector on or about September 1. The intent of this provision is to reallocate quota between the small boat CV sectors as early in the year as possible, in order for these sectors to have an opportunity to harvest the quota under better weather conditions.

Not approving the proposed regulatory change that would have subdivided among trawl sectors the annual PSC limits apportioned to the Pacific cod trawl gear fisheries, will help minimize the effects of the reduced allocation on the small entities that are members of the non-AFA trawl CP sector by reducing the chance that the non-AFA trawl CP sector's directed fishery for Pacific cod may be closed due to an insufficient PSC allowance.

This action increases the BSAI Pacific cod allocation to the CDQ Program from

7.5 percent of the Pacific cod TAC to 10.7 percent, as mandated by the recent amendments to the Magnuson-Stevens Act. A tradeoff exists in terms of impacts on the small entities in the non-CDQ sectors whose allocations will be reduced (proportionally by 3.2 percent) by the increase to the CDQ Program. However, the action represents a positive effect on the six small entities that comprise the CDQ groups in terms of potential revenues resulting from an increased allocation. This increase in royalty payments is estimated as approximately $1.1 million. Nonetheless, efforts to minimize the burden on the smallest of small entities, as discussed above, by exempting them from the most onerous permit and recency requirements, and by allocating Pacific cod TAC amounts in excess of their recent Pacific cod harvest levels, reflect a sincere effort to address the needs of these small entities.

In sum, many vessels in each sector directly regulated by Alternative 2 are small entities. Because this action is principally designed to reapportion access to the cod resource among current user groups, by definition, it represents tradeoffs (i.e., some small entities could be negatively affected, while others are positively affected). In addition, the six CDQ groups will receive an increased allocation under this action.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory 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.

The preamble to this final rule serves as the small entity compliance guide. This action does not require any additional compliance from small entities that is not described in the preamble. Copies of this final rule are available from NMFS (see **ADDRESSES**) and at the following website: *http://www.fakr.noaa.gov*.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: August 23, 2007.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; and Pub. L. 108 199, 118 Stat. 110.

■ 2. In § 679.2, remove the definition for ''AFA catcher/processor'', revise the definition for ''CDQ reserve'', and add definitions for ''AFA trawl catcher/processor'', ''Hook-and-line catcher/processor'', ''Non-AFA trawl catcher/processor'', and ''Pot catcher/processor'' in alphabetical order to read as follows:

§ 679.2 Definitions.

* * * * *

AFA trawl catcher/processor means:

(1) For purposes of BS pollock and all BSAI groundfish fisheries other than Atka mackerel, flathead sole, Greenland turbot, Pacific cod, Pacific ocean perch, rock sole, and yellowfin sole, a catcher/processor that is permitted to harvest BS pollock under § 679.4(l)(2).

(2) For purposes of BSAI Atka mackerel, flathead sole, Greenland turbot, Pacific cod, Pacific ocean perch, rock sole, and yellowfin sole, a catcher/processor that is permitted to harvest BS pollock and that is listed under § 679.4(l)(2)(i).

* * * * *

CDQ reserve means the amount of each groundfish TAC apportioned under § 679.20, the amount of each catch limit for halibut, or the amount of TAC for crab that has been set aside for purposes of the CDQ Program.

* * * * *

Hook-and-line catcher/processor means a catcher/processor vessel that is named on a valid LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher/processor fishing activity, catcher/processor, Pacific cod, and hook-and-line gear.

* * * * *

Non-AFA trawl catcher/processor means, for purposes of BSAI Atka mackerel, flathead sole, Greenland turbot, Pacific cod, Pacific ocean perch, rock sole, and yellowfin sole, a catcher/processor vessel using trawl gear and that:

(1) Is not an AFA trawl catcher/processor listed under § 679.4(l)(2)(i);

(2) Is named on a valid LLP license that is endorsed for Bering Sea or Aleutian Islands trawl catcher/processor fishing activity; and

(3) Was used to harvest with trawl gear in the BSAI and process not less than a total of 150 mt of Atka mackerel, flathead sole, Greenland turbot, Pacific cod, Pacific ocean perch, rock sole, or yellowfin sole between January 1, 1997, and December 31, 2002.

* * * * *

Pot catcher/processor means a catcher/processor vessel that is named on a valid LLP license that is noninterim and transferable, or that is interim and subsequently becomes noninterim and transferable, and that is endorsed for Bering Sea or Aleutian Islands catcher/processor fishing activity, catcher/processor, Pacific cod, and pot gear.

* * * * *

■ 3. In § 679.7, revise paragraph (d)(5) and add paragraph (d)(25) to read as follows:

§ 679.7 Prohibitions.

* * * * *

(d) * * *

(5) For a CDQ group, exceed a CDQ or a halibut PSQ.

* * * * *

(25) For a CDQ group, exceed a seasonal allowance of Pacific cod under § 679.20(a)(7)(i)(B).

* * * * *

■ 4. In § 679.20, remove paragraph (b)(1)(iv) and revise the section's introductory text and paragraph (a)(7) to read as follows:

§ 679.20 General limitations.

This section applies to vessels engaged in directed fishing for groundfish in the GOA or the BSAI.

(a) * * *

(7) *Pacific cod TAC, BSAI*—(i) *CDQ reserve and seasonal allowances.* (A) A total of 10.7 percent of the annual Pacific cod TAC will be allocated to the CDQ Program in the annual harvest specifications required under paragraph (c) of this section. The Pacific cod CDQ allocation will be deducted from the annual Pacific cod TAC before allocations to the non-CDQ sectors are made under paragraph (a)(7)(ii) of this section.

(B) The BSAI Pacific cod CDQ gear allowances by season, as those seasons are specified under § 679.23(e)(5), are as follows:

Gear Type	A season	B season	C season
(*1*) Trawl	60%	20%	20%
(*i*) Trawl CV	70%	10%	20%
(*ii*) Trawl CP	50%	30%	20%
(*2*) Hook-and-line CP and hook-and-line CV ≥60 ft (18.3 m) LOA	60%	40%	no C season
(*3*) Jig	40%	20%	40%
(*4*) All other non-trawl gear	no seasonal allowance	no seasonal allowance	no seasonal allowance

(ii) *Non-CDQ allocations*—(A) *Sector allocations.* The remainder of the BSAI Pacific cod TAC after subtraction of the CDQ reserve for Pacific cod will be allocated to non-CDQ sectors as follows:

Sector	% Allocation
(*1*) Jig vessels	1.4
(*2*) Hook-and-line/pot CV <60 ft (18.3 m) LOA	2
(*3*) Hook-and-line CV ≥60 ft (18.3 m) LOA	0.2
(*4*) Hook-and-line CP	48.7
(*5*) Pot CV ≥60 ft (18.3 m) LOA	8.4
(*6*) Pot CP	1.5
(*7*) AFA trawl CP	2.3
(*8*) Non AFA trawl CP	13.4
(*9*) Trawl CV	22.1

(B) *Incidental catch allowance.* During the annual harvest specifications process set forth at paragraph (c) of this section, the Regional Administrator will specify an amount of Pacific cod that NMFS estimates will be taken as incidental catch in directed fisheries for groundfish other than Pacific cod by the hook-and-line and pot gear sectors. This amount will be the incidental catch allowance and will be deducted from the aggregate portion of Pacific cod TAC annually allocated to the hook-and-line and pot gear sectors before the allocations under paragraph (a)(7)(ii)(A) of this section are made to these sectors.

(iii) *Reallocation among non-CDQ sectors.* If, during a fishing year, the Regional Administrator determines that a non-CDQ sector will be unable to harvest the entire amount of Pacific cod allocated to that sector under paragraph (a)(7)(ii)(A) of this section, the Regional Administrator will reallocate the projected unused amount of Pacific cod to other sectors through notification in the **Federal Register**. Any reallocation decision by the Regional Administrator will take into account the capability of a sector to harvest the reallocated amount of Pacific cod, and the following reallocation hierarchy:

(A) *Catcher vessel sectors.* The Regional Administrator will reallocate projected unharvested amounts of Pacific cod TAC from a catcher vessel sector as follows: first to the jig sector, or to the less than 60 ft (18.3 m) LOA hook-and-line or pot catcher vessel sector, or to both of these sectors; second, to the greater than or equal to 60 ft (18.3 m) LOA hook-and-line or to the greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sectors; and third to the trawl catcher vessel sector. If the Regional Administrator determines that a projected unharvested amount from the jig sector allocation, the less than 60 ft (18.3 m) LOA hook-and-line or pot catcher vessel sector allocation, or the greater than or equal to 60 ft (18.3 m) LOA hook-and-line catcher vessel sector allocation is unlikely to be harvested through this hierarchy, the Regional Administrator will reallocate that amount to the hook-and-line catcher/processor sector. If the Regional Administrator determines that a projected unharvested amount from a greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sector allocation is unlikely to be harvested through this hierarchy, the Regional Administrator will reallocate that amount to the pot catcher/processor sector in accordance with the hierarchy set forth in paragraph (a)(7)(iii)(C) of this section. If the Regional Administrator determines that a projected unharvested amount from a trawl catcher vessel sector allocation is unlikely to be harvested through this hierarchy, the Regional Administrator will reallocate that amount to the other trawl sectors in accordance with the hierarchy set forth in paragraph (a)(7)(iii)(B) of this section.

(B) *Trawl gear sectors.* The Regional Administrator will reallocate any projected unharvested amounts of Pacific cod TAC from a trawl sector (trawl catcher vessel, AFA trawl catcher/processor, and non-AFA trawl catcher/processor sectors) to other trawl sectors before unharvested amounts are reallocated and apportioned to specified gear sectors as follows:

(*1*) 83.1 percent to the hook-and-line catcher/processor sector,

(*2*) 2.6 percent to the pot catcher/processor sector, and

(*3*) 14.3 percent to the greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sector.

(C) *Pot gear sectors.* The Regional Administrator will reallocate any projected unharvested amounts of Pacific cod TAC from the pot catcher/processor sector to the greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sector, and from the greater than or equal to 60 ft (18.3 m) LOA pot catcher vessel sector to the pot catcher/processor sector before reallocating it to the hook-and-line catcher/processor sector.

(iv) *Non-CDQ seasonal allowances*—(A) *Seasonal allowances by sector.* The BSAI Pacific cod sector allowances are apportioned by season, as those seasons are specified at § 679.23(e)(5), as follows:

Sector	Seasonal Allowances		
	A season	B season	C season
(*1*) Trawl			

Sector	Seasonal Allowances		
	A season	B season	C season
(*i*) Trawl CV	74 %	11 %	15 %
(*ii*) Trawl CP	75 %	25 %	0 %
(*2*) Hook-and-line CP, hook-and-line CV ≥60 ft (18.3 m) LOA, and pot gear vessels ≥60 ft (18.3 m) LOA	51 %	49 %	no C season
(*3*) Jig vessels	60 %	20 %	20 %
(*4*) All other nontrawl vessels	no seasonal allowance	no seasonal allowance	no seasonal allowance

(B) *Unused seasonal allowances.* Any unused portion of a seasonal allowance of Pacific cod from any sector except the jig sector will be reallocated to that sector's next season during the current fishing year unless the Regional Administrator makes a determination under paragraph (a)(7)(iii) of this section that the sector will be unable to harvest its allocation.

(C) *Jig sector.* The Regional Administrator will reallocate any projected unused portion of a seasonal allowance of Pacific cod for the jig sector under this section to the less than 60 ft (18.3 m) LOA hook-and-line or pot catcher vessel sector. The Regional Administrator will reallocate the projected unused portion of the jig sector's C season allowance on or about September 1 of each year.

* * * * *

■ 5. In § 679.21, remove paragraph (e)(1)(i), redesignate paragraphs (e)(1)(ii) through (e)(1)(ix) as (e)(1)(i) through (e)(1)(viii), and revise paragraphs (e)(2), (e)(3)(i), (e)(3)(v), and (e)(4), to read as follows:

§ 679.21 Prohibited species bycatch management.

* * * * *

(e) * * *

(2) *Nontrawl gear, halibut.* The PSC limit of halibut caught while conducting any nontrawl fishery for groundfish in the BSAI during any fishing year is the amount of halibut equivalent to 900 mt of halibut mortality.

(3) * * *

(i) *General.* (A) An amount equivalent to 7.5 percent of each PSC limit set forth in paragraphs (e)(1)(i) through (iv) and paragraphs (e)(1)(vi) through (viii) of this section is allocated to the groundfish CDQ Program as PSQ reserve. The PSQ reserve is not apportioned by gear or fishery.

(B) NMFS, after consultation with the Council and after subtraction of the PSQ reserve, will apportion each PSC limit set forth in paragraphs (e)(1)(i) through (vii) of this section into bycatch allowances for the fishery categories defined in paragraph (e)(3)(iv) of this section, based on each category's proportional share of the anticipated incidental catch during a fishing year of prohibited species for which a PSC limit is specified and the need to optimize the amount of total groundfish harvested under established PSC limits.

* * * * *

(v) *AFA prohibited species catch limitations.* Halibut and crab PSC limits for the AFA trawl catcher/processor sector and the AFA trawl catcher vessel sector will be established according to the procedures and formulas set out in § 679.64(a) and (b) and managed through directed fishing closures for the AFA trawl catcher/processor sector and the AFA trawl catcher vessel sector in the groundfish fisheries for which the PSC limit applies.

(4) *Halibut apportionment to nontrawl fishery categories*—(i) *General.* (A) An amount equivalent to 7.5 percent of the nontrawl gear halibut PSC limit set forth in paragraph (e)(2) of this section is allocated to the groundfish CDQ Program as PSQ reserve. The PSQ reserve is not apportioned by gear or fishery.

(B) NMFS, after consultation with the Council and after subtraction of the PSQ reserve, will apportion the halibut PSC limit for nontrawl gear set forth under paragraph (e)(2) of this section into bycatch allowances for the nontrawl fishery categories defined under paragraph (e)(4)(ii) of this section.

(C) Apportionment of the nontrawl halibut PSC limit among the nontrawl fishery categories will be based on each category's proportional share of the anticipated bycatch mortality of halibut during a fishing year and the need to optimize the amount of total groundfish harvested under the nontrawl halibut PSC limit.

(D) The sum of all bycatch allowances of any prohibited species will equal its PSC limit.

(ii) *Nontrawl fishery categories.* For purposes of apportioning the nontrawl halibut PSC limit among fisheries, the following fishery categories are specified and defined in terms of round-weight equivalents of those BSAI groundfish species for which a TAC has been specified under § 679.20.

(A) *Pacific cod hook-and-line catcher vessel fishery.* Catcher vessels fishing with hook-and-line gear during any weekly reporting period that results in a retained catch of Pacific cod that is greater than the retained amount of any other groundfish species.

(B) *Pacific cod hook-and-line catcher/processor fishery.* Catcher/processors fishing with hook-and-line gear during any weekly reporting period that results in a retained catch of Pacific cod that is greater than the retained amount of any other groundfish species.

(C) *Sablefish hook-and-line fishery.* Fishing with hook-and-line gear during any weekly reporting period that results in a retained catch of sablefish that is greater than the retained amount of any other groundfish species.

(D) *Groundfish jig gear fishery.* Fishing with jig gear during any weekly reporting period that results in a retained catch of groundfish.

(E) *Groundfish pot gear fishery.* Fishing with pot gear under restrictions set forth in § 679.24(b) during any weekly reporting period that results in a retained catch of groundfish.

(F) *Other nontrawl fisheries.* Fishing for groundfish with nontrawl gear during any weekly reporting period that results in a retained catch of groundfish and does not qualify as a Pacific cod hook-and-line catcher vessel fishery, a Pacific cod hook-and-line catcher/processor fishery, a sablefish hook-and-line fishery, a jig gear fishery, or a groundfish pot gear fishery as defined under this paragraph (e)(4)(ii).

* * * * *

§ 679.23 [Amended]

■ 6. In § 679.23, remove paragraphs (e)(6) and (e)(7).

■ 7. In § 679.64:

A. Remove paragraph (a)(1) introductory text.

B. Redesignate paragraph (a)(1)(i) as paragraph (a)(1) introductory text.

C. Redesignate paragraph (a)(2) introductory text as paragraph (a)(1)(i).

D. Redesignate paragraphs (a)(2)(i) and (ii) as paragraphs (a)(1)(i)(A) and(B), respectively.

E. Redesignate paragraph (a)(3) introductory text as paragraph (a)(1)(ii).

F. Redesignate paragraphs (a)(3)(i) through (iii) as paragraphs (a)(1)(ii)(A) through (C), respectively.

G. Redesignate paragraph (a)(4) introductory text as paragraph (a)(1)(iii).

H. Redesignate paragraphs (a)(4)(i) and (ii) as paragraphs (a)(1)(iii)(A) and (B), respectively.

I. Redesignate paragraph (a)(5) as paragraph (a)(2).

J. Redesignate paragraph (a)(6) as paragraph (a)(3), and

K. Revise newly redesignated paragraphs (a)(1) introductory text and (a)(3).

The revisions read as follows:

§ 679.64 Harvesting sideboards limits in other fisheries.

(a) * * *

(1) *How will groundfish sideboard limits for AFA listed catcher/processors be calculated?* Except for Aleutian Islands pollock and BSAI Pacific cod, the Regional Administrator will establish annual AFA catcher/processor harvest limits for each groundfish species or species group in which a TAC is specified for an area or subarea of the BSAI as follows:

* * * * *

(3) *How will AFA catcher/processor sideboard limits be managed?* The Regional Administrator will manage groundfish harvest limits and PSC bycatch limits for AFA catcher/processors through directed fishing closures in fisheries established under paragraph (a)(1) of this section in accordance with the procedures set out in §§ 679.20(d)(1)(iv) and 679.21(e)(3)(v).

* * * * *

§§ 679.20, 679.21, 679.31, 679.32, 679.50, and 679.64 [Amended]

■ 8. In the table below, for each of the paragraphs shown under the ''Paragraph'' column, remove the phrase indicated under the ''Remove'' column and replace it with the phrase indicated under the ''Add'' column for the number of times indicated in the ''Frequency'' column.

Paragraph(s)	Remove	Add	Frequency
§ 679.20(b)(1)(i)	except pollock and the	except pollock, Pacific cod, and the	2
Newly redesignated § 679.21(e)(1)(i) introductory text	paragraphs (e)(1)(iii)(A) through	paragraphs (e)(1)(i)(A) through	1
Newly redesignated § 679.21(e)(1)(ii) introductory text	paragraphs (e)(1)(iii)(A) and	paragraphs (e)(1)(ii)(A) and	1
Paragraph heading of newly redesignated § 679.21(e)(1)(vi)	*Chinook salmon*	*BS Chinook salmon*	1
§ 679.21(e)(3)(ii)(B)(2)	paragraph (e)(1)(ii) of	paragraph (e)(1)(i) of	1
§ 679.21(e)(7)(viii) introductory text	paragraphs (e)(1)(vii) and (e)(1)(ix) of	paragraphs (e)(1)(vi) and (e)(1)(viii) of	1
§ 679.21(e)(7)(viii)(A) introductory text	paragraph (e)(1)(vii) of	paragraph (e)(1)(vi) of	1
§ 679.21(e)(7)(viii)(B) introductory text	paragraph (e)(1)(ix) of	paragraph (e)(1)(viii) of	1
§ 679.31(c)	(See § 679.20(b)(1)(iii))	(See § 679.20(a)(7)(i) and (b)(1)(iii).)	1
§ 679.31(e)	(See § 679.21(e)(1)(i) and (e)(2)(ii)).	(See § 679.21(e)(3)(i)(A) and (e)(4)(i)(A).)	1
§ 679.32(b)	under § 679.21(e)(5) in	under § 679.21(e)(4) in	1
§ 679.50(c)(1)(iii)	under § 679.21(e)(7)(vi), or	under § 679.21(e)(7)(vii), or	1
Newly redesignated § 679.64(a)(1)(i)(B)	paragraph (a)(2)(i) of	paragraph (a)(1)(i)(A) of	1
Newly redesignated § 679.64(a)(1)(iii)(A)	paragraphs (a)(1)(ii) through (a)(3) of	paragraphs (a)(1)(i) through (a)(1)(ii) of	1
Newly redesignated § 679.64(a)(1)(iii)(B)	paragraph (a)(4)(i) of	paragraph (a)(1)(iii)(A) of	1

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