Manufacturer	Subject lines
VOLKSWAGEN	Toyota Cressida. Lexus ES. Lexus GS. Lexus LS. Lexus SC Audi 5000S. Audi 100. Audi 200. Audi A6. Audi S4. Audi S6. Audi Cabriolet. Volkswagen Cabrio. Volkswagen Corrado. Volkswagen Golf/GTI. Volkswagen Passat. Volkswagen Jetta/Jetta III

[1] Exempted in full beginning with MY 1999.
[2] Renamed the Acura RL beginning with MY 1997.
[3] Replaced by the Acura TL beginning with MY 1996.
[4] Replaced by the SL320 beginning with MY 1997.
[5] Renamed the SL500 beginning with MY 1994.
[6] Renamed the SL600 beginning with MY 1994.
[7] Exempted in full beginning with MY 1999.

Appendix A—II to Part 541—High-Theft Lines With Antitheft Devices Which are Exempted In-Part From the Parts-Marking Requirements of This Standard Pursuant to 49 CFR Part 543

Manufacturers	Subject lines	Parts to be marked
GENERAL MOTORS	Buick LeSabre	Engine, Transmission.
	Cadillac Deville	Engine, Transmission.
	Cadillac Eldorado	Engine, Transmission.
	Cadillac Sixty Special [1]	Engine, Transmission.
	Oldsmobile Ninety-Eight	Engine, Transmission.
	Pontiac Bonneville	Engine, Transmission.
	Pontiac Firebird	Engine, Transmission.
	Chevrolet Camaro	Engine, Transmission.
	Oldsmobile Eighty-Eight	Engine, Transmission.

[1] Renamed the Cadillac Concours beginning with MY 1994.

Issued on: June 30, 1998.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 98–18538 Filed 7–14–98; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 980406085-8164-01; I.D. 031998C]

RIN 0648–AJ27

Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Management Measures for Nontrawl Sablefish

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement management measures recommended by the Pacific Fishery Management Council (Council) for the limited entry, fixed gear sablefish fishery north of 36° N. lat. These measures provide a three-tiered management regime with three different cumulative landings limits for permit holders participating in the regular, limited entry, fixed gear sablefish fishery. The cumulative landings limit available to a permit holder depends on the tier to which the permit is assigned, with tier assignment based on historical and more recent participation in the fixed gear sablefish fishery. Both the limited entry and open access fixed gear sablefish fisheries will be closed for 48 hours immediately before and for 30 hours immediately after the regular fishery, with different restrictions applying during the two closed periods. Provisional 1997 regulatory language is updated by this final rule. These actions are intended to recognize the historical and more recent participation and investment in the fixed gear sablefish fishery while eliminating the traditional ''derby'' style management system.

DATES: Effective July 10, 1998.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) and the Final Regulatory Flexibility Analysis (FRFA) for this action are available from the Pacific Fishery Management Council, 2130 SW. Fifth Avenue, Suite 224, Portland, OR 97201. Comments regarding the collection-of-information requirements contained in this rule should be sent to William Stelle, Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Seattle, WA 98115–0070 or to

William Hogarth, Administrator, Southwest Region, NMFS, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, (OMB) Washington, DC 20503 (ATTN: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: Yvonne deReynier at 206–526–6140, or Wes Silverthorne at 562–980–4000.

SUPPLEMENTARY INFORMATION:

Background

NMFS issues this final rule to implement recommendations from the Council, under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), to implement changes to the management measures for the limited entry, fixed gear sablefish fishery. The notice of proposed rulemaking for this action (63 FR 19878, April 22, 1998) fully described the background and rationale for the Council's recommendations. NMFS requested public comments on this action through May 22, 1998. NMFS received 26 letters during the comment period, which are addressed later in the preamble to this final rule.

In summary, limited entry permits with sablefish endorsements are divided into three tiers, with placement based on the cumulative sablefish catch associated with that permit from 1984 through 1994. Each tier is allowed a different cumulative limit during the regular, limited entry, fixed gear fishery. These measures apply only north of 36° N. lat.

Three-Tier Program

NMFS has accepted the Council's recommendation for qualifying criteria for the three different tiers. To qualify for the highest tier, Tier 1, a permit must be associated with at least 898,000 lb (407.33 mt) of cumulative sablefish landings made from 1984 through 1994. To qualify for the middle tier, Tier 2, a permit must be associated with between 380,000 lb (172.36 mt) and 897,999 lb (407.33 mt) of cumulative sablefish landings made from 1984 through 1994. Permits with sablefish endorsements that are associated with less than 380,000 lb (172.36 mt) of cumulative sablefish landings from 1984 through 1994 qualify for the lowest tier, Tier 3.

Analysts examined the distribution of sablefish cumulative catch histories over the 1984 through 1994 period to determine whether there were any large gaps between groupings of the cumulative catch histories of limited entry permits with sablefish endorsements that might serve as logical breakpoints between tiers. The Council wanted broad divisions of permit catch history between permits assigned to different tiers. Based on the analysis available at its meetings, the Council determined that the above qualifying criteria for Tier 1 reflected the largest break among a series of high catch history breakpoints, and that the qualifying criteria for Tier 2 reflected the largest break among a series of mid-range catch history breakpoints.

Permit catch history will be used to determine tier assignments for limited entry permit holders with sablefish endorsements. Permit catch history includes the catch history of the vessel(s) that initially qualified for the permit, as well as subsequent catch history that was accrued when the limited entry permit or permit rights were associated with other vessels. Permit catch history also includes the catch associated with any interim permit held during the appeal of an initial NMFS decision to deny the initial issuance of a limited entry permit, but only if (1) the appeal for which an interim permit was issued was lost by the appellant, and (2) the owner's current permit was used by the owner in the 1995 limited entry sablefish fishery. The catch history of an interim permit where the full ''A'' permit was ultimately granted will also be considered part of the catch history of the ''A'' permit. If the current permit is the result of the combination of multiple permits, the combined catch histories of all of the permits that were combined to create a new permit before March 12, 1998, will be used in calculating the tier assignment for the resultant permit, together with any catch history (during the qualifying period) of the resultant permit. Only sablefish catch regulated by the FMP that was legally taken with longline or fishpot gear will be considered for tier placement. Harvest taken in tribal sablefish set-asides will not be included in calculating permit catch histories.

Under the regulations that implemented Amendment 9 to the FMP, which established the sablefish endorsement requirement, if two limited entry, fixed gear permits are combined to generate a single permit with a larger length endorsement, the resulting permit also will have a sablefish endorsement only if all permits being combined have sablefish endorsements. After tier assignments are issued by NMFS, if permits are combined, the resulting permit will be assigned to the highest tier held by either of the original permits before combination.

The three-tier program maintains a ratio between the cumulative landings limits for the three tiers that approximates the 1991–1995 catch relationships between permits assigned to each tier on a group average basis. Setting cumulative limits by ratios ensures that the long-term relationships between the cumulative limits for each tier will remain stable. With cumulative limits set by ratio, impacts from changes in the numbers of permits distributed to each tier will be shared by all vessels in the fleet. The cumulative landings limit ratio for the tiers is 3.85 (Tier 1); 1.75 (Tier 2); and 1 (Tier 3). For example, if Tier 3 had a cumulative limit of 10,000 lb (4,536 kg), Tier 2 would have a corresponding cumulative limit of 17,500 lb (7,938 kg), and Tier 1 would have a corresponding cumulative limit of 38,500 lb (17,463 kg).

Overhead guidelines will be used to set the cumulative limits for each tier and for the overall expected catch for the fishery. ''Overhead'' is defined as the difference between the expected harvest level and the total harvest that would occur if each permitted vessel took its cumulative limit (maximum potential harvest). The concept of overhead is based on the premise that not all participants in this fishery will harvest the cumulative limit. NMFS considers a fishery where all participants have the opportunity to catch a cumulative limit and are all able to catch that limit to be an Individual Fishing Quota (IFQ) program. The Magnuson-Stevens Act imposes a moratorium on implementation of new IFQ programs until October 1, 2000.

Cumulative limits and season lengths for the limited entry, fixed gear regular sablefish fishery will be set to achieve a projected overhead, based on the most reasonable assumptions, of at least 25 percent and an overhead based on worst-case assumptions of at least 15 percent for the fleet as a whole. The overhead goal for any single tier will be at least 15 percent, based on the most reasonable assumptions.

Tier assignments for limited entry permits with sablefish endorsements will 'be issued by NMFS, before the start of the regular 1998 limited entry, fixed gear sablefish season. NMFS has used landings records from the Pacific States Marine Fisheries Commission's Pacific Fisheries Information Network (PacFIN) database to preliminarily determine which limited entry permits meet the Council-recommended qualifications for each tier.

The Sustainable Fisheries Division (SFD), NMFS Northwest Region, has

notified each limited entry permit owner with a sablefish endorsement by letter whether PacFIN records indicate that his or her permit qualifies for Tier 1, Tier 2, or Tier 3.

A permit owner who believes that his or her permit qualifies for a different tier than the tier indicated by PacFIN records has 30 days to send supporting documentation, such as fish tickets, to the SFD to demonstrate how the qualifying criteria for a different tier have been met. A new tier will be assigned if the permit owner demonstrates that his or her permit meets the qualifying criteria. If the SFD, after review of the information submitted by the permit owner, decides that the permit does not qualify for the tier requested by the owner, the owner will have 30 days to appeal the decision to the Regional Administrator, NMFS Northwest Region. Unlike the initial limited entry permitting process but similar to the sablefish endorsement issuance process, there will be no industry appeals board to review appeals of tier placement.

For the 1998 season only, permit owners with sablefish endorsements will be issued certificates of tier assignment that will need to be kept with, and considered part of, their limited entry permits. When limited entry permit owners renew their permits for 1999, tier assignments for those limited entry permit owners with sablefish endorsements will be indicated directly on the limited entry permit.

Applications for sablefish endorsements, implemented in 1997 under Amendment 9 to the FMP, will not be accepted after November 30, 1998, which is the limited entry permit renewal deadline for the 1999 fishing year.

Changes From the Proposed Rule

NMFS received Council recommendations on the two changes to the proposed rule described in this section.

At the March 1998 Council meeting, the Council learned from its analysts that the initial analysis presented before the 1997 Council decision on the three-tier program had two mistakes directly related to the Council's decision. The Council reconsidered the affected portions of its recommendations. The first mistake was that the database used for the initial analysis for the three-tier program had inadvertently included some sablefish taken in waters off Alaska and later landed at a Pacific Coast port. Tier qualification catch history includes only sablefish landed from the Pacific Coast groundfish fishery. The catch histories of some permits were inflated because of this inclusion of Alaska-caught sablefish. Once the Alaska-caught sablefish was removed from the permit catch history database, the tier qualification levels had to be re-analyzed to determine whether the breaks between permit catch histories (described above) were still large enough to draw clear distinctions between permits above and below the breaks. The Council particularly did not wish to set a qualification level that was within a few thousand pounds of the next lowest permit catch history level. Removal of Alaska sablefish data did not significantly change the breaks in cumulative catch histories identified by the Council at its November 1997 meeting. The break for Tier 1, 898,000 lb (407.33 mt), actually became larger, and so is a more effective fleet-division indicator than it was when the Alaska data were included in the cumulative catch histories. The qualifying amount that the Council had originally recommended for Tier 2, 411,000 lb (186.43 mt), also occurs at a large break in cumulative catch histories, but it is no longer the lowest large breakpoint in its class. Analysis presented at the March 1998 meeting showed that 398,000 lb (180.53 mt) was the most significant break in cumulative catch histories, and the lowest large break among mid-range breakpoints. The Council commented on this issue, stating that it preferred to use the lowest large breakpoint in the mid-range area. In order to cushion any further possible data mistakes, the Council recommended setting the Tier 2 qualifying poundage at 380,000 lb (172.37 mt). NMFS received no public comment on this issue, and implements this change with this final rule.

The second mistake in the November 1997 analysis was made when the Council considered whether permits that were the result of the combination of two earlier permits would be assigned to a tier based on the cumulative catch history of one of the earlier permits, or based on the combined cumulative catch histories of both permits together. The analysis presented to the Council in November indicated that no permit holder would be denied qualification to a higher tier if the cumulative catch history of the highest of two combined permits were used as the qualifying catch history for that permit, rather than the summed cumulative catch history of both permits that were used to create the currently held permit. However, analysts later discovered a permit that is a result of two previously combined permits with catch histories that would each qualify for Tier 2, but that combined would qualify the resultant permit for Tier 1. This mistake was presented to the Council at its March 1998 meeting, after which the Council recommended changing its initial decision so that permits that are the result of a combination of multiple permits made before March 12, 1998, may combine the cumulative catch histories of all of the permits that went into the combination in order to determine the tier qualification status for the resultant permit. The Council only allowed this change for pre-existing combinations, but not for future combinations, so that permit holders would not have an incentive to buy up latent effort in the fleet to expand the capacity of their own operations. During the comment period, NMFS received two letters expressing support for the new Council recommendation. NMFS implements this change with this final rule.

Management Measures for 1998 and Beyond

To facilitate enforcement, there will be a 48–hour closure before the start of the limited entry, fixed gear regular season, during which time all fixed gear north of 36° N. lat. must be out of the water, and no sablefish may be landed by a fixed gear vessel. The 1998 pre-season closure will begin at noon local time (l.t.) on Thursday, July 30, and end at noon l.t. on Saturday, August 1, at the start of the fishery. There will be no opportunities for any fishers to set their gear before the 1998 regular season start time.

The 1998 limited entry, fixed gear regular season will begin at noon l.t. on Saturday, August 1, 1998. Only holders of limited entry permits with sablefish endorsements and tier assignments may participate in this fishery. The fishery will be 6 days long, ending at noon l.t. on Friday, August 7, 1998. The cumulative landings limits for participants in the limited entry, fixed gear sablefish fishery will be 52,000 lb (23,587 kg) for Tier 1; 23,500 lb (10,660 kg) for Tier 2, and 13,500 lb (6,124 kg) for Tier 3. During the regular and mop-up seasons, there is a trip limit in effect for sablefish smaller than 22 inches (56 cm) total length, which may comprise no more than 1,500 lb (680 kg) or 3 percent of all legal sablefish 22 inches (56 cm) or larger, whichever is greater.

To facilitate enforcement at the end of the regular season, there will be a 30–hour post-season closure north of 36° N. lat., during which time no sablefish taken with fixed gear (limited entry or open access) may be taken and retained

for the 30 hours immediately after the end of the regular season. However, sablefish taken and retained during the regular season may be possessed and landed during that 30–hour period. The post-season closure has been changed from 48 hours in duration to 30 hours in duration. This shorter post-season closure is a compromise between vessel owners with pot gear who would prefer a short post-season closure so that they may retrieve gear as soon after offloading as possible, and vessels delivering sablefish to ports in Puget Sound that are farther from the main fishing grounds than from direct ocean ports. In 1998, this 30–hour post-season closure will begin at noon l.t. on August 7 and end at 1800 hours l.t. on August 8. Gear may remain in the water during the 30–hour post-season closure; however, gear used to take and retain groundfish may not be set or retrieved during this period.

Commencing at 1800 hours l.t., August 8, 1998, the daily trip limits for fixed gear sablefish will resume at 300 lb (136 kg) per day north of 36° N. lat. (Daily trip limits apply to calendar days. Therefore, on August 8, 1998, a daily trip limit may be landed between 1800 hours and 12 midnight l.t. Beginning at 0001 hours l.t. on August 9, 1998, daily trip limits will apply to the full 24 hours.) A vessel participating in the regular fishery must begin landing its catch before 1800 hours l.t., August 8, 1998, and complete the offloading before returning to sea or continuing a trip at sea, or the daily trip limit will apply to the fish remaining on board after 1800 hours l.t. on August 8, 1998.

Estimates of the likely total harvest in the regular fishery have been made conservatively in order to ensure that the fishery does not exceed its total allocation. Because of this conservative management and the need to provide harvest overhead in setting cumulative landings limits for the three tiers, the regular fishery may not harvest all of the limited entry, fixed gear allocation for north of 36° N. lat. in excess of that required for the daily trip limit fishery. Following an estimation of the catch from the regular fishery, there will be a mop-up fishery to harvest this excess. The recommendation on the size of the mop-up cumulative limit will be made by the Council's Groundfish Management Team, after calculation of the actual landed catch from the regular fishery and the daily trip limit fishery. NMFS will announce the start date, duration, and cumulative limit amount for the mop-up portion of the fishery in the **Federal Register** before the start of the mop-up season.

Comments and Responses

The comments in 26 letters received during the public comment period ending on May 22, 1998, are summarized below. Comments 1 through 17 were received from 12 individuals in opposition to the three-tier program. Comments 18 through 30 are comments were received from 13 individuals and from an attorney representing west Coast fixed gear fishers. One letter in support of the rule included a suggestion that permit owners be allowed to stack multiple permits to pursue multiple cumulative limits during the regular fishery and a suggestion that the regular fishery be managed with an option of two different start dates, one in April and one in August. Neither of these suggestions was within the scope of the proposed rule or the Council's considerations for the three-tier program, so those comments have not been responded to below.

Comments Opposing the Rule

Comment 1: No justifiable need has been demonstrated for tiered sablefish allocation. Tiered allocation does nothing to further the stated purpose of the overall management program—to end derby fishing. In fact, derby fishing would be perpetuated by this program. The three-tier program does not address the safety-at-sea issue.

Response: For the past several years, the Council has expressed a strong desire to end the status quo management regime of an open competition derby while still maintaining historic trends in catch distribution among participants. Each year, since 1987, the open competition derby season has shortened in duration, yet the Council has been unable to choose whether to support the management recommendations of long-term fleet members who wanted to maintain their historic share of sablefish landings, or the management recommendations of new entrants to the fleet who wanted to increase their future shares of sablefish landings. The history of the fixed gear sablefish management regime is discussed in the preamble to the proposed rule. Finally, for 1998 and beyond, the Council recommended the three-tier program, a compromise that recognizes historic and recent fishery participation levels. The unrestricted competition derby will end with the implementation of the three-tier program.

The amount of sablefish available to a three-tier regular fishery provides a 6-day fishery in 1998. Without this rule, the regular fishery would be an unrestricted derby of 2 to 3 days. With this rule, approximately one-third of the expected participating vessels will be able to slow their rate of fishing over the rate that they would have fished under an unrestricted derby fishery, without reducing their catch. The Council has several times deliberated on whether this fishery would still be unsafe for vessels unable to catch the cumulative limit within the time allotted for the fishery. Fishers who knew that they would not be able to catch the cumulative limit within the time available have testified before the Council that any increase in the number of days in the fishery would allow them to slow the pace of their fishing and improve their ability to operate in a safer manner. The Council concluded that the three-tier program was an appropriate compromise because it would substantially slow the fishery without the adverse impacts of the alternatives that would have more drastically redistributed the catch.

The regular fishery under the three-tier program will still be a short, intense season. However, the only management option that has been suggested to end such seasons entirely was to set equal, monthly cumulative landings limits, an option with other offsetting drawbacks. Equal monthly landings limits would drastically redistribute catch from longer term participants to more recent and smaller capacity entrants. Cumulative limits also give fishers incentive to aim for a limit, and in aiming for that limit, they often exceed the limit and must discard any fish exceeding the limit. Discard mortality is largely unmeasured, and thus is a danger to the long-term health of the fish stocks. A system of monthly limits risks the possibility that fishers will aim for and exceed 12 small landings limits. The three-tier program has just the large, regular fishery limit to aim for, plus an expected second, smaller limit in the mop-up portion of the fishery.

Comment 2: The three-tier program is based solely on historic catch. Historic catch is not mentioned in the Magnuson-Stevens Act. The Magnuson-Stevens Act states that if the available resource must be allocated to American fishers, historic participation shall be required. All fishers with sablefish endorsements have shown historic participation in the fishery.

Response: Under section 303 of the Magnuson-Stevens Act, a Council may establish a limited access program if it takes into account, among other things, ''historical fishing practices in, and dependence on, the fishery.'' The three-tier program uses cumulative sablefish landings from the 1984 through 1994

period to quantify the historical fishing practices and dependence of participating fishers on the fixed gear sablefish fishery.

National standard 4 of the Magnuson-Stevens Act states that, ''Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.'' The three-tier program is fair and equitable to participants in the program because it recognizes historic and recent participation and dependence on the fishery, and because it divides fishing privileges in a manner designed to minimize economic impact on those participants, within the constraints of the Magnuson-Stevens Act prohibition on implementing new IFQ programs.

Derbies, three-tier programs, and series of monthly cumulative limits, were three of the major alternatives considered in this action. Each provides a different means of controlling harvest in this fishery, each with different social, economic, and conservation implications that would change over time and with conditions in the fishery. The implementation of any of these alternatives would promote resource conservation. Deteriorating social and economic conditions resulting from derby fishery management led to the consideration of alternative conservation measures.

Finally, if the fishery could be managed in a way that would allow each of the permits to harvest the entire cumulative limit associated with the tiers, each of the permits in the top tier would be receiving just 1.4 percent of the total catch available to that fishery. A small number of fleet participants own more than one permit, so it is extremely unlikely that any one individual, corporation, or any other entity will acquire an excessive share of the privileges associated with this fishery through the three-tier program.

Comment 3: The Magnuson-Stevens Act states that economic gain shall not be used to allocate fish resources.

Response: National standard 5 of the Magnuson-Stevens Act states that, ''Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.'' The purpose of the three-tier program is to move away from the unrestricted derby fishery with a management program that allows sablefish catch distribution to reflect historic and recent participation levels in the fishery. A management measure that would improve the efficiency of the use of a fishery resource would, among other things, remove or discourage redundant capacity in the fleet targeting that resource. Derby management encourages each fishery participant to increase the capacity of his or her vessel, to maximize the amount of fish that a vessel can catch during the time of the fishery. If the catching capacity of each vessel in a fleet is increased to improve its competitive advantage over other vessels, the total catching capacity in the fleet becomes so great that the duration of the derby must be shortened to prevent these vessels from exceeding the harvest guideline for the target species. The Pacific Coast fixed gear sablefish fishery has had a classic case history of a derby fishery that rushed into the vicious spiral of ever-increasing redundant capacity and ever-decreasing fishery duration. The three-tier program is intended to decrease the intensity of this spiral by matching permits to the tiers that most closely reflect their historic landings shares of the fishery. Fishers within each tier will be allowed to pursue cumulative limits that match more closely their current vessel capacities, and will thus as a group have less incentive to continue to increase those vessel capacities. There will still be incentive for vessels that are unable to catch their cumulative limit in the allotted time to increase their capacity (about two-thirds of the fleet), but the degree of incentive will be reduced. The three-tier program is a compromise program resulting from constraints created by the Magnuson-Stevens Act moratorium on the creation of new IFQ programs and the major reallocative effects of other alternative management strategies (e.g., a year-round series of monthly cumulative limits). Economic allocation is not the sole purpose of this regulation. As discussed in response to comments 1 and 2, the rule also has social and conservation purposes.

Comment 4: The tier system rewards overcapitalization by large producers by giving them an unreasonably larger allocation of sablefish in comparison to the rest, and majority, of the fleet.

Response: Fleet overcapitalization is primarily the result of two factors: individual fishers improving and supplementing their gear and vessel catching capabilities, and increasing numbers of new entrants to the fleet. Both of these factors contributed to overcapitalization in the fixed gear sablefish fishery. It is incorrect to say that, during any given period, a vessel that added gear contributed more to the overcapacity problem than a fisher bringing in a similar amount of capacity as a new entrant, or to say that this program rewards overcapitalization by recognizing historic and recent fishery participation. The three-tier program is designed to reflect, in part, dependence on the fishery.

The ratio that describes this distribution of cumulative catch limits between tiers approximates the 1991 through 1995 catch relationships between permits assigned to each tier on a group average basis. Setting cumulative limits by ratios ensures that the long-term relationships between the cumulative limits for each tier will remain stable. With cumulative limits set by ratio, impacts from changes in the numbers of permits distributed to each tier will be shared by all vessels in the fleet. The cumulative limits ratio for the tiers will be 3.85 (Tier 1); 1.75 (Tier 2); and 1 (Tier 3). The ratio between the average permit catch histories for permits in the three different tiers over the 1984 through 1994 period is 10.9 (permits in Tier 1) to 3.9 (permits in Tier 2) to 1 (permits in Tier 3). Tier 1 fishers will not have an unreasonably larger allocation of sablefish as compared with the rest of the fleet, particularly given the difference between the historic cumulative catch ratio and the cumulative limits ratio implemented by the three-tier program.

Comment 5: The tier program criteria are arbitrary and inappropriately inflexible. The criteria do not adequately allow for the changing circumstances and contingencies common in the industry, such as boat and gear loss, weather, price fluctuations, etc.

Response: NMFS disagrees. The three-tier program qualifying criteria include the initial 1984 through 1988 window period used to qualify vessels for limited entry permits, plus the 1989 through 1994 period that was added to the limited entry window period for sablefish endorsement qualification. In considering this question, it is important to remember that NMFS considers the relevant history to be the history of the groundfish fishing firm as represented by the groundfish permit. Within the 11-year window period, NMFS expects that most fishers had some period of relatively low fishing activity due to any number of possible problems they might have had with their boats, gear and weather, with personal health and family needs or with basic changes in market

conditions. The long (11 years) qualifying period reduces the impact of any particular problem that might have affected a fisher's participation in this fishery. For vessels that may have entered the fishery in the latter part of the qualifying period, such as those qualifying for a limited entry permit based on construction provisions, notice was given as early as the November 1991 Council meeting (announced at 57 FR 4394, February 5, 1992), that additional actions might be taken to further restrict access to the fishery, and that the Council was reserving the option to not consider subsequent investment and dependence on the fishery in determining future allocation questions with regard to this fishery. The qualifying requirement represents a balance that considers both the duration of involvement in the fishery and the size of the harvest operation. A fisher who entered the fishery as a large producer in the later part of the qualification window would have an opportunity to qualify for one of the higher tiers, as would a fisher who participated at a lower, but consistent, level over a longer period.

Comment 6: The catch requirements for tier placement would unfairly favor large vessels and handicap smaller vessels. Recent derby management has artificially widened the catch gap between larger and smaller vessels, because small boats are more vulnerable to adverse weather and must spend a greater percent of time in transit, loading, and offloading. Thus, the catch rate of these smaller vessels has been constrained during the extremely short seasons.

Response: NMFS agrees that there is some correlation between vessel size and vessel catch history. However, there are also several examples of small-sized vessels in the Tier 1 that have had high and consistent sablefish landings over the entire 11-year qualifying period. Conversely, there are very large vessels in Tier 3 with relatively low cumulative catch histories. Many factors contribute to whether a vessel has a relatively large or small sablefish catch history. In addition to basic vessel length, cumulative catch history might be related to sablefish abundance near the home port of the vessel, the fishing skills of the captain and crew, the type and condition of the gear used, the condition of the vessel, choices of the vessel owner to participate in the West Coast sablefish fishery or in other simultaneous fisheries, the number of years in this fishery, and many other possible factors. During the 1984 through 1994 window period, only the last three seasons could be classified as short in duration, being 15 days in 1992, 21 days in 1993, and 20 days in 1994. These short periods necessarily constrained the catch rates of all participating vessels to ensure that the fishery did not exceed the available harvest guideline. NMFS does not agree that smaller sized vessels necessarily spend more time in transit, or in loading and offloading than larger vessels.

Comment 7: High-producing pot fishers had an advantage of high harvest levels during the window period because they, unlike longliners, were allowed to set their gear before the start of the season. This was supposedly justified by safety concerns that boats carrying too many pots would be unstable.

Response: In 1993 and 1994, fixed gear vessels were prohibited from taking and retaining, possessing, or landing sablefish for the 72 hours before the start of the regular sablefish fishery (58 FR 16629, March 30, 1993). For those 2 years, all fixed gear fishers could deploy their gear during the 72–hour pre-season closure, but no sablefish could be taken from the water until the season start. In 1995, longliners were prohibited from deploying their gear until the start of the season, while pot fishers were allowed to deploy and bait their gear in advance of the start of the regular season (60 FR 34473, July 3, 1995). Because tier qualification status is based on landings made from 1984 through 1994, the pot pre-set allowance in 1995 and 1996 did not affect harvest during the three-tier qualification period.

Comment 8: The three-tier program does not consider the impact on the small fishing ports along the coast, as directed by the Magnuson-Stevens Act.

Response: National standard 8 of the Magnuson-Stevens Act requires that, ''Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impact on such communities.'' NMFS notes that, according to the Council's decisional analysis, the three-tier program is expected to cause little change in the inter-port distribution of harvest over past years' harvest distributions. Moreover, other alternatives to unrestricted derby management, such as providing a single period equal cumulative limit fishery for all vessels or a series of equal monthly cumulative limits, would have imposed greater changes to inter-port harvest distribution than the three-tier program implemented by this rule. The program implemented by this rule meets the requirements of national standard 8.

Comment 9: The three-tier plan is only a disguised IFQ program, which is not allowed under the Magnuson-Stevens Act. The ''overhead'' allowance does not remedy this being an IFQ program. Additionally, the season has been artificially shortened in order to maintain this ''overhead'' fiction, increasing the fishery's hazardousness for all participants.

Response: The October 11, 1996, Sustainable Fisheries Act significantly revised and renamed the Magnuson-Stevens Act. The new changes to the Magnuson-Stevens Act included a moratorium on the implementation of new IFQ programs until October 1, 2000. An IFQ is defined in the Magnuson-Stevens Act as, ''a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person.''

Management measures for the limited entry, fixed gear sablefish fishery have been carefully designed not to violate this IFQ prohibition. As with the 1997 equal cumulative limit fishery, the Council recommended using overhead guidelines in setting the cumulative limits for each tier and for the overall expected catch for the total fishery. ''Overhead'' is defined as the difference between the expected harvest level and the total harvest that would occur if each permitted vessel took its full cumulative limit (maximum potential harvest). The concept of overhead is based on the premise that not all participants in this fishery will be able to harvest the cumulative limit. Because not all participants will be able to harvest the cumulative limits, and the remaining fish will be made available to others in the fleet, the cumulative limits are not held for ''exclusive use by a person.'' These limits are merely caps on what the most productive members of each tier may harvest during the regular season. NMFS considers a fishery where all participants have the opportunity to catch a cumulative limit and they are all able to catch that limit to be an IFQ program. The Council recommended setting cumulative limits and season lengths in 1998 and beyond to achieve a projected overhead, based on the most reasonable assumptions, of at least 25 percent and an overhead, based on worst-case assumptions, of at least 15 percent for the fleet as a whole. The goal overhead for any single tier

would be at least 15 percent, based on the most reasonable assumptions. Overhead provisions ensure that fishery participants do not have exclusive use of the cumulative limits. Any fish that is not harvested in the cumulative limit fishery will be redistributed in another catch opportunity during the mop-up fishery. NMFS is satisfied that a management program based on these conservative overhead guidelines will not result in all participating fishers being able to catch their full cumulative limits and that such a program will, therefore, not be an IFQ program. NMFS agrees that a longer season would be more desirable for its safety benefits. However, a longer season is not possible under the current IFQ moratorium, and would not achieve the Council's goal of ending the unrestricted derby with a management program that recognizes historic and recent participation.

Comment 10: Adequate consideration has not been given to alternative means of achieving the program's objectives. Alternatives to the three-tier program include management by equal allocation of sablefish for all limited entry permit holders, as in 1997.

Response: NMFS disagrees that adequate consideration has not been given to alternative means of achieving the program's objectives. The history of Council deliberation regarding this management system was described in the preamble to the proposed rule. The Council specifically considered, analyzed, and rejected options that provide equal allocation of sablefish for all permit holders as having too great a redistributive effect on the fishery. Because an option was not adopted does not mean that it was not considered.

The 1997 management scheme for the limited entry, fixed gear sablefish fishery set equal cumulative limits for all limited entry permit holders with sablefish endorsements. This scheme was specifically adopted for 1 year only because a long-term equal limits policy would have had significant adverse social and economic effects. This option, in addition to an option to set monthly equal cumulative limits, was included in the Council's decisional analysis for the management of this fishery in 1998 and beyond. In addition to these options, the Council considered a status quo derby option, three different three-tier options, and one four-tier option. The Council thoroughly analyzed and considered all seven management options before choosing the three-tier program implemented by this rule.

Comment 11: One commenter opposed to the rule supported the single period equal cumulative limit with mop-up option. The commenter noted that the Council's analysis for this issue showed that only 18 percent of fishery participants would experience a greater than 5–percent decrease in their incomes, making this less than NMFS's standard ''significant impact'' criteria of 20 percent.

Response: This comment appears to refer to NMFS criteria for determining whether an action will have a significant economic impact on a substantial number of small entities, a determination NMFS makes pursuant to the Regulatory Flexibility Act (RFA). NMFS considers an impact to be ''significant'' if it results in a reduction in annual gross revenues by more than 5 percent, an increase in annual compliance costs of greater than 5 percent, compliance costs at least 10 percent higher than for large entities, compliance costs that require significant capital expenditures, or the likelihood that 2 percent of the small entities would be forced out of business. NMFS considers a ''substantial number'' of small entities to be more than 20 percent of those small entities affected by the regulation that are engaged in the fishery. This determination is discussed in the Classification section of this rule, and analyzed in the EA/RIR/IRFA/FRFA for this action.

The Council set an equal cumulative limit regime in 1997 forall sablefish endorsement holders with the understanding that such a division of fishing opportunities within a fleet with vastly differing historical fishery participation rates and dependence levels would be an unfair allocation as a long-term policy. In the final rule implementing the 1997 regime, NMFS stated that, while the equal cumulative limit regime was preferable to a derby, the agency would support a 1998 management system that better reflected historic and more recent levels of fishery participation. NMFS does not agree that an equal allocation for all sablefish endorsement holders is an appropriate management option for this fishery. Although the single period equal cumulative limit option would have resulted in fewer businesses with economic loss, the degree of impact on those businesses would have been much greater. Those businesses that would have lost economically under this option would have lost revenue to a greater degree than those businesses losing revenue under any of the tier options. Comparisons of revenue losses and gains under the different management options considered by the Council are analyzed in the EA/RIR/IRFA and FRFA for this action. There is a higher likelihood that applying the NMFS RFA criteria to a management measure to implement a long-term policy of equal cumulative limits would have resulted in a finding of significant economic impacts to fleet participants on the basis of the standard that more than 2 of participating small businesses could have been forced to cease operations. Thus, while the three-tier program results in a greater number of businesses experiencing losses, those losses are smaller, and the impacts of the new management regime are spread more evenly through the fleet.

Comment 12: Equal opportunity to access the fisheries is the fair and long-established approach to fishery management. There is no justification for managing this one fishery differently from other West Coast fisheries. Monthly trip limits have worked for trawlers, why can't they be used for the longline and pot sablefish fishery?

Response: Management of the trawl and longline fishery for sablefish diverged in 1987, when the Council established constraining trip limits for the trawl fishery, but did not set trip limits for the non-trawl fishery. Since then, the fisheries have developed in different manners. A sudden shift to monthly trip limits for the non-trawl fishery would have drastic reallocative impacts on the fishery, which the Council specifically wanted to avoid. While equal trip limits could be imposed on the fixed gear fleet, the effect would be, and was in 1997, very different than for trawl vessels because of the different management paths these two gear groups have taken. The trawl fishery reached its current trip limit levels over a period of many years, with some downward adjustments made each year. The sudden imposition of today's limits on a trawl fleet previously constrained only by season length would be extremely reallocative and disruptive. When the size of harvests is changed dramatically and suddenly, rather than over time, greater dislocations result, both in terms of labor and business, as well as personal capital. The monthly trip limit for trawlers is not without problems. An overcapitalized fleet fishing on relatively low trip limits in a multi-species fishery may have high discard rates, with reduced economic viability for many of the fishery participants. Any management scheme has drawbacks, and the Council must balance all competing factors in choosing a management regime for any fishery.

Comment 13: If a permit received an endorsement, the Council should allow permit holders who did not qualify for limited entry permits to use their vessel

catch history, rather than just the permit catch history, to qualify that permit for tier placement.

Response: Permit catch history includes the catch history of the vessel(s) that initially qualified for the permit and subsequent catch histories accrued when the limited entry permit or permit rights were associated with other vessels. This comment suggests that a permit holder who purchased a permit after the limited entry program went into effect should be able to add his or her personal vessel's pre–1994 catch history to the pre–1994 catch history of the vessel that initially qualified for the purchased permit.

It has been the Council's policy to allow permit catch history to include a vessel's catch only from a time when that vessel was associated with the permit. Permit catch history includes the catch history of the vessel that initially qualified for the permit (before 1994), plus any catch history accumulated by vessels using that permit after issuance (1994 - present). It would be inconsistent with historic Council and NMFS policy to change these parameters for vessel and permit catch history for the three-tier program. To the degree possible, it is important to maintain consistent policy so that people can move in and out of the fishery and plan their fishery investments. Changing a policy that has been consistently followed since 1989 would create uncertainty about future policies for current participants and new entrants, and would require substantial justification.

A different set of qualifying histories would require redesign of the entire program, with the result being a different set of permit owners benefitting and losing under the new qualifying histories. If the proposal in this comment were adopted, either the qualifying requirements for the tiers would have to be raised to maintain a similar number of permits in each tier, or the cumulative limits for all vessels would have to be reduced in order to accommodate a greater number of permits in higher tiers. The net effect in the former case is that some permits would be moved down so that others could move up, or that everyone would experience a decrease in his or her harvest so that more permits could move up.

Comment 14: In 1992, the Council established a window period for future sablefish access limitation programs with a 1991 cutoff date. A commenter noted that fishing business decisions were based on this cutoff date and that, for this reason, his West Coast landings after 1991 are not as high as they would have been if he had known that there would be a later cutoff date.

Response: On February 5, 1992, NMFS published a Notice of Control Date (57 FR 4394), indicating that the Council was considering further access restrictions to the limited entry groundfish fisheries. At that time, the Council intended to consider individual quota (IQ) programs for West Coast halibut and sablefish fisheries. In the Notice of Control Date, NMFS stated, ''If IQ programs are adopted, the Council has expressed its intent to exclude from consideration fishing activity occurring after November 13, 1991, in establishing priorities for issuance and shares of individual quotas for these fisheries.'' The notice also explained that IQ programs were only a potential future management program, and that setting a control date was intended to ''discourage speculative entry into these fisheries (sablefish and halibut) while discussions on access control continues.'' Just as the Council prepared to take final action on whether to implement an IQ program, it received a letter from the West Coast congressional delegation requesting that it defer action until national policy guidance could be developed. The Council delayed action in response to this letter and the industry controversy surrounding the issue. Subsequently, Congress enacted a moratorium on new IFQ programs.

On August 1, 1995, NMFS published another Notice of Control Date (60 FR 39144), this time stating that the Council was considering establishing a sablefish endorsement program for limited entry, fixed gear permit holders to control participation or effort in the regular sablefish season. The notice read ''If a limited entry program is established, the Council is considering June 29, 1995, as a possible control date. Consideration of a control date is intended to discourage new entry by nontrawl 'A'permit holders into the sablefish fishery based on economic speculation during the Council's deliberation on the issues.'' This notice also explained that the Council might choose a different control date or might choose a management regime thatdid not make use of a control date. The purpose of a published notice of control date was to prevent fishers from rushing into the fishery in the hopes of accumulating catch history for possible future management schemes.

The sablefish endorsement program and the Council's recommendation for a three-tier management program have the same 11-year qualification period of 1984 through 1994. This qualification period incorporates catch over a long period and includes both historic and recent participation. It also accounts for the fact that some fishers may depend on different fisheries in different years or may have some years of relatively low catch for reasons outside their control.

The use of control dates is a difficult issue. Control dates are necessary for the protection of the resources and the fishers that are dependent on the fishery. However, when a policy is not developed fairly soon after the issuance of the control date, so many changes occur in the fishery that adherence to old control dates lead to perceived inequities. The need to maintain the control date is difficult to balance with the need to account for changes in the fishery. One way to resolve this balance is to recognize that one of the purposes of the qualification criteria is to establish degree of dependence on the fishery. If the Council had not set the 1991 control date, the commenter may have made investments and fished at a level that established a degree of dependence entitling his or her permit to qualify for a higher tier. However, during the intervening years, such investment was not made, and a greater degree of dependence on future income from sablefish was not established. There is a greater probability that the commenter's fishing enterprise will be able to withstand a harvest reduction associated with assignment to a lower tier, or the need to purchase a permit for a higher tier, than an enterprise that has harvested at a higher rate. It is also possible, depending on his or her catch history, that, even in the lowest tier, the commenter will experience an increase relative to recent harvests.

Comment 15: A commenter suggested that the qualifying amount for Tier 1 should be lower than it is, because some long-time participants in the fishery may be placed in Tier 2.

Response: As discussed in this document and in the preamble to the proposed rule for the three-tier program, the tier qualification amounts are based on the largest breaks between a ranking of the cumulative catch histories of all of the limited entry permits with sablefish endorsements. A permit's tier placement reflects the catch history associated with that permit, as compared with the catch histories associated with all of the other permits with sablefish endorsements. These 163 permits are associated with a wide range of cumulative catch histories, from under 40,000 lb (18.14 mt) cumulative catch history from 1984 through 1994 to over 3,000,000 lb (1,360.78 mt) cumulative catch history during that same period. The breakpoints in this three-tier program fall at levels where

there were large and obvious divisions between groupings of permit catch histories.

Qualification requirements have to do not only with being a fisher and a boat owner, but also with the level of participation in the fixed gear sablefish fishery. A long-term owner in the fishery and steady participant should end up in a tier somewhat reflective of his or her general harvest levels. Because the program cannot provide individual allocations due to the Magnuson-Stevens Act's moratorium on IQ programs, there will inevitably be some reallocation from historic catch shares; some fishers will receive more than their demonstrated production levels and others will receive less. To those who sold a vessel or permit with catch history or who recently invested in a vessel with little catch history, many notices have been given since the close of the 1988 limited entry window period that access rules for the fishery might change overtime.

Comment 16: If there is to be a tiered system, the regulations should have an appeal procedure under which hardship circumstances adversely affecting an individual boat owner's tier placement can be heard and placement upgraded if adequately justified.

Response: A permit holder eligible for participation in the three-tier program has the opportunity to appeal his or her permit's tier placement if that permit holder believes that the permit has been placed in the wrong tier based on incorrect information about the catch history associated with that permit. Like the sablefish endorsement program, the three-tier program does not include a hardship provision for tier placement. The three-tier program has a long qualifying period (1984 through 1994) that encompasses the limited entry window period plus more recent years.

Tier assignments are based on catch history of the permit, which includes the catch history of the vessel that initially qualified for the permit during the time before the permit was issued, plus any subsequent catch made by vessels operating under the permit. The qualifying window period for limited entry permits was July 11, 1984, through August 1, 1988. Most vessels that qualified for an initial limited entry permit based on personal hardship had to have been fishing before the end of the limited entry qualifying period. Every permit should have a long permit history, except for those that qualified under vessel construction or conversion criteria.

The vessel construction/conversion criteria required that construction on the vessel must have been started before 1988 and completed by September 1990. Vessels qualifying under this provision had at least 4 years of fishing opportunity during the three-tier window period, except where unexpected circumstances may have prevented construction completion before September 1990. A construction history running from before August 1, 1988 through September 1990 or later demonstrates some degree of ability to survive financially without substantial fishing income.

Vessels entering the fishery for the first time in 1991, or later, arrived in the fishery when there were only short derby fishing opportunities and after the Council had provided notice of impending changes to fishery access rules. A vessel that was a high producer during the last four derbies in the three-tier qualification period (1991 through 1994) may have established a high enough permit history to qualify that permit for Tier 2. Conversely, low-producing vessels that participated only in the 1991 through 1994 derbies have shown a relatively low level of dependence on the fishery. Vessels that entered the fishery at a later date had less of an opportunity to qualify for a higher tier assignment than vessels with a long history of fishery participation.

Comment 17: A commenter suggested that, if the tier system is approved, upon death of a permit holder or sale of any permit, the permit's associated cumulative limit should be forfeited into the total amount available to all sablefish endorsement holders, to be divided between active permits.

Response: NMFS is uncertain exactly how this proposal would work. It appears that the proposal is to make sablefish harvesting a non-transferable privilege, as opposed to the other fishing privileges conferred by permit ownership. Similar provisions have been considered in the past, but rejected because of complications having to do with methods by which ''sales'' can be circumvented, and defining deaths where partnerships or corporations are involved in the ownership. The three-tier program is a program to allocate the fixed gear portion of the limited entry sablefish allocation between participants in the regular fishery; it is not a capacity reduction program. However, the Council has expressed an interest in capacity reduction programs, and this idea might be considered during future Council efforts to develop capacity reduction programs.

Comments Supporting the Rule

Comment 18: The three-tier plan is equitable because it recognizes historic dependence on and investment in the fishery as a rational method of fishery management. The 11-year window period of 1984 through 1994 for the three-tier program is inclusive of both historical participation and (at the time of program development) current dependence upon the fishery. Using catch history to allocate fish is the best method of distributing reductions in fishing opportunity through an overcapitalized fleet. The time has come to implement a management regime that will maintain a semblance of economic stability and continued participation in a long-established fishery.

This three-tier program is also a compromise that gives low level participants a higher harvest catch level than they have historically enjoyed, while greatly reducing the poundage of the high level producers. Vessels in Tier 1 will lose about 3.2 percent of their total catch, while vessels in Tiers 2 and 3 are expected to gain 1.0 percent and 0.7 percent respectively. Reallocation of proportional catch share within and between permit holders in each tier is relatively modest.

The length of the qualifying period and the lack of an exception for personal hardship represents a balance in the consideration of the dependence of long-term producers and more recent entrants. For owners of permits with a long catch history, the lack of a hardship provision is another way of weighing the degree of dependence established in the fishery. For the three-tier program, the question is not whether a vessel will qualify for a tier assignment, but which tier assignment the associated permit will receive. Owners of permits not qualifying for a higher tier may move to a higher tier by purchasing a higher tier permit, just as people who have not yet entered the fishery will have to do to enter even the lowest tier.

Response: This comment refers in part to analysis in the EA/RIR/IRFA for this issue that shows how the distribution of catch shares between vessels in the fishery would change upon implementation of the three-tier program. NMFS agrees that the three-tier program takes both historic and recent participation into account in setting qualification levels for the three tiers. NMFS also agrees that the three-tier program has been carefully designed to spread the burden of more rational management among fleet members. NMFS notes that many of the comments in favor of the three-tier program were received from persons who would have been negatively affected (as compared with status quo derby management) by either the equal cumulative limits program or the three-tier program, but

who prefer the three-tier program for its recognition of differing fishery participation levels. However, NMFS also notes that, despite this effort to reduce the reallocative effects of this program, the degree of reallocation of proportional catch shares within the tiers is still substantial, with some vessels experiencing increases and others decreases.

Comment 19: The proposed rule would provide an effective mechanism for the prevention of overfishing and the achievement of optimum yield by providing close control over harvesting conducted by an over-capitalized fleet. The proposed rule would enhance conservation of the fishery by making the fishery easier to manage, increasing the likelihood that harvests will remain within the harvest guideline, thus improving the sustainability of the fishery. For these reasons, the three-tier program complies with national standard 1.

Response: NMFS disagrees that the fishery is necessarily easier to manage under the three-tier system than it would be under the derby. The sum of the cumulative limits for all vessels in the fishery substantially exceeds the total amount of available fish. Cumulative limit management with overhead allows a longer fishery than unrestricted derby management, at a similar degree of risk and conservativeness. Additionally, there are enforcement and monitoring problems with cumulative limits that must be recognized. Under derby management, no incentive exists for vessels to under-report landings. Under cumulative limit management, vessels able to take their cumulative limits in the available time might under-report their landing in order to land more sablefish than the limits allow. All of these factors were taken into account when the Council and NMFS balanced conservation, safety, allocation, and other management objectives in selecting what they determined to be the best management option.

Comment 20: The three-tier program complies with national standard 2, which states that ''Conservation and management measures shall be based on the best scientific information available.'' Not only did the Council use the most current data and analyses in shaping the three-tier program, but also, when analysts discovered errors in the database of permit catch histories, those mistakes were properly and timely disclosed, and the Council reviewed and reconsidered its decisions based on the new data.

Response: NMFS agrees. Changes from the proposed rule to the final rule result from decisions made at the Council's March 1998 meeting, and are described above.

Comment 21: According to one commenter, opponents of the three-tier program argue that catch history should not be used to allocate the sablefish resource and that equal allocation is the most fair allocation. That same commenter noted that ''fairness of allocation (national standard 4) is in the eye of the receiver.'' This commenter pointed out that the 1997 equal limits management allowed permits that had caught only 16,000 pounds in a single year to fish toward a limit of 34,000 pounds, also allocating 34,000 pounds to permits with historical annual catches of 300,000 pounds. Additionally, several commenters noted that, in the three-tier program, fishers in Tiers 1 and 2 will lose catch opportunity, and fishers in Tier 3 will gain catch opportunity, commenting that this program is a well compromised allocation.

Response: As indicated in the response to Comment 11, NMFS agrees that the three-tier program, which spreads the burden of catch reductions more evenly through the fleet, is a fairer allocation than a long-term equal cumulative limit allocation.

Comment 22: The three-tier program is an initial step toward capacity reduction. Before capacity can be reduced, it must be prevented from increasing. By assigning each permit an allocation, fleet harvest capacity cannot increase because the incentive to catch more fish disappears. In this way, the program complies with national standard 5, which states that ''conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.''

Response: NMFS partially agrees. As stated in the responses to Comment 3, derby-style fishery management encourages each individual in a given fleet to expand his or her vessel's catching capacity to better compete with all of the other vessels in the fleet. Even if a limited entry program restricts the number of vessels in the derby, individual fishers have incentives to improve the competitive abilities of their vessels. Derby management inevitably leads to the cumulative catching ability of the fleet exceeding the actual capacity needed to harvest the available resource. The three-tier program reduces but does not end this derby-style management, and attempts to match permits to tiers based on the cumulative catch associated with those permits. During the fishery, a portion of vessels in each of the tiers will closely match the catching ability associated with the available cumulative limit and the time available, while some vessels will have more than enough catching ability, and some vessels will have less catching ability than needed for taking that cumulative limit within the available time.

Comment 23: One commenter stated that he appreciated the stability this program will bring to a fishery that has a history of management difficulties. The commenter noted that the stability of this program will allow him to assure his crew members that otherwise lean years can be filled out by catch in the sablefish season, and anticipated that this stability would ensure loyalty from his experienced crew members throughout the year.

The commenter further noted that the three-tier program will also allow flexibility to participate in multiple fisheries. The three-tier program, with a fixed fishery period and a mop-up following shortly afterwards, allows fishers to get their gear on and off their boats and to pursue the multiple fisheries necessary to make a year round living. The commenter also was pleased that the three-tier program accounts for the different fishing strategies of the many fleet participants, the three-tier program follows national standard 6, which states that ''Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.''

Response: In developing the three-tier program, one of the Council's goals was to begin to bring stability and rational management to a frenetic and unstable fishery. The Council and NMFS recognize that fixed gear fishers participate in a variety of fisheries throughout the year, and season start dates for this fishery are set to accommodate as many alternative fishery schedules as possible.

Comment 24: The fixed gear sablefish fleet is diverse and divided into opposing categories: long term participants and new entrants, large catch histories and small catch histories, large boat and small boats. This program causes some losses and gains for some coastal communities because we all deliver to and support coastal communities, not because of a disregard for coastal communities. The three-tier program complies with national standard 8, which states that the interests of fishing communities be taken into account when implementing conservation and management measures.

Response: NMFS agrees. As stated in the response to Comment 8, the three-tier program is expected to cause little change in the inter-port distribution of fixed gear sablefish landings, and less variation in inter-port distribution than would have occurred under a long-term system of equal cumulative limits. All of the vessels involved in this fishery are considered small businesses, and all of the boats in the fishery deliver their fish to coastal communities. National standard 8, which addresses the dependence of fishing communities on fishery resources, does not constitute a basis for allocating resources to specific fishing communities.

Comment 25: One commenter stated that a longer fishery, even if it is longer only by several days, allows him to keep and handle his bycatch. Open derbies lead to people setting out more gear than they can haul in a given time, resulting in a waste of gear and hooked fish. At the other end of the scale, a monthly trip limit fishery would unquestionably lead to high-grading and increased bycatch on a regular basis. The commenter noted that this longer fishery will also allow him to handle his gear more carefully, making him less likely to lose gear. By minimizing bycatch, the three-tier program complies with national standard 9.

Response: Bycatch can occur for many reasons. In a derby fishery, where all vessels are participating at their highest possible rates of fishing, fishers may not have the time to fish in a selective manner. Fish would be hauled on board as quickly as possible without regard to species or size, and then a portion would be discarded according to market or regulatory constraints on what catch should and may be retained. Conversely, in a fishery where all participants have ample time to sort through their catch and fish until their vessels are filled with the highest value fish, many lower value fish may be discarded in the process. The three-tier program will allow some fishers to slow their rates of fishing and to improve the selectivity of their fishing methods. To some extent, however, selectivity in fishing is a matter of personal ethics and fishing skill. NMFS does agree that a slower paced fishery should have the much-desired result of reducing gear abandonment and ghostfishing by lost gear.

Comment 26: The three-tier program provides increased safety with respect to the status quo derby because fishers will know how much fish they are allowed to catch and the season can be tailored to more favorable weather patterns. The three-tier program allows 6 days fishing while an unrestricted derby would probably allow 2. Several commenters noted that any increase in the number of days in the fishery, even if it is from 2 days to 6 days, is a safety improvement. These commenters concluded that, for these reasons, the three-tier program complies with national standard 10, which states that ''Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.'' Finally, one commenter noted with irony that if the Council had been able to implement an IFQ program, the fishery could be several months long, rather than several days long.

Response: NMFS agrees that a 6-day fishery provides greater safety than a 2-day fishery. It is unfortunate that overcapitalization and the reduced 1998 sablefish harvest guideline level have severely shortened the fishery duration. NMFS expects that the primary safety benefit of a 6-day fishery over a 2-day fishery will occur for the approximately one-third of the fleet easily able to take the allotted cumulative limit during the time allowed. For the other two-thirds of the fleet still operating in the derby mode, the effect of this action on safety is uncertain. Income will increase as the length of the fishery increases, and it is possible that risk-taking behavior will decline as the amount of potential income increases. However, the Council decision documents show that these are not conclusive findings.

NMFS also agrees that IFQ management for this fishery nwould allow fishers adequate time to catch sablefish poundage associated with their tiers. If this fishery were managed with an IFQ program (an option currently prohibited under the Magnuson-Stevens Act), regardless of how the available catch were allocated between permits, each permit owner would likely be able to catch his or her entire allocation at any time during the year, and likely without landings limits.

Comment 27: The three-tier program complies with section 303(b)(6) of the Magnuson-Stevens Act, which states that, ''Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may — (6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—(A) present participation in the fishery, (B) historical fishing practices in, and dependence on, the fishery, (C) the economics of the fishery, (D) the capability of fishing vessels used in the fishery to engage in other fisheries, (E) the cultural and social framework relevant to the fishery and any affected fishing communities, and (F) any other relevant considerations.'' In making its recommendations for this program, the Council considered all of the factors required under this section and, has therefore, met the requirements of this section.

Response: NMFS agrees, see also response to Comment 2.

Comment 28: As stated in the proposed rule for the three-tier program, the Council initially decided not to allow permit owners with permits that were the result of a combination of multiple permits to determine their tier placement based on the combined catch histories of those original permits. This decision was based on a study that showed that no individuals currently operating in the fishery would be affected by that restriction. After further study, however, analysts showed that this first assumption was incorrect and that this decision would negatively affect a few individuals who had combined their permits long before discussions of the three-tier program. We the commenters who would have been harmed by this action, supported the Council's March 1998 recommendation to allow permits that were a result of a combination made before March 12, 1998, to combine their cumulative catch histories for tier qualification status.

Response: NMFS agrees. The Council's initial recommendation on this issue was based on an incorrect analysis. After receiving more complete information, the Council revised that recommendation to allow permits that were the result of a combination of multiple permits to receive tier placement based on the combined cumulative catch histories of the permits that went into the combination. Regulatory language detailed in the proposed rule has been changed to reflect public and Council comments on this issue.

Comment 29: One commenter supports the three-tier program, but would like to be allowed to set his pots for 24 hours before the opening of the regular fishery, since it takes at least 48 hours for him to set all of his pots.

Response: As stated in the response to Comment 7, in 1995 and 1996, pot fishers were allowed to set their gear before the start of the regular fishery. Longliners were opposed to this practice because it gave pot fishers the chance to choose and then monopolize premium fishing ground positions before the start of the derby. Because of these concerns and because the 1997 10-day fishery period was expected to provide all pot gear participants with sufficient time to set and tend their gear, this pot pre-set

option was not allowed in the 1997 regular fishery. The Council reconsidered a pot pre-set allowance for the three-tier system, but concluded that the tiered cumulative limits would constrain pot fisher catch levels enough so that they would not need to fish at a speed that would require a pre-set allowance.

Comment 30: Several commenters who have participated in and/or have studied the Alaska halibut and sablefish IFQ program support future consideration of an IFQ program in the fixed gear sablefish fishery once the Magnuson-Stevens Act moratorium is lifted.

Response: A Council may not submit and the Secretary may not approve or implement an IFQ program before October 1, 2000. However, a Council may begin development of an IFQ program before that date.

Comment 31: The proposed rule would not implement an IFQ system. Under the Magnuson-Stevens Act and NMFS interpretation, for a program to be an IFQ program, it must grant permits that give recipients a privilege to harvest a specified percentage of the total annual catch (TAC). Unless sold or otherwise disposed of, that permit holder has an annual, guaranteed privilege to harvest that same percentage of the TAC. With the three-tier program, no person is guaranteed a percent of the harvest, fishers are merely separated into three different tiers with three different cumulative limits that they can then try to achieve in the given season. The ''overhead'' system embedded in the rule ensures that this program is not an IFQ system. The proposed rule would ensure that there is no guaranteed right to a specific amount of fish—the antithesis of an IFQ system.

Response: NMFS agrees that the three-tier program is not an IFQ program. See response to Comment 9.

Classification

Under 5 U.S.C. 553(d)(3), the Assistant Administrator finds good cause to waive the 30-day delay in effectiveness for this rule. August 1 was chosen as a season opening date to promote safety and to allow fishers to participate in other fisheries aside from this directed sablefish fishery. In order to avoid a 2 to 3 day derby fishery this year and to allow the limited entry fixed gear sablefish fishery to fully benefit from the increased vessel safety of holding the regular and consequent mop-up seasons before the most difficult autumn weather, this rule must be made effective to allow implementation of the three-tier program before the August 1, 1998, start date of the regular season. To this extent, to delay the effectiveness of this rule would be contrary to the public interest.

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

The Final Regulatory Flexibility Analysis (FRFA) consists of the FRFA supplemental analysis prepared by NMFS, the IRFA (as submitted by the Council and supplemented by the preamble to the proposed rule (63 FR 19878, April 22, 1998)), and the preamble to this final rule. NMFS considers an impact to be ''significant'' if it results in a reduction in annual gross revenues by more than 5 percent, an increase in annual compliance costs of greater than 5 percent, compliance costs at least 10 percent higher for small entities than for large entities, compliance costs that require significant capital expenditures, or the likelihood that 2 percent of the small entities would be forced out of business. NMFS considers a ''substantial number'' of small entities to be more than 20 percent of those small entities affected by the regulation that are engaged in the fishery.

There are 163 limited entry, fixed gear permit owners with sablefish endorsements. All of the permit owners and vessels in the Pacific Coast, limited entry, fixed gear fleet are considered small entities. As indicated in the FRFA for this action, 42 permit holders with sablefish endorsements (26 percent) would suffer a greater than 5 percent loss in total gross fishing revenue over what they would have been expected to earn if the open competition derby management had been continued for 1998.

The Council initially reviewed six different management options aside from status quo, open competition derby management. Of those six options, two options would have resulted in fewer than 26 percent of endorsement holders suffering a greater than 5 percent loss in gross annual revenue. The Council considered continuing the status quo derby undesirable, expecting that a future policy of unrestricted derby fishing would cause significant negative social and economic impacts to fishery participants, with potentially grave safety consequences. An option to continue the 1997 style fishery management of a single period equal cumulative limit regime would have resulted in 18 percent of endorsement holders suffering a greater than 5 percent loss in total gross annual revenue. Although this option would have resulted in fewer businesses with significant economic loss, those businesses that would have lost economically under this option would have lost revenue to a greater degree than those businesses losing revenue under any of the tier options. This option would have also resulted in a greater proportion of the harvest being reallocated amongst fleet members than the proportion of harvest reallocation under the three-tier management program implemented by this rule. There is a higher likelihood that a management measure to implement a long-term policy of equal cumulative limits would have been found to have significant economic impacts to fleet participants on the basis of the standard that questions whether more than 2 percent of participating small businesses would have been forced to cease operations. Thus, while the option chosen by the Council results in a greater number of businesses with significant economic losses, the impacts of that option are spread more evenly through the fleet. The Council also specifically decided when it recommended a single period equal cumulative limit for 1997 that it would not recommend continuing such an option for 1998 because of the severe reallocative impacts.

The other option that would have resulted in fewer than 26 percent of permit owners suffering a greater than 5 percent loss in gross annual revenue was a four-tiered access system. This option was projected as leading to greater than a 5 percent loss in gross annual revenue for 22 percent of permit holders with sablefish endorsements. One major impediment to Council recommendation of a four-tiered option was that maintaining an overhead to prevent designation as an IFQ system would have been more difficult under a four-tiered option. The greater the number of tiers in a tiered access system, the more likely it is that fishers will be able to achieve their tier limits, and the greater the likelihood that the agency would find the program to function as an IFQ. In an IFQ fishery, all fishers would be allowed to use as much time as necessary to catch whatever cumulative limits are available for the year. The Council chose the option that would have the least impact on fishers' revenues while still maintaining enough overhead to avoid the NMFS IFQ classification criteria and eliminating derby management.

In addition to the single-period equal cumulative limit fishery, the three-tier options, the four-tier option and the status quo derby, the Council considered setting a year-round series of equal, monthly cumulative limits as an

option that could offer greater safety benefits than the three-tier program. However, a year-round fishery would have resulted in the greatest reallocation of catch among participants, and would have had significant, negative economic consequences for the greatest number of fleet participants. The Council was also concerned that this option would increase discard of sablefish. Finally, the Council expected that the effects of year-round cumulative trip limits in this fishery would be contrary to Magnuson-Stevens Act national standards on fairness and equity, and on providing for sustained participation and minimizing adverse effects on fishing communities.

This action is not expected to result in an increase in annual compliance costs of greater than 5 percent, compliance costs at least 10 percent higher for small entities than for large entities, compliance costs that require significant capital expenditures, or the likelihood that 2 percent of the small entities will be forced out of business.

In summary, all of the affected entities are small entities. Therefore, there are no special provisions that can be inserted to affect small entities differently than large entities. The losses from one small entity turn to gains for another small entity. In order to eliminate the traditional, unrestricted derby fishery, some small entities will suffer negative economic impacts. The Council selected the legally-available option that would eliminate the traditional unrestricted derby, while minimizing the reallocation of catch.

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) that has been approved by the OMB under OMB Control Number 0648–0203. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number. This rule's collection of information burden applies only to those permit owners who disagree with the initial NMFS tier assignment, and who wish to provide documentation to prove that they have in fact met the tier qualifications for the tier that they wish to have assigned to their permits. It is expected that the public reporting burden will be 2 hours to make an initial application and possible appeal. This is a one-time only collection-of-information, and this rule imposes no annual reporting and recordkeeping burden. Send comments regarding the collection-of-information burden or any other aspect of the information collection to NMFS and OMB (see **ADDRESSES**).

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: July 9, 1998.

David L. Evans,

Deputy Assistant Administrator for Fisheries, 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 660.323 is amended by revising paragraph (a)(2) to read as follows:

§ 660.323 Catch restrictions.

(a) * * *

(2) *Nontrawl sablefish*. This paragraph (a)(2) applies to the regular and mop-up seasons for the nontrawl limited entry sablefish fishery north of 36° N. lat., except for paragraphs (a)(2)(ii), (iv), and (vii) of this section, which also apply to the open access fishery north of 36° N. lat. Limited entry and open access fixed gear sablefish fishing south of 36° N. lat. is governed by routine management measures imposed under paragraph (b) of this section.

(i) *Sablefish endorsement*. A vessel may not participate in the regular or mop-up season for the nontrawl limited entry fishery, unless the vessel's owner holds (by ownership or otherwise) a limited entry permit for that vessel, affixed with both a gear endorsement for longline or trap (or pot) gear, and a sablefish endorsement.

(ii) *Pre-season closure—open access and limited entry fisheries*. (A) Sablefish taken with fixed gear in the limited entry or open access fishery in the EEZ may not be retained or landed during the 48 hours immediately before the start of the regular season for the nontrawl limited entry sablefish fishery.

(B) All fixed gear used to take and retain groundfish must be out of EEZ waters during the 48 hours immediately before the opening of the regular season for the nontrawl limited entry sablefish fishery.

(iii) *Regular season—nontrawl limited entry sablefish fishery*. (A) The Regional Administrator will announce a season for waters north of 36° N. lat. to start on any day from August 1 through September 30, based on consultations with the Council, taking into account tidal conditions, Council meeting dates, alternative fishing opportunities, and industry comments.

(B) During the regular season, each vessel with a limited entry permit with a sablefish endorsement that is registered for use with that vessel may land up to the cumulative trip limit announced for the tier to which the permit is assigned. Each permit will be assigned to one of three tiers. A cumulative trip limit is the maximum amount of sablefish that may be taken and retained, possessed, or landed per vessel in a specified period of time, with no limit on the number of landings or trips.

(C) The Regional Administrator will annually calculate the length of the regular season and the size of the cumulative trip limit for each tier in accordance with the process specified in chapter 1 of the EA/RIR/IRFA for ''Fixed Gear Sablefish Tiered Cumulative Limits,'' dated February 1998, which is available from the Council. The season length and the size of the cumulative trip limits will vary depending on the amount of sablefish available for the regular and mop-up fisheries and the projected harvest for the fishery. The season will be set to be as long as possible, under the constraints described in chapter 1 of the EA/RIR/IRFA, up to a maximum season length of 10 days.

(D) During the regular and mop-up season, limited entry nontrawl sablefish fishers may also be subject to trip limits to protect juvenile sablefish.

(E) There will be no limited entry, daily trip limit fishery during the regular season.

(iv) *Post-season closure—limited entry and open access*. No sablefish taken with fixed gear north of 36° N. lat. during the 30 hours immediately after the end of the regular season for the nontrawl limited entry sablefish fishery, may be retained. Sablefish taken and retained during the regular season may be possessed and landed during the 30–hour period. Gear may remain in water during the 30–hour post-season closure. Fishers may not set or pull from the water fixed gear used to take and retain groundfish during the 30–hour post-season closure.

(v) *Mop-up season—limited entry fishery*. A mop-up season to take the remainder of the limited entry nontrawl allocation will begin in waters north of

36° N. lat. about 3 weeks, or as soon as practicable, after the end of the regular season. During the mop-up fishery, a cumulative trip limit will be imposed. A cumulative trip limit is the maximum amount of sablefish that may be taken and retained, possessed, or landed per vessel in a specified period of time, with no limit on the number of landings or trips. The length of the mop-up season and the amount of the cumulative trip limit, will be determined by the Regional Administrator in consultation with the Council or its designees, and will be based primarily on the amount of fish remaining in the limited entry nontrawl allocation, the amount of sablefish needed for the remainder of the daily trip limit fishery, and the number of mop-up participants anticipated. The Regional Administrator may determine that too little of the nontrawl allocation remains to conduct an orderly or manageable fishery, in which case there will not be a mop-up season. There will be no limited entry daily trip limit fishery during the mop-up season.

(vi) *Other announcements*. The dates and times that the regular season starts and ends (and trip limits on sablefish of all sizes are resumed), the size of the cumulative trip limits for the three tiers in the regular fishery, the dates and times for the 30–hour post-season closure, the dates and times that the mop-up season begins and ends, and the size of the cumulative trip limit for the mop-up fishery will be announced in the **Federal Register**, and may be modified. Unless otherwise announced, these seasons will begin and end at 12 noon on the specified date.

(vii) *Trip limits*. Trip and/or frequency limits may be imposed in the limited entry fishery before and after the regular season, and after the mop-up season, under paragraph (b) of this section. Trip and/or size limits to protect juvenile sablefish in the limited entry or open-access fisheries also may be imposed at any time under paragraph (b) of this section. Trip limits may be imposed in the open-access fishery at any time under paragraph (b) of this section.

* * * * *

3. In § 660.333, the first sentence of paragraph (c)(1), paragraphs (d) introductory text, (f)(2), and (h)(2)(iii) are revised to read as follows:

§ 660.333 Limited entry fishery—general.

* * * * *

(c) *Transfer and registration of limited entry permits and gear endorsements*. (1) When the SFD transfers a limited entry permit, the SFD will reissue the permit in the name of the new permit holder with such gear and, if applicable, species endorsements and tier assignments as are eligible for transfer with the permit. * * *

* * * * *

(d) *Evidence and burden of proof*. A vessel owner (or person holding limited entry rights under the express terms of a written contract) applying for issuance, renewal, transfer, or registration of a limited entry permit has the burden to provide evidence that qualification requirements are met. The owner of a permit endorsed for longline or trap (or pot) gear applying for a sablefish endorsement or a tier assignment under § 660.336(c) or (d) has the burden to submit evidence to prove that qualification requirements are met. The following evidentiary standards apply:

* * * * *

(f) * * *

(2) Gear endorsements, sablefish endorsements, and sablefish tier assignments may not be transferred separately from the limited entry permit.

* * * * *

(h) * * *

(2) * * *

(iii) Two or more limited entry permits with ''A'' gear endorsements for the same type of limited entry gear may be combined and reissued as a single permit with a larger size endorsement. With respect to permits endorsed for nontrawl limited entry gear, a sablefish endorsement will be issued for the new permit only if all of the permits being combined have sablefish endorsements. If two or more permits with sablefish endorsements are combined, the new permit will receive the same tier assignment as the tier with the largest cumulative landing limit of the permits being combined. The vessel harvest capacity rating for each of the permits being combined is that indicated in Table 2 of this part for the LOA (in feet) endorsed on the respective limited entry permit. Harvest capacity ratings for fractions of a foot in vessel length will be determined by multiplying the fraction of a foot in vessel length by the difference in the two ratings assigned to the nearest integers of vessel length. The length rating for the combined permit is that indicated for the sum of the vessel harvest capacity ratings for each permit being combined. If that sum falls between the sums for two adjacent lengths on Table 2 of this part, the length rating shall be the higher length.

* * * * *

4. In § 660.336, the section heading paragraphs (a)(1), (a)(2), (b) introductory text, (b)(1), (c) heading, and paragraph (c)(1), are revised; and paragraphs (b)(3), (d), and (e) are added to read as follows:

§ 660.336 Limited entry permits—sablefish endorsement and tier assignment.

(a) * * *

(1) A sablefish endorsement with a tier assignment will be affixed to the permit and will remain valid when the permit is transferred.

(2) A sablefish endorsement and its associated tier assignment are not separable from the limited entry permit, and therefore may not be transferred separately from the limited entry permit.

(b) *Endorsement and tier assignment qualifying criteria*. A sablefish endorsement will be affixed to any limited entry permit that meets the sablefish endorsement qualifying criteria and for which the owner submits a timely application. Limited entry permits with sablefish endorsements will be assigned to one of three different cumulative trip limit tiers, based on the qualifying catch history of the permit.

(1) Permit catch history will be used to determine whether a permit meets the qualifying criteria for a fixed gear sablefish endorsement and to determine the appropriate tier assignment for endorsed permits. Permit catch history includes the catch history of the vessel(s) that initially qualified for the permit, and subsequent catch histories accrued when the limited entry permit or permit rights were associated with other vessels. The catch history of a permit also includes the catch of any interim permit held by the current owner of the permit during the appeal of an initial NMFS decision to deny the initial issuance of a limited entry permit, but only if the appeal for which an interim permit was issued was lost by the appellant, and the owner's current permit was used by the owner in the 1995 limited entry sablefish fishery. The catch history of an interim permit where the full ''A'' permit was ultimately granted will also be considered part of the catch history of the ''A'' permit. If the current permit is the result of the combination of multiple permits, then for the combined permit to qualify for an endorsement, at least one of the permits that were combined must have had sufficient sablefish history to qualify for an endorsement; or the permit must qualify based on catch occurring after it was combined, but taken within the qualifying period. If the current permit is the result of the combination of multiple permits, the combined catch histories of all of the permits that were combined to create a new permit before March 12, 1998, will

be used in calculating the tier assignment for the resultant permit, together with any catch history (during the qualifying period) of the resultant permit. Only sablefish catch regulated by this part that was taken with longline or fish trap (or pot) gear will be considered for this endorsement. Sablefish harvested illegally or landed illegally will not be considered for this endorsement.

* * * * *

(3) Only limited entry, fixed gear permits with sablefish endorsements will receive cumulative trip limit tier assignments. The qualifying criteria for Tier 1 are: At least 898,000 lb (406,794 kg) cumulative round weight of sablefish caught with longline or trap (or pot) gear over the years 1984 through 1994. The qualifying criteria for Tier 2 are: At least 380,000 lb (172,365 kg), but no more than 897,999 lb (406,793 kg) cumulative round weight of sablefish caught with longline or trap (or pot) gear over the years 1984 through 1994. Fixed gear permits with less than 380,000 lb (172,365 kg) cumulative round weight of sablefish caught with longline or trap (or pot) gear over the years 1984 through 1994 qualify for Tier 3. All catch must be sablefish managed under this part. Sablefish taken in tribal set aside fisheries does not qualify.

(c) *Issuance process for sablefish endorsements*. (1) The SFD has notified each limited entry, fixed gear permit holder, by letter of qualification status, whether Pacific States Marine Fisheries Commission's Pacific Fisheries Information Network (PacFIN) records indicate that his or her permit qualifies for a sablefish endorsement. A person who has been notified by the SFD, by letter of qualification status, that his or her permit qualifies for a sablefish endorsement will be issued a revised limited entry permit with a sablefish endorsement if, by November 30, 1998, that person returns to the SFD the endorsement application and pays the one-time processing fee. No new applications for sablefish endorsements will be accepted after November 30, 1998.

* * * * *

(d) *Issuance process for tier assignments*. (1) The SFD will notify each owner of a limited entry permit with a sablefish endorsement, by letter of qualification status, of the tier assignment for which his or her permit qualifies, as indicated by PacFIN records. The SFD will also send to the permit owner a tier assignment certificate.

(2) If a permit owner believes there is sufficient evidence to show that his or her permit qualifies for a different tier than that listed in the letter of qualification status, that permit owner must, within 30 days of the issuance of the SFD's letter of qualification status, submit information to the SFD to demonstrate that the permit qualifies for a different tier. Section 660.333(d) sets out the relevant evidentiary standards and burden of proof.

(3) After review of the evidence submitted under paragraph (d)(2) of this section, and any additional information the SFD finds to be relevant, the SFD will issue a letter of determination notifying a permit owner of whether the evidence submitted is sufficient to alter the initial tier assignment. If the SFD determines the permit qualifies for a different tier, the permit owner will be issued a revised tier assignment certificate once the initial certificate is returned to the SFD for processing.

(4) If a permit owner chooses to file an appeal of the determination under paragraph (d)(3) of this section, the appeal must be filed with the Regional Administrator within 30 days of the issuance of the letter of determination (at paragraph (d)(3) of this section). The appeal must be in writing and must allege facts or circumstances, and include credible evidence demonstrating why the permit qualifies for a different tier assignment. The appeal of a denial of an application for a different tier assignment will not be referred to the Council for a recommendation under § 660.340(e).

(5) Absent good cause for further delay, the Regional Administrator will issue a written decision on the appeal within 30 days of receipt of the appeal. The Regional Administrator's decision is the final administrative decision of the Department of Commerce as of the date of the decision.

(e) *Tier assignment certificates*. For the 1998 season only, permit holders with sablefish endorsements will be issued certificates of tier assignment that are to be kept with and are considered part of their limited entry permits. When limited entry permit holders renew their permits for 1999, tier assignments for those limited entry permit holders with sablefish endorsements will be indicated directly on the limited entry permit.

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