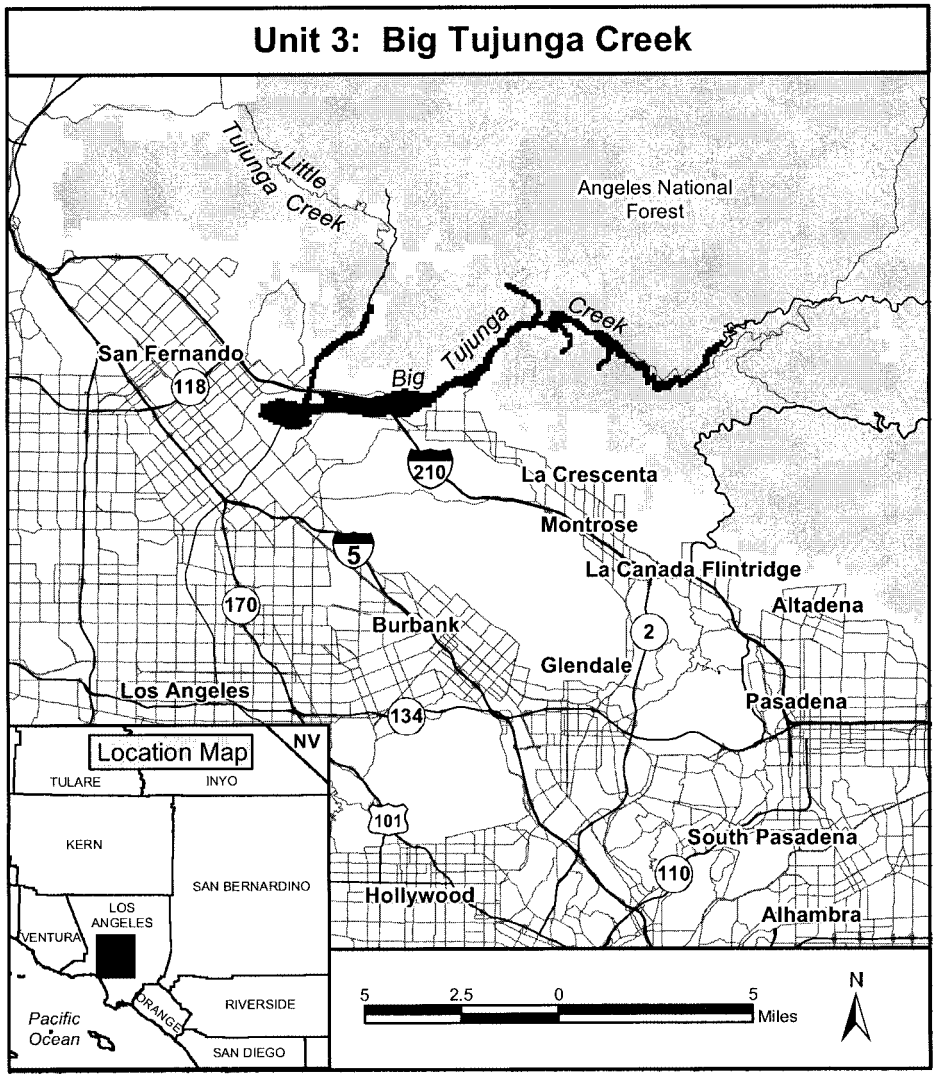
3796300; 383000, 3796300; 383000, 3796400; 383100, 3796400; 383100, 3796800; 383000, 3796800; 383000, 3796900; 382900, 3796900; 382900, 3797000; 382700, 3797000; 382700, 3797100; 382500, 3797100; 382500, 3797200; 382200, 3797200; 382200, 3797300; 382100, 3797300; 382100, 3797400; 381900, 3797400; 381900, 3797500; 381800, 3797500; returning to 381800, 3797700.

(ii) The map of Unit 3 follows:

BILLING CODE 4310–55–P



(7) Lands located within the exterior boundaries of the critical habitat designation that are not considered critical habitat and are therefore excluded by definition include: existing paved roads; bridges; parking lots; railroad tracks; railroad trestles; and residential, commercial, and industrial developments.

* * * * *

Dated: February 20, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–4225 Filed 2–25–04; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 030821210–4052–02; I.D.081103A]

RIN 0648–AR36

Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Amendment 16–1

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 16–1 to the Pacific Coast Groundfish Fishery Management Plan (FMP). Amendment 16–1 sets a process for and standards by which the Council will specify rebuilding plans for groundfish stocks declared overfished by the Secretary of Commerce. Amendment 16–1 is intended to ensure that Pacific Coast groundfish overfished species rebuilding plans meet the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), in particular national standard 1 on overfishing which addresses rebuilding overfished

fisheries. Amendment 16–1 is also intended to partially respond to a Court order in which NMFS was ordered to provide Pacific Coast groundfish rebuilding plans as FMPs, FMP amendments, or regulations, per the Magnuson-Stevens Act.

DATES: Effective March 29, 2004.

ADDRESSES: Copies of Amendment 16–1 and the environmental assessment/initial regulatory impact review (EA/RIR/IRFA)) are available from Donald McIsaac, Executive Director, Pacific Fishery Management Council, 7700 NE Ambassador Place, Portland, OR 97220, phone: 503–820–2280. Copies of the final regulatory flexibility analysis (FRFA) are available from D. Robert Lohn, Administrator, Northwest Region (Regional Administrator), NMFS, 7600 Sand Point Way N.E., Bldg. 1, Seattle, WA 98115–0070.

FOR FURTHER INFORMATION CONTACT: Yvonne deReynier (Northwest Region, NMFS), phone: 206–526–6150; fax: 206–526–6736 and; e-mail: yvonne.dereynier@noaa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access

The proposed rule also is accessible via the Internet at the Office of the **Federal Register**'s website at *http://www/gpoaccess/gpv/fr/index.html*. Background information and documents are available at the NMFS Northwest Region website at *http://www/nwr.noaa.gov/1sustfsh/gdfsh/gdfsh01.htm* and at the Council's website at *http://www.pcouncil.org*.

Background

A Notice of Availability for Amendment 16–1 to the FMP was published on August 18, 2003 (68 FR 49415). NMFS requested comments on the amendment under the Magnuson-Stevens Act FMP amendment review provisions for a 60–day comment period, ending October 17, 2003. A proposed rule to implement Amendment 16–1 was published on September 5, 2003 (68 FR 52732). NMFS requested comment on the proposed rule through October 6, 2003. During the comment periods on the amendment and proposed rule, NMFS received four letters of comment, which are addressed later in the preamble to this final rule. The preamble to the proposed rule for this action provides additional background on the fishery and on this rule. Further detail on Amendment 16–1 also appears in the EA/RIR/IRFA prepared by the Pacific Fishery Management Council (Council) for this action.

NMFS approved Amendment 16–1 on November 14, 2003. Amendment 16–1 requires that Pacific Coast groundfish overfished species rebuilding plans be added into the FMP via FMP amendment, and then implemented through Federal regulations. For each approved overfished species rebuilding plan, the following parameters will be specified in the FMP: estimates of unfished biomass (B_0) and target biomass (B_{MSY}, the year the stock would be rebuilt in the absence of fishing (T_{MIN}), the year the stock would be rebuilt if the maximum time period permissible under national standard guidelines were applied (T_{MAX}), the estimated probability that the stock would be rebuilt by this date under the adopted rebuilding plan based on the application of stock rebuilding measures, the year in which the stock would be rebuilt under the adopted rebuilding plan based on the application of stock rebuilding measures (T_{TARGET}), and a harvest control rule. These estimated values will serve as management benchmarks in the FMP. The FMP will not be amended if, as is likely to happen, the values for these parameters change as a result of new stock assessments. Other relevant information listed in Amendment 16–1 will also be included in the FMP.

The two rebuilding parameters that control the establishment of the annual or biennial optimum yield (OY) of each overfished species will be codified in the Code of Federal Regulations (CFR): the target year for rebuilding and the harvest control rule to be used to rebuild the stock. If, after a new stock assessment, the Council and NMFS conclude that these should be revised, the revision will be done through a rulemaking, and the updated values codified in the CFR.

In addition to specifying how rebuilding plans and their parameters will be handled in the FMP and in Federal regulations, Amendment 16–1 will: set schedules and standards for reviewing rebuilding plans; specify that the rebuilding plan for each species will set a species-specific standard for determining the adequacy of rebuilding progress for the particular species toward that goal; give Endangered Species Act (ESA) jeopardy standards and/or recovery plans precedence over rebuilding plans if they establish higher recovery standards than those already set in the rebuilding plans, and; make minor housekeeping amendments to the FMP text, such as correcting mis-spelled species names, revising definitions to better comport with the national standard guidelines, revising the Stock Assessment and Fishery Evaluation report schedule, clarifying that the Federal observer program is mandatory, and reorganizing outdated sections of the FMP.

Comments and Responses

NMFS received four letters of comment on the proposed rule to implement Amendment 16–1: two letters were received from environmental advocacy organizations, one letter was received from the U.S. Department of the Interior, and one letter was received from the U.S. Coast Guard. Their comments are addressed here:

Comment 1: We recommend that the FMP specify for each overfished species a virgin biomass (B_0 or $B_{UNFISHED}$)that is the product of that stock's spawning potential ratio in an unfished state and the average recruitment during the early years of the fishery, or the standard used by NMFS for stock assessments. We also recommend that this value be specified in Federal regulations.

Response: According to the Council's Scientific and Statistical Committee's (SSC's) Terms of Reference for Groundfish Rebuilding Analyses (April 2001), analysts typically estimate B_0 values by reviewing recruitment from a sequence of years in which recruitment is believed to be reasonably representative of that of an unfished stock. This practice typically translates into a reliance on stock size estimates from the earliest years for which recruitment information is available. Incorporating new data on stock size and recruitment levels into a stock assessment would likely result in the revision of B_0 for that species. For example, the June 2002 canary rockfish rebuilding analysis completed for Amendment 16–2 revised an earlier estimate of B_0 by incorporating older historical information (back to 1940) on canary rockfish recruitment. Both the canary rockfish and darkblotched rockfish B_0 values provided in Amendment 16–2 were calculated in the manner suggested by the commenter.

For Pacific ocean perch (POP), assessment authors reviewed this traditional approach and modified it somewhat because POP recruitment is highly variable and recruitment levels in the earlier years of the POP assessment period were unusually high. Assessment authors found that recruitment values earlier than and later than the assessment period were substantially smaller than the values for the years at the start of the assessment period. For lingcod, which tends to have more constant recruitment rates than rockfish species, stock assessment authors looked at recruitment rates for

the entire time series available for lingcod (1973–1995).

In raising this issue, the commenter addresses a basic conundrum in fish stock assessment. West Coast fisheries and atmospheric scientists acknowledge that West Coast waters experience periodic warming and cooling cycles that seem to affect recruitment success for some West Coast species. If the earliest data available on a particular stock were from years when ocean conditions for that stock's recruitment levels were good, an assessment author could use those data and overestimate the long-term average size of B_0. In this circumstance the earlier B_0 could not be maintained by the stock under the subsequent poorer ocean conditions, even in the absence of fishing. Conversely, if the ocean conditions were not favorable to recruitment during the early years of a particular stock's assessment period, an assessment author could use those data and underestimate the size of B_0. These possibilities are particularly evident for rockfish, which seem to have highly variable rates of recruitment. Thus, while NMFS recognizes that the commenter's B_0 estimation method has merit and should be considered in the development of rebuilding analyses, the agency continues to support the SSC's recommendations that the determination of B0 be attuned to the behavior of and information about each particular stock being assessed.

For each overfished species, NMFS intends to include only the target year for rebuilding (T_{TARGET}) and the harvest control rule in Federal regulations because these parameters would control the establishment of OY for these species. Other rebuilding parameters such as B_0 will be included in the FMP.

Comment 2: The commenter recommended that the FMP specify for each overfished species a proxy for biomass at MSY (B_{MSY}) that is forty percent of $B_{UNFISHED}$. The commenter also recommended that this value be specified in Federal regulations.

Response: The FMP, as amended by Amendment 16–1, specifies in its definition of ''MSY stock size'' that the proxy for B_{MSY} ''typically used in this fishery management plan is 40 percent of the estimated unfished biomass, although other values based on the best scientific information are also authorized.'' This proxy is again specified in the FMP at Section 4.4.1, which establishes a B_{MSY} precautionary threshold for stocks that have received quantitative assessments. Species with stock sizes below their B_{MSY} are to be managed at more precautionary harvest levels. Section 4.4.1 reads in part, ''The default precautionary threshold will be 40 percent of the estimated unfished biomass level. The Council may recommend different precautionary thresholds for any species or species group based on the best scientific information about that species or species group. It is expected that the threshold will be between 25 percent and 50 percent of the estimated unfished biomass level.''

The B_{MSY} levels set for each of the four overfished species in Amendment 16–2 are set at B_{40}. As the FMP makes clear, B_{40} is the default B_{MSY} proxy for all stocks that have received quantitative assessments, including overfished species. However, the FMP is also clear in stating that B_{MSY} for a particular stock may be modified from B_{40} if the best available scientific information on that stock warrants the revision.

For each overfished species, NMFS intends to include only the target year for rebuilding (T_{TARGET}) and the harvest control rule in Federal regulations because these parameters would control the establishment of OY for these species. Other rebuilding parameters such as B_0 will be included in the FMP.

Comment 3: The commenter recommended that the FMP specify a target time for rebuilding (T_{TARGET}) that is the midpoint between the minimum time for rebuilding (T_{MIN}) and the maximum time for rebuilding (T_{MAX}). The commenter also recommended that this value be specified in Federal regulations.

Response: According to the national standard guidelines at 50 CFR 600.310(e)(4)(ii)(B)(*3*), if T_{MIN} is 10 years or greater, ''then the specified time period for rebuilding [T_{TARGET}] may be adjusted upward to the extent warranted by the needs of fishing communities and recommendations by international organizations in which the United States participates, except that no such upward adjustment can exceed the rebuilding period calculated in the absence of fishing mortality, plus one mean generation time or equivalent period based on the species' life-history characteristics [T_{MAX}].''

The Council has not recommended for the 16–2 species a T_{TARGET} value that exceeds T_{MAX}. For some species, it would be appropriate to set a T_{TARGET} that is the midpoint between T_{MIN} and T_{MAX}. Amendment 16–2, for example, includes Council-preferred alternatives for darkblotched rockfish and POP T_{TARGET} levels that are set at the midpoints between their respective T_{MIN} and T_{MAX} levels. However, there are cases where the needs of fishing communities or recommendations of international organizations may result in the setting of a T_{TARGET} year that is different from the midpoint between the minimum time for rebuilding and the maximum time for rebuilding.

Many of the overfished groundfish stocks tend to be thoroughly mixed with other, more abundant stocks. Historically, NMFS and the Council have interpreted the needs of the fishing communities to primarily include the need to have some fishing occurring for those more abundant stocks. Some overfished species, such as canary rockfish, co-occur with more abundant fish stocks to such a great degree that setting a T_{TARGET} year at the midpoint between the minimum time for rebuilding and the maximum time for rebuilding would result in the closure of one or more fishing sectors, resulting in severe impacts on participants in these fisheries.

Canary rockfish rebuilding parameters in Amendment 16–2 provide an example of the effects of managing to different T_{TARGET} years in a multi-species fishery. The Council's preferred alternative is a canary rockfish T_{TARGET} of 2074, with a T_{MIN} of 2057 and a T_{MAX} of 2076. The Amendment 16–2 Draft Environmental Impact Statement (DEIS) analyzes canary rockfish rebuilding for a range of alternatives that include maximum conservation by managing to T_{MIN} and maximum harvest by managing to T_{MAX}. At T_{MIN}, no directed or incidental take of canary rockfish would be permitted (Table 2.0–1, 16–2 DEIS). Table 3.1–1 of the DEIS shows the known latitudinal and depth distributions of FMP groundfish, with canary rockfish listed as a coastwide stock with a depth distribution of 50–150 fm (91–274 m). To fully avoid canary rockfish, recreational fisheries for groundfish would have to close entirely because of their canary rockfish interceptions. A broad range of commercial fisheries ranging from groundfish trawl to halibut longline would similarly need to be closed in order to avoid canary rockfish altogether (Table 4.4–11, 16–2 DEIS). Even at the Council's preferred T_{TARGET} of 2074, management measures to protect canary rockfish in 2004 include: a Rockfish Conservation Area (RCA) in which groundfish bottom trawling is prohibited between the 75 fm (137 m) and 200 fm (366 m) depths, trawl footrope gear restrictions to make trawl gear less effective in canary rockfish habitat, an RCA in which fishing for groundfish with non-trawl gear is prohibited between the 30–fm (55–m) and 100–fm (183–m) depths, state-management requirements that shrimp and prawn trawlers carry finfish

excluder devices, and prohibiting canary rockfish retention in the recreational fisheries coastwide. In summary, due to socioeconomic considerations and the constraints on fishing communities associated with rebuilding measures for overfished species, the agency does not expect to set a single T_{TARGET} guideline for all species that would be the midpoint between T_{MIN} and T_{MAX}. While the Technical Guidance on the Use of the Precautionary Approaches to Implementing National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act (Technical Guidance) at page 38 suggests that T_{TARGET} be set no higher than the midpoint between T_{MIN} and T_{MAX}, adopting that as a binding criterion in all cases would not be consistent with the Magnuson-Stevens Act. It would not be consistent with the Magnuson-Stevens Act because it would not allow the criteria in the Act at section 304(e)(4) and the national standard guidelines at 600.310(e)(4)(ii) to be taken into account. The Technical Guidance is not a binding regulation that must be followed. The Technical Guidance itself acknowledges that it deals with biological issues, and not with socioeconomic issues, which fishery management councils must consider, per the Magnuson-Stevens Act (Technical Guidance at 1, 28).

NMFS intends to include a value for T_{TARGET} for each overfished species in Federal regulations at 50 CFR 660.370, as shown in the proposed rule to implement Amendment 16–2 (December 5, 2003, 68 FR 67998.)

Comment 4: We recommend that the FMP specify a T_{MAX} that is associated with a ninety percent probability ($P_{90\%}$) of rebuilding to B_{MSY} for those species with a stock assessment containing uncertainty and with an eighty percent probability ($P_{80\%}$) of rebuilding to B_{MSY} for those species with stock assessments containing no uncertainty. This rebuilding time would serve as an outer bound for rebuilding analyses.

Response: The definition for T_{MAX} was provided above in the response to Comment 3 and is repeated here, in part: ''the specified time period for rebuilding [T_{TARGET}] may be adjusted upward . . . except that no such upward adjustment can exceed the rebuilding period calculated in the absence of fishing mortality, plus one mean generation time or equivalent period based on the species' life-history characteristics [T_{MAX}]'' (600.310(e)(4)(ii)(B)(*3*)). Thus, T_{MAX} is an outer boundary for the rebuilding time that is defined by a stock's recruitment in the absence of fishing and by the stock's mean generation time. The probability of rebuilding to B_{MSY} by T_{MAX} is a function of the fishing mortality rate, not the calculated T_{MAX}; the fishing mortality rate also determines T_{TARGET}. In order to ensure that it had illustrated the range of effects on the environment of different rebuilding probabilities for the Amendment 16–2 species, the Amendment 16–2 Environmental Impact Statement (EIS) includes a ''maximum conservation'' alternative, in which the fishing mortality rate is set to 0, T_{TARGET} is equal to T_{MIN}, and the probability of rebuilding to B_{MSY} within T_{MAX} equals or approaches 100 percent.

The commenter also differentiates between those stock assessments that contain uncertainty and those that do not contain uncertainty. Stock assessments are mathematical descriptions of what the data on a particular stock lead us to believe about the relative health and status of that stock. ''Uncertainty'' is a measure of the range around the best scientific estimates that come from the stock assessment. Uncertainty is not a lack of knowledge. Results that are close to the assessment's best estimate are likely to be close to the true situation, and other results are possible but unlikely. There are several factors that contribute to uncertainty in the stock assessment, including variability in the catch and survey data that go into the model, incompletely known factors about the biology of the fish, necessary simplifications in the assessment model itself, and changes in the actual productivity of the fish stock. Continued research helps us reduce each of these sources of uncertainty. However, given current research technology, it is unlikely that a stock assessment scientist working on wild fish stocks will have the opportunity to conduct a stock assessment with no uncertainty. Explaining this disconnect between a mathematician's definition of ''uncertainty'' and the public belief that ''uncertainty'' means ''lack of knowledge'' is a regular communication challenge for stock assessment scientists.

To the extent that the comment is intended to advocate a consistently conservative approach to establishing rebuilding parameters, the agency does employ a precautionary approach. However, as explained in the response to Comment 3, above, the Magnuson-Stevens Act and the national standard guidelines require that the Council and NMFS create overfished species rebuilding programs that both rebuild overfished species within T_{MAX} and minimize the adverse economic impacts of such programs on fishing communities.

Comment 5: The EA states that the methods of calculating the rebuilding parameters T_{MAX} and T_{MIN} are set at a national level. What is the relationship between the Magnuson-Stevens Act's national standards and the national standard guidelines?

Response: At Section 301(a), the Magnuson-Stevens Act sets 10 national standards for fishery management. These standards were created, amended, and updated through the series of legislative actions that created and have since amended the law first known as the 1976 Fishery Conservation and Management Act and now known as the Magnuson-Stevens Act. Section 301(b) directs the Secretary of Commerce to ''establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans.'' This authority under the Magnuson-Stevens Act has been delegated to NMFS. NMFS has had national standard guidelines in effect for many years. The Magnuson-Stevens Act was amended in 1996 by the Sustainable Fisheries Act, which strengthened the overfishing prohibitions of the Magnuson Act and enacted the rebuilding provisions under which NMFS currently operates. After two public comment periods on a proposed rule, NMFS promulgated the final rule implementing the current national standard guidelines on May 1, 1998 (63 FR 24212). Those guidelines provide an interpretation of the national standards and are codified in Federal regulations at 50 CFR 600.310 through 600.355. The specific sections that relate to T_{MIN} and T_{MAX} are found in 50 CFR 600.310(e)(4)(ii)(A) and (B). These national standard guidelines apply to all fisheries, nation-wide, that are managed under the aegis of the Magnuson-Stevens Act.

Comment 6: For those rebuilding plan parameters that are to be specified in Federal regulations, we recommend full notice and comment rulemaking when these specific numeric criteria are changed via a stock assessment or other similar process.

Response: As discussed earlier in the responses to several comments, above, NMFS plans to codify for each overfished species a value for T_{TARGET} and a harvest control rule in Federal regulations at 50 CFR 660.370. Any future revisions to these parameters would be made via notice-and-comment rulemaking. Because NMFS expects that revisions to rebuilding parameters would occur as a result of a change in a stock assessment for an overfished

species, the notice-and-comment rulemaking for revisions to rebuilding parameters would generally occur simultaneously with a notice-and-comment rulemaking on harvest specifications and management measures.

Comment 7: We urge NMFS to ensure that the groundfish FMP establish OY levels for groundfish species consistent with the Magnuson-Stevens Act and NMFS Technical Guidance. National standard 1 of the Magnuson-Stevens Act requires that ''conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States Fishing Industry'' (16 U.S.C. 1851(a)(1)). For species that are not overfished, the Council and NMFS must ensure that management measures are aimed at achieving an OY value, by reducing harvest levels such that OYs are below the MSY level. For species that are overfished, the OY and management measures should be designed to achieve rebuilding goals. Further, NMFS should ensure that the FMP consider proxies for OY in the case of data poor situations. We urge consideration of proxies found in the Technical Guidance for these species in the 2004 specifications environmental impact statement.

Response: FMP policies on the setting of ABCs and OYs are generally consistent with national standard 1 and with the Technical Guidance to implement the biological aspects of national standard 1. The Council addressed Magnuson-Stevens Act guidance on setting acceptable biological catch (ABCs) and OYs with its 1998 Amendment 11 to the FMP. The FMP at Section 4.3 identifies three categories of stocks: Category 1 is stocks with quantitative assessments, Category 2 is stocks with nonquantitative assessments, and Category 3 is stocks for which there is not enough information to set ABC values.

Category 1 Stocks: Under the FMP at Section 4.3, ABCs for Category 1 species are to be set at the MSY harvest level. The ABC for a species or species group is generally derived by multiplying the harvest rate proxy by the current estimated biomass. In 2001, the Council's SSC conducted a harvest rate workshop that resulted in the Council developing new default harvest rate proxies. These harvest rate proxies have been in use since the 2002 fishing year: $F_{40\%}$ for flatfish, $F_{50\%}$ for rockfish (including thornyheads), and $F_{45\%}$ for other groundfish such as sablefish and lingcod. A rate of $F_{40\%}$ can be explained as that which reduces spawning potential per female to 40 percent of what it would have been under natural conditions (if there were no mortality due to fishing), and is, therefore, a more aggressive rate than $F_{45\%}$ or $F_{50\%}$.

The OY for each species or species group is set according to a series of rules that vary depending upon the relative abundance of the stock and upon the quantity and quality of scientific assessment on the stock. For stocks with stock assessments that indicate those stocks are above B_{MSY}, harvest specifications may be set such that OY = ABC, unless reductions in available harvest need to be made to account for: high degree of uncertainty about the biomass estimate and other parameters, anticipated bycatch mortality of that species, past OY levels resulted in overfishing occurring on that species, or international fishery management agreements regarding that species (FMP at 4.6.1). Regardless of where the OY is set for a stock above B_{MSY}, the fisheries will likely not be permitted to achieve that OY if that species co-occurs with an overfished species and fishing the more abundant stock must be constrained to protect the overfished stock.

Those stocks with stock assessments that indicate a population level between $B_{40\%}$ and $B_{25\%}$ are considered to be in a ''precautionary zone.'' Under the FMP at Section 4.5.1 and 4.6.1, OYs for stocks in the precautionary zone will generally be reduced from ABC on a scale known as the ''40–10'' policy, demonstrated by the following figure:

BILLING CODE 3510–22–S

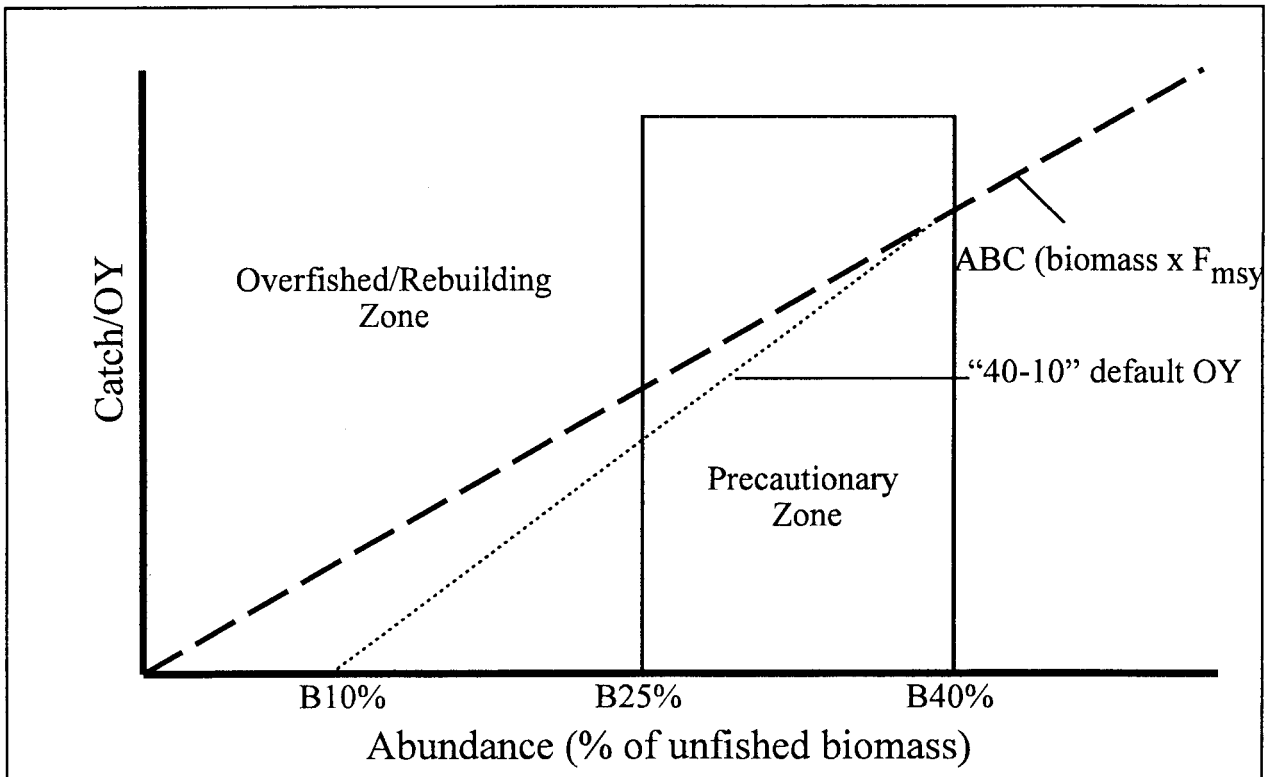


Figure 1: Illustration of default OY rule compared to ABC, known as "40--10 policy"

BILLING CODE 3510–22–C

As is shown in this figure, harvest level parameters for stocks in the precautionary zone are increasingly conservative as they are applied to stocks of lower abundance within the precautionary zone. NMFS and the Council have applied the 40–10 policy to stocks with biomasses estimated to be within the precautionary zone since Amendment 11 was implemented in 1999. These stocks in the precautionary zone are proposed to be managed at harvest levels reduced from OY by the 40–10 policy in 2004: sablefish, Dover sole, and shortspine thornyhead. The 40–10 policy is more precautionary than the Technical Guidance's recommendations for stocks below B_{MSY}. The Technical Guidance does not recommend reducing fishing mortality below F_{MSY} until the stock is at 75 percent of B_{MSY} (Technical Guidance at 35–37).

Stocks with stock assessments that indicate the biomass is below $B_{25\%}$ are considered overfished. Overfished species OYS are not set with a universally applicable policy. Each species' OY is set by a harvest rate intended to achieve the rebuilding goals for that species. Amendment 16–1 and its companion amendments, (16–2, 16–3, and 16–4) further develop harvest conservation principles explored in the FMP through Amendment 11. As discussed earlier in this document, Amendment 16–1 sets a process for and standards by which overfished species rebuilding plans will be developed. Amendment 16–2 (available for public comment on November 7, 2003, 68 FR 63053), Amendment 16–3 (under Council development), and Amendment 16–4 (to follow the 2004 whiting stock assessment) will establish rules by which OYS for each of the nine overfished species will be set under their respective rebuilding plans.

Category 2 Stocks: For stocks with nonquantitative stock assessments, the ABC is generally set based on the average of historic landings levels (FMP at 4.3.2). The FMP recognizes that an ABC based on average historical landings cannot be the upper harvest level for a species if historical landings have been unsustainable. Section 4.6.2 of the FMP governs the setting of OYS for Category 2 species. Under the OY policy for Category 2 species, precautionary downward adjustments are made to the OY from the ABC if there is a perception that the stock is below its MSY or if there is a high degree of uncertainty about the condition of the stock. This guidance is carried out through more specific Council policies for setting annual harvest values. ABC values are first calculated from average historic landings levels and then set by reducing the resultant average by 25 percent. Thus, an ABC for a Category 2 species is set at 75 percent of its average historic landings level. OY levels for Category 2 species are further reduced from their ABCs by 2 percent if they are species with less rigorous stock assessment, or by 50 percent if they are species with nonquantitative stock assessments. Thus an OY for a Category 2 species with a less rigorous stock assessment is set by multiplying the historic average landings level by 0.75, and then by multiplying that result by 0.75, ultimately resulting in an OY that is 56.25 percent of the historic average landings level. An OY for a Category 2 species with a nonquantitative assessment is set by multiplying the historic average landings level by 0.75, and then by multiplying that result by 0.5, ultimately resulting in an OY that is 37.5 percent of the historic average landings level. These policies, which were recommended by the Council's SSC, are consistent with but more precautionary than those described in the Technical Guidance for creating proxies in data poor situations. To see these policies in practice, refer to Table 1 in the 2004 specifications and management measures (69 FR 1380,

January 8, 2004), footnotes for minor rockfish.

Category 3 Species: When the Council first developed the groundfish FMP in the early 1980's, it swept a wide variety of species under the authority of the groundfish FMP. At the time, West Coast salmon fisheries were of paramount importance, thus the groundfish FMP served as the management vehicle for many species other than salmon. There is generally little known about Category 3 species, perhaps because they have historically low catch rates or abundance relative to other more widespread stocks, or because they are not vulnerable to survey sampling gear. These species may not appear on fish tickets because they are not taken in the fisheries or because they are not commercially desirable. If a fishery were to develop for a Category 3 species, then more information on that species would become available, possibly allowing it to be re-categorized as Category 1 or 2. For example, a new stock assessment is under development for cabezon, a Category 3 species that has become more common in the nearshore recreational and commercial fisheries in recent years. This stock assessment covers waters off California, where cabezon are most frequently found. Once the assessment is complete, cabezon off California will be considered a Category 1 stock. Category 3 species currently include: cabezon and greenling; some of the flatfish species that are either not often commercially valuable or which are too small to be regularly caught in legal groundfish trawl nets, such as butter, curlfin, flathead, rex, and sand soles, pacific sanddab, and starry flounder; the FMP's six elasmobranch species (big, California, and longnose skates, leopard and soupfin sharks, spiny dogfish); as well as, finescale codling, Pacific rattail, and ratfish. In the harvest specifications and management measures, these species are grouped into either the ''other flatfish'' or ''other fish'' categories, as appropriate, and have species group ABCs for each West Coast management area based on historical landings for those species groups. This policy is consistent with the Technical Guidance for those species that are believed to be above B_{MSY} for creating proxies in data poor situations. In general, there is not enough information about these species to determine whether they are above or below B_{MSY}, a pre-condition for using the data-poor proxy creation guidance in the Technical Guidance. For 2005 and beyond, the Council is considering whether to apply its policies for ''remaining rockfish'' and ''other rockfish'' to the ''other flatfish'' and ''other fish'' species categories, to provide a precautionary adjustment for these Category 3 species. To see these policies in practice, refer to Table 1 in the 2004 specifications and management measures (69 FR 1380, January 8, 2004), footnotes for ''other flatfish'' and ''other fish.''

Comment 8: The harvest control rule established in the FMP to rebuild each overfished species should be consistent with the Technical Guidance.

Response: Harvest control rules for overfished species are used to set annual OYs for those species. As discussed above in the response to Comment 7, OYs for overfished species are species-specific and are intended to achieve the rebuilding goals for a particular species. The FMP contains default harvest control rules for stocks above B_{MSY}, depleted stocks below B_{MSY} but above the overfished threshold and, through Amendment 16–2, species-specific harvest control rules for lingcod, canary rockfish, darkblotched rockfish, and POP. The default harvest control rule was described earlier in the response to Comment 7. As discussed earlier, the 40–10 harvest control rule is generally consistent with the Technical Guidance because harvest rates set by that rule are always less than or equal to the MSY control rule (which is the overfishing level) and rates decline at low stock biomass levels. Species-specific control rules for the remaining overfished species will be added to the FMP through Amendments 16–3 and/or 16–4.

The Technical Guidance at section 3.4 provides suggestions for calculating mean generation time for overfished species, default rebuilding plans in the absence of species-specific rebuilding plans, and on addressing the role of uncertainty in rebuilding plans. Methods used by stock assessment scientists to determine mean generation time vary by species and according to quantity and quality of data available on that species' life history. For Amendment 16–2 species with T_{MINs} greater than 10 years (canary rockfish, darkblotched rockfish, POP,) mean generation times were calculated with the approach recommended in the Technical Guidance.

We have already addressed the Council's default rebuilding policy in the response to Comment 7. For species-specific rebuilding plans, the Technical Guidance offers three suggestions for setting the rebuilding plan parameters and harvest control rule. First, the Technical Guidance suggests that, ''The maximum rebuilding period, T_{MAX}, should be 10 years, unless T_{MIN} is greater than 10 years, when T_{MAX} should be equal to T_{MIN} plus one mean generation time.'' This is the definition of T_{MAX} provided by the national standard guidelines at section 600.310(e)(4)(ii)(B)(*3*) and is the method that NMFS and the Council use to calcluate T_{MAX} for overfished groundfish species.

Second, the Technical Guidance suggests that ''the target rebuilding time period, T_{TARGET}, should be as short as possible and lower than T_{MAX} (although it could be adjusted upward to T_{MAX} under the circumstances described in Section 600.310(e)(4) of the national standard guidelines.) We suggest that T_{TARGET} not exceed the midpoint between T_{MIN} and T_{MAX}.'' $T_{TARGETs}$ set for overfished groundfish species do not exceed T_{MAX}. We addressed the suggestion that T_{TARGET} not exceed the midpoint between T_{MIN} and T_{MAX} earlier in this document, in the response to Comment 3.

Finally, the Technical Guidance suggests that ''if the stock is well below the minimum stock size threshold (MSST) (e.g. $B \leq \frac{1}{2}MSST$), it may be necessary to set the fishing mortality rate as close to zero as possible (i.e., to that associated with unavoidable levels of bycatch) for a number of years. Since 2000, NMFS and the Council have pursued a policy of restricting or eliminating opportunities for fishers to directly target overfished stocks. In order to reduce unavoidable bycatch, directed harvest of more abundant stocks that co-occur with overfished species has also been curtailed. In 1998, prior to the declaration of any groundfish as overfished, the total commercial groundfish landings by weight were 274,690 mt. Total commercial groundfish landings by weight in 2003 were 168,589 mt, an approximate 39–percent reduction in commercial harvest. These reductions reflect measures to reduce overfished species take to unavoidable bycatch levels and to reduce opportunities for incidental harvest by also reducing directed fishing opportunities for more abundant species. The suite of management measures NMFS has implemented to limit overfished species take to unavoidable bycatch is described later in this document in the response to Comment 13.

On page 38, the Technical Guidance suggests addressing uncertainty with the guideline that ''rebuilding plans be designed to possess a 50–percent or higher chance of achieving B_{MSY} within T_{TARGET} years, and a 90–percent or higher chance of achieving B_{MSY} within

T_{MAX} years.'' Rebuilding plans for the overfished species in Amendment 16–2 have been designed with a 50–percent chance of achieving B_{MSY} within T_{TARGET} years, although not with a 90–percent chance of achieving B_{MSY} within T_{MAX} years. Rebuilding plans in Amendment 16–2 provide a 60–percent chance for canary rockfish and lingcod, a 70–percent chance for POP, and an 80–percent chance for darkblotched rockfish to achieve their respective B_{MSY} levels within T_{MAX} years. As mentioned in the Preface to the Technical Guidance itself, it provides guidance on ''those aspects of scientific fishery management advice that have biological underpinnings'' and it recognizes that there are other important factors for fisheries management, such as the social and economic goals of the Magnuson-Stevens Act. Probabilities of achieving B_{MSY} within T_{MAX} years that are less than 90 percent have been established in order to meet varying needs of West Coast fishing communities, as discussed earlier in this document.

Comment 9: One commenter stated that the Magnuson-Stevens Act requires the Secretary of Commerce to review rebuilding plans for overfished species every 2 years to ensure adequate progress toward rebuilding goals (16 U.S.C. 304(e)(7).) The Council has recommended reviewing rebuilding plans every 2–5 years, with progress toward rebuilding to MSY only to be reviewed when new stock assessments are provided for the species in question. This commenter expected that, regardless of the review process that the Council has recommended through Amendment 16–1, the Department of Commerce will meet its duty to review the rebuilding plans every 2 years.

A second commenter assumed that the Council's rebuilding plan review process was intended to be a substitute for a Secretarial review process. This commenter read Amendment 16–1 as authorizing NMFS and the Council to avoid the Magnuson-Stevens Act requirement to review the adequacy of rebuilding progress for overfished species managed under rebuilding plans every 2 years.

Response: The first commenter is correct. The FMP describes the Council's responsibilities. The Council's intended rebuilding plan review schedule is in Amendment 16–1. This schedule does not relieve NMFS of its duty to review, every two years, overfished species rebuilding plans for progress toward rebuilding goals. In addition, NMFS has worked with the Council staff to add a sentence to the FMP at the end of Section 4.5.3.6 to read, ''Regardless of the Council's schedule for reviewing overfished species rebuilding plans, the Secretary of Commerce, through NMFS, is required to review the progress of overfished species rebuilding plans toward rebuilding goals every two years, per the Magnuson-Stevens Act at 16 U.S.C. 304(e)(7).'' This statement is added to the FMP for the sake of clarity and in no way changes the intent or effect of either the FMP or Amendment 16–1.

Comment 10: We recommend that Amendment 16–1 be expanded to include a discussion of the procedures that would be used to revise rebuilding plans. Rebuilding parameters specified in the FMP should be changed only when new scientific information is available that would warrant modification of these parameters. Changes to specifications for T_{MIN}, T_{MAX}, and T_{TARGET} should only occur in response to a resolution of scientific uncertainty. These values should not be revised to accommodate greater direct or indirect harvest of overfished species.

Response: As described above in the responses to Comments 3 and 4, T_{MIN} is the minimum time that it would take to rebuild the stock in the absence of fishing. An estimate of a stock's rebuilding time in the absence of fishing depends upon the estimate of that stock's growth rate. A stock's growth rate is affected by recruitment as reduced by natural mortality. Our understanding of recruitment rates tends to change with each new stock assessment, as new data are added to the assessment and as new year classes enter the fishery. Thus, as stock assessments are updated for each overfished species with the best available science, the T_{MIN} estimate for those species will likely also be updated. T_{MIN} is calculated from T_0 (the year the species was declared overfished) and that rebuilding start date would not change.

T_{MAX} is T_{MIN} plus one mean generation time. Thus, a species' estimated T_{MAX} could change if that species' estimated T_{MIN} changes. T_{MAX} could also change if the best available scientific information on a species' mean generation time changes, which would be characterized as reduced uncertainty about the mean generation time parameter.

Unlike T_{MIN} and T_{MAX}, T_{TARGET} is not set based solely on scientific information about a particular stock's recruitment or life history characteristics. T_{TARGET} is T_{MIN}, plus a time period that ''may be adjusted upward to the extent warranted by the needs of fishing communities and recommendations by international organizations in which the United States participates,'' although T_{TARGET} may not exceed T_{MAX}. Section 4.5.3.4 of the FMP, as added by Amendment 16–1, provides examples of when rebuilding plan parameters might be changed, but does not limit triggers for those changes: ''...Since the target year [T_{TARGET}] is a key rebuilding parameter, it should only be changed after careful deliberation. For example, the Council might recommend that the target year be changed if, based on new information, they determine that the existing target year is later than the recomputed maximum rebuilding time (T_{MAX}) or if a recomputed harvest control rule would result in such a low optimum yield as to cause substantial socioeconomic impacts. These examples are not definitive: the Council may elect to change the target year because of other circumstances. However, any change to the target year or harvest control rule must be supported by commensurate analysis.'' If updated scientific information in a new stock assessment for a particular species warrants a change to that species' T_{MIN} and T_{MAX}, the Council may also consider changing the T_{TARGET} for that species. In particular, T_{TARGET} might be revised if that revision would prevent the complete closure of one or more sectors of the fishery.

Comment 11: The Council's preferred alternative for the setting of standards used to determine whether rebuilding progress has been adequate to achieve rebuilding goals is that each rebuilding plan would have its own set of standards specific to the overfished stock in question. We ask that the Council's SSC or some other scientific body be convened to develop standards for measuring progress of rebuilding plans so as to meet the obligations of the Council's preferred alternative and to ensure that rebuilding time frames are not modified in the future based solely on fisheries management's failure to achieve fishing mortality related restrictions.

Response: NMFS agrees with the commenter's suggestion to ask the Council's SSC to review and develop standards for measuring the progress of rebuilding plans. NMFS made this request to the Council and SSC at the Council's November 2003 meeting. NMFS also made this request to the Council in its letter of approval for Amendment 16–1. In that letter, NMFS recommended that setting standards for measuring the progress of rebuilding plans be included in the SSC's Terms of Reference for the Stock Assessment Review (STAR) processes. NMFS review of the adequacy of progress of

rebuilding plans will be primarily informed by stock assessment updates. By including the setting of rebuilding plan progress standards in the STAR processes for overfished species, the NMFS/Council process for developing and reviewing stock assessments would continue the link between stock assessments and rebuilding plans for overfished species.

Comment 12: As the Council and its SSC work to develop standards for measuring the progress of rebuilding plans, we recommend adopting a standard such that if the probability of achieving T_{TARGET} falls below 50 percent, then progress will be considered inadequate and the harvest control rule must be adjusted to increase the probability of rebuilding within T_{TARGET} to at least 50 percent. We further recommend that, on an annual basis, NMFS and/or the Council compare annual total mortality levels with specified OY values to determine if overages have occurred. If overages have occurred, an inseason adjustment to harvest mortality rates should be made to compensate for these overages.

Response: Section 4.5.3.6 of the FMP, as inserted by Amendment 16–1, includes examples of standards that might be used to review rebuilding plan progress. The standard provided by the commenter is included in that section of the FMP and would be reviewed for use with particular overfished stocks in the process described in the response to Comment 11.

NMFS is required to annually report to Congress on whether ABC values have been exceeded, as exceeding an ABC set at F_{MSY} would be considered overfishing. In looking at whether ABC values have been exceeded, NMFS also notes whether OY values have been exceeded and works with the Council to revise management measures so that OYs for the same species for subsequent years are not exceeded. Under the Technical Guidance at Section 1.3, OYs are target levels that, so long as they are less than or equal to MSY, should not be exceeded more than 50 percent of the time, nor on average. None of the West Coast groundfish OYs are knowingly set higher than MSY. Management measures are intended to achieve OYs without exceeding them, unless the achievement of a particular species' OY would negatively affect the rebuilding of a co-occurring overfished species. In such a case, management measures would be designed to keep the harvest under the OY of the healthy stock in order to rebuild the overfished stock. Thus, NMFS will continue to monitor whether the fisheries have exceeded ABCs or OYs and will continue to work with the Council to make inseason adjustments to management measures to prevent the fisheries from regularly exceeding OY target levels.

The Technical Guidance at Section 3.4 suggests that ''...[S]tock rebuilding should be monitored closely so that adjustments can be made when rebuilding milestones are not being met for whatever reason. For example, if target rebuilding Fs (fishing mortality rates set for overfished species management) are exceeded due to quota over-runs, subsequent target Fs should typically be adjusted downwards to put the stock back on the rebuilding time table.'' For West Coast groundfish, NMFS and the Council monitor stock rebuilding progress through regular stock assessments. Stock assessments take harvest overages and underages into account in evaluating the status of a stock and whether rebuilding milestones are being met. F rates set subsequent to each new stock assessment will be set to keep the stock on its rebuilding trajectory.

Comment 13: As we read Amendment 16–1, it does not require the Council and NMFS to include in a rebuilding plan those measures that are necessary to rebuild the overfished species in question. We are particularly concerned that Amendment 16–1 fails to mandate that the Council and NMFS include in rebuilding plans the bycatch minimization and habitat protection measures necessary to rebuild overfished groundfish species. The Magnuson-Stevens Act requires that each FMP minimize adverse effects [of fishing activities] on essential fish habitat, identify actions to protect essential fish habitat, and include all practicable measures to minimize bycatch and bycatch mortality. Further, Amendment 16–1 violates the Magnuson-Stevens Act's requirement that rebuilding plans be sufficient ''to end overfishing in the fishery and to rebuild affected stocks of fish'' (16 U.S.C. 1854(e)(3)(A)) because it suggests that rebuilding plans could use ''flexible specifications'' that would be implemented through the annual or biennial harvest specifications and management measures process. These types of specifications are so vague as to be meaningless and offer no protection to overfished species.

Response: West Coast groundfish fisheries are multi-species fisheries and the FMP covers over 80 species of fish. The nine overfished species managed under the FMP co-occur with many other, more abundant stocks. Because of this commingling of overfished and more abundant stocks, the varied fisheries that take groundfish all tend to have some effect on at least one of the overfished species. The FMP addresses how the fisheries as a whole are to be managed, whereas rebuilding plans are species-specific and define the parameters that govern the rebuilding of a particular species. The harvest specifications and management measures, on an annual or biennial basis, address the fisheries as a whole. Regulations implemented through the harvest specifications and management measures are intended to address all of the fisheries that take groundfish and, in large part, to minimize total catch of overfished species. Management measures in these regulatory packages are based on the most recently available scientific information on the status of the various groundfish stocks and fisheries. In managing a multi-species fishery, it is not necessary or practical to include all of the management measures that will be used to rebuild a particular overfished species in that species' rebuilding plan. It is important for the FMP as a whole to provide the structure to implement a variety of different management measures to rebuild overfished stocks, and to manage the fisheries as a whole in accordance with the Magnuson-Stevens Act. Relying on the whole FMP to protect overfished stocks within a multi-species fishery does not violate the Magnuson-Stevens Act.

The FMP and its rebuilding plans are sufficient ''to end overfishing in the fishery and to rebuild affected stocks of fish'' (16 U.S.C. 1854(e)(3)(A). They are neither vague nor meaningless. This Amendment 16–1 sets out the required elements for a rebuilding plan. The FMP states in section 4.6.1.5. that ''OY recommendations will be consistent with established rebuilding plans and achievement of their goals and objectives. . . . (b) In cases where a stock or stock complex is overfished, Council action will specify OY in a manner that complies with rebuilding plans developed in accordance with Section 4.5.2. The Plan further states at 5.1.4 ''For any stock the Secretary has declared overfished or approaching the overfished condition, or for any stock the Council determines is in need of rebuilding, the Council will implement such periodic management measures as are necessary to rebuild the stock by controlling harvest mortality, habitat impacts, or other effects of fishing activities that are subject to regulation under the biennial process. These management measures will be consistent with any approved rebuilding plan.'' Most management measures used in the fishery are described in section 6

of the FMP. The existing emergency rule for groundfish for January and February 2004, (69 FR 13222; January 8, 2004), implements the first four rebuilding plans, and the interim rebuilding strategies for the remaining overfished species for January and February. The proposed rule for groundfish for 2004 (69 FR 1380; January 8, 2004), proposes ABCs/OYs and management measures that implement the rebuilding plans. The management of overfished species for 2004 is summarized at 69 FR 1380.

The Magnuson-Stevens Act at section 303(a) describes the required provisions of any Federal fishery management plan. Sub-paragraph 303(a)(7) requires that the FMP describe and identify essential fish habitat (EFH) and ''minimize to the extent practicable adverse effects on such habitat caused by fishing...'' Sub-paragraph 303(a)(11) requires that the FMP ''establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority: (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided.''

Amendment 11 to the FMP provided a description within the FMP of EFH for West Coast groundfish. Amendment 11 was challenged in American Oceans Campaign v. Daley 183 F. Supp. 2d1 (D.C.C. 2000,) along with challenges to fisheries managed by the Caribbean, Gulf of Mexico, New England, and North Pacific fishery management councils. For West Coast groundfish, the Court found that NMFS had not conducted an adequate National Environmental Policy Act (NEPA) analysis on the effects of fishing on groundfish EFH. NMFS is drafting an environmental impact statement (draft EIS) on groundfish EFH and is scheduled to release the draft EIS for public review through the Environmental Protection Agency in February 2005. Further information on this EIS is available at: *http://www.nwr.noaa.gov/1sustfsh/groundfish/eis_efh/efh/*.

Amendment 11 described EFH for West Coast groundfish based on information that was available in 1998, when the amendment was completed. Since that time, there have been notable increases in funding for EFH research and improvements in ocean habitat mapping technologies. These research and mapping improvements are informing the drafting of the new EFH DEIS. Until the completion of that DEIS, Amendment 11's descriptions of EFH for each of the overfished species must serve to characterize species-specific EFH and to inform management measures intended to rebuild those species. For example, the EFH appendix to Amendment 11 (online at *http://www.nwr.noaa.gov/1sustfsh/efhappendix/page1.html*) provides descriptions of the habitats used by the 80+ species in the FMP, including the ocean depths where those species are commonly found. The Council used these habitat descriptions in the development of its Rockfish Conservation Areas (RCAs), which are intended to protect the suite of continental shelf and slope overfished species in waters where they are commonly found. RCAs are primarily intended to protect overfished stocks from being incidentally harvested by vessels targeting more abundant species. Closure of these areas, however, also protects habitat within the RCAs from the effects of groundfish fishing gear. NMFS anticipates that the new EFH EIS will allow the Council to incorporate more data-rich descriptions of the EFH of individual groundfish species into its groundfish fishery management planning.

Section 303(a) of the Magnuson-Stevens Act requires that the FMP as a whole include a description of EFH and EFH protection measures. It does not require that each amendment to the FMP describe EFH and provide EFH protection measures. The commenter is correct in stating that Amendment 16–1 does not require overfished species rebuilding plans to include EFH protection measures. However, the commenter is incorrect in then concluding that overfished species are not adequately protected by the FMP.

Amendment 13 to the FMP addressed bycatch in the West Coast groundfish fisheries and was also challenged in Court, Pacific Marine Conservation *Council, Inc.* v. *Evans*, 200 F. Supp. 2d1194 (N.D. Calif. 2002). The Court held that Amendment 13 failed to establish an adequate bycatch reporting methodology, did not comply with the duty to minimize bycatch and bycatch mortality, and violated NEPA because NMFS did not take ''hard look'' at the environmental consequences of Amendment 13, and failed to consider a reasonable range of alternatives and their environmental consequences. In particular, the Court concluded that Amendment 13 failed to establish a standardized reporting methodology because it failed to establish either a mandatory or an adequate observer program. Further, it failed to minimize bycatch and bycatch mortality because it failed to include all practicable management measures in the FMP itself. The Court also found a lack of reasoned decisionmaking because four specific bycatch reduction measures (fleet size reduction, marine reserves, vessel incentives, and discard caps) were rejected without consideration on their merits. With respect to NEPA, the environmental assessment prepared for Amendment 13 failed to address adequately the ten criteria for an action's significance set forth in the Council on Environmental Quality (CEQ) regulations at 40 CFR 1508.27(b), and also failed to analyze reasonable alternatives, particularly the immediate implementation of an adequate at-sea observer program and bycatch reduction measures.

NMFS is drafting an EIS to address the court's requirement for a new NEPA analysis on bycatch in the groundfish fisheries and is scheduled to release the draft EIS for public review through the Environmental Protection Agency in early 2004. Further information on this EIS is available at: *http://www.nwr.noaa.gov/1sustfsh/groundfish/eis_efh/pseis/*. NMFS has implemented numerous bycatch reduction measures since the Council's approval of Amendment 13 in 2000. The agency has supported full retention or full utilization Exempted Fishing Permit (EFP) programs for the Washington arrowtooth flounder trawl, yellowtail rockfish trawl and longline dogfish fisheries, and for the California flatfish trawl fishery. Shorter-than-year-round fishing seasons have been set for various species and sectors of the groundfish fleet in order to protect different overfished groundfish species. Amendment 14 to the FMP implemented a permit stacking program for the limited entry fixed gear fleet that reduced the number of vessels participating in the primary sablefish fishery by about 40 percent. In 2003, NMFS implemented a buyback of limited entry trawl vessels and their permits, reducing the groundfish trawl fleet by about one-third. NMFS has implemented gear modification requirements that restrict the use of trawl gear in rockier habitat and constrain the catching capacity of recreational fishing gear. Higher groundfish landings limits have been made available for trawl vessels using gear or operating in areas where overfished species are less likely to be taken. Species-to-species landings limit ratios have been thoroughly re-examined in a groundfish bycatch model first introduced in 2002 and modified each intervening year as new observer program data become available. The development and use of this bycatch model and the implementation

of the NMFS West Coast Groundfish Observer Program (WCGOP) in August 2001 serve to address the court's order that NMFS implement an adequate bycatch assessment methodology. The RCAs described earlier in this document and implemented through 50 CFR 660.304 and the harvest specifications and management measures are large time/area closures that affect the entire West Coast and are specifically designed to reduce the incidental catch of overfished groundfish species in fisheries targeting more abundant stocks.

The FMP, as amended by Amendment 16–1, complies with the Magnuson-Stevens Act at section 303(a)(11). NMFS has had the WCGOP, which uses a standardized reporting methodology, in place since August 2001. Data from this observer program, from historic observer programs, and from fishery-dependent data inform the bycatch model for West Coast groundfish fisheries. These data sources together with their use in the bycatch model, which is used to analyze where and when different sectors of the groundfish fleet have targeted and may target groundfish, comprise an adequate reporting methodology on the amount and type of bycatch occurring in the fishery. NMFS has implemented numerous management programs and measures to reduce bycatch in the groundfish fisheries. The upcoming draft EIS on bycatch in the groundfish fisheries will provide information on how NMFS might further improve its bycatch reduction program for West Coast groundfish fisheries.

Comment 14: Amendment 16–1 fails to mandate an adequate observer program for the Pacific Coast groundfish fishery. While Amendment 16–1 does require NMFS to ''implement an observer program through a Council-approved regulatory framework,'' (FMP Section 6.1.5.2) it does not contain any requirements for the scope or adequacy of this observer program. The Magnuson-Stevens Act requires that NMFS establish in the FMP a bycatch assessment methodology that is sufficient to show ''the amount and type of bycatch occurring in the fishery.'' 16 U.S.C. 1853(a)(11). The court in PMCC v. Evans, supra, rejected Amendment 13 in part because it failed to establish a mandatory and adequate observer program in the FMP. Because Amendment 16–1 does not mandate an adequate observer program in the FMP, it violates the Magnuson-Stevens Act and fails to cure Amendment 13's failure under *PMCC* v. *Evans*.

Response: At 16 U.S.C. 1853(a)(11), the Magnuson-Stevens Act requires that FMPs, among other things, ''establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery...'' Amendment 16–1 revises the FMP so that it states at section 6.5.1.2, ''The [NMFS] Regional Administrator will implement an observer program through a Council-approved Federal regulatory framework. Details of how observer coverage will be distributed across the West Coast groundfish fleet will be described in an observer coverage plan. NMFS will publish an announcement of the authorization of the observer program and description of the observer coverage plan in the **Federal Register**.''

NMFS first implemented an observer program for the West Coast groundfish fisheries using a standardized bycatch reporting methodology in August 2001. The WCGOP observer coverage plan is available via the internet at: *http://www.nwfsc.noaa.gov/research/divisons/fram/Observer*. NMFS published its announcement of the authorization of the observer program and description of the observer coverage plan on January 10, 2002 (67 FR 1329). In the first year of the WCGOP (August 2001–August 2002), NMFS focused observer coverage largely on the non-whiting groundfish trawl fleet, with some pilot effort in the nontrawl limited entry and open access fleets. Observer coverage for the nontrawl fleet, particularly for limited entry vessels with sablefish endorsements expanded during the second year of the observer program (September 2002–August 2003). In September 2003, NMFS reported to the Council on bycatch modeling and observer data developments. WCGOP has focused its coverage on the limited entry trawl fleet because that fleet annually makes greater than 95 percent (by weight) of commercial West Coast groundfish landings coastwide (PacFIN, 1999–2003). Under the WCGOP coverage plan, the program has a goal of 10–percent coverage of trawl landings in any one year. With its 30–40 observers available each year, the WCGOP has been able to select each trawl fleet participant for coverage for at least one cumulative limit period in each year. Observer coverage levels are dependent upon the number of vessels actively participating in the fishery and on available program funding. Data from the first year of the observer program are available on the WCGOP site, mentioned earlier in this paragraph. NMFS is evaluating data from the second year of observer coverage and plans to release a data report on the WCGOP activities over September 2002–August 2003 in January 2004.

Following the release of the first year of WCGOP data in January 2003, NMFS incorporated observer program data on the bycatch of overfished species into the bycatch model. The Council began to use observer data to inform inseason groundfish management at its April 2003 meeting. For the 2004 fishing year, NMFS has further revised the bycatch model to incorporate discard rates on both overfished and targeted species, as generated by observer data. Because the second year of the WCGOP increased coverage of the limited entry nontrawl fleet, NMFS plans to further modify the 2004 bycatch model to incorporate nontrawl data once it has compiled and released that second year's data. The agency expects that data from the second year of the WCGOP will be incorporated into inseason groundfish fisheries management by the April 2004 Council meeting, and will be used in the development of 2005–2006 management measures.

With Amendment 16–1, the FMP mandates an observer program for the groundfish fishery, which NMFS has implemented. The commenter also wishes the FMP to discuss the scope and adequacy of an observer program, whereas the FMP defers the design of the observer program to NMFS.

Over the past year, NMFS has been reviewing the agency's approach to standardized bycatch monitoring programs for all federally managed fisheries. The report, ''Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs,'' is available on the internet at: *http://www.nmfs.noaa.gov/bycatch.htm*. Also available at that website is the ''NOAA Fisheries Objectives, Protocol, and Recommended Precision Goals for Standardized Bycatch Reporting Methodologies.'' This latter report addresses the question of the adequacy of an observer program or other standardized reporting methodology by setting ''precision goals'' for monitoring programs. According to this report, the levels of precision NMFS strives to achieve for fishery resources, excluding species protected under the ESA or MMPA, caught as bycatch in a fishery as ''a 20–30 percent CV [coefficient of variation] for estimates of total discards (aggregated over all species) for the fishery; or if total catch cannot be divided into discards and retained catch then the recommended goal for estimates of total catch is a CV of 20–30 percent.'' In setting these precision goals, NMFS recognizes that ''(1) there are intermediate steps in increasing precision which may not immediately achieve the goals; (2) there are circumstances in which higher levels of precision may be desired, particularly

when management is needed on fine spatial or temporal scales; (3) there are circumstances under which meeting the precision goal would not be an efficient use of public resources; and (4) there may be significant logistical constraints to achieving the goal.''

The ''Evaluating Bycatch'' report characterizes the WCGOP as a ''developing'' observer program, meaning that it is a program ''in which an established stratification design has been implemented and alternative allocation schemes [for observer coverage] are being evaluated to optimize sample allocations by strata to achieve the recommended goals of precision of bycatch estimates for the major species of concern.'' The next step beyond a developing observer program is a ''mature'' program ''in which some form of an optimal sampling allocation scheme has been implemented. The program is flexible enough to achieve the recommended goals of precision of bycatch estimates for the major species of concern considering changes in the fishery over time.''

As discussed above, NMFS has released the second year of observer data in January 2004 (*http://www.nwfsc.noaa.gov/research/divisions/fram/Observer*). Because observer coverage in the WCGOP has been largely focused on the trawl fishery, NMFS expects that it will have achieved the NMFS precision goals of 20–30 percent CV for estimates of total discards in the trawl fishery and of 20–30 percent CV for estimates of species-specific discards of those overfished species that are commonly taken in the trawl fishery. For overfished species that are either not commonly taken in the trawl fishery, such as yelloweye rockfish, or species that are unavailable to the fisheries because of large area closures, such as cowcod, NMFS expects that the current trawl-focused sampling program will not achieve the 20–30 percent CV precision goal. As it works toward becoming a mature observer program, the WCGOP will likely have to increase observer coverage of nontrawl vessels in order to get a more precise estimate of yelloweye rockfish bycatch. For cowcod, a rare event species with large portions of its habitat closed to fishing, evaluation of annual mortality may have to take some form other than a fishery observation program.

At section 6.3.3, the FMP identifies the management need for an observer program or other bycatch measurement program as an aid for the Council to ''better identify and prioritize the bycatch problems in the groundfish fishery, based on the expected benefits to the U.S. and on the practicality of addressing these problems.'' The Council has used data from WCGOP to re-shape its landings limits and time/area closures. The Council has also used WCGOP data to evaluate species-to-species landings limit ratios, as well as species-to species catch ratios in the bycatch model. NMFS expects that the WCGOP will continue to meet the Council's need to identify and prioritize bycatch problems in the groundfish fishery, and that WCGOP data will continue to directly inform both annual and inseason management measures.

Comment 15: On the issue of what legal obligations apply if a groundfish species is listed under the ESA. Amendment 16–1 must make absolutely clear that NMFS and the Council must comply with all obligations imposed by both the Magnuson-Stevens Act and the ESA.

Response: Amendment 16–1 establishes a new section 4.5.3.7 in the FMP. This section provides guidance on how the Council and NMFS would address the mandates of the Magnuson-Stevens Act and the ESA if a groundfish species were to be listed as either threatened or endangered under the ESA at some future time. Section 4.5.3.7 states that ''measures under a[n ESA] recovery plan or 'no jeopardy' standards in a biological opinion will supercede [Magnuson-Stevens Act] rebuilding plan measures and targets if they will result in the stock rebuilding to its target biomass by an earlier date than the target year identified in the current rebuilding plan.'' This section is intended to guide the Council and NMFS to ensure that, if a species is listed under the ESA, rebuilding and recovery will follow the mandates of both the Magnuson-Stevens Act and the ESA, while also rebuilding the stock at the most rapid rate required by law. Amendment 16–1 does not imply, nor does it have the effect of providing NMFS and/or the Council with an avenue to fail to comply with either the Magnuson-Stevens Act or the ESA for any species that may be managed under both of these laws.

Comment 16: In our review of the amendatory language for the FMP, we noted that Section 4.2 of the FMP (Determination of MSY or MSY Proxy and B_{MSY}) contains some outdated language, ''...management should avoid fishing rates that hold biomass below B_{MSY} for long periods.'' This language does not comport with the Magnuson-Stevens Act and should be removed from the FMP.

Response: NMFS has worked with Council staff to ensure that this sentence is removed from the FMP. The paragraph containing this sentence is essentially narrative and the referenced sentence not only does not comport with the Magnuson-Stevens Act, but also does not comport with FMP policies for setting harvest rates. NMFS and Council staff believe that leaving this sentence in the FMP was an editorial oversight and removing it now in no way changes the intent or effect of either the FMP or Amendment 16–1.

Comment 17: Amendment 16–1 adds a new sentence to the FMP that reads in reference to the decline of overfished stock abundance, ''Further declines below the overfished levels in the 1990s were due mostly to much lower than expected recruitment.'' While recruitment is a big part of the current plight of groundfish, many other factors contributed to the condition of these species. Improper accounting of bycatch in the 1980s and 1990s and the failure to heed scientific advice were contributing factors to the decline of groundfish stocks. Amendment 16–1 also proposes to delete language regarding a historical account of the Council's use of fishing mortality rates based on scientific information. We urge NMFS to keep these discussions in the FMP to better document the genesis of current fishing mortality rates.

Response: NMFS has worked with Council staff to retain the historical discussion of how the Council and its SSC have reviewed and revised groundfish harvest policies over time. This historical information provides a more accurate characterization of groundfish overharvest in the 1990s. As discussed in the FMP, groundfish science in the 1990s was characterized in part by increasing evidence that groundfish recruitment rates were lower than had been thought. A 2000 review of groundfish harvest rates by the Council's SSC showed that then-current scientific information indicated both lower than historically estimated recruitment levels for West Coast groundfish and a corresponding need for lower than historically used harvest rates. Since 2000, NMFS and the Council have set ABCs for groundfish species at the following rates: $F_{40\%}$ for flatfish, $F_{50\%}$ for rockfish (including thornyheads), and $F_{45\%}$ for other groundfish such as sablefish and lingcod. Upon reviewing this historical language, NMFS and Council staff agreed that the sentence discussed by the commenter should be changed to read, ''Further declines below the overfished levels in the 1990s were due in large part to harvest rate policies that were later discovered to not be sustainable. More recent stock assessments indicate that West Coast

groundfish stocks likely have lower levels of productivity than other similar species worldwide. Based on this retrospective information, harvest rate policies in the 1990s were too high to maintain stocks at B_{MSY}. The Council revised its harvest rate policies for lower levels of production, described [later in the FMP].'' This section of the FMP is essentially narrative in nature and this revision would in no way change the intent or effect of either the FMP or Amendment 16–1.

Federal Regulations under Amendment 16–1

Regulations to implement Amendment 16–1 establish a new section of the Federal groundfish regulations at 50 CFR 660.370, ''Overfished Species Rebuilding Plans.'' Because Amendment 16–1 provides a framework for future rebuilding plans, the regulations implemented through this action similarly provide a framework within Federal groundfish regulations for future species-specific rebuilding plans. On November 7, 2003 (68 FR 63053), NMFS published a Notice of Availability for Amendment 16–2 to the FMP, which would set the first four overfished species rebuilding plans (canary rockfish, darkblotched rockfish, lingcod, POP) in the FMP and implement those rebuilding plans within 50 CFR 660.370. Public scoping for Amendment 16–3, which would cover the next four rebuilding plans (bocaccio, cowcod, widow rockfish and yelloweye rockfish), was held at the Council's November 2003 meeting. The Council is scheduled to finalize Amendment 16–3 at its April 2004 meeting, after which it will submit the amendment to NMFS for review. The final rebuilding plan for Pacific whiting, will be Amendment 16–4, is scheduled for Council consideration and NMFS implementation in 2004.

Classification

The Administrator, Northwest Region, NMFS, has determined that Amendment 16–1 is necessary for the conservation and management of the Pacific Coast groundfish fishery and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

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

The Council prepared a FRFA describing the impact of this action on small entities. The FRFA incorporates the IRFA which was summarized in the proposed rule on September 5, 2003 (68 FR 52732).

The following is a summary of the FRFA. A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUMMARY** and **BACKGROUND** of the preamble to the proposed rule for this action and at the beginning of this final rule. There are no recordkeeping, reporting, or other compliance issues forthcoming from this proposed rule. This action does not duplicate, overlap, or conflict with other Federal rules. None of the comments received on the proposed rule addressed the economic impacts of the rule.

A fish-harvesting business is considered a ''small'' business by the Small Business Administration (SBA) if it has annual receipts not in excess of $3.5 million. Approximately 1,560 vessels participate in the West Coast groundfish fisheries. Of those, about 410 vessels are registered to limited entry permits issued for either trawl, longline, or pot gear. About 1,150 vessels land groundfish against open access limits while either directly targeting groundfish or taking groundfish incidentally in fisheries directed at non-groundfish species. All but 10–20 of those vessels are considered small businesses by the SBA. This final rule is not expected to yield disproportionate economic impacts between those small and large entities. In the 2001 recreational fisheries, there were 106 Washington charter vessels engaged in salt water fishing outside of Puget Sound, 232 charter vessels active on the Oregon coast and 415 charter vessels active on the California coast.

This final rule is administrative in nature and affects only the administrative process by which individual species rebuilding plans are formulated, and so does not have significant adverse economic effects on consumers, producers or processors of groundfish. The Council considered the form (FMP amendments, regulations, a combination thereof) and required elements of a rebuilding plan. The remaining issues are concerned with setting internal Council standards for periodic review and modification of rebuilding plans, and defining the interaction of a rebuilding plan with recovery plans for a rebuilding species that is subsequently listed under the ESA.

For the main issue considered in this action, the form of rebuilding plans, the Council considered 4 alternatives. The first alternative, the status quo alternative, would have maintained rebuilding plan formatting standards from Amendment 12. These status quo formatting standards were disapproved by the Court because they did not set rebuilding plans in the form of an FMP, an FMP amendment, or Federal regulations. The Council did not adopt the status quo alternative because it had already been disapproved by the Court. The second alternative would have implemented rebuilding plans as FMP amendments, with rebuilding parameters specified in the FMP. This second alternative was not adopted by the Council because it would have created a burdensome process for reviewing and revising rebuilding plan parameters and goals, possibly slowing the inclusion of the most recently available science into rebuilding plans. The third alternative would have implemented rebuilding plans entirely as Federal regulations, with T_{TARGET} and a harvest control rule for each overfished species specified in regulations. This third alternative was not adopted by the Council because it would have separated rebuilding plan parameters and goals from rest of the Council's policies on groundfish harvest rates, which are found within the FMP. The final and preferred alternative specifies T_{TARGET} and the harvest control for each overfished species in Federal regulations, and places the formulas and methodology for determining rebuilding parameters in the FMP. The preferred alternative was chosen because it requires a clear record in the FMP of the rebuilding plan standards that were in place at the start of each rebuilding plan, while also maintaining a current record in Federal regulations of the rebuilding plan parameters that directly govern the setting of annual or biennial harvest levels.

While there will be no direct impact on small entities as a result of adopting any particular process for formulating rebuilding plans, the implementation of specific rebuilding plans for overfished species may entail substantial economic impacts for groundfish processors, commercial harvesters and recreational charter vessels. These type of impacts are specific to particular stocks or species and so will be addressed in the individual rebuilding plans themselves. While there may be slight differences between the alternatives in the amount of administrative capacity required to formulate and implement individual species rebuilding strategies, these differences are not quantifiable and will depend more on the variability of periodic stock assessments once a particular rebuilding plan is adopted than on the effects of these proposed actions or the subsequent adoption of individual rebuilding plans.

List of Subjects in 50 CFR Part 660

Administrative practice and procedure, American Samoa, Fisheries,

Fishing, Guam, Hawaiian Natives, Indians, Northern Mariana Islands, Reporting and recordkeeping requirements.

Dated: February 19, 2004.

Rebecca Lent,

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

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

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

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

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

■ 2. Section 660.370 is added to read as follows:

§ 660.370 Overfished Species Rebuilding Plans.

For each overfished groundfish stock with an approved rebuilding plan, this section contains the standards to be used to establish annual or biennial OYS, specifically the target date for rebuilding the stock to its MSY level and the harvest control rule to be used to rebuild the stock.

[FR Doc. 04–4286 Filed 2–25–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031126297–3297–01; I.D. 022304C]

Fisheries of the Exclusive Economic Zone Off Alaska; Vessels Catching Pacific Cod for Processing by the Inshore Component in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by vessels catching Pacific cod for processing by the inshore component in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the interim 2004 total allowable catch (TAC) of Pacific cod apportioned to vessels catching Pacific cod for processing by the inshore component of the Western Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 24, 2004, until superseded by the notice of Final 2004 Harvest Specifications of Groundfish for the GOA, which will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The interim 2004 TAC of Pacific cod apportioned to vessels catching Pacific cod for processing by the inshore component in the Western Regulatory Area is 7,553 metric tons (mt) as established by the interim 2004 harvest specifications of groundfish for the GOA (68 FR 67964, December 5, 2003).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the interim 2004 TAC of Pacific cod apportioned to vessels catching Pacific cod for processing by the inshore component of the Western Regulatory Area of the GOA will be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 7,433 mt, and is setting aside the remaining 120 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will soon be reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by vessels catching Pacific cod for processing by the inshore component in the Western Regulatory Area of the GOA.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent the Agency from responding to the most recent fisheries data in a timely fashion and would delay the closure of the fishery under the interim 2004 TAC of Pacific cod apportioned to vessels catching Pacific cod for processing by the inshore component of the Western Regulatory Area of the GOA.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by section 679.20 and is exempt from review under Executive Order 12866.

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

Dated: February 23, 2004.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–4265 Filed 2–23–04; 4:23 pm]

BILLING CODE 3510–22–S