

(2) \* \* \*

(ii) Dealers may first receive BAYS tunas only if they have submitted reports to NMFS according to reporting requirements of paragraphs § 635.5(b)(1)(ii) and only from a vessel that has a valid Federal commercial permit for Atlantic tunas issued under this part in the appropriate category. Individuals issued a valid HMS Commercial Caribbean Small Boat permit, and operating in the U.S. Caribbean as defined at § 622.2, may sell their trip limits of BAYS tunas, codified at § 635.24(c), to dealers and non-dealers.

\* \* \* \* \*

(d) \* \* \*

(1) Persons that own or operate a vessel on which a swordfish in or from the Atlantic Ocean is possessed may sell such swordfish only if the vessel has a valid commercial permit for swordfish issued under this part. Persons may offload such swordfish only to a dealer who has a valid permit for swordfish issued under this part; except that individuals issued a valid HMS Commercial Caribbean Small Boat permit, and operating in the U.S. Caribbean as defined at § 622.2, may sell swordfish, as codified at § 635.24(b)(3), to non-dealers.

\* \* \* \* \*

■ 9. In § 635.71:

- a. Revise paragraphs (a)(3), (a)(4), and (a)(53);
- b. Add paragraph (a)(56); and
- c. Revise paragraphs (e)(1), (e)(10), (e)(11), and (e)(16).

The revisions and addition read as follows:

**§ 635.71 Prohibitions.**

\* \* \* \* \*

(a) \* \* \*

(3) Purchase, receive, or transfer or attempt to purchase, receive, or transfer, for commercial purposes, Atlantic bluefin tuna landed by owners of vessels not permitted to do so under § 635.4, or purchase, receive, or transfer, or attempt to purchase, receive, or transfer Atlantic bluefin tuna without the appropriate valid Federal Atlantic tunas dealer permit issued under § 635.4. Purchase, receive, or transfer or attempt to purchase, receive, or transfer, for commercial purposes, other than solely for transport, any BAYS tunas, swordfish, or sharks landed by owners of vessels not permitted to do so under § 635.4, or purchase, receive, or transfer, or attempt to purchase, receive, or transfer, for commercial purposes, other than solely for transport, any BAYS tunas, swordfish, or sharks without the appropriate valid dealer permit issued

under § 635.4 or submission of reports by dealers to NMFS according to reporting requirements specified in § 635.5. This prohibition does not apply to HMS harvested by HMS Commercial Caribbean Small Boat vessel permit holders operating in the U.S. Caribbean as defined at § 622.2 or to a shark harvested from a vessel that has not been issued a permit under this part and that fishes exclusively within the waters under the jurisdiction of any state.

(4) Sell or transfer or attempt to sell or transfer, for commercial purposes, an Atlantic tuna, shark, or swordfish other than to a dealer that has a valid dealer permit issued under § 635.4, except that this does not apply to HMS Commercial Caribbean Small Boat vessel permit holders operating in the U.S. Caribbean as defined at § 622.2, or to a shark harvested by a vessel that has not been issued a permit under this part and that fishes exclusively within the waters under the jurisdiction of any state.

\* \* \* \* \*

(53) Fish for, catch, possess, retain, or land an Atlantic swordfish using, or captured on, "buoy gear" as defined at § 635.2, unless the vessel owner has been issued a swordfish directed limited access permit or a swordfish handgear limited access permit in accordance with § 635.4(f) or a valid HMS Commercial Caribbean Small Boat permit in accordance with § 635.4(o).

\* \* \* \* \*

(56) Have been issued a valid HMS Commercial Caribbean Small Boat permit and to purchase, barter for, or trade for HMS harvested by other vessels with the intent to sell.

\* \* \* \* \*

(e) \* \* \*

(1) Purchase, barter for, or trade for a swordfish from the north or south Atlantic swordfish stock without a dealer permit as specified in § 635.4(g), unless the harvesting vessel possesses a valid HMS Commercial Caribbean Small Boat permit issued under § 635.4 of this part and harvested the swordfish in the U.S. Caribbean as defined at § 622.2.

\* \* \* \* \*

(10) Fish for, catch, possess, retain, or land an Atlantic swordfish using, or captured on, "buoy gear" as defined at § 635.2, unless the vessel owner has been issued a swordfish directed limited access permit or a swordfish handgear limited access permit in accordance with § 635.4(f) or a valid HMS Commercial Caribbean Small Boat permit in accordance with § 635.4(o).

(11) As the owner of a vessel permitted, or required to be permitted, in the swordfish directed, swordfish handgear limited access permit

category, or issued a valid HMS Commercial Caribbean Small Boat permit and utilizing buoy gear, to possess or deploy more than 35 individual floatation devices, to deploy more than 35 individual buoy gears per vessel, or to deploy buoy gear without affixed monitoring equipment, as specified at § 635.21(e)(4)(iii).

\* \* \* \* \*

(16) Possess any HMS, other than Atlantic swordfish, harvested with buoy gear as specified at § 635.21(e) unless issued a valid HMS Commercial Caribbean Small Boat permit and operating within the U.S. Caribbean as defined at § 622.2.

\* \* \* \* \*

[FR Doc. 2012-24136 Filed 9-28-12; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

[Docket No. 110620343-2450-02]

RIN 0648-BB18

**Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area; Amendment 97**

**ACTION:** Final rule.

**SUMMARY:** NMFS publishes regulations to implement Amendment 97 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). Amendment 97 allows the owner of a trawl catcher/processor vessel authorized to participate in the Amendment 80 catch share program to replace that vessel with a vessel that meets certain requirements. This action establishes the regulatory process for replacement of vessels in the Amendment 80 fleet and the requirements for Amendment 80 replacement vessels, such as a limit on the overall length of a replacement vessel, a prohibition on the use of an AFA vessel as a replacement vessel, measures to prevent a replaced vessel from participating in Federal groundfish fisheries off Alaska that are not Amendment 80 fisheries, and measures that extend specific catch limits (known as Amendment 80 sideboards) to a replacement vessel. This action is necessary to promote safety-at-sea by allowing Amendment 80 vessel owners to replace their vessels for any reason at any time and by requiring replacement

vessels to meet certain U.S. Coast Guard vessel safety standards, and to improve the retention and utilization of groundfish catch by these vessels by facilitating an increase in the processing capabilities of the fleet. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable laws.

**DATES:** Effective October 31, 2012.

**ADDRESSES:** Electronic copies of this rule, the Environmental Assessment (EA), Regulatory Impact Review (RIR), and the initial regulatory flexibility analysis (IRFA) prepared for this action may be obtained from <http://www.regulations.gov> or from the Alaska Region Web site at <http://alaskafisheries.noaa.gov>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted by mail to 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 by email to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov), or fax to 202-395-7285.

**FOR FURTHER INFORMATION CONTACT:** Seanbob Kelly, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the U.S. groundfish fisheries of the Bering Sea and Aleutian Islands Management Area (BSAI) in the Exclusive Economic Zone (EEZ) under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and other applicable laws. Regulations implementing the FMP appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

This final rule implements Amendment 97 to the FMP. Under this final rule, the owner of a trawl catcher/processor vessel authorized to participate in the Amendment 80 catch share program is allowed to replace that vessel with a vessel that meets certain requirements. NMFS published the Notice of Availability for Amendment 97 in the **Federal Register** on March 6, 2012 (77 FR 13253), with a 60-day comment period that ended May 7, 2012. The Secretary approved Amendment 97 on June 6, 2012, after determining that Amendment 97 is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law.

NMFS published a proposed rule for Amendment 97 in the **Federal Register** on April 4, 2012 (77 FR 20339). The 30-day comment period on the proposed rule ended May 4, 2012. NMFS received a total of 15 comment letters from 11 unique persons during the comment periods on Amendment 97 and the proposed rule implementing the amendment. The letters contained 13 separate topics. A summary of these comments and NMFS's responses are provided in the Comments and Responses section of this preamble.

#### Elements of the Final Rule

A detailed review of the provisions of Amendment 97 and its implementing regulations is provided in the preamble to the proposed rule (77 FR 20339, April 4, 2012) and is not repeated here. The proposed rule is available from the NMFS Alaska Region Web site (see **ADDRESSES**). The preamble to this final rule provides a brief review of the regulatory changes made by this final rule to the management of the Amendment 80 fleet and an explanation of any differences between the proposed and final regulations. NMFS' responses to public comments on Amendment 97 and the proposed rule to implement Amendment 97 are also presented below.

This final rule establishes regulations that permit the owner of an Amendment 80 vessel to replace that vessel with up to one other vessel for any reason and at any time. The vessel replacement process established by this final rule provides Amendment 80 vessel owners with the flexibility to incorporate a broad range of processing opportunities that are not currently available on all vessels. Regulations implemented by this final rule are intended to facilitate improved retention and utilization of catch by the Amendment 80 sector through vessel upgrades and new vessel construction. This final rule also is intended to address the regulatory deficiencies that were identified by the court in *Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050 (W.D. Wash. 2008). Specifically, this final rule: (1) Allows Amendment 80 vessels to be replaced for any reason at any time, up to a one-for-one vessel replacement; (2) prohibits American Fisheries Act (AFA) vessels from being used as Amendment 80 replacement vessels; (3) establishes a maximum vessel length for Amendment 80 replacement vessels and modifies the maximum length over-all (MLOA) on License Limitation Program (LLP) licenses assigned to Amendment 80 replacement vessels; (4) establishes a process for reassigning an Amendment

80 Quota Share (QS) permit to either an Amendment 80 replacement vessel or an Amendment 80 LLP license; (5) imposes sideboard limitations on replaced vessels; (6) applies Gulf of Alaska (GOA) sideboard measures to an Amendment 80 replacement vessel if GOA sideboard measures applied to the Amendment 80 vessel being replaced, with exceptions for the F/V *Golden Fleece*; (7) establishes specific regulatory restrictions and requirements that apply to any vessel that replaces the F/V *Golden Fleece*; (8) allows an Amendment 80 replacement vessel to conduct directed fishing for GOA flatfish if the Amendment 80 vessel being replaced was authorized to conduct directed fishing for GOA flatfish; (9) requires an owner to demonstrate to NMFS an Amendment 80 replacement vessel's compliance with U.S. Coast Guard safety requirements; and (10) establishes a process by which a vessel owner can apply to NMFS for approval to use an Amendment 80 replacement vessel in the Amendment 80 sector. Finally, this action demonstrates to the U.S. Maritime Administration (MARAD) that the Council and NMFS have authorized Amendment 80 replacement vessels to exceed specific vessel limits set forth in the AFA and therefore Amendment 80 replacement vessels that exceed these limits are eligible to receive a certificate of documentation consistent with 46 U.S.C. 12113 and MARAD regulations at 46 CFR 356.47.

#### *Replacement for Any Reason at Any Time, Up to One-for-One Vessel Replacement*

The regulations implemented by this final rule, at § 679.4(o)(1)(v) and (vii), allow an owner of an Amendment 80 vessel to replace the vessel for any reason and at any time up to a one-for-one vessel replacement. The Council determined, and NMFS agrees, that a vessel owner is best-suited to determine the appropriate time to replace a vessel, and that the vessel owner should be afforded broad discretion as to the reasons supporting vessel replacement. This final rule enables a vessel owner to initiate new construction of a replacement vessel while the vessel to be replaced is still active (*i.e.*, before it is lost), providing an opportunity for a potentially seamless replacement process and thereby reducing potential costs associated with foregone harvests.

Although the owner of an Amendment 80 vessel can apply to use an existing Amendment 80 vessel as an Amendment 80 replacement vessel, or other vessels that otherwise meet the requirements of this final rule, the

Council and NMFS anticipate that most replacement vessels will be newly constructed and larger than the vessel being replaced. Many of the existing vessels in the Amendment 80 fleet were originally constructed for purposes other than fishing; therefore, these vessels may be less well-designed for fishing than a new, purposefully constructed fishing vessel would be. A vessel built to contemporary standards is likely have improved hold capacity, fuel efficiency, and harvest capacity relative to existing similarly sized vessels in the Amendment 80 fleet. Such modifications can enable a vessel operator to store large quantities of fish and create or make value-added products like surimi, fillets, and fishmeal in onboard fishmeal plants. Replacing a smaller vessel with a larger vessel could allow participants to fish for longer periods of time and reduce the number of trips required to offload products. As an alternative to new vessel construction, this final rule also enables the owner of an Amendment 80 vessel to replace an aging or underperforming vessel with an existing vessel, including a vessel currently prosecuting Amendment 80 fisheries. As described below, this final rule requires all Amendment 80 replacement vessels, including vessels that are currently participating in an Amendment 80 fishery, to meet contemporary vessel construction and safety standards, and other applicable regulations established by this final rule. A detailed review of the Amendment 80 fleet safety regulations implemented by this final rule also can be found in Section 2.4.9.1 of the EA/RIR/IRFA for this action and in the preamble to the proposed rule (see **ADDRESSES**).

Although an Amendment 80 vessel owner is authorized to replace the vessel at any time for any reason, the final rule limits the number of replacement vessels an owner may have, requiring that each Amendment 80 vessel may be replaced by no more than one vessel at any given time. Under the Amendment 80 program, NMFS determined that 28 vessels met the criteria for participation and therefore were eligible to participate in the Amendment 80 sector. Under this final rule, in no case could more than 28 vessels participate in the Amendment 80 fisheries at any given time.

#### *American Fisheries Act Vessels and Amendment 80 Vessel Replacement*

This final rule includes a provision that prohibits the use of AFA vessels as Amendment 80 replacement vessels. The following paragraphs provide the

background for and an explanation of this provision.

Regulations implementing Amendment 80 limited participation in the Amendment 80 sector to non-AFA trawl catcher/processors that qualified under the definition of the non-AFA trawl catcher/processor subsector in section 219(a)(7) of the BSAI Catcher Processor Capacity Reduction Program (CRP), included in the Department of Commerce and Related Agencies Appropriations Act, 2005 (Pub. L. 108-447). Section 219(g)(1)(A) of the CRP provides that only a member of a catcher/processor subsector may participate in the catcher/processor sector of the BSAI non-pollock groundfish fishery. Four catcher processor subsectors are defined by the CRP, including the AFA trawl catcher processor subsector at section 219(a)(1) and the non-AFA trawl catcher processor subsector at section 219(a)(7). Section 219(a)(7) of the CRP defines the "non-AFA trawl catcher processor subsector" as "the owner of each trawl catcher processor—(A) that is not an AFA trawl catcher processor; (B) to whom a valid LLP license that is endorsed for Bering Sea or Aleutian Islands trawl catcher processor fishing activity has been issued; and (C) that the Secretary determines has harvested with trawl gear and processed not less than a total of 150 metric tons of non-pollock groundfish during the period January 1, 1997 through December 31, 2002." NMFS determined that 28 vessels met the criteria specified in section 219(a)(7) of the CRP. NMFS listed these vessels in the final rule implementing Amendment 80 (September 14, 2007; 72 FR 52668). NMFS concluded that because the CRP set forth the criteria for vessels eligible to participate in the non-AFA trawl catcher/processor, or Amendment 80, sector, only the 28 listed vessels could be used in the Amendment 80 sector and only a listed qualifying vessel could be used to replace an originally qualifying vessel.

Arctic Sole Seafoods challenged the final rule, arguing that section 219(a)(7) permitted the replacement of qualifying vessels with non-qualifying vessels and that the prohibition on such replacement was contrary to the language of the CRP. On May 19, 2008, the U.S. District Court for the Western District of Washington issued a decision invalidating those Amendment 80 regulatory provisions that limited the vessels used in the Amendment 80 sector to only those vessels that meet the qualification criteria in section 219(a)(7) of the CRP. In *Arctic Sole Seafoods v. Gutierrez*, 622 F.Supp.2d 1050 (W.D. Wash. 2008), the court

found the statutory language ambiguous as to whether replacement of qualifying vessels with non-qualifying vessels was permissible, and found the agency's interpretation of the statute to be arbitrary and capricious. The court held that the CRP applies to the owners of vessels that meet the statutory criteria for the non-AFA trawl catcher/processor subsector, and that the owner of a qualifying vessel could replace that vessel with a non-qualifying vessel. The court noted that Congress, through the CRP, limited the universe of owners authorized to participate in the BSAI non-pollock groundfish fishery by limiting eligibility to those individuals who own vessels with a particular catch history and who have a particular license, but that nothing in the CRP indicated that Congress was concerned with which particular vessels are used in the BSAI non-pollock groundfish fishery. The court determined that an owner of a non-AFA trawl catcher/processor vessel must satisfy the criteria specified in section 219(a)(7) to originally qualify for the non-AFA trawl catcher/processor subsector and the Amendment 80 sector, but the owner of such a vessel may replace that vessel with a vessel that does not meet the original qualifying criteria of the CRP but that is otherwise eligible to participate in the BSAI non-pollock groundfish fishery. The court concluded that the inability to replace a qualifying vessel with a non-qualifying vessel would ultimately result in the elimination of the sector through vessel attrition, and that Congress had not intended such an outcome in the CRP. The court ordered that "[t]o the extent that [regulations] restrict access to the BSAI non-pollock groundfish fishery to qualifying vessels without allowing a qualified owner to replace a lost qualifying vessel with a single substitute vessel, the regulations must be set aside \* \* \*."

After receiving the court's decision, NMFS immediately developed and issued interim guidance for vessel replacement consistent with the court's decision. In October 2008, NMFS asked the Council to amend the FMP to clarify the conditions under which an Amendment 80 vessel may be replaced consistent with the court's decision, the CRP, and the Magnuson-Stevens Act. In response, the Council initiated development of Amendment 97. The Council initially received an analysis for Amendment 97 at its February 2010 meeting. This analysis included a summary of the interim guidance NMFS prepared for vessel replacement, including a revised version of the

responses to frequently asked questions contained within the guidance. In response to the question of whether there are any limitations on the characteristics of a replacement vessel, the analysis states, "Because the CRP makes a clear distinction between the AFA and non-AFA trawl catcher/processor subsectors, an AFA catcher/processor as defined by the CRP would be ineligible to fish as a non-AFA trawl catcher/processor and could not replace an Amendment 80 vessel." No additional explanation for this statement is provided in the analysis. This statement remained in the analysis during the Council's consideration of Amendment 97, the interpretation of the CRP was not challenged during the Council process, the Council did not consider an alternative that would allow the use of AFA vessels as Amendment 80 replacement vessels, and thus the analysis does not include an evaluation of those considerations. As a result, the Council did not recommend a prohibition or other limitation on the use of an AFA vessel as an Amendment 80 replacement vessel in its final motion on Amendment 97 in June 2010.

In February 2012, before the start of Secretarial review of Amendment 97, NMFS received a letter from a member of the public asserting that the CRP and the court's decision in *Arctic Sole Seafoods v. Gutierrez* do not prohibit the use of an AFA vessel as an Amendment 80 replacement vessel. The commenter stated that "[t]he distinction the CRP draws between AFA and non-AFA vessels is only for purposes of specifying which vessels owners initially qualified for the Amendment 80 sector" and that while an owner of a vessel had to meet the criteria specified in section 219(a)(7) to initially qualify for the non-AFA trawl catcher/processor subsector, including the criterion that the vessel not be an AFA trawl catcher/processor, "[t]he CRP does not limit the universe of vessels that a qualified owner may then draw from to replace the vessel through which it initially entered the Amendment 80 sector."

In the proposed rule preamble, the agency advised that following receipt of the letter, it re-examined the CRP and decision in *Arctic Sole Seafoods v. Gutierrez* regarding whether the CRP prohibits use of an AFA vessel as an Amendment 80 replacement vessel. Based on that re-examination, it stated in the preamble its view that the CRP did not prohibit use of an AFA vessel, and that in the absence of an explicit regulatory prohibition recommended by the Council, the rule as proposed did not prohibit use of an AFA vessel.

NMFS invited the public to comment on the proposed rule, including the potential use of AFA vessels as Amendment 80 replacement vessels.

During the public comment periods for Amendment 97 and the proposed rule, NMFS received extensive public comment on the question of whether the CRP prohibits the use of AFA vessels as Amendment 80 replacement vessels, the lack of Council consideration or analysis of this issue, and the potential economic impacts that could result from the use of AFA vessels as Amendment 80 replacement vessels. As summarized in Comments 4 and 7 in the Comments and Responses section of this final rule, some commenters wrote in support of the view that the CRP does not prohibit the use of AFA vessels as Amendment 80 replacement vessels and suggested that the sideboards applicable to AFA vessels should not be imposed on AFA vessels that are used as Amendment 80 replacement vessels. However, as summarized in Comments 5 and 6, some commenters disagreed with the view that the CRP does not prohibit use of AFA vessels as Amendment 80 replacement vessels. These commenters expressed concerns about the use of AFA vessels and asserted that the Council did not intend for AFA vessels to be eligible to replace Amendment 80 vessels. Additionally, these commenters noted that the analysis prepared for the action and available to the Council at the time of final action did not describe the potential impacts that could result from the use of AFA vessels as Amendment 80 replacement vessels. These commenters suggested that a regulation that would allow AFA vessels to participate in the Amendment 80 sector would represent a significant change in the policy that formed the basis of the Council's recommendation at final action and that the policy change would destabilize status quo management of groundfish fisheries in the North Pacific.

After consideration of all comments received during the public comment periods for Amendment 97 and the proposed rule, NMFS determined that notwithstanding its view that the CRP does not prohibit the use of AFA vessels as Amendment 80 replacement vessels, a regulatory provision prohibiting the use of AFA vessels as Amendment 80 replacement vessels is necessary to carry out Amendment 97 as recommended by the Council and approved by NMFS. The prohibition is further necessary to allow NMFS to conclude that Amendment 97 as implemented is consistent with the FMP as required by section 304 of the Magnuson-Stevens Act in light of the

issues raised by the commenters concerning adverse impacts to the groundfish fisheries and fishery participants that could occur if AFA vessels are used, and the current lack of record support demonstrating that no impacts other than those described in the analysis for Amendment 97 would occur if AFA vessels are used. Therefore, NMFS has included in this final rule a provision at § 679.4(o)(4)(i)(D) that prohibits the use of AFA vessels as Amendment 80 replacement vessels.

NMFS determined that the prohibition is an integral part of Amendment 97 as adopted and recommended by the Council. Although the Council did not specifically articulate the prohibition in its motion for Amendment 97, the Council implicitly incorporated the prohibition into its decision on Amendment 97. The Council based its motion for Amendment 97 on the analysis and public comments presented to it. As explained earlier, the analysis stated that AFA vessels could not be used as Amendment 80 replacement vessels. That conclusion was not challenged while the Council was considering Amendment 97. Given the lack of any analysis, alternative or Council discussion on this issue, it is difficult to conclude that the Council intended to permit the use of AFA vessels as Amendment 80 replacement vessels. NMFS also determined that a regulation implementing the Council's implicit prohibition is necessary because the omission of such a prohibition from the final rule implementing Amendment 97 could undermine the intent of Amendment 97 as adopted by the Council. This final rule establishes an application process by which NMFS approves Amendment 80 replacement vessels. Without a regulatory provision prohibiting the use of AFA vessels as Amendment 80 replacement vessels, NMFS would have no basis upon which to deny an application requesting that NMFS approve an AFA vessel as an Amendment 80 replacement vessel, if the AFA vessel met all the regulatory criteria for Amendment 80 vessel replacement. Therefore, a regulation implementing the Council's implicit prohibition on the use of AFA vessels as Amendment 80 replacement vessels in Amendment 97 is needed. NMFS is authorized to include this prohibition under section 305(d) of the Magnuson-Stevens Act (16 U.S.C. 1855(d)), which states that NMFS has general responsibility to carry out any fishery management plan or plan amendment approved by NMFS and that NMFS may

promulgate such regulations in accordance with the Administrative Procedure Act (APA) as may be necessary to discharge that responsibility.

NMFS also determined that a regulatory prohibition on the use of AFA vessels as Amendment 80 replacement vessels is reasonable and that the protections the prohibition affords the Amendment 80 sector are justified given the lack of analysis on the impacts that could occur if AFA vessels are permitted to be used as Amendment 80 replacement vessels and the concerns that exist at this time on adverse effects on the fisheries and participants that could occur without a prohibition. The analysis for Amendment 97 fully describes the anticipated impacts of authorizing vessel replacement in the Amendment 80 sector with vessels that are not AFA vessels, with an exception for the F/V *Ocean Peace* which is both an AFA and an Amendment 80 vessel. However, the analysis does not provide any information on the potential effects and impacts of allowing AFA vessels to be used as Amendment 80 replacement vessels on fishing operations in both the AFA and the Amendment 80 sectors. Without this analysis, NMFS does not have adequate information on which to assess the potential impacts of the use of AFA vessels as Amendment 80 replacement vessels, or the specific parameters under which AFA vessels could be used as Amendment 80 replacement vessels. NMFS currently lacks the necessary information and analysis demonstrating that the use of AFA vessels as Amendment 80 replacement vessels is consistent with the FMP and the Magnuson-Stevens Act.

Additionally, as summarized in Comments 5 and 6, some participants in the Amendment 80 sector asserted that the use of AFA vessels would have an adverse impact on their fishing operations. Although NMFS does not yet have adequate information to determine the degree of these impacts, the concerns expressed over the potential for AFA vessels to be more competitive than other Amendment 80 vessels create unanticipated and undesirable consolidation within the sectors, and cause adverse disruption of fishing operations appear to have some merit at this time. NMFS has determined that consolidation of the Amendment 80 sector in excess of what the analysis prepared for Amendment 97 anticipates could occur if AFA vessels are permitted to be used as Amendment 80 replacement vessels. This unanticipated consolidation has

the potential to impact communities, crew, the conservation and sustainability of fishery resources, the timing of the fishery, and the value of the fishery in ways that ultimately may not be consistent with the goals and objectives of the FMP. NMFS recognizes that this final rule may indirectly impact vessel owners by limiting the potential amount of consolidation and efficiency that may have been possible through fleet consolidation in the absence of a prohibition. However, given the agency's concerns and the information available at this time, NMFS cannot conclude that the impacts resulting from the use of AFA vessels as Amendment 80 replacement vessels would be consistent with Amendment 97 and the FMP, as required by section 304 of the Magnuson-Stevens Act.

NMFS also determined that the prohibition will not adversely affect existing operations of AFA vessel owners. As noted in the analysis prepared for this rule, no AFA vessels (other than the F/V *Ocean Peace*) are active in the Amendment 80 sector. The prohibition will not affect the F/V *Ocean Peace*. While the prohibition will limit potential future operations of AFA vessels as Amendment 80 replacement vessels, AFA vessel owners will be able to continue all existing fishing operations unaffected by the prohibition. While some AFA vessel owners are advocating for the use of AFA vessels as Amendment 80 replacement vessels, NMFS has received no information through the public comments received on Amendment 97 or the proposed rule that indicates any Amendment 80 vessel owners are seeking to transfer their Amendment 80 QS to AFA vessel owners. The available public comment indicates that such transfers are generally opposed by participants in the Amendment 80 sector. Therefore, it is unlikely that this prohibition will have a foreseeable effect on potential future AFA vessel operations. Although the prohibition only pertains to the use of AFA vessels as Amendment 80 replacement vessels, NMFS notes that this final rule does not prevent AFA vessel owners from purchasing assets in the Amendment 80 fisheries, including Amendment 80 QS and Amendment 80 vessels, which has been possible since the Amendment 80 program was effective in 2008.

NMFS determined that including the prohibition on using AFA vessels as Amendment 80 replacement vessels will not prevent either the Amendment 80 or the AFA sectors from achieving the conservation and management goals and objectives set forth in the FMP for these sectors. The prohibition will not prevent

the Amendment 80 sector from replacing lost or aging vessels with safer, more efficient vessels. Although an Amendment 80 vessel owner will not be able to use an AFA vessel as a replacement vessel, this final rule allows the owner to use other non-AFA vessels if the Amendment 80 vessel owner chooses not to invest in a newly constructed vessel. AFA vessel owners will be able to prosecute the fisheries in which they have been participating without change. As mentioned earlier in this preamble, the inclusion of the prohibition does not remove a harvest opportunity that the AFA sector was benefitting from prior to this final rule. With an exception for the F/V *Ocean Peace*, which is both an AFA and an Amendment 80 vessel, no AFA vessel has been used in the Amendment 80 sector since Amendment 80 was implemented. As for the Magnuson-Stevens Act, the Council articulated how Amendment 97, without the use of AFA vessels as Amendment 80 replacement vessels, and this final rule are consistent with the national standards and the other provisions of the MSA. NMFS concurred in the Council's explanation in the agency's approval of Amendment 97 and issuance of this final rule.

NMFS has determined that the prohibition in this final rule is a logical outgrowth of the proposed rule and is consistent with other applicable laws. The preamble to the proposed rule for Amendment 97 explained that the proposed rule did not include a prohibition on the use of AFA vessels as Amendment 80 replacement vessels, described NMFS's view of the CRP, and invited the public to comment. The comments received by NMFS on Amendment 97 and the proposed rule directly focus on whether the final rule should or should not include a prohibition on the use of AFA vessels as Amendment 80 replacement vessels and clearly demonstrate that the affected public understood the effects of the agency's proposed action. The affected public clearly understood that in the proposed rule NMFS was asking for comments on whether AFA vessels should be allowed or prohibited from being used as Amendment 80 replacement vessels and the public provided the agency with pertinent information leading to the agency's decision to include a prohibition on their use in the final rule.

NMFS also determined that the regulatory prohibition on the use of AFA vessels as Amendment 80 replacement vessels in this final rule is consistent with the CRP. NMFS stated in the proposed rule its view that the

CRP does not prohibit the use of AFA vessels as Amendment 80 replacement vessels. At the same time, however, nothing in the CRP requires the Council or NMFS to permit the use of AFA vessels as Amendment 80 replacement vessels. The regulatory prohibition on the use of AFA vessels as Amendment 80 replacement vessels, like other Amendment 80 replacement vessel criteria concerning maximum vessel length and U.S. Coast Guard safety requirements, does not prevent the BSAI non-pollock groundfish catcher/processor subsectors from achieving the purpose of the CRP, which is to reduce excess harvesting capacity through the development of capacity reduction plans. The prohibition does not prevent owners of AFA vessels from participating in BSAI non-pollock groundfish fisheries as members of the AFA trawl catcher/processor subsector or prevent the owners of AFA trawl catcher/processor vessels from participating in a capacity reduction plan under the CRP. The prohibition does not prevent Amendment 80 vessel owners from replacing qualifying Amendment 80 vessels. Additionally, nothing in the CRP overrides the Council's and NMFS's authority under the Magnuson-Stevens Act to impose reasonable criteria consistent with the Magnuson-Stevens Act and other applicable law to achieve the fishery management goals and objectives of the FMP. Moreover, even if the provisions of the CRP could be construed as requiring the use of AFA vessels as Amendment 80 replacement vessels, section 303 of Public Law 111-348 states that "Notwithstanding any other provision of law, the Secretary of Commerce may promulgate regulations that allow for the replacement or rebuilding of a vessel qualified under subsections (a)(7) and (g)(1)(A) of section 219 of the [CRP]." This provision, passed into law after the CRP, authorizes NMFS to prohibit by regulation the use of AFA vessels as Amendment 80 replacement vessels even if the provisions of the CRP require it.

During the June 2012 Council meeting, NMFS consulted with the Council, as required by section 304(b) of the Magnuson-Stevens Act, regarding the agency's intent to add a regulation to the final rule implementing Amendment 97 that would prohibit AFA vessels from participating as Amendment 80 replacement vessels. NMFS also urged the Council to consider the issue of AFA vessels as Amendment 80 replacement vessels and develop a policy recommendation on the issue. After

receiving the agency's report, the Council received comment from the public on the proposal to add a regulation to the final rule prohibiting use of AFA vessels. Following receipt of public comment, the Council discussed NMFS' approach and did not object to the inclusion of the prohibition in the Amendment 97 final rule. Some Council members stated that a prohibition was not included at the time of Council final action on Amendment 97 because at that time the Council understood the CRP precluded the use of AFA vessels as Amendment 80 replacement vessels. In light of NMFS' request, the Council recommended the development of a discussion paper that examines the potential impacts of the use of AFA vessels as Amendment 80 replacement vessels. Specifically, the Council asked NMFS to provide (1) rationale for the interpretation that the CRP does not prohibit an AFA vessel from replacing an Amendment 80 vessel, (2) a general discussion of policy considerations for allowing or not allowing replacement of Amendment 80 vessels with AFA vessels and AFA vessels with Amendment 80 vessels, (3) a discussion of compliance with the CRP should an AFA vessel replace an Amendment 80 vessel, (4) a description of the statutory requirements for replacement of an AFA vessel and whether an Amendment 80 vessel could replace an AFA vessel, and (5) a description of the purpose of sideboards in the AFA and if or how they would apply to an AFA vessel that replaced an Amendment 80 vessel. This discussion paper, currently scheduled to be presented to the Council at its October 2012 meeting, could provide additional information for the Council to recommend that the prohibition on the use of AFA vessels as Amendment 80 replacement vessels as established in this final rule be maintained, modified, or removed. Although NMFS has concluded that the best available information currently supports a regulation that prohibits AFA vessels from participating as Amendment 80 replacement vessels, the Council could choose to act in the future to modify this policy based on new information analyzed and reviewed by the Council at that time.

#### *Replacement Vessel Length Limits, Maximum Length Overall*

This final rule limits the length overall (LOA) of Amendment 80 replacement vessels to 295 feet (89.9 m). As described in Section 2.4.5 of the analysis for this action, the average LOA on an Amendment 80 LLP license is 168 feet (51.2 m). Under this action, the LOA of all Amendment 80 vessels could

increase up to 295 feet (89.9 m). The Council determined that a vessel length limit of 295 feet (89.9 m) was not likely to constrain the type of fishing operations possible on an Amendment 80 replacement vessel, or the economic viability of a replacement vessel (see Comments 4 through 7). The maximum vessel length is intended to provide equal opportunity for each vessel owner to increase or maintain vessel length, to improve the range of processed products, and to increase hold capacity onboard the vessel. The Council and NMFS recognize that in many cases vessel length is less important for increasing harvest rates than for providing a large enough vessel to provide adequate hold capacity and thereby increase groundfish retention.

This final rule limits the length of replacement vessels to address the potentially adverse competitive effects of new fishing capacity entering the fishery relative to the existing fleet. As described in detail in Section 2.5.5 of the analysis for this action, the length restriction of 295 feet (89.9 m) for replacement vessels is intended to limit overall harvesting capacity of the fleet by providing an upper boundary on total fleet capacity and encourage general improvements in harvesting capacity that any replacement vessel may provide over the vessel being replaced. Similarly, replacement vessel length restrictions are intended to reduce the potential for a race for fish among Amendment 80 participants in the Amendment 80 limited access fishery in concert with cooperative quota and sideboard restrictions. As noted in Section 2.5.5.2 of the EA/RIR/IRFA for this action, Amendment 80 vessels are constrained by quotas in most fisheries in the BSAI and by sideboards limits in the GOA. These restrictions will remain in place and will continue to constrain the fleet in most fisheries.

Under the final rule, NMFS will modify the maximum LOA (MLOA) on Amendment 80 LLP licenses to reflect the regulatory limit of 295 feet (89.9 m) LOA for Amendment 80 vessels when an Amendment 80 LLP license is transferred to a NMFS-approved Amendment 80 replacement vessel. Under regulations at §§ 679.4(o) and 679.7(i)(2), an Amendment 80 vessel is required to use an Amendment 80 LLP while fishing in the BSAI or GOA. Section 2.4.5 of the analysis for this action identifies the 28 LLP licenses that are currently assigned, or may be eligible to be assigned, to Amendment 80 vessels. This final rule removes a prohibition on using an Amendment 80 LLP license on a vessel that does not

meet the original qualifying criteria and allows Amendment 80 LLP licenses to be used on approved Amendment 80 replacement vessels. In most cases, the MLOA on an Amendment 80 LLP license is below 295 feet (89.9 m); therefore, NMFS will increase the MLOA on an Amendment 80 LLP license when transferred to a NMFS-approved Amendment 80 replacement vessel to ensure that the replacement vessel is not constrained by the MLOA on an Amendment 80 LLP license. NMFS will not adjust the MLOA of an Amendment 80 LLP license until it is transferred to a NMFS-approved Amendment 80 replacement vessel.

#### *Assignment of Amendment 80 Quota Share Permits*

This final rule makes three modifications to existing regulations concerning the assignment of Amendment 80 QS permits. First, regulations at § 679.90(e)(3) are revised to provide an Amendment 80 vessel owner with the choice of either assigning the Amendment 80 QS permit to an Amendment 80 replacement vessel or permanently assigning the Amendment 80 QS permit to the LLP license derived from the originally qualifying vessel. Second, regulations at § 679.7(o)(3)(iv) are revised to prohibit replaced or replacement vessels from participating in an Amendment 80 fishery unless an Amendment 80 QS permit is assigned to that vessel or to the LLP license naming that vessel. Third, regulations at § 679.4(o)(4) are added to allow all persons holding an Amendment 80 QS permit to replace the vessel associated with the Amendment 80 QS permit, including those Amendment 80 QS permits associated with Amendment 80 vessels that are permanently ineligible to re-enter U.S. fisheries. Each of these modifications is discussed in detail in the preamble to the proposed rule (see **ADDRESSES**) and is summarized here.

This final rule provides Amendment 80 vessel owners with a choice of either assigning the Amendment 80 QS permit to an Amendment 80 replacement vessel or permanently affixing the Amendment 80 QS permit to the LLP license derived from the originally qualifying Amendment 80 vessel, as specified in Table 31 to part 679. Under this second option, the holder of an Amendment 80 LLP/QS license could then assign the license to a vessel authorized to participate in the Amendment 80 sector. Under existing regulations, the holder of an Amendment 80 QS permit that has been assigned to an LLP license cannot uncouple the permit and license at a later date. This final rule maintains the

existing practice of permanently affixing the Amendment 80 QS permit to the LLP license.

Regulations implemented by this final rule allow multiple Amendment 80 QS permits or Amendment 80 LLP/QS licenses to be used on an Amendment 80 replacement vessel. Therefore, one replacement vessel could have several Amendment 80 QS permits assigned to that vessel in any fishing year. A single vessel with greater hold capacity could reduce travel times and operational costs associated with operating two or more vessels.

The final rule addresses two situations where the owner of an originally qualifying Amendment 80 vessel and the person holding the Amendment 80 QS permit derived from that vessel differ. First, § 679.7(o)(3)(iv) prohibits replaced or replacement vessels from participating in an Amendment 80 fishery unless an Amendment 80 QS permit is assigned to that vessel or to the LLP license naming that vessel. This provision is intended to eliminate the risk that a person, who is not linked to the Amendment 80 fishery other than through holding title to a lost Amendment 80 vessel could replace that vessel and enter the replacement vessel into the Amendment 80 limited access fishery. In making this recommendation, the Council recognized that vessel owners could have an incentive to enter a replacement vessel into the Amendment 80 sector without having any underlying Amendment 80 QS permits being assigned to that vessel. Second, the final rule contains regulatory provisions that require a vessel participating in the Amendment 80 sector to have an Amendment 80 QS permit assigned to that vessel or permanently assigned to the LLP license derived from the original qualifying vessel. Without such regulation, a person holding title to an originally qualifying Amendment 80 vessel, but not holding QS, could replace that vessel and become active in the fishery, thereby increasing the number of vessels qualified to participate in the Amendment 80 sector. Not only would such a situation be inconsistent with the CRP and the Court's decision, it would likely pose a risk of increased competition for participants in the Amendment 80 limited access fishery.

Finally, this final rule establishes regulations that allow a person holding an Amendment 80 QS permit associated with an Amendment 80 vessel that is permanently ineligible to re-enter U.S. fisheries to replace the vessel associated with its QS permit. This provision is consistent with the CRP because the

maximum number of vessels participating in the Amendment 80 sector will not increase given that the replaced vessel cannot re-enter U.S. fisheries. Under this final rule, the person holding the Amendment 80 QS permit for such a vessel is responsible for supplying NMFS with a U.S. Coast Guard or MARAD determination of permanent ineligibility when applying to replace the ineligible vessel.

#### *Sideboard Limitations for Replaced Vessels*

This action is intended to limit effort in non-Amendment 80 fisheries by Amendment 80 vessels not assigned to an Amendment 80 QS permit or an Amendment 80 LLP/QS license, also referred to as replaced Amendment 80 vessels. Therefore, this final rule establishes restrictions on the ability of replaced Amendment 80 vessels to participate in Federal groundfish fisheries within the BSAI and GOA. NMFS will allocate a catch limit of zero metric tons in all BSAI and GOA groundfish fisheries to any replaced Amendment 80 vessel. Catch limits of zero metric tons will effectively prohibit these vessels from conducting directed fishing for groundfish in the BSAI and GOA. The Council and NMFS determined that assigning a catch limit of zero metric tons to replaced Amendment 80 vessels was the most direct way to limit participation by replaced vessels. These regulations are intended to prevent replaced Amendment 80 vessels from increasing fishing effort in non-catch share fisheries. Additionally, the Council and NMFS determined that the potential for consolidation of capital among longtime participants in groundfish fisheries might disadvantage or have negative impacts on other participants in those fisheries. This type of restriction on replaced Amendment 80 vessels is consistent with measures contained in other limited access privilege programs in the BSAI and GOA, such as the AFA (see the final rule implementing the AFA at 67 FR 79692, December 30, 2002), the BSAI Crab Rationalization Program (see the final rule implementing the BSAI Crab Rationalization Program at 70 FR 10174, March 2, 2005), and the Central GOA Rockfish Program (see the final rule implementing the Central GOA Rockfish Program at 76 FR 81248, December 27, 2011). NMFS notes that Amendment 97 and this final rule will not restrict replaced Amendment 80 vessels from participating in the BSAI and GOA fisheries as motherships, Community Quota Entity floating processors, or stationary floating processors that only

receive deliveries from other vessels for processing. Similarly, this action will not restrict replaced Amendment 80 vessels from operating in fisheries managed under the jurisdiction of other regional fishery management councils.

#### *Amendment 80 Sideboard Catch Limits and Replacement Vessels*

Existing regulatory prohibitions and requirements for monitoring, enforcement, permitting, and recordkeeping and reporting that apply to all original Amendment 80 vessels will continue to apply to all replacement vessels under this final rule. With an exception for the F/V *Golden Fleece*, GOA groundfish and halibut prohibited species catch (PSC) sideboard measures that apply to original Amendment 80 vessels will continue to apply to replacement vessels. As noted in the analysis, the Council intended that regulations implementing Amendment 97 extend these existing management measures and limitations to any replacement vessel and treat a replacement vessel the same as the original qualifying vessel being replaced. The regulations that apply to Amendment 80 vessels are best described in the final rule implementing Amendment 80 (September 14, 2007; 72 FR 52668).

Regulations implementing Amendment 97 continue to recognize the special standing that the F/V *Golden Fleece* has under the Amendment 80 program. The Council and NMFS determined that the F/V *Golden Fleece* has a unique harvest pattern in the GOA that warranted specific GOA sideboard measures under Amendment 80, including an exemption from the GOA halibut PSC sideboard limit established by regulations implementing Amendment 80. These specific GOA sideboard measures enable the F/V *Golden Fleece* to maintain its historic fishing patterns in certain GOA groundfish fisheries. As described in Section 2.4.7 of EA/RIR/IRFA for this action, the F/V *Golden Fleece* has maintained its historic fishing patterns, including its halibut PSC rates, since implementation of Amendment 80.

Under this final rule, any replacement vessel for the F/V *Golden Fleece* that is less than or equal to the MLOA of the LLP license that was originally assigned to the F/V *Golden Fleece* (124 feet, 37.8 m) will receive the F/V *Golden Fleece* GOA groundfish sideboard limits and the exemption from the GOA halibut PSC sideboard limit implemented under Amendment 80. However, if the replacement vessel for the F/V *Golden Fleece* is greater than 124 feet (37.8 m) LOA, then that replacement vessel will

be subject to the GOA groundfish and halibut PSC sideboard limits that apply to other Amendment 80 vessels. Under the latter scenario, the replacement vessel will not receive the specific F/V *Golden Fleece* sideboard restrictions and exemptions and GOA groundfish and halibut PSC use of the F/V *Golden Fleece* will be added to the existing Amendment 80 GOA sideboards. Section 2.7.4.3 of the analysis for this action describes the methods that NMFS will use to modify GOA sideboard limits if the F/V *Golden Fleece* is replaced with a vessel greater than 124 feet (37.8 m) LOA. By exempting the F/V *Golden Fleece* from the Amendment 80 GOA groundfish and halibut PSC sideboard limits, the Council and NMFS maintained the F/V *Golden Fleece's* ability to continue to harvest its traditional amounts of GOA flatfish protected from any adverse impacts resulting from other Amendment 80 vessels that could choose to fish in the GOA and use halibut PSC. As with other Amendment 80 replacement vessels, NMFS will adjust the MLOA of the LLP license that was originally assigned to the F/V *Golden Fleece* to 295 feet (89.9 m) for any vessel replacing the F/V *Golden Fleece*.

#### *Directed Fishing in GOA Flatfish Fisheries*

Under this final rule, any vessel that replaces an Amendment 80 vessel that is eligible to conduct directed fishing for flatfish in the GOA will be allowed to conduct directed fishing in the GOA flatfish fisheries. There are eleven Amendment 80 vessels currently authorized to conduct directed fishing in the GOA flatfish fisheries. The Council and NMFS determined that there is no conservation or management issue for GOA flatfish fisheries at this time; therefore, eligible Amendment 80 vessel owners should not have to choose between vessel safety improvements and the ability to continue to harvest GOA flatfish. The Council and NMFS recognize the potential for fishing effort to move from the Amendment 80 fisheries to the GOA flatfish fisheries. However, NMFS and the Council do not anticipate a rapid increase in fishing effort in these fisheries due to the impact of replacement vessels and could address the issue at a later date should a conservation or management problem be predicted.

#### *Safety Requirements*

The Council and NMFS have long sought to improve safety-at-sea and have recognized the safety concerns within the Amendment 80 fleet. Since 2000, vessel losses and individual fatalities

have made the Amendment 80 fleet one of the highest-risk Federal fisheries within the jurisdiction of the Council. The U.S. Coast Guard considers the catcher/processor vessels currently participating in the Amendment 80 sector as high risk primarily due to the age of the vessels, the areas in which they operate, the large number of crew they carry, and their relatively high incidence of marine casualty history.

Under current law, any fish processing vessel that is built or undergoes a major conversion after July 27, 1990, is required by 46 U.S.C. 4503 to meet all survey and classification requirements prescribed by the American Bureau of Shipping or another similarly qualified classification society. A classification society is a non-governmental organization that establishes and maintains technical standards and rules for the construction (hull, machinery, and other vital systems) and operation of ships and offshore structures. The classification society will also validate that construction is completed according to these standards and will carry out regular surveys to ensure continued compliance with the standards. Similarly, all vessels 79 feet or greater that are built or converted for use as a fish processing vessel after January 1, 1983, are required by 46 U.S.C. 5102 to have a load line. A load line establishes the maximum draft of the ship and the legal limit to which a ship may be loaded for specific water types and temperatures. A load line is intended to ensure that a ship has sufficient freeboard so that the vessel has the necessary stability to operate safely.

The vast majority of the vessels currently used in the Amendment 80 sector are not load lined or classed. Due to a variety of concerns, classification societies have not recently classed or load lined vessels greater than 20 years old, and do not appear likely to do so in the foreseeable future. The average age of an Amendment 80 vessel is 32 years, and 22 of the 24 Amendment 80 vessels currently used in the Amendment 80 sector cannot meet the requirements of class and load line because of the age of the vessel. Based on this limitation, the U.S. Coast Guard and owners of Amendment 80 vessels collaborated to develop an alternative program to address the safety risks of this fleet. This collaborative effort is known as the Alternative Compliance and Safety Agreement (ACSA) program. Program development began in June 2005, and implementation was achieved between June 2006 and January 2009. The ACSA program is designed to achieve numerous safety, economic, and

fishery management goals, both directly and indirectly.

While the U.S. Coast Guard and Amendment 80 vessel owners have seen significant improvements in vessel safety as a result of the ACSA program, there are limitations to its long-term effectiveness for the Amendment 80 fleet. The Council and NMFS recognize that no Amendment 80 vessels were constructed to meet the requirements of class and load line; therefore, there are some inherent limitations in achieving a total safety equivalency. Moreover, the National Transportation and Safety Board's (NTSB) investigation into the sinking of the F/V *Alaska Ranger* found that "while the NTSB finds that ACSA has improved the safety of the vessels enrolled in the program, the effectiveness of ACSA is limited because it is a voluntary program." Another key limitation to the ACSA program is vessel age. The average age of an Amendment 80 vessel is 32 years. U.S. Coast Guard marine inspectors in charge of implementing the ACSA program continue to express serious concern over the material condition of this aging fleet, in part because some studies have shown that an increase in vessel age increases the probability of a total loss due to a collision, fire/explosion, material/equipment failure, capsizing, or sinking.

NMFS and the Council note that newly constructed fish processing vessels have to meet the full suite of modern safety standards—including all construction, stability, and manning requirements—intended to ensure such a vessel is inherently safer. Any newly constructed Amendment 80 replacement vessel will be required to be classed and load lined.

This final rule requires an Amendment 80 vessel owner applying to NMFS to replace a vessel with a newly built or recently converted vessel to submit documentation demonstrating that the replacement vessel meets U.S. Coast Guard requirements applicable to processing vessels operating in the Amendment 80 sector or, if unable to meet these requirements and the vessel is currently eligible to participate in the Amendment 80 sector, demonstrate that the vessel is enrolled in the ACSA program. These provisions are intended to improve safety at sea by requiring Amendment 80 replacement vessels to meet safety requirements established for fishing vessels in recent years. The Council and NMFS recognize that it will likely take decades for all Amendment 80 vessels to receive safety upgrades; however, the management measures in this rule that require safety certifications will promote long-term safety

improvements for the Amendment 80 fleet.

#### *Amendment 80 Replacement Vessel Applications*

The final rule adds regulations at § 679.4(o)(4)(ii) to establish the process for eligible participants to request that a vessel be approved as an Amendment 80 replacement vessel. This final rule requires all eligible participants to submit a completed application before NMFS will approve a replacement vessel for use in the Amendment 80 fisheries. For NMFS to consider an application for approval, the applicant must identify the Amendment 80 vessel being replaced, identify the replacement vessel, and provide documentation demonstrating that the replacement vessel is classed and load lined or, if incapable of being classed and load lined, that the vessel is enrolled in the ACSA Program.

Section § 679.4(o)(4)(i)(B) of this final rule requires that Amendment 80 replacement vessels be built in the United States, and if ever rebuilt, rebuilt in the United States. The applicant must provide documentation with an application to NMFS demonstrating that the replacement vessel was built, or rebuilt, in the United States. NMFS proposed this regulation for Amendment 80 replacement vessels because it is consistent with current vessel replacement regulations for trawl C/Ps participating in the AFA C/P subsector (see § 679.4(l)(7)(i)(B)). As noted in Section 2.4.6.2 of the EA/RIR/FRFA prepared for this action, the requirement that vessels be built or rebuilt in the United States was applicable law for other trawl catcher/processors (*i.e.*, AFA C/Ps) operating in the Bering Sea at the time the Council took final action on Amendment 97. NMFS also proposed this regulation because Section 2.4.9.2 the analysis for Amendment 97 indicates that Amendment 80 vessels owners will be primarily focused on new vessel construction if an owner wants to substantially improve the size, horsepower, tonnage, processing capacity, fuel consumption, handling, or safety components of an Amendment 80 vessel and be able to undertake higher value added processing operations, such as filleting or surimi. Generally, statutes governing vessel construction have required that new vessels be built, or rebuilt, in the United States (*e.g.*, 46 U.S.C. 12102(a), 12151(b)). NMFS determined that this requirement is consistent with the Magnuson-Stevens Act and other applicable law.

The applicant must sign and date an affidavit affirming that all information

provided on the application is true, correct, and complete to the best of his or her knowledge and belief. In addition, an applicant holding an Amendment 80 QS permit for a vessel that has been lost at sea or is otherwise permanently ineligible to participate in Amendment 80 fisheries and who applies to replace that vessel must provide evidence to NMFS that ineligibility has been established through a U.S. Coast Guard or MARAD determination. Written documentation must be provided to establish that an ineligible vessel cannot reenter the fishery and that the replacement vessel should be permitted to replace the ineligible vessel.

If NMFS receives a completed application in conformance with regulations at § 679.4(o)(4)(ii), NMFS will process that application as soon as possible. Once a complete application is received by NMFS, the Regional Administrator will approve a vessel that is eligible to participate in Federal fisheries as an Amendment 80 replacement vessel provided that:

- The replacement vessel does not exceed 295 feet (89.9 m) LOA;
- The replacement vessel was built in the United States and, if ever rebuilt, rebuilt in the United States;
- The replacement vessel is not a permitted AFA vessel;
- The replacement vessel is classed and load lined or, if the vessel cannot be classed and load lined, the vessel is enrolled in the U.S. Coast Guard ACSA program;
- Only one replacement vessel is named as a replacement for any one replaced vessel at a given time; and
- The replacement vessel is not otherwise prohibited from participation.

Based on experience with similar actions, NMFS would likely complete the review of an application within 10 calendar days. Applicants should consider the potential time lag between submission of a completed application and the effective date of NMFS' approval of an Amendment 80 replacement vessel. A list of NMFS-approved Amendment 80 vessels, including replacement vessels, will be publicly available at the NMFS Web site at <http://alaskafisheries.noaa.gov>.

The evaluation of an application for an Amendment 80 replacement vessel will require a decision-making process subject to administrative appeal. Applications not meeting the requirements will not be approved. If NMFS denies an application, NMFS will issue an initial administrative determination (IAD) that indicates the deficiencies in the information or evidence submitted in support of the

application and provides information on how an applicant could appeal the IAD. NMFS will use the appeals process described under § 679.43 for administratively adjudicating Amendment 80 vessel replacement decisions. However, rather than appealing an application that is denied, eligible contract signatories also could reapply to NMFS at any time. The process for replacing vessels under Amendment 97 is designed to be flexible and includes no deadlines for submission or limit on the number of times applications can be submitted to NMFS.

#### *Amendment 80 QS Transfer Application*

In order to implement Amendment 97, NMFS modifies regulations at § 679.90(d), (e), and (f) regarding the allocation, use, and transfer of Amendment 80 QS permits. Specifically, NMFS adds provisions to the Application to Transfer Amendment 80 QS Permit that allow Amendment 80 QS permit holders to transfer an Amendment 80 QS permit to an Amendment 80 replacement vessel, transfer an Amendment 80 QS permit to a new person, transfer an Amendment 80 QS permit to the Amendment 80 LLP license assigned to the originally qualifying Amendment 80 vessel as noted in Table 31 to part 679, or transfer an Amendment 80 QS permit affixed to an Amendment 80 LLP/QS license to an Amendment 80 replacement vessel. In order to transfer an Amendment 80 QS permit to another person, to a vessel approved as an Amendment 80 replacement vessel, or to an Amendment 80 LLP license defined in Table 31 to part 679, a person must submit an application to transfer an Amendment 80 QS permit that is approved by NMFS under the regulatory provisions at § 679.90(f). A person holding an Amendment 80 LLP/QS license will be able to transfer that Amendment 80 LLP/QS license to another person under the provisions of § 679.4(k)(7).

#### *United States Maritime Administration (MARAD) Vessel Documentation*

In order to participate in a U.S. fishery, a vessel must obtain a certificate of documentation with a fishery endorsement either from the U.S. Coast Guard or MARAD (see, e.g., 46 U.S.C. 12102(a), 12113(b)(1), and 12151(b)). Vessels greater than 100 feet (30.5 m) LOA must receive this documentation through MARAD. Federal law prohibits larger vessels from obtaining a fishery endorsement unless specific conditions are met. These prohibitions are currently codified at 46 U.S.C. 12113(d).

Unless an exemption applies, a vessel is not eligible for a fishery endorsement if it is greater than 165 feet (50.3 m) in registered length; is more than 750 gross registered tons (as measured pursuant to 46 U.S.C. Chapter 145) or 1,900 gross registered tons (as measured pursuant to 46 U.S.C. Chapter 143); or possesses a main propulsion engine or engines rated to produce a total of more than 3,000 shaft horsepower, excluding auxiliary engines for hydraulic power, electrical generation, bow or stern thrusters, or similar purposes. One exemption states that a vessel that is prohibited from receiving a fishery endorsement because it exceeds one or more of the three size limits will be eligible for a fishery endorsement if the owner of such vessel demonstrates to MARAD that the regional fishery management council of jurisdiction established under section 302(a)(1) of the Magnuson-Stevens Act has recommended after October 21, 1998, and the Secretary has approved, conservation and management measures to allow such vessel to be used in fisheries under such council's authority.

This action permits an Amendment 80 vessel to be longer than 165 feet (50.3 m) registered length and have greater tonnage and horsepower than would otherwise be permitted by 46 U.S.C. 12113(d) and the MARAD regulations. The Secretary approved Amendment 97 on June 6, 2012, and issues this final rule to implement Amendment 97; therefore, the Secretary has approved conservation and management measures that permit an Amendment 80 replacement vessel to exceed the specific length, tonnage, and horsepower limits specified at 46 U.S.C. 12113(d). Secretarial approval of Amendment 97 and publication of implementing regulations is intended to provide MARAD with a clear indication that the Council and NMFS have recommended that Amendment 80 replacement vessels meeting or exceeding the specific length, tonnage, or horsepower limits set forth at 46 U.S.C. 12133(d)(1) are eligible to receive a fishery endorsement consistent with 46 U.S.C. 12113(d)(2)(B) and MARAD regulations at 46 CFR 356.47(c). NMFS will provide MARAD with notification of the publication of this rule to document the Secretary's approval of measures that permit Amendment 80 replacement vessels to exceed these limits.

#### **Changes From the Proposed Rule**

As noted earlier in the preamble, the final rule has one substantive change to the regulatory text from the proposed rule (April 4, 2012; 77 FR 20339). The final rule adds a regulatory provision at

§ 679.4(o)(4)(i) that prohibits the use of AFA vessels as Amendment 80 replacement vessels. A complete explanation of the provision and NMFS's rationale for its inclusion is provided earlier in the preamble and also in the responses to comments below.

In addition, NMFS identified four minor errors in the proposed regulatory text that require clarification from proposed to final rule. First, the final rule revises proposed regulatory text for §§ 679.4(o)(4)(ii) and 679.90(f) by replacing the phrase "with all applicable fields accurately completed" with the more precise phrase "with all required fields accurately completed." Second, the final rule revises proposed regulatory text for § 679.7(o)(3)(iv) by removing the words "A vessel to fish" at the beginning of the prohibition and replacing them with the word "Fish" to make the prohibition more precise and grammatically correct. Third, the final rule revises proposed regulatory text for § 679.90(e)(3)(i) by replacing the phrase "or to a vessel approved as an Amendment 80 replacement vessel approved by NMFS" with the more precise phrase "or to a vessel approved by NMFS as an Amendment 80 replacement vessel." Fourth, proposed regulatory text for § 679.92(c)(2)(ii) inadvertently referred to "column A or Table 39" when the proposed regulatory text should have read "column A of Table 39." This final rule replaces the word "or" with "of" for this reference in § 679.92(c)(2)(ii).

#### **Comments and Responses**

NMFS received 15 comment letters containing 13 unique comments during the public comment periods on the Notice of Availability for Amendment 97 and the proposed rule to implement Amendment 97. Of the 11 unique individuals who commented, 10 are representatives of the fishing industry and one is a member of the general public. A summary of the comments received, grouped by subject matter, and NMFS' responses follow.

##### *General Comments*

*Comment 1:* Most commenters expressed general support for Amendment 97 and the proposed rule.

*Response:* NMFS acknowledges this comment.

*Comment 2:* One commenter expressed general dissatisfaction with fishery management policy and suggested that Amendment 80 vessels should not be permitted to be replaced. Instead, the commenter suggested that NMFS should reduce the number of vessels in the Amendment 80 fleet and

require existing vessels meet modern safety standards.

*Response:* No changes have been made to the proposed rule in response to this comment. The Council considered and rejected an alternative that would prevent Amendment 80 vessels from being replaced. As described in Section 2.5.1 of the analysis for this action, the Council considered Alternative 1a, the No Action alternative. This alternative directly contravenes the CRP and the court's order in *Arctic Sole Seafoods v. Gutierrez*, is inconsistent with the Council's and NMFS' past practice of allowing replacement vessels in catch share programs, including NMFS' authorization of a replacement vessel for the originally qualifying Amendment 80 vessel F/V *Arctic Rose*, and creates an untenable disagreement between Amendment 97 as approved by NMFS and implementing regulations. The court in *Arctic Sole Seafoods v. Gutierrez* held that the owner of an originally qualifying Amendment 80 vessel may "replace a lost qualifying vessel with a single substitute vessel." Without a way to replace vessels, there would be a slow reduction of the Amendment 80 fleet through attrition. In addition, Alternative 1a was rejected because it would fail to meet the specific recommendation of the National Transportation Safety Board (NTSB) made following the sinking of the FV *Alaska Ranger*. After that accident, the NTSB recommended that NMFS establish clear regulatory provisions that allow vessel replacement for reasons other than loss.

Had the Council recommended Alternative 1a, Amendment 80 vessel owners would need to maintain and update originally qualifying vessels. As noted in section 2.4.9.1 of the analysis for this action and summarized in response to Comment 11, the age of the current fleet would prevent even rebuilt vessels (*i.e.* vessels undergoing a major conversion) from being classed and load lined. The Council recommended the preferred alternative, in part, to encourage replacement of existing vessels with newly constructed vessels that must meet all applicable safety laws and could increase the wholesale value of fishery products through the use of value-added processing forms. Newer vessels are likely to incorporate safer designs and more advanced safety measures. In addition, new vessels can be designed to meet contemporary international class and load line requirements that would allow vessel operators to retain more products than they currently can under the U.S. Coast Guard's ACSA program, thereby

improving the retention and utilization of groundfish.

*Comment 3:* Most commenters urged NMFS to implement Amendment 97 in an expedited manner and suggested that the delayed Secretarial review of Amendment 97 and its implementing regulations has surpassed a reasonable standard.

*Response:* NMFS is aware that there is significant interest within the Amendment 80 sector to begin the process of replacing aging vessels and that publication of a final rule implementing Amendment 97 is needed to provide regulatory certainty to Amendment 80 vessel owners. NMFS has many competing projects and worked expeditiously to begin Secretarial review of Amendment 97. NMFS directed limited resources away from other high priority projects to expedite the implementation of this action. NMFS periodically informed the public and the Council of the status of the development of the proposed and final rules and other competing projects. Although the Council did not specifically request prioritization of this action relative to other NMFS projects, NMFS did respond to requests for additional information on a timely basis and considered comments from the public and individual Council members when establishing priorities. NMFS disagrees with any characterization by the commenter that NMFS purposefully delayed Secretarial review of Amendment 97 and its implementing regulations.

#### *Use of AFA Vessels as Amendment 80 Vessels*

*Comment 4:* The final rule should clarify that AFA vessels can be used as Amendment 80 vessels. The preamble to the proposed rule suggests that only two types of vessels may serve as Amendment 80 replacement vessels—vessels currently eligible to participate in Amendment 80 fisheries and newly constructed vessels. The use of AFA vessels as replacement vessels in the Amendment 80 fleet is consistent with the goals of the CRP and is consistent with the Council's goals of improved vessel safety and increased retention and utilization of groundfish by the Amendment 80 fleet. For some participants in the Amendment 80 fleet, AFA catcher/processors may be the only practicable means to those ends.

*Response:* NMFS declines to modify the final rule as the commenter requests. Contrary to the clarification the commenter requests, this final rule prohibits the use of AFA vessels as Amendment 80 replacement vessels. For reasons provided earlier in the

preamble, NMFS determined that such a prohibition is necessary to carry out management of the fisheries in the BSAI consistent with the Council's expectations at the time the Council took final action on Amendment 97 and is reasonable given the information available at this time concerning the potential adverse impacts that could occur within the fishery if AFA vessels are permitted to be used as replacement vessels.

At the June 2012 Council meeting in Kodiak, AK, NMFS consulted with the Council about the agency's intent to include a provision prohibiting the use of AFA vessels as Amendment 80 replacement vessels in the final rule for Amendment 97. After receiving NMFS's report and listening to public comments on the report, the Council requested the development of a discussion paper analyzing the potential impacts of the prohibition on AFA vessels participating as Amendment 80 replacement vessels and the potential impacts of allowing AFA vessels to participate as Amendment 80 replacement vessels. A more detailed description of the discussion paper requested by the Council is provided earlier in this preamble. The Council noted that it was appropriate to have a better understanding of the issues before it considered establishing a policy. As explained earlier, while it is NMFS's view that the CRP does not prohibit use of AFA vessels as Amendment 80 replacement vessels, the goals and purpose of the CRP are not impeded by a prohibition on the use of AFA vessels as Amendment 80 replacement vessels. NMFS expects that the Council, as it considers the use of AFA vessel as Amendment 80 replacement vessels, will receive information on whether the use of AFA vessels as Amendment 80 replacement vessels is consistent with the goals of the FMP and the Magnuson-Stevens Act, and is a practicable way to achieve those goals.

NMFS disagrees with the commenter that the proposed rule suggested that only two types of vessels may serve as Amendment 80 replacement vessels. The proposed rule clearly articulated the criteria that would have to be satisfied for a vessel to be approved as an Amendment 80 replacement vessel and none of these criteria require the replacement vessel to be only a newly constructed vessel or a currently participating Amendment 80 vessel. The proposed rule acknowledged that Amendment 80 vessels owners would likely prefer newly constructed vessels over existing vessels and that newly constructed vessels would likely meet the regulatory criterion that Amendment

80 replacement vessels be compliant with U.S. Coast Guard safety requirements. Additionally, the proposed rule explained that a currently participating Amendment 80 vessel could be used as an Amendment 80 replacement vessel as long as the vessel meets the criteria, including the criterion for compliance with U.S. Coast Guard safety requirements or is enrolled in the ACSA program. Although this final rule adds another eligibility criterion for Amendment 80 replacement vessels, the final rule does not limit the universe of eligible Amendment 80 replacement vessels to only currently participating Amendment 80 vessels and newly constructed vessels.

*Comment 5:* The final rule for this action should clarify that AFA vessels are not eligible to replace Amendment 80 vessels. By allowing AFA vessels to replace Amendment 80 vessels, NMFS risks investments that fishery participants have made in new vessel construction, hyper-fleet consolidation, excessive shares in these fisheries, and the encroachment of AFA participants in non-AFA fisheries. None of these potential impacts were analyzed or considered as part of this action. NMFS should return to its previous longstanding policy of a clear distinction between the AFA and non-AFA vessel sectors in order to protect status quo management of groundfish in the North Pacific.

The intent of Amendment 97 has always been to allow the Amendment 80 sector to replace vessels, not to facilitate AFA entry into the Amendment 80 sector or to disrupt existing fisheries management in the North Pacific. NMFS inaccurately assumes that the lack of an alternative recommending that NMFS prohibit AFA vessels from replacing Amendment 80 vessels is a tacit endorsement by the Council of this drastic policy change. The analysis before the Council at the time of final action clearly described NMFS' longstanding policy that AFA catcher/processors would be ineligible to fish as non-AFA trawl catcher/processors and could not replace Amendment 80 vessels. None of the alternatives before the Council included a scenario where AFA vessels could be used as Amendment 80 replacement vessels; therefore, the Council could not have understood the economic implications of this policy change. Furthermore, the public was not provided adequate time to comment on the use of AFA vessels as replacement vessels.

Moreover, allowing AFA vessels to be used as Amendment 80 replacement

vessels is controversial, illegal, and contrary to the Court Rulings and Federal statutes that govern the AFA and Amendment 80 fleets (see *Arctic Sole Seafoods Inc. v. Gutierrez*; *Oceana v. Evans*, 2005; *Fishermen Finest v. Locke*, 2010; *Oceana v. Locke*, 2011; Pub. L. 111–281; and Pub. L. 111–348). The CRP clearly prohibits AFA vessels from participating in the Amendment 80 fleet (Pub. L. 108–447). Similarly, Congress made it clear that the participants in the AFA fleet relinquished all rights to participate in other BSAI sectors in exchange for its monopoly in the pollock fishery (see AFA sections 208 and 211). Congress has consistently demonstrated that AFA and non-AFA sectors are mutually exclusive. NMFS lacks the authority to change statutory intent; such a change would require Congressional action (see 16 U.S.C. 1854(a)(3) and (b)). Furthermore, any attempt by NMFS to create a rule outside of the rulemaking process (*i.e.*, through preamble text only) is invalid under provisions of the APA (see 5 U.S.C. 706(2)(A) and (C)).

*Response:* NMFS has included a provision in this final rule that prohibits the use of AFA vessels as Amendment 80 replacement vessels at § 679.4(o)(4)(i). For reasons explained earlier, NMFS determined that at this time, a provision prohibiting the use of AFA vessels as Amendment 80 replacement vessels is necessary to achieve the goals and objectives of Amendment 97 and the FMP and is consistent with the Magnuson-Stevens Act and applicable law.

NMFS disagrees with the commenter's assumption that NMFS interpreted the absence of an alternative containing a prohibition on the use of AFA vessels as Amendment 80 vessels in the Council's motion for Amendment 97 as the Council's "tacit endorsement" of their use as Amendment 80 replacement vessels. In the preamble of the proposed rule, NMFS acknowledged that its view of the CRP had changed from that provided to the Council and that the Council's motion did not contain a specific prohibition on the use of AFA vessels as Amendment 80 replacement vessels. NMFS did not state that the combination of these two factors led NMFS to assume that the Council endorsed the use of AFA vessels as Amendment 80 replacement vessels. NMFS was fully aware of the impact its new understanding of the CRP had on the Council's decision on Amendment 97 and highlighted the issue in order to solicit public comment on the matter.

Although not a basis for the final rule's prohibition on use of AFA

vessels, NMFS will respond to the commenter's assertion that the CRP clearly prohibits AFA vessels from participating in the Amendment 80 sector. Section 219(a)(7) of the CRP as interpreted by the court sets forth the criteria that an owner of a vessel must meet to originally qualify for participation in the Amendment 80 sector. When the original qualification criteria at section 219(a)(7) have been met, the owner of a qualifying vessel may replace that vessel with a vessel that does not meet all the original qualification criteria. As explained above, the court interpreted the CRP as limiting the universe of owners eligible to participate in the BSAI non-pollock groundfish fishery. It accomplished this objective by limiting eligibility to a person who owns a particular type of vessel with a particular catch history and who has a particular license. However, a person who owns an eligible vessel is no longer bound by the statutory criteria when replacing that vessel. As the court noted, nothing in the CRP indicates that Congress was concerned with which particular vessels are used in the BSAI non-pollock groundfish fishery. Therefore, the owner of a non-AFA trawl catcher/processor vessel must satisfy the criteria specified in section 219(a)(7) of the CRP to originally qualify for the non-AFA trawl catcher/processor subsector and the Amendment 80 sector, but the owner of such a vessel may replace it with a vessel that might not meet the original qualifying criteria of the CRP but is otherwise eligible to participate in the BSAI non-pollock groundfish fishery.

As NMFS stated in the preamble in the proposed rule, its view is that nothing in the CRP or the court's decision supports an interpretation that the criterion at section 219(a)(7)(A), which excludes AFA trawl catcher/processors from the universe of originally qualifying Amendment 80 vessels, should extend to an Amendment 80 replacement vessel. The purpose of the CRP is to promote sustainable fisheries management through the removal of excess harvesting capacity from the catcher/processor sector of the non-pollock groundfish fishery. The use of an AFA vessel as an Amendment 80 replacement vessel does not undermine this purpose. The owner of a vessel that is both an AFA vessel and an Amendment 80 replacement vessel could still participate in a capacity reduction plan developed by one or more of the subsectors in which the owner is a member. Additionally, the owner of a vessel that is both an AFA

vessel and an Amendment 80 replacement vessel would continue to be a member of a catcher/processor subsector, and therefore eligible to participate in the BSAI non-pollock groundfish fishery. Also, the use of an AFA vessel as an Amendment 80 vessel would not increase the harvesting capacity of either the AFA or the Amendment 80 sectors. Generally, if AFA vessels were used as Amendment 80 replacement vessels, NMFS expects the total harvesting capacity in the BSAI catcher/processor sector would decrease rather than increase as AFA vessels replace Amendment 80 vessels and the replaced Amendment 80 vessel is removed from participation in BSAI and GOA groundfish fisheries. This overall reduction in harvesting capacity would be consistent with the goals of the CRP. For these reasons, the agency's view is that the CRP does not prohibit the use of an AFA vessel as an Amendment 80 replacement vessel.

NMFS agrees that existing AFA regulatory provisions, such as sideboards, implemented by the Council and NMFS under section 211 of the AFA and the Magnuson-Stevens Act severely limit or possibly prevent the use of AFA vessels as Amendment 80 replacement vessels. However, as explained in the proposed rule preamble, section 213(c) of the AFA provides the Council and NMFS with the authority to supersede certain provisions of the AFA, such as sideboards, to mitigate adverse effects caused by the AFA. NMFS also acknowledges that section 211(a) of the AFA states that the Council shall recommend for approval by NMFS those conservation and management measures it determines necessary to protect other fisheries under its jurisdiction and the participants in those fisheries from adverse impacts caused by the AFA or fishery cooperatives in the directed pollock fishery. NMFS has determined, as explained earlier, that it has the authority under the Magnuson-Stevens Act and other law to implement with this final rule a provision prohibiting the use of AFA vessels as Amendment 80 vessels and that such a prohibition is necessary and consistent with Amendment 97, the FMP, and the Magnuson-Stevens Act at this time. As described in the response to Comment 4, the Council has requested a discussion paper analyzing the potential impacts of the prohibition on AFA vessels participating as Amendment 80 replacement vessels and the potential impacts of allowing AFA vessels to participate as Amendment 80 replacement vessels. After receiving the

information provided in this discussion paper and other information presented to it through public testimony, the Council could choose not to take any action and AFA vessels will be prohibited from use as Amendment 80 replacement vessels, or the Council could initiate an analysis to consider the status quo prohibition and options to allow the use of AFA vessels as Amendment 80 replacement vessels.

NMFS disagrees with the commenter's statements that the agency has a longstanding policy prohibiting the use of AFA vessels as Amendment 80 replacement vessels. In 2007, NMFS had initially interpreted the CRP as prohibiting the replacement of vessels that originally qualified for the Amendment 80 sector under the criteria established by the CRP with a vessel that did not meet the CRP's criteria. NMFS determined that it had no discretion under the CRP to permit vessel replacement with non-qualifying vessels. The court in *Arctic Sole Seafoods* disagreed with NMFS's interpretation, finding the statutory language of the CRP ambiguous on the ability to replace qualifying vessels with non-qualifying vessels, and finding NMFS' prohibition on replacement with non-qualifying vessels arbitrary and capricious. Shortly after receiving the court's decision in *Arctic Sole Seafoods*, NMFS expressed its view that the statutory language of the CRP prohibited the use of AFA vessels as Amendment 80 replacement vessels. This interpretation removed the ability of the Council and agency to exercise their discretionary authority under the Magnuson-Stevens Act to permit or prohibit the use of AFA vessels as Amendment 80 replacement vessels. As explained earlier, NMFS re-examined this interpretation and in the proposed rule expressed its view that the CRP as interpreted by case law did not prohibit the use of AFA vessels. With this final rule, NMFS is implementing a policy decision to prohibit the use of AFA vessels as Amendment 80 replacement vessels for reasons provided earlier in this preamble.

Finally, the commenter objects to what it perceives as NMFS's attempt to implement a statutorily prohibited measure (*i.e.*, permission to use AFA vessels as Amendment 80 replacement vessels) through a statement in the proposed rule preamble rather than as a proposed regulation, in violation of the Administrative Procedure Act. Although NMFS disagrees with the commenter's characterization of the proposed rule preamble and law, NMFS believes that the commenter's concern has been addressed with the implementation of a

regulation that prohibits the use of AFA vessels as Amendment 80 vessels in this final rule.

#### *Proposed Catch Limits and Sideboards*

*Comment 6:* The AFA and non-AFA sectors operate under separate, distinct rules and requirements. When compared, it is obvious that one vessel cannot simultaneously satisfy conflicting statutory and regulatory requirements, such as AFA section 211 sideboards, requirements to hold Amendment 80 quota share, AFA and Amendment 80 sector GOA sideboards and PSC limits, and Amendment 85 Pacific cod allocations between non-AFA and AFA subsectors.

Amendment 97 was not intended to be a vehicle to reconsider longstanding sideboard provisions applicable to the AFA and Amendment 80 sectors. NMFS should not encourage the Council to reconsider sector qualifications, allocations, sideboards, harvest limits, and other operational restrictions in order to facilitate AFA vessels entering into the non-AFA sector. Such a regulatory change would be counter-productive for Amendment 80 vessel replacement and would destabilize status quo management of groundfish fisheries in the North Pacific.

*Response:* As explained earlier in the preamble, this final rule prohibits the use of AFA vessels as Amendment 80 replacement vessels. Therefore, the basis for the commenter's concerns as to whether AFA vessels could be used effectively as Amendment 80 replacement vessels (given all of the harvest requirements and restrictions highlighted by the commenter) has been removed.

NMFS disagrees with the commenter's suggestion that NMFS should not engage the Council on the issues surrounding the eligibility of AFA vessels as replacement vessels, including the applicability of AFA and Amendment 80 sideboard limits. The range of public comments raised in response to this issue demonstrates that this subject is of substantial interest. The Council is the appropriate body to address issues concerning fishery policy. By raising this issue to the Council, NMFS is making the Council aware of the public's interest. In addition, the Council is specifically authorized to recommend modifications to the AFA as appropriate. As NMFS noted in the preamble to the proposed rule for this action, section 213(c) of the AFA authorizes the Council and NMFS to supersede the AFA sideboards and other harvest limits established by the AFA to mitigate adverse effects in fisheries caused by the AFA at any time

it deems necessary. Although the potential impacts of AFA vessels also participating in Amendment 80 fisheries as Amendment 80 replacement vessels was not discussed in the analysis for Amendment 97, the Council could choose to analyze the impacts of alternative actions and decide if the impacts warrant additional management measures to mitigate adverse effects. NMFS consulted with the Council in June 2012 and described NMFS' rationale for and intent to prohibit AFA vessels from participation as Amendment 80 replacement vessels. During the consultation at the June 2012 Council meeting, NMFS urged the Council to engage stakeholders in a discussion of the potential impacts to inform the Council on future action. AFA C/P vessel owners may ask the Council and NMFS to examine changes to existing sideboard limits for AFA catcher/processors that would accommodate the use of an AFA catcher/processor as an Amendment 80 replacement vessel.

As noted in the response to Comment 4, the Council requested a discussion paper analyzing the potential impacts of the prohibition on AFA vessels participating as Amendment 80 replacement vessels and the potential impacts of allowing AFA vessels to participate as Amendment 80 replacement vessels. Thus, the discussion paper will focus on the impacts of permitting versus the impacts of prohibiting versus AFA vessels use as Amendment 80 replacement vessels. As part of this discussion paper, the Council requested that staff describe the possible impacts of catch limits, including sideboards, should the Council recommend that AFA vessels become eligible to participate in Amendment 80 fisheries as replacement vessels.

*Comment 7:* NMFS' interpretation of the applicability of sideboards to an AFA vessel replacing an Amendment 80 vessel and subsequently participating in non-AFA fisheries is not correct. NMFS should interpret sideboard regulations as it did for Amendment 80 vessels harvesting species allocated to, and on behalf of, Community Development Quota (CDQ) groups. In the CDQ case, NMFS determined that AFA sideboards did not extend to CDQ fisheries because of the language and purpose of the AFA. Extending sideboards to fisheries that are no longer subject to increased competition from the AFA sector (e.g., Amendment 80 fisheries) is not necessary because these sideboards would not protect participants in non-AFA fisheries. Furthermore, extending these catch limits is inconsistent with

Congressional intent, as established by the AFA. NMFS should establish sideboards consistent with existing regulations and the plain language text of AFA section 211(b)(2) that requires AFA sideboards to apply only to AFA vessels that are pursuing the "harvest available." Thus, AFA sideboards would not extend to the operations of an AFA catcher/processor serving as an Amendment 80 replacement vessel; when such a vessel is operating in an Amendment 80 fishery, Amendment 80 TAC is "not available" to the AFA catcher/processor sector (see AFA section 211(b)(2)(A)). Similar logic would also apply to PSC reserved for the Amendment 80 sector that is "unavailable" to the AFA catcher/processor sector (see AFA section 211(b)(2)(A)). Therefore, AFA catcher/processors operating in Amendment 80 fisheries should not have to operate under AFA sideboards because the sideboards would not accrue to the benefit of the AFA sector. In both cases the allocations are unavailable to the AFA sector.

Moreover, if AFA sideboards are applied to AFA vessels participating in Amendment 80 fisheries, NMFS would preclude the use of AFA vessels as replacements for vessels in the Amendment 80 fleet. Congress did not intend to limit the vessels available as replacement vessels to the participants in the Amendment 80 sector. Such a limit is not consistent with the language and purpose of the AFA or the CRP legislation, which created the Amendment 80 sector 6 years later. As the court observed in *Arctic Sole Seafoods v. Gutierrez*, "there is nothing in the [CRP legislation] that indicates Congress was concerned with which particular vessels are used in the [Amendment 80] fishery" (see 622 F. Supp. 2d 1050, 1060 n.3).

*Response:* In the proposed rule, NMFS explained that AFA sideboards would apply to any AFA vessel used as an Amendment 80 replacement vessel. Recognizing that these limitations may effectively preclude the use of AFA vessels as Amendment 80 replacement vessels, NMFS identified the need for the Council to examine the issue. However, for reasons explained earlier, NMFS has included a provision in this final rule that prohibits the use of AFA vessels as Amendment 80 replacement vessels. Because this final rule prohibits the use of AFA vessels as Amendment 80 replacement vessels, the question of whether AFA sideboards apply to AFA vessels operating as Amendment 80 replacement vessels is no longer applicable.

The commenter also states that application of AFA sideboards is inconsistent with the language and purpose of the AFA and the CRP legislation because the sideboards would preclude the use of AFA vessels as replacements for vessels in the Amendment 80 fleet and Congress did not intend to limit the vessels available as replacement vessels to the participants in the Amendment 80 sector. NMFS has previously explained that the Council and NMFS have the authority to impose requirements for Amendment 80 replacement vessels. As explained earlier, NMFS has asked the Council to examine the issue of whether AFA vessels should be permitted to be used as Amendment 80 replacement vessels, and the Council is scheduled to review a discussion paper examining this issue at its October 2012 meeting. The discussion paper will examine the impacts of AFA sideboards.

*Comment 8:* The proposed regulations do not go far enough to restrict the use of replaced Amendment 80 vessels in other fisheries. NMFS should implement stronger regulations similar to those prohibiting replaced AFA vessels from participating in any fishery in the EEZ. Specifically, the Coast Guard Authorization Act of 2010 limits the use of replaced AFA vessels by stating that a replaced AFA vessel will no longer be eligible for a fishery endorsement, unless the vessel in turn replaces another AFA vessel. Allowing less-safe replaced Amendment 80 vessels to participate in other fisheries contradicts National Standard 10, to promote safety of human life at sea.

*Response:* As noted in section 2.5.9 of the analysis for this action, the Council and NMFS are limited in their ability to address the status of replaced vessels. NMFS does not have general authority to remove a fishery endorsement issued by the U.S. Coast Guard under 46 U.S.C. 12108. NMFS has been able to permanently remove a vessel's ability to receive a fishery endorsement only when granted specific statutory authority by Congress. For example, NMFS removed a vessel's fishing endorsement under the Crab Buyback Program under the authority of the Consolidated Appropriations of 2001 (Pub L. 106-555, sec. 144) and has been granted the authority to do so for replaced AFA vessels (see 46 U.S.C. 12113). Without specific authority from Congress to remove a fishery endorsement from a replaced Amendment 80 vessel, NMFS and the Council had to consider other options to limit the potential use of replaced vessels outside of its jurisdiction.

At final action, the Council recommended that NMFS implement a sideboard limit of zero metric tons of groundfish as defined in the BSAI and GOA FMPs for replaced Amendment 80 vessels. A groundfish sideboard limit of zero for replaced Amendment 80 vessels will prohibit replaced vessels from conducting directed fishing for federally managed groundfish in the BSAI and GOA and should prevent the harvesting capacity of a replaced vessel from displacing existing fishery participants or accelerating the race for fish in non-catch share fisheries managed by the Council. This provision is consistent with similar measures taken to limit access to vessels participating in other limited access privilege program fisheries in the BSAI.

NMFS disagrees that failing to prevent replaced vessels from the Amendment 80 fleet from participating in any EEZ fishery is inconsistent with National Standard 10 of the Magnuson-Stevens Act, which requires that the Secretary shall, to the extent practicable, promote safety of human life at sea. The Secretary has determined that Amendment 97 and this final rule are consistent with all of the national standards and U.S. Coast Guard safety regulations. As described in the proposed rule, U.S. Coast Guard regulations require various safety standards based on the type of processing conducted by the vessel, the area in which the vessel operates, and the number of crew it carries. For example, a replaced Amendment 80 vessel could potentially operate safely in a lower-risk fishery, outside of the North Pacific. The U.S. Coast Guard has found that fatality rates and causal factors are highly differentiated among vessel type, fishery gear, species being fished, and geographic region. NMFS notes that replaced Amendment 80 vessels will be required to meet the applicable fishing vessel safety regulations to operate in other Federal fisheries outside of the North Pacific region.

*Comment 9:* The proposed rule at page 20344 is misleading and needs to be clarified. NMFS needs to clarify that the provisions of the Coast Guard Authorization Act of 2010 concerning "replaced" AFA vessels are not implicated when a permitted AFA vessel is "replacing" a vessel in another fishery.

*Response:* NMFS disagrees that the proposed rule was misleading. However, NMFS clarifies that the Coast Guard Authorization Act of 2010 (Pub. L. 111-281, Title VI, Sec. 602) prohibits replaced AFA vessels from participation in any fishery other than as a

replacement vessel in the AFA fleet and agrees with the commenter that these provisions do not apply to AFA vessels that are legally participating in AFA fisheries and are also used to replace a vessel in another fishery.

*MLOA of 295 Feet (89.9 m) for All Replacement Vessels*

*Comment 10:* The proposed rule incorrectly states that the longest MLOA in the Amendment 80 fleet is 295 feet (89.9 m). One vessel, the F/V *Seafreeze Alaska*, currently is assigned an LLP license with an MLOA of 296 feet (90.2 m). As proposed, the regulations would reduce the MLOA of the LLP license associated with this vessel to 295 feet (89.9 m). The administrative record does not support reducing the MLOA of the LLP license associated with the F/V *Seafreeze Alaska* and NMFS should not reduce the MLOA for the LLP license associated with this vessel. One commenter suggested that NMFS establish a 295 feet (89.9 m) MLOA for all Amendment 80 LLP licenses that have an existing MLOA of less than 295 feet (89.9 m) when the license is assigned to a replacement vessel, while another commenter suggested that NMFS should allow Amendment 80 replacement vessels to have an MLOA of 296 feet (90.2 m) rather than the proposed MLOA of 295 feet (89.9 m).

*Response:* NMFS agrees that the proposed rule preamble on page 20340 incorrectly states that the longest MLOA on an Amendment 80 LLP license is 295 feet (89.9 m). While this sentence is incorrect, the information provided in Tables 1 and 28 and in section 2.4.5 of the analysis for this action accurately state that the MLOA of the LLP license associated with the F/V *Seafreeze Alaska* is 296 feet (90.2 m).

The F/V *Seafreeze Alaska* is named on an LLP with an MLOA of 296 feet (90.2 m); however, the F/V *Seafreeze Alaska* is 295 feet (89.9 m) LOA as noted on the Federal Fisheries Permit assigned to that vessel. Tables 1 and 28 of the analysis note both the 296 feet (90.2 m) MLOA of the LLP license currently associated with the F/V *Seafreeze Alaska* and the 295-foot LOA (89.9 m) for the F/V *Seafreeze Alaska*. Upon initial issuance of an LLP license, each license holder was assigned an MLOA based on the length of the qualifying vessel on a specific date, as described in the final rule for the LLP program (63 FR 52642; October 1, 1998). During the development of Amendment 97, NMFS recommended that the Council take similar action when considering vessel length restrictions as part of a vessel replacement action. Specifically, NMFS proposed that the

Council establish the LOA of an originally qualifying Amendment 80 vessel as the benchmark for determining the maximum LOA of any replacement vessel under any length limit alternatives considered by the Council. NMFS used the LOA in its Federal fishing permit database as the basis for determining the LOA for all qualifying vessels, and those data are presumed to be correct. Therefore, under the final rule, the MLOA on the LLP license associated with the F/V *Seafreeze Alaska* will be adjusted to 295 feet (89.9 m) when NMFS approves a replacement vessel for it.

NMFS disagrees that the administrative record does not support the Council's recommendation that all LLP licenses associated with Amendment 80 replacement vessels be assigned a 295-foot (89.9 m) MLOA. Section 2.5.5 of the EA/RIR/IRFA for this action analyzes several options for length restrictions based on the LOA of Amendment 80 vessels. In addition to the 295-foot (89.9 m) MLOA restriction, the Council considered an option to limit the length of the replacement vessel to the LOA of the original qualifying vessel, an option to limit the LOA of a replacement vessel based on the MLOA of the LLP license used on the replacement vessel, and two suboptions that would modify the LOA of a vessel, not the MLOA of an LLP license.

At final action on Amendment 97, the Council selected the option that would limit the length overall of an Amendment 80 replacement vessel to 295 feet (89.9 m) LOA. This measure allows each replacement vessel to be as long as the largest vessel currently operating in the Amendment 80 fleet. In selecting the limit of 295 feet (89.9 m) LOA for replacement vessels, the Council reviewed the LOAs of participating Amendment 80 vessels and determined that replacement vessels should not be longer than the longest vessel currently participating in the sector; in other words, no replacement vessel should exceed the LOA of the longest currently participating vessel. For the reasons provided in the preamble of the proposed rule, the Council determined that the LOA of the longest vessel currently participating in the sector would accommodate all of the safety, retention and utilization goals the Council wanted to achieve with replacement vessels while providing an upper bound on total fleet capacity. Therefore the Council determined and NMFS agrees that a limit of 295 feet (89.9 m) on the LOA for replacement vessels struck the appropriate balance

between long enough without being too long.

The Council rejected the option that would have established no limit on the length of replacement vessels. As described in detail in Section 2.4.5 of the analysis for this action, the restriction of 295 feet (89.9 m) on the length of replacement vessels is intended to limit overall harvesting capacity of the fleet, reduce the potential for a race for fish in non-catch share fisheries managed by the Council, and encourage general improvements in harvesting capacity that any newly constructed vessel would provide over the vessel being replaced, while providing an upper boundary on total fleet capacity.

The Council has frequently recommended limits on vessel length as a proxy for controlling fishery effort. Although length is only one measure of a vessel's fishing capacity, it is a metric that is commonly used, considered to be a reasonable indicator of total harvest capacity, and is relatively easily measured and enforced compared to other vessel measurements (e.g., vessel hold capacity). The 295 feet (89.9 m) LOA limit implemented by this final rule is intended to improve the Council's and NMFS' ability to analyze and predict the maximum fishery impacts of the Amendment 80 fleet in future actions.

To ensure that the maximum size limit recommended by the Council can be implemented, NMFS is establishing an MLOA of 295 feet (89.9 m) for all Amendment 80 LLP licenses that are assigned to an Amendment 80 replacement vessel (see revised definition for Maximum LOA (MLOA) at § 679.2). This provision is intended to ensure that Amendment 80 LLP licenses accurately reflect the MLOA of the replacement vessel.

Although a vessel that is 296 feet LOA would not be approved as an Amendment 80 replacement vessel, the owner of the F/V *Seafreeze Alaska* is likely to benefit from a newly constructed vessel at its current LOA of 295 feet (89.9 m). The analysis for this action indicates that vessels with the longest LOA are likely to benefit from vessel replacement under Amendment 97. Generally, all Amendment 80 vessels larger than 250 feet (76.2 m) LOA are long enough to incorporate a meal plant, fillet lines, or other improvements in vessel processing; however, any newly constructed, or newly rebuilt, replacement vessel is likely to have improved operational capabilities relative to existing vessels of the same length. A new vessel can incorporate improved hull design,

processing plant construction, engines, electronics, fishing gear, and other advancements in marine design that improve efficiency and vessel safety.

NMFS made no change to the final rule in response to this comment.

*Comment 11:* NMFS should clarify that rebuilt vessels are eligible as Amendment 80 replacement vessels under this action, including the regulatory provisions that establish an MLOA of 295 feet (89.9 m) for all replacement vessels.

*Response:* NMFS agrees that rebuilt vessels, which are those vessels that have undergone a major conversion, are eligible to apply to NMFS for approval as an Amendment 80 replacement vessel. However, as described earlier, Amendment 80 replacement vessels must be classed and load lined or, if the vessel cannot be classed and load lined, the vessel must be enrolled in the U.S. Coast Guard ACSA program. Vessels must also have been rebuilt in the United States. Section 2.4.9 of the analysis for this action considered the impacts of using rebuilt Amendment 80 replacement vessels. It is NMFS's understanding based on information provided by the U.S. Coast Guard that an Amendment 80 vessel owner who undertakes a major conversion of an Amendment 80 vessel to increase its size, address safety concerns, or otherwise improve its efficiency will no longer be eligible for the U.S. Coast Guard's ACSA certification program. Therefore, a rebuilt Amendment 80 vessel must be classed and load lined in order to meet the vessel safety requirements for Amendment 80 replacement vessels established by this rule.

All commercial fishing vessels that carry more than 16 people on board and are built or have undergone a major conversion must meet contemporary safety requirements. As fish processing vessels, newly rebuilt Amendment 80 vessels are required to be classed (see 46 CFR part 28, subpart D) and load lined (see 46 U.S.C. 5102). The analysis notes that age restrictions imposed by the classification societies preclude the vast majority of the Amendment 80 fleet from eligibility for certification as either load lined or classed. Given this information and the information presented in Section 2.4.9.1 of the analysis, NMFS has serious concerns as to whether a rebuilt Amendment 80 vessel could be classed and load lined. NMFS will not approve a vessel as an Amendment 80 replacement vessel if the vessel is not classed and load lined and is not enrolled in the U.S. Coast Guard ACSA program. Should a vessel

owner choose to rebuild an existing Amendment 80 vessel, that vessel owner must apply to NMFS and NMFS must approve the vessel as an Amendment 80 replacement vessel prior to it being used as an Amendment 80 replacement vessel and prior to receiving an MLOA of 295 feet (89.9 m) on the LLP license associated with that vessel.

#### Comments on FMP Text

*Comment 12:* Under Amendment 97, Section 3.7.5.7.1 of the FMP will appropriately include the phrase "or their replacement" after references to "non-AFA trawl catcher/processors." The phrase "or their replacement" also should be included after references to "non-AFA trawl catcher/processors" in the Executive Summary and Section 3.7.5.4.2.

*Response:* NMFS acknowledges this comment; however, the changes to the FMP text suggested by the commenter are not required. The Executive Summary section of the FMP is intended to provide a general description of the FMP and its contents, and does not require additional details that are included later in the FMP. Similarly, Section 3.7.5.4.2 of the FMP opens with an introductory sentence that lists 11 issues that are described in more detail later in that section. Although NMFS agrees that the introductory sentence for Section 3.7.5.4.2 of the FMP does not include the phrase "or their replacement," the new paragraph 11 to Section 3.7.5.4.2 provides the details necessary to derive an allocation formula for Amendment 80 replacement vessels. As noted earlier in the preamble, the Secretary determined that Amendment 97 as submitted by the Council was consistent with the FMP, the Magnuson-Stevens Act, and other applicable law and approved it on June 6, 2012.

*Comment 13:* Under Amendment 97, Section 3.7.5.7 of the FMP amendment will describe the sideboards applicable to replaced Amendment 80 vessels as "Each non-AFA trawl catcher/processor named on an LLP license endorsed for participation in the Amendment 80 sector, but not assigned QS in an Amendment 80 fishery would have a sideboard limit of zero in all BSAI and GOA groundfish fisheries." As proposed, the FMP text would not include Amendment 80 vessels that are no longer named on Amendment 80 QS permits, Amendment 80 LLP licenses, or Amendment 80 LLP/QS licenses, and therefore appears to be materially different than the sideboard regulation proposed at § 679.92(e). Thus, NMFS should replace the text of the FMP

amendment with the more precise regulatory text in the proposed rule.

*Response:* NMFS determined that the text proposed by the commenter is not necessary in the FMP as the amendment language is sufficiently clear. The FMP text quoted by the commenter adequately describes the sideboards that will apply to replaced Amendment 80 vessels. Regulations implementing an FMP amendment often contain additional descriptive language to provide additional regulatory clarity and technical continuity.

#### Classification

The Administrator, Alaska Region, NMFS, determined that this final rule is necessary for the conservation and management of the groundfish fisheries off Alaska and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

#### 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 final regulatory flexibility analysis (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 the proposed rule and this final rule serve 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 at the following Web site: <http://alaskafisheries.noaa.gov>.

#### Executive Order 12866

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

#### Final Regulatory Flexibility Analysis

This FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA), a summary of the significant issues raised by the public comments, NMFS' responses to those comments, and a summary of the analyses completed to support the action. NMFS published the proposed rule on April 4, 2012 (77 FR 20339), with comments invited through May 4, 2012. An IRFA was prepared and summarized in the "Classification" section of the preamble to the proposed rule. The description of this action, its purpose, and its legal basis are

described in the preamble to the proposed rule and are not repeated here. The FRFA describes the impacts on small entities, which are defined in the IRFA for this action and not repeated here. Analytical requirements for the FRFA are described in the Regulatory Flexibility Act (RFA), sections 604(a)(1) through (5), and summarized below.

The FRFA must contain:

1. A succinct statement of the need for, and objectives of, the rule;
2. A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
3. A description and an estimate of the number of small entities to which the rule will apply, or an explanation of why no such estimate is available;
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
5. 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 "universe" of entities to be considered in a FRFA generally includes only those small entities that can reasonably be expected to be directly regulated by the final rule. If the effects of the rule fall primarily on a distinct segment of the industry, or portion thereof (e.g., user group, gear type, geographic area), that segment would be considered the universe for purposes of this analysis.

In preparing a FRFA, an agency may provide either a quantifiable or numerical description of the effects of a rule (and alternatives to the rule), or more general descriptive statements, if quantification is not practicable or reliable.

#### Need for and Objectives of This Final Rule

This final rule is necessary to amend the FMP and Federal regulations related to the Amendment 80 program to

establish a process for the owners of Amendment 80 vessels to replace eligible trawl catcher/processor vessels. This final rule is intended to rectify the currently untenable disagreement among the FMP, implementing regulations, and the court order in *Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050 (W.D. Wash 2008). Currently, the FMP and implementing regulations prohibit the replacement of any originally qualifying Amendment 80 vessel; however, the court order vacated the specific regulatory provisions that preclude vessel replacement. This action is intended to provide a clear regulatory framework and the certainty that vessel operators are likely to need in order to replace vessels.

#### Summary of Significant Issues Raised During Public Comment

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 97 on different sectors of the industry. Specific comments addressed the potential economic impacts of allowing AFA vessels to be used as amendment 80 replacement vessels (see Comments 4 through 7). For a summary of the comments received, refer to the section above titled Comments and Responses.

#### Number and Description of Small Entities Regulated by the Final Rule

NMFS estimated the number of small versus large entities by matching the gross earnings from all fisheries of record for 2009 with the vessels, the known ownership of those vessels, and the known affiliations of those vessels in the BSAI or GOA groundfish fisheries for that year. NMFS has specific information on the ownership of vessels and the affiliations that exist based on data provided by the Amendment 80 sector, as well as a review of ownership data independently available to NMFS from Federal fishing permit and LLP applications. The vessels with a common ownership linkage, and therefore affiliation, are reported in Table 2 in Section 2 of the analysis. In addition, those vessels that are assigned to an Amendment 80 cooperative and receive an exclusive harvest privilege are categorized as a large entities for the purpose of the RFA, under the principles of affiliation, due to their participation in a harvesting cooperative.

NMFS knows that as many as 28 non-AFA trawl catcher/processors could be active in the Amendment 80 fishery. Those persons who apply for and receive Amendment 80 QS are eligible to fish in the Amendment 80 sector, and those QS holders will be directly regulated by the final rule. Vessels that are assigned Amendment 80 QS and that are eligible to fish in the Amendment 80 sector are commonly known as Amendment 80 vessels. Currently, there are 27 Amendment 80 vessels that will be directly regulated based on this action. Additionally, one vessel owner, who could be eligible for the Amendment 80 program and could apply for Amendment 80 QS, has not applied to NMFS to participate in this sector. Therefore, this vessel will not be directly regulated by the final rule unless and until the owner is approved to participate in the Amendment 80 sector and is assigned Amendment 80 QS. Based on the known affiliations and ownership of the Amendment 80 vessels, all but one of the Amendment 80 vessel owners are categorized as large entities for the purpose of the RFA. Thus, this analysis estimates that only one small entity would be directly regulated by the final rule. It is possible that this one small entity could be linked by company affiliation to a large entity, which may then qualify that entity as a large entity, but complete information is not available to determine any such linkages.

#### *Recordkeeping and Reporting*

Recordkeeping and reporting requirements are not expected to change as a result of the final rule. The action under consideration requires no additional reporting, recordkeeping, or other compliance requirements that differ from the status quo.

#### *Description of Significant Alternatives to the Final Rule*

The suite of potential actions included three alternatives. A detailed description of these alternatives is provided in Section 2 of the analysis. Alternative 1 is the “no action” alternative. This alternative does not address the Federal Court Order to provide for replacement of Amendment 80 vessels and is not consistent with the purpose and need of this action. Alternative 2 would allow an Amendment 80 vessel owner to replace a vessel under conditions of loss or permanent ineligibility. This alternative meets the minimum requirements of the Court Order but was not selected because it may limit a vessel’s ability to add modern safety upgrades. It also carried a substantially higher economic

cost than alternative 3 to achieve the same regulatory outcome for the fishing sector, causing it to fail the requirement that it minimize the adverse economic impacts on directly regulated small entities. The lack of any quantitative data makes it impossible to rigorously assess the relative differences in expected economic benefits among the alternatives.

Alternative 3, the preferred alternative of the Council and NMFS, would allow a vessel owner to replace a vessel for any purpose. Based upon the best available scientific data and information, none of the alternatives to the final action accomplish the stated objectives of the Magnuson-Stevens Act and other applicable statutes, while minimizing any significant adverse economic impact on small entities, beyond those achieved under the final rule. Compared with the other alternatives and options, the associated suite of options composing the preferred alternative best minimizes adverse economic impacts on small entities, while providing the most benefits to the directly regulated small entities. The preferred alternative provides greater economic benefits for participants than alternative 2 by allowing participants to replace a vessel for any reason, and at any time, thus enabling the vessel to receive economic benefits from the fishery and Amendment 80 QS while incorporating safety and efficiency upgrades encouraged by the preferred alternative. The lack of any quantitative data makes it impossible to rigorously assess the relative differences in expected economic impacts among the alternatives. The Council chose to recommend the preferred alternative because it best meets the goals of this action and minimizes the potential negative impacts to directly regulated small entities by providing the same opportunities for each vessel owner to improve the range of processed products and increase hold capacity onboard by establishing regulations to limit the maximum size of replacement vessels.

#### *Collection-of-Information Requirements*

This rule contains collection-of-information requirements subject to the Paperwork Reduction Act and which have been approved by the Office of Management and Budget (OMB). Public reporting burden estimates per response for these requirements are listed by OMB control number.

#### *OMB Control No. 0648-0334*

Public reporting burden is estimated to average per response: 1 hour for Application for Transfer, License

Limitation Program Groundfish/Crab License.

#### *OMB Control No. 0648-0565*

Public reporting burden is estimated to average per response: 2 hours for Amendment 80 QS permit application; 2 hours for Amendment 80 QS permit transfer application; and 2 hours for Amendment 80 Vessel Replacement application.

Public reporting burden estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by email to *OIRA\_Submission@omb.eop.gov*, or fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

#### **List of Subjects in 50 CFR Part 679**

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: September 25, 2012.

#### **Alan D. Risenhoover,**

*Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, NMFS amends 50 CFR part 679 as follows:

#### **PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA**

■ 1. The authority citation for 50 CFR part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; Pub. L. 108-447.

■ 2. In § 679.2:

■ a. Revise the definition of “Amendment 80 LLP/QS license” and the definition for “Amendment 80 vessel;” and

■ b. Add a new definition of “Amendment 80 replacement vessel” in alphabetical order, and add paragraph (2)(iv) to the definition of “Maximum LOA (MLOA)”.

The revisions and additions read as follows:

§ 679.2 Definitions.

\* \* \* \* \*

Amendment 80 LLP/QS license means an LLP license originally assigned to an originally qualifying Amendment 80 vessel with an Amendment 80 QS permit assigned to that LLP license.

\* \* \* \* \*

Amendment 80 replacement vessel means a vessel approved by NMFS in accordance with § 679.4(o)(4).

\* \* \* \* \*

Amendment 80 vessel means any vessel that:

- (1) Is listed in Column A of Table 31 to this part with the corresponding USCG Documentation Number listed in Column B of Table 31 to this part; or
- (2) Is designated on an Amendment 80 QS permit, Amendment 80 LLP/QS license, or Amendment 80 LLP license and is approved by NMFS in accordance with § 679.4(o)(4) as an Amendment 80 replacement vessel.

\* \* \* \* \*

Maximum LOA (MLOA) means:

(2) \* \* \*

(iv) The MLOA of an Amendment 80 LLP license or Amendment 80 LLP/QS license will be permanently changed to 295 ft. (89.9 m) when an Amendment 80 replacement vessel is listed on the license following the approval of a license transfer application described at § 679.4(k)(7).

\* \* \* \* \*

■ 3. In § 679.4:

■ a. Revise paragraphs (k)(7)(vii), (o)(1)(ii), and (o)(1)(v); and

■ b. Add paragraphs (k)(3)(i)(C), (o)(1)(vii), (o)(4), and (o)(5).

The revisions and additions read as follows:

§ 679.4 Permits.

\* \* \* \* \*

(k) \* \* \*

(3) \* \* \*

(i) \* \* \*

(C) Modification of the MLOA on an Amendment 80 LLP license or an Amendment 80 LLP/QS license. The MLOA designated on an Amendment 80 LLP license or an Amendment 80 LLP/QS license will be 295 ft. (89.9 m) if an Amendment 80 replacement vessel is designated on the license following the approval of a license transfer request under paragraph (k)(7) of this section.

\* \* \* \* \*

(7) \* \* \*

(vii) Request to change the designated vessel. (A) A request to change the vessel designated on an LLP groundfish or crab species license must be made on a transfer application. If this request is approved and made separately from a license transfer, it will count towards

the annual limit on voluntary transfers specified in paragraph (k)(7)(vi) of this section.

(B) A request to change the vessel designated on an Amendment 80 LLP license or an Amendment 80 LLP/QS license must be made on an Application for Amendment 80 Replacement Vessel in accordance with § 679.4(o)(4)(ii). The MLOA modification specified at paragraph (k)(3)(i)(C) of this section will be effective when a complete application is submitted to NMFS in accordance with paragraph (k)(7) of this section, and the application is approved by the Regional Administrator.

\* \* \* \* \*

(o) \* \* \*

(1) \* \* \*

(ii) An Amendment 80 QS permit is assigned to the owner of an Amendment 80 vessel that gave rise to that permit under the provisions of § 679.90(b), or its replacement under § 679.4(o)(4), unless the Amendment 80 QS permit is assigned to the holder of an LLP license originally assigned to an Amendment 80 vessel under the provisions of § 679.90(d) or § 679.90(e).

\* \* \* \* \*

(v) Amendment 80 QS units assigned to an Amendment 80 QS permit are non-severable from that Amendment 80 QS permit and if transferred, the Amendment 80 QS permit must be transferred in its entirety to another person under the provisions of § 679.90(d) or § 679.90(e).

\* \* \* \* \*

(vii) The owner of an Amendment 80 vessel must designate the Amendment 80 vessel on an Amendment 80 QS permit and on an Amendment 80 LLP license, or designate the Amendment 80 vessel on the Amendment 80 LLP/QS license to use that Amendment 80 vessel in an Amendment 80 fishery.

\* \* \* \* \*

(4) Amendment 80 Replacement Vessel. (i) The owner of an Amendment 80 vessel may replace such vessel for any purpose. All Federal fishery regulations applicable to the replaced vessel apply to the replacement vessel, except as described at § 679.92(d)(2)(ii) if applicable. A vessel that replaces an Amendment 80 vessel will be approved by the Regional Administrator as an Amendment 80 vessel following the submission and approval of a completed application for an Amendment 80 Replacement Vessel, provided that:

(A) The replacement vessel does not exceed 295 ft. (89.9 m) LOA;

(B) The replacement vessel was built in the United States and, if ever rebuilt, rebuilt in the United States;

(C) The applicant provides documentation that the replacement vessel complies with U.S. Coast Guard safety requirements applicable to processing vessels operating in the Amendment 80 sector or, if unable to provide such documentation, the applicant provides documentation that the replacement vessel meets the requirements of the U.S. Coast Guard's Alternative Compliance and Safety Agreement; and

(D) The replacement vessel is not a vessel listed at section 208(e)(1) through (20) of the American Fisheries Act or permitted under § 679.4(l)(2)(i), or an AFA catcher vessel permitted under § 679.4(l)(3)(i).

(ii) Application for Amendment 80 Replacement Vessel. A person who wishes to replace an Amendment 80 vessel must submit to NMFS a complete Application for Amendment 80 Replacement Vessel. An application must contain the information specified on the form, with all required fields accurately completed and all required documentation attached. This application must be submitted to NMFS using the methods described on the application.

(5) Application evaluations and appeals—(i) Initial evaluation. The Regional Administrator will evaluate an application for an Amendment 80 replacement vessel submitted in accordance with paragraph (o)(4) of this section. If the vessel listed in the application does not meet the requirements for an Amendment 80 replacement vessel at § 679.4(o)(4), NMFS will not approve the application. An applicant who submits claims based on inconsistent information or fails to submit the information specified in the application for an Amendment 80 replacement vessel will be provided a single 30-day evidentiary period to submit evidence to establish that the vessel meets the requirements to be an Amendment 80 replacement vessel. The burden is on the applicant to establish that the vessel meets the criteria to become a replacement vessel.

(ii) Additional information and evidence. The Regional Administrator will evaluate the additional information or evidence to support an application for Amendment 80 replacement vessel submitted within the 30-day evidentiary period. If the Regional Administrator determines that the additional information or evidence meets the applicant's burden of proving that the vessel meets the requirements to become an Amendment 80 Replacement Vessel, the application will be approved. However, if the Regional Administrator determines that the

vessel does not meet the requirements to become an Amendment 80 Replacement Vessel, the applicant will be notified by an initial administrative determination (IAD) that the application for replacement vessel is denied.

(iii) *Initial administrative determinations (IAD)*. The Regional Administrator will prepare and send an IAD to the applicant following the expiration of the 30-day evidentiary period if the Regional Administrator determines that the information or evidence provided by the applicant fails to support the applicant's claims and is insufficient to establish that the vessel meets the requirements for an Amendment 80 replacement vessel or if the additional information, evidence, or revised application is not provided within the time period specified in the letter that notifies the applicant of his or her 30-day evidentiary period. The IAD will indicate the deficiencies in the application, including any deficiencies with the information, the evidence submitted in support of the information, or the revised application. An applicant who receives an IAD may appeal under the appeals procedures set out at § 679.43.

■ 4. In § 679.7, add paragraph (o)(3)(iv) to read as follows:

**§ 679.7 Prohibitions.**

\* \* \* \* \*

- (o) \* \* \*
- (3) \* \* \*

(iv) Fish in an Amendment 80 fishery without an Amendment 80 QS permit or Amendment 80 LLP/QS license assigned to that vessel.

\* \* \* \* \*

■ 5. In § 679.90, revise paragraphs (d)(2)(ii), (e)(1)(ii), (e)(3), and (f) to read as follows:

**§ 679.90 Allocation, use, and transfer of Amendment 80 QS permits.**

\* \* \* \* \*

- (d) \* \* \*
- (2) \* \* \*

(ii) *Amendment 80 LLP/QS license*. NMFS will issue an Amendment 80 QS permit as an endorsement on an Amendment 80 LLP license to the holder of an LLP license originally assigned to an Amendment 80 vessel listed in Column A of Table 31 to this part, under the provisions of § 679.4(k)(7), if that person submitted a timely and complete Application for Amendment 80 QS that was approved by NMFS under paragraph (a)(2)(ii) of this section.

\* \* \* \* \*

- (e) \* \* \*
- (1) \* \* \*

(ii) If an Amendment 80 QS permit is assigned to an Amendment 80 LLP license originally assigned to an Amendment 80 vessel, that Amendment 80 LLP license is designated as an Amendment 80 LLP/QS license. A person may not separate the Amendment 80 QS permit from that Amendment 80 LLP/QS license.

\* \* \* \* \*

(3) *Transfers of Amendment 80 QS permits*. (i) A person holding an Amendment 80 QS permit assigned to an Amendment 80 vessel may transfer that Amendment 80 QS permit to another person, to the LLP license originally assigned to an Amendment 80 vessel, or to a vessel approved by NMFS as an Amendment 80 replacement vessel in accordance with § 679.4(o)(4) by submitting an Application to Transfer an Amendment 80 QS permit that is approved by NMFS under the provisions of paragraph (f) of this section.

(ii) A person holding an Amendment 80 LLP license that is designated as an Amendment 80 LLP/QS license may designate a vessel approved as an Amendment 80 replacement vessel by submitting an Application For Transfer License Limitation Program Groundfish/ Crab License that is approved by NMFS under the provisions of paragraph (f) of this section.

\* \* \* \* \*

(f) *Application to Transfer Amendment 80 QS*. A person holding an Amendment 80 QS permit who wishes to transfer the Amendment 80 QS permit to the LLP license originally assigned to the Amendment 80 vessel, or transfer the Amendment 80 QS permit to another person, or transfer the Amendment 80 QS permit to an Amendment 80 replacement vessel must submit to NMFS a complete Application to Transfer an Amendment 80 QS permit. The holder of an Amendment 80 LLP/QS license may designate the replacement vessel on the LLP license by using the Application for Transfer License Limitation Program Groundfish/ Crab License. An application must contain the information specified on the form, with all required fields accurately completed and all required documentation attached. This application must be submitted to NMFS using the methods described on the application.

■ 6. In § 679.92:

- a. Revise paragraph (c); and
- b. Add paragraphs (d)(2) and (e).

The additions and revisions read as follows:

**§ 679.92 Amendment 80 Program use caps and sideboard limits.**

\* \* \* \* \*

(c) *Sideboard restrictions applicable to Amendment 80 vessels directed fishing for flatfish in the GOA—(1) Originally Qualifying Amendment 80 Vessels*. An Amendment 80 vessel listed in column A of Table 39 to this part may be used to fish in the directed arrowtooth flounder, deep-water flatfish, flathead sole, rex sole, and shallow-water flatfish fisheries in the GOA and in adjacent waters open by the State of Alaska for which it adopts a Federal fishing season.

(2) *Amendment 80 Replacement Vessels*. (i) Any vessel that NMFS approves to replace an Amendment 80 vessel listed in column A of Table 39 to this part may be used to fish in the directed arrowtooth flounder, deep-water flatfish, flathead sole, rex sole, and shallow-water flatfish fisheries in the GOA and in adjacent waters open by the State of Alaska for which it adopts a Federal fishing season.

(ii) Any vessel that NMFS subsequently approves to replace an Amendment 80 replacement vessel that replaced an Amendment 80 vessel listed in column A of Table 39 to this part may be used to fish in the directed arrowtooth flounder, deep-water flatfish, flathead sole, rex sole, and shallow-water flatfish fisheries in the GOA and in adjacent waters open by the State of Alaska for which it adopts a Federal fishing season.

(d) \* \* \*

(2) *Sideboard restrictions applicable to any vessel replacing the GOLDEN FLEECE*. (i) If the vessel replacing the GOLDEN FLEECE is of an LOA less than or equal to 124 ft. (38.1 m) (the MLOA of the LLP license that was originally assigned to the GOLDEN FLEECE, LLG 2524), then the sideboard provisions at § 679.92(c) and (d)(1) apply.

(ii) If the vessel replacing the GOLDEN FLEECE is greater than 124 ft. (38.1 m) (the MLOA of the LLP license that was originally assigned to the GOLDEN FLEECE, LLG 2524), then the sideboard provisions at § 679.92(b) and (c) apply.

(e) *Sideboard restrictions applicable to Amendment 80 vessel not assigned an Amendment 80 QS permit, Amendment 80 LLP license, or Amendment 80 LLP/QS license*. All Amendment 80 vessels not designated on:

- (1) An Amendment 80 QS permit and an Amendment 80 LLP license; or

(2) An Amendment 80 LLP/QS license will be allocated a catch limit of 0 mt in the BSAI and GOA.

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