

below, comply with the EVMS requirements of this clause as follows:

(1) For subcontracts with an estimated dollar value of \$50M or more, the following subcontractors shall comply with the requirements of this clause.

(Contracting Officer to insert names of subcontractors or subcontracted effort).

(2) For subcontracts with an estimated dollar value of less than \$50M, the following subcontractors shall comply with the requirements of this clause except for the requirement in paragraph (b), if applicable, to obtain compliance/validation.

(Contracting Officer to insert names of subcontractors or subcontracted effort.)

(g) If the contractor identifies a need to deviate from the agreed baseline by working against an Over Target Baseline (OTB) or Over Target Schedule (OTS), the contractor shall submit to the Contracting Officer a request for approval to begin implementation of an OTB or OTS. This request shall include a top-level projection of cost and/or schedule growth, whether or not performance variances will be retained, and a schedule of implementation for the reprogramming adjustment. The Government will approve or deny the request within 30 calendar days after receipt of the request. Failure of the Government to respond within this 30-day period constitutes approval of the request. Approval of the deviation request does not constitute a change, or the basis for a change, to the negotiated cost or price of this contract, or the estimated cost of any undefinitized contract actions.

(End of clause)

#### (Alternate I) (NOV 2006)

As prescribed in 1834.203-70(b), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) If, at the time of award, the Contractor's EVMS has not been determined by the Cognizant Federal Agency to be compliant with the EVMS guidelines, or the Contractor does not have an existing cost/schedule control system that is compliant with the guidelines in the ANSI/EIA-748 Standard (current version at the time of award), the Contractor shall apply the system to the contract and shall take timely action to implement its plan to be compliant with the guidelines. The Government will not formally validate/accept the Contractor's EVMS with respect to this contract. The use of the Contractor's EVMS for this contract does not imply Government acceptance of the Contractor's EVMS for application to future contracts. The Government will monitor compliance through routine surveillance.

#### 1852.242-74 through 1852.242-77 [Removed]

■ 6. Sections 1852.242-74, 1852.242-75, 1842.242-76, and 1852.242-77 are removed.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 060609159-6272-02; I.D. 060606A]

RIN 0648-AU12

#### Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Amendment 18

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement Amendment 18 to the Pacific Coast Groundfish Fishery Management Plan (FMP). Amendment 18 responds to a court order by setting the Pacific Fishery Management Council's (Council's) bycatch minimization policies and requirements into the FMP.

**DATES:** Effective December 13, 2006.

**ADDRESSES:** Amendment 18 is available on the Council's Web site at: <http://www.pcouncil.org/groundfish/gffmp.html>.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

The proposed and final rules for this action are accessible via the Internet at the Office of the Federal Register's Web site at: <http://www.gpoaccess.gov/fr/index.html>. The FEIS on bycatch mitigation is available on the NMFS Northwest Region Web site at: <http://www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/NEPA-Documents/Programmatic-EIS.cfm> and at the Council's Web site at <http://www.pcouncil.org>.

##### Background

Amendment 18 revised the FMP to set the Council's bycatch minimization

policies and requirements into the FMP. Amendment 18 responds to court orders in *Pacific Marine Conservation Council v. Evans*, 200 F.Supp.2d 1194 (N.D. Calif. 2002) [hereinafter *PMCC v. Evans*]. This final rule implements the following actions: require that groundfish fishery management measures take into account the co-occurrence ratios of overfished species with more abundant target stocks; require vessels that participate in the open access groundfish fisheries to carry observers if directed by NMFS; authorize the use of depth-based closed areas as a routine management measure for protecting and rebuilding overfished stocks, preventing the overfishing of any groundfish species, minimizing the incidental harvest of any protected or prohibited non-groundfish species, controlling effort to extend the fishing season, minimizing the disruption of traditional commercial fishing and marketing patterns, spreading the available recreational catch over a large number of anglers, discouraging target fishing while allowing small incidental catches to be landed, and allowing small fisheries to operate outside the normal season; update the boundary definitions of the Klamath and Columbia River Salmon Conservation Zones and Eureka nearshore area to use latitude and longitude coordinates in a style similar to that of the Groundfish Conservation Areas (GCAs); and, allow species to be identified for sorting prior to landing if there is a scientific need for those species to be separately identified upon landing.

A Notice of Availability for Amendment 18 was published on June 9, 2006 (71 FR 33432). NMFS requested comments on the amendment under the Magnuson-Stevens Act FMP amendment review provisions for a 60-day comment period, ending August 8, 2006. A proposed rule was published on June 27, 2006 (71 FR 36506), requesting public comment through August 8, 2006. During the Amendment 18 and proposed rule comment period, NMFS received two letters of comment. These letters are addressed later in the preamble to this final rule. The preamble to the proposed rule for this action provides additional background information on the fishery and on this final rule. Further detail on Amendment 18 also appears in the bycatch mitigation FEIS, referenced above under "Electronic Access." After consideration of the public comments received on the amendment, NMFS approved Amendment 18 on September 6, 2006.

## Comments and Responses

NMFS received two letters of comment on the proposed rule to implement Amendment 18: one letter was jointly sent by four environmental advocacy organizations, and one letter was sent by the Washington Department of Fish and Wildlife (WDFW). These comments are addressed here:

*Comment 1:* WDFW believes that groundfish species sorting requirements at § 660.306 need to be expanded so that managers may better quantify total catch for some species that are part of the FMP, but which are not required to be sorted because they lack species-specific trip limits, size limits, harvest guidelines, quotas, or optimum yields (OYs). Skates (*Raja* spp.) serve as an example of species for which broadening sorting requirements could greatly improve total catch accounting. There are several West Coast skate species and they are often landed with their wings removed, making these animals particularly difficult to identify by species when they are landed unsorted. Allowing NMFS to designate, upon recommendation by the Council, certain species as required to be sorted under a scientific sorting designation would allow science and management agencies to better assess populations of some of the less commonly caught species within the groundfish complex. Therefore, WDFW suggests that Federal regulations at § 660.306(a)(7) and § 660.370(h)(6) be revised to require that, in addition to other sorting requirements, vessels sort species with “scientific sorting designation.”

*Response:* NMFS agrees that WDFW’s suggestion will be beneficial to improving total catch information on less commonly caught species. The suggested revision to Federal regulations supports language added to the FMP via Amendment 18, found at Section 6.4.1.2, on Commercial Fisheries total catch reporting methodology, “Catch weight by sorted species category, area of catch, vessel identification number, and other data elements are required on fish tickets. Landings are also sampled in port by State personnel, who collect species composition data, otoliths for ageing, lengths, and other biological data. \* \* \* All landings of groundfish stocks of concern (overfished stocks and stocks below  $B_{MSY}$ ) and target stocks and stock complexes in West Coast fisheries are tracked in Quota Species Monitoring reports of landed catch.” NMFS anticipates that WDFW’s suggestion will allow the Council to target particular stocks for improved species-specific data gathering, and to potentially

address a management challenge identified under Section 4.3.3 of the FMP, the inability to conduct species-specific stock assessments on fish stocks without species-specific landings data. Therefore, this final rule includes WDFW’s suggested modification to Federal framework regulations at § 660.306(a)(7) and § 660.370(h)(6). No species would be added through this action to the lists at § 660.370(h)(6)(i)–(ii) that designate the species and species groups currently required to be sorted. Species required to be sorted via a scientific sorting designation would be considered through the Council process and through a future Federal rulemaking.

*Comment 2:* The commenting organizations (Natural Resources Defense Council, Pacific Marine Conservation Council, Oceana, and The Ocean Conservancy, hereinafter “The Four Organizations”) generally agree with the Council’s three-part bycatch minimization strategy of: Improving data collection and analysis; improving modeling to better correlate bycatch rates with time, place, and gear type; and developing management measures that minimize bycatch and bycatch mortality. However, for reasons explained in subsequent comments, below, they do not believe that Amendment 18 satisfies the requirements of the Magnuson-Stevens Act and other applicable laws. Pursuant to 16 U.S.C. 1854(a)(3), they call on NMFS to disapprove portions of Amendment 18 on the following grounds: (1) The failure to adopt all practicable bycatch minimization measures; (2) the failure to articulate why certain measures adopted as part of the Council’s preferred alternative have been deemed impracticable and thus dismissed from implementation at this time; (3) the failure to provide objectives and targets for implementing currently impracticable measures, or to include performance standards and measurable criteria for determining progress towards reducing bycatch; (4) an inadequate standardized total catch reporting (and observer) program; and (5) other reasons explained below.

*Response:* The Magnuson-Stevens Act at 16 U.S.C. 1854(a)(3) requires that “The Secretary [of Commerce] shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period [on the FMP or FMP amendment] by written notice to the Council.” NMFS sent written notice to the Council on September 6, 2006 that the agency had fully approved Amendment 18 to the FMP, prior to the Magnuson-Stevens Act’s 30-day deadline from the end of

the comment period. NMFS approved Amendment 18, after taking into account all comments received, because it revises the FMP to meet the requirements of the Magnuson-Stevens Act to minimize bycatch to the extent practicable, and to provide a standardized bycatch reporting methodology. As discussed in the proposed rule for this action, Amendment 18 significantly revised Chapter 6 of the FMP, “Management Measures” to address the bycatch monitoring and minimization requirements of the Magnuson-Stevens Act. With Amendment 18’s revisions, the FMP sets a high priority on bycatch minimization and requires the use of practicable bycatch minimization measures, including: A total catch reporting and compliance program (Section 6.4); bycatch mitigation measures to be implemented if practicable, such as full retention programs, sector-specific and vessel-specific total catch limit programs, and catch allocation to or gear flexibility for gear types with lower bycatch rates (Section 6.5); gear definitions and restrictions (Section 6.6); catch restrictions such as quotas, size limits, trip limits, and bag limits (Section 6.7); time/area closures for bycatch mitigation and habitat protection (Section 6.8); capacity control measures such as permits and licenses (Section 6.9); and enforcement and safety standards (Section 6.10). The FMP at 6.5.1 states that “The Council has all of the management measures detailed in Sections 6.5–6.10 at its disposal to manage directed catch and reduce bycatch of groundfish species in the groundfish fisheries. Because of the interaction among the various species and the regular incorporation of new information into the management system, the details of the specific measures will change over the years, or within years, based on the best available science. Management measures will be designed taking into account the co-occurrence ratios of target stocks with overfished stocks. To protect overfished species and minimize bycatch through reducing incidental catch of those species, the Council will particularly use, but is not limited to: Catch restrictions detailed in Section 6.7 to constrain the catch of more abundant stocks that commingle with overfished species, in times and areas where higher abundance of overfished species are expected to occur; time/area closures detailed in Section 6.8 and designed to prevent vessels from operating during times when or in areas where overfished species are most vulnerable to a

particular gear type or fishery; and gear restrictions described in Section 6.6, where that gear restriction has been shown to be practicable in reducing overfished species incidental catch rates." The groundfish FMP addresses over 90 species; its management area spans the length of the U.S. West Coast; and its fisheries affecting groundfish range from treaty tribal ceremonial fisheries, to commercial fisheries with international markets varying from elite delicacies to mass-market surimi, to family weekend sport fishing trips. The diverse array of management measures required in the FMP for bycatch mitigation reflects the Council's philosophy that there is not one single solution for minimizing bycatch in such a diverse set of fisheries, and that addressing bycatch is an ongoing process.

NMFS notes that although The Four Organizations requested partial disapproval of Amendment 18, their comments did not specify which sections of Amendment 18 they wished NMFS to disapprove. The Four Organizations also state that "NMFS must reject the portions of the proposed rule implementing Amendment 18 that fail to comply with the bycatch requirements of the Magnuson-Stevens Act, and the reasoned decision-making standard of the Administrative Procedures Act (APA)." The Four Organizations elaborated on each of the five points on which they based their request that NMFS disapprove portions of Amendment 18. NMFS has approved all of Amendment 18 and its implementing regulations because they are consistent with the Magnuson-Stevens Act and other applicable laws. NMFS responds below to both the general and detailed comments of The Four Organizations, which they had summarized as stated in Comment 2 as the introduction to their letter.

*Comment 3:* The Four Organizations believe that Amendment 18 fails to adopt all practicable management measures. The Magnuson-Stevens Act requires that NMFS implement all "practicable" bycatch minimization measures (16 U.S.C. 1853(a)(11).) Although NMFS has some discretion in determining which measures are practicable, mere "[i]nconvenience is not an excuse" for finding a particular measure impracticable (63 FR 24212 at 24224, May 1, 1998—Preamble to National Standard Guidelines.) The only bycatch minimization measures required by Amendment 18—(1) Gear restrictions found in FMP Section 6.6; (2) catch restrictions found in FMP Section 6.7; and (3) time-area closures contained in FMP Section 6.8—have

already been part of the status quo management of the fishery for several years. All other measures remain discretionary or are deemed not yet practicable. Thus, the only measures that the Council considers to be practicable in 2006 are those that have comprised the status quo since prior to the decision in *PMCC v. Evans*.

*Response:* As discussed in the preamble to the proposed rule for this action, *PMCC v. Evans* addressed Amendment 13, which NMFS approved on December 31, 2001. The Four Organizations are incorrect in asserting that the Council only considers measures implemented in 2001 and earlier to be practicable in 2006. NMFS provided a list of bycatch management measures required by the FMP, via Amendment 18, in the response to Comment 2, above. Since 2001, and in response to the Court's decision in 2002 on Amendment 13, NMFS and the Council have evaluated and implemented numerous new bycatch minimization measures through the FMP's framework authority. The following list of measures implemented since 2001 does not include either the Amendment 18 regulations or those additional bycatch minimization measures that NMFS has proposed to be implemented for the 2007–2008 groundfish fisheries via the groundfish specifications and management measures process (71 FR 57764, September 29, 2006):

#### *Standardized Total Catch Reporting Methodologies*

- Requirement for participants in the West Coast groundfish fisheries to carry one or more Federal observers onboard their vessels. Observer program regulations implemented May 24, 2001 (66 FR 20609, April 24, 2001).

- NMFS's West Coast Groundfish Observer Program (WCGOP) begins placing observers on vessels that participate in the groundfish fisheries in Federal waters (August 2001).

- NMFS first uses a bycatch model, populated by data from historical experiments, to set groundfish trip limits that vary by time of year and depth, in accordance with co-occurrence ratios in the bycatch model (67 FR 1555, January 11, 2002).

- NMFS completes analysis of first year's worth of data from WCGOP in January 2003 (<http://www.nwfsc.noaa.gov/research/divisions/fram/observer/dareport/trawl/dareportjan2003.cfm>)

- NMFS approves Amendment 16–1 to the FMP on November 13, 2003. In addition to setting a framework for incorporating overfished species

rebuilding plans into the FMP, Amendment 16–1 revises the FMP to make a groundfish observer program a mandatory tool in fishery management (69 FR 8861, February 26, 2004).

- NMFS reconstructs groundfish fishery bycatch model and populates it with WCGOP data to model species co-occurrence ratios, plus trip limit and depth-based management regimes for the 2004 fishing year, effective January 1, 2004 (69 FR 1380, January 8, 2004).

- Requirement for at-sea processors and catcher-processors to carry one or more Federal observers onboard their vessels implemented July 7, 2004. These vessels had previously been carrying observers voluntarily for their participation in the at-sea whiting fishery, but NMFS viewed mandatory coverage as needed in order to ensure observer data integrity (69 FR 31751, June 7, 2004).

#### *Fleet-Size/Effort Reduction (With Direct or Indirect Bycatch Minimization Effects)*

- Restriction on the frequency of limited entry permit transfers in order to restrict the number of vessels that may use a permit within a calendar year implemented August 1, 2001 (66 FR 40918, August 6, 2001).

- Amendment 14 to the FMP, program to consolidate limited entry sablefish fleet by allowing vessels to stack up to three permits on the same vessel, implemented August 2, 2001 (66 FR 41152, August 7, 2001). Between 2001 and the present, fleet size reduced by approximately 50 percent.

- Limited entry trawl permit and vessel buyback program; fleet size reduced by 34 percent between July and December 2003 (68 FR 42613, July 18, 2003).

- The Council announces its intent to consider implementing an individual quota program for the limited entry trawl fishery, setting a control date for considerations of qualifying catch (69 FR 1563, January 9, 2004).

- The Council announces its intent to consider a license limitation program for the open access fishery, setting a control date for considerations of qualifying catch (**Federal Register** publication anticipated by November 15, 2006).

#### *Marine Areas Closed to Fishing*

- Eastern and Western Cowcod Conservation Areas implemented in Southern California Bight, January 5, 2001 (66 FR 2338, January 11, 2001).

- Darkblotched Rockfish Conservation Area (RCA) implemented for trawlers operating north of Cape Mendocino, CA for the months of

September–December 2002 (67 FR 57973, September 13, 2002).

- Darkblotched RCA replaced with coastwide (U.S. border with Canada to U.S. border with Mexico) RCAs for commercial fisheries, primarily closing fishing on the continental shelf (68 FR 908, January 7, 2003, and 68 FR 11182, March 7, 2003).
- Yelloweye Rockfish Conservation Area implemented off Washington coast (68 FR 908, January 7, 2003, and 68 FR 11182, March 7, 2003).
- Vessel monitoring system requirements for limited entry fleet implemented January 1, 2004 (68 FR 62374, November 4, 2003).
- Recreational fisheries first subject to RCAs and depth-based management (69 FR 1322, January 8, 2004, and 69 FR 11064, March 9, 2004).
- NMFS establishes for the 2005 Pacific whiting fishery, via emergency rule, the Ocean Salmon Conservation Zone, closing the whiting fishery shoreward of the 100-fm depth contour (70 FR 51682, August 31, 2005).
- NMFS implements 51 new closed areas within the West Coast Exclusive Economic Zone for the protection of groundfish Essential Fish Habitat (71 FR 27408, May 11, 2006.)

#### *Gear Restrictions or Incentives*

- Differential trip limits are introduced for vessels using small footrope gear, intended to discourage fishing in areas where nearshore and shelf rockfish occur, January 5, 2001 (66 FR 2338, January 11, 2001.)
- Selective flatfish trawl gear required for trawl vessels operating shoreward of the RCAs and north of Cape Mendocino, CA, effective January 1, 2005 (69 FR 77012, December 23, 2004.)

*Comment 4:* The Four Organizations believe that Amendment 18 fails to adopt all practicable management measures. According to the bycatch mitigation EIS, the preferred alternative that Amendment 18 purports to implement would: “primarily use sector allocations and reward those sectors with the best bycatch minimization performance. It would encourage individual vessels to carry observers at the vessel’s expense and provide larger trip limits for those vessels, in combination with catch limits for overfished species. Those vessels that participate would be exempted from the sectors and not be closed if a sector were closed.”

*Response:* The Four Organizations have quoted a discussion of a portion of the preferred alternative from the EIS’s Executive Summary, not the preferred alternative itself, which the Council developed to incorporate elements from

several of the EIS’s alternatives. NMFS addresses sector bycatch caps in its responses to Comments 5 and 6. Here, NMFS provides the text of the preferred alternative, so that readers may be clear as to the precise wording:

“Create a new Alternative 7 that includes elements of Alternatives 1, 4, and 5. Elements from Alternative 1 that would be included in Alternative 7 would be all current programs for bycatch minimization and management, including but not limited to: setting optimum yield specifications, gear restrictions, area closures, variable trip and bag limits, season closures, establishing landings limits for target species based on co-occurrence ratios with overfished stocks, etc. The FMP would be amended to more fully describe our standardized reporting methodology program and to require the use of bycatch management measures indicated under Alternative 1 for the protection of overfished and depleted groundfish stocks and to reduce bycatch and bycatch mortality to the extent practicable. These would be used until replaced by better tools as they are developed.

Elements from Alternative 4 that would be included in Alternative 7 would be the development and adoption of sector-specific caps for overfished and depleted groundfish species where practicable. We anticipate phasing in sector bycatch caps that would include: Monitoring standards, full retention programs, and individual vessel incentives for exemption from caps.

Elements of Alternative 5 that would be included in Alternative 7 would be the support of future use of Individual Fishing Quota programs for appropriate sectors of the fishery. The FMP would incorporate the Strategic Plan’s goal of reducing overcapacity in all commercial fisheries. Additionally, baseline accounting of bycatch by sector shall be established for the purpose of establishing future bycatch program goals.”

*Comment 5:* The Four Organizations believe that Amendment 18 fails to adopt all practicable management measures. They believe that NMFS must implement hard bycatch caps for all sectors targeting Pacific groundfish. Continued delay in setting hard caps and other important bycatch reduction measures is irresponsible, because it promotes overfishing and fails to promote a more efficient and thus more profitable fishery. Hard caps, along with rapid inseason management responses and robust monitoring, are necessary to prevent exceeding the OY of Pacific groundfish. Absent these measures, they believe that the fisheries risk exceeding

the Acceptable Biological Catch (ABC) and/or OY on a regular basis, as they assert occurred with lingcod, Dover sole, canary rockfish, bocaccio, shortspine thornyheads, and black rockfish in 2003 and with darkblotched rockfish and canary rockfish in 2004. Moreover, from an ecosystem-based perspective, The Four Organizations believe that NMFS must improve the counting and control of bycatch of all marine life since fishing affects not only targeted and overfished species, but also marine ecosystems more broadly.

*Response:* NMFS has determined, as explained below, that “hard” bycatch caps are not practicable at this time. The Four Organizations are incorrect in asserting that hard bycatch caps are necessary to prevent overfishing. While Amendment 18 endorses the use of sector bycatch caps, where practicable, hard bycatch caps are not a prerequisite for preventing overfishing, nor are bycatch caps the sole management measure available to prevent overfishing.

Amendment 18 discusses sector-specific total catch limit programs in Section 6.5.3.2 as follows: “A sector-specific total catch limit program is one in which a fishery sector would have access to a pre-determined (probably through the harvest specifications and management measure process, Section 6.2, C) amount of a groundfish FMU species, stock, or stock complex that would be allowed to be caught by vessels in that sector. Once a total catch limit is attained, all vessels in the sector would have to cease fishing until the end of the limit period, unless the total catch limit is increased by the transfer of an additional limit amount. A sector-specific total catch limit program could be based on either: (1) Monitoring of landed catch and inseason modeling of total catch based on past landed catch and bycatch rates, or (2) monitoring of total catch and real-time delivery of total catch data. If a sector-specific total catch limit program is based on inseason monitoring of landed catch, a sector would close when inseason total catch modeling estimated that the sector had achieved an FMU [Fishery Management Unit] species, stock, or stock complex total catch limit. If a sector-specific total catch limit program is based on inseason monitoring of total catch, a sector would close when inseason total catch monitoring estimated that the sector had achieved an FMU species, stock, or stock complex total catch limit.”

Currently, before the start of a two-year management cycle, the Council and NMFS use projection models incorporating past WCGOP data to set

fishery management measures so that they best reflect the known catch ratios between target and rebuilding species. During each two-year management cycle, new WCGOP data is incorporated into the model and total catch is estimated so that management measures may be revised inseason to keep the fishery within OYs. Following each fishing year, WCGOP data for that year are used for post-season total catch evaluations, and are then used in setting or revising management measures for subsequent fishing years. Taking these three evaluation and implementation steps—pre-season, inseason, and post-season—ensures that NMFS and the Council are using the best available scientific information to minimize bycatch to keep total catch within OYs, and to ensure that management is constantly improved through the use of updated information. The OYs of non-target species serve as total catch limits for those species, although most species are not allocated by sector. If a species is not allocated by sector, a higher-than-predicted catch in one sector may be accounted for by constraining catch in another sector with lower-than-predicted catch for that species.

For example, in summer 2006, the Council used an inseason bycatch limit to ensure that the summer fisheries' incidental catch of canary rockfish remained low enough so that autumn and winter fisheries with incidental rockfish catch would not have to be closed to keep the catch of canary rockfish within its OY, recommending that: "If the catch of canary in the LE bottom trawl sector is projected to reach 7.75 mt of the end of either July or August, NMFS will move the shoreward boundary of the RCA in to the shore north of 40° 10' N. lat. at the end of that month. The Groundfish Management Team will reevaluate management measures relative to canary rockfish at the Council's September meeting." That Council recommendation illustrates the type of bycatch limit that is both possible and effective in groundfish fishery management, a limit that relies on projections from data received inseason, rather than on real-time estimates of the exact amount of catch being taken at a given time. Because the current management system is more flexible than a hard bycatch cap system, it allows overages discovered inseason for one portion of the fishery, or with research catch, to be accommodated with reductions in available bycatch amounts in other portions of the fishery.

Regarding whether overfishing occurred on darkblotched and canary rockfish in 2004, NMFS has recent revised estimates that show overfishing

did not occur. Under the FMP, ABCs for all species are set at the  $F_{MSY}$  level or its proxy the level that, for a particular year, is intended to produce maximum sustainable yield for that species on a continuing basis. OYs for most groundfish species are set below their ABCs. Overfishing occurs when the total catch of a species exceeds that species' ABC. NMFS completed its post-season evaluation of the 2004 fisheries in early 2006. In an analysis by NMFS Northwest Fisheries Science Center dated May 18, 2006, NMFS estimated that overfishing had occurred on darkblotched rockfish in 2004. Subsequently, NMFS determined that some double-counting had occurred in the summarization of landed catches in the May 18, 2006, analysis. A revised analysis of total fishing mortality, or total catch, was published on the Northwest Fisheries Science Center Web site on September 29, 2006. [[http://www.nwfsc.noaa.gov/research/divisions/fram/observer/dareport/docs/revised\\_total\\_fg\\_catch\\_estimation2004.pdf](http://www.nwfsc.noaa.gov/research/divisions/fram/observer/dareport/docs/revised_total_fg_catch_estimation2004.pdf)] Based on the September 29, 2006 analysis, NMFS estimates that no species were subject to overfishing during the 2004 fishing year. The total catch of darkblotched rockfish, which was previously estimated to have exceeded the 240 mt ABC by 1.6 mt, is now estimated to have been 9.1 mt below the ABC. The September 29, 2006, analysis estimates that the 2004 total catch of canary rockfish exceeded the 47.3 mt OY by 0.8 mt. This does not represent overfishing because the total catch was below the ABC of 243 mt. In no other instance did the estimated 2004 total catch of a species exceed that species ABC.

As reported in Table 4–2 in the final EIS for the 2005–2006 groundfish specifications and management measures, estimated 2003 lingcod total catch exceeded the lingcod ABC of 841 mt by 525.6 mt. The lingcod stock, which had previously been listed as overfished, completed its rebuilding ahead of its 2009 anticipated rebuilt date and was announced as rebuilt in 2005. The 2003 shortspine thornyhead estimated total catch exceeded its ABC of 1,004 mt by 216.2 mt. These two species were subject to overfishing, but were protected from overfishing in subsequent years both by a more conservative management regime and by a more consistent total catch calculation methodology between the pre-season period and the inseason management period, as described below. Dover sole, canary rockfish and bocaccio estimated total catch levels exceeded their OYs: Dover sole estimated total catch was

8,342.2 mt, between its 7,440 mt OY and its 8,510 ABC; canary rockfish estimated total catch was 46.8 mt, between its 44 mt OY and its 272 mt ABC; and bocaccio estimated total catch was 29.1 mt, between its 20 mt OY and its 198 mt ABC. Bycatch rate and total catch estimation was particularly challenging in 2003, because NMFS had modeled bycatch rates prior to the fishing year based on pre-WCGOP data, then revised its bycatch rate estimates inseason based on data from WCGOP's first year, which became available for management use for the first time in January 2003. Post-season total catch estimates also used WCGOP data to assess total catch. The number of species with catches in excess of their OYs in 2003 is an indicator of the challenge of managing a fishery to use best and most recently available science, when the new scientific data in question represents a significant shift in scientific method. However, when the newly available science revealed that the fishery had or was projected to exceed its 2003 OY level, NMFS and the Council responded quickly with inseason actions to constrain the fisheries. The effects of newly available inseason observer data have diminished over time as more years of observer data are added to the management process, since those additional years of data provide NMFS with a more complete picture of how fishing vessel behavior and groundfish stock migrations change during the calendar year. The effects of all harvest levels, whether under or over OYs, are accounted for in subsequent stock assessments.

Finally, The Four Organizations state that NMFS must improve the counting and control of bycatch of all marine life, because they believe that fishing affects not only targeted and overfished species, but also marine ecosystems more broadly. NMFS agrees that it is important to assess and minimize the bycatch of marine species other than those that are either targeted or overfished. Many of the measures currently in place reduce bycatch of all species; for example, the gear restrictions described in the response to comment 6. See also the response to comment 14. Because of the Magnuson-Stevens Act's mandate to rebuild overfished species, and because of the unusually long lives and low productivity levels of rockfish managed under rebuilding plans, NMFS places its highest bycatch minimization priority on constraining incidental catch of overfished species. NMFS most recently described its approach to overfished species rebuilding in the preamble to

the proposed rule to implement Amendment 16–4 to the FMP and the 2007–2008 groundfish specifications and management measures (71 FR 57764, September 29, 2006.) A more detailed analysis of this management approach is also available in the Final EIS for that action, available online from the Council at: <http://www.pcouncil.org/nepa/nepatrack.html>.

**Comment 6:** The Four Organizations believe that the proposed rule fails to provide a rational basis for dismissing measures as impracticable. Neither the proposed rule nor Amendment 18 explains sufficiently why other measures that the Council analyzed but did not adopt, such as hard sector caps, are not currently practicable. NMFS has dismissed certain measures by simply labeling them impracticable, without fully considering the practicability of achieving those measures and without explaining why they are impracticable. In Amendment 13, NMFS dismissed as “impracticable without an observer program” two methods of reducing bycatch: (1) “the use of incentives for vessels with lower bycatch rates, such as allowing higher landing limits (and thus greater fishing profits) for fishing vessels that fish selectively and thus have relatively low discard rates;” and (2) “the use of discard caps to manage the fishery” (*PMCC v. Evans*). The agency argued that “both alternatives are deemed impracticable without a full observer program, since both would require individual vessel monitoring” (*PMCC v. Evans*). The agency never explained why full observer coverage was impracticable; it just concluded that it was so.

Several bycatch minimization programs that were chosen as part of the agency’s preferred alternative have been dismissed as impracticable at the present time, including: full retention programs, sector-specific total catch limits, vessel-specific total catch limits, and providing increased catch allocations to or gear flexibility for gear types with lower bycatch rates. NMFS states that the reasons for this are that “[s]ector specific limits are not practicable until the shore-based retention and monitoring program is more fully developed” and vessel-based limits “would be dependent upon a more intense level of monitoring than is practicable under the current management regime \* \* \*.” (71 FR 36506 at 36510, June 27, 2006.) This rationale is wholly insufficient to satisfy the Administrative Procedures Act’s (APA’s) requirement for reasoned decision-making, just as the court in *PMCC v. Evans* found inadequate NMFS’s explanation in Amendment 13

that “the type of observer program that would be needed to implement a vessel incentive program is not practicable.” (66 FR 29729, at 29731 (June 1, 2001)). In *PMCC v. Evans*, the Court found that NMFS had engaged in “unreasoned decision-making” because it “did not fully consider the practicability of the more comprehensive observer program necessary to administer vessel incentives or discard caps in light of the factors set forth in 50 CFR 600.350(d)(3)(i).” The Council’s “Preliminary Discussion Draft Practicability Analysis for Amendment 18” does not suffice. It was not included in the analysis of either the proposed rule or Amendment 18 and, even if it had been, the draft is confusing and incomplete. For example, the analysis only considers the socio-economic obstacles or costs of individual fishing quotas, which are but one of several measures from the preferred alternative in the PEIS that are dismissed as impracticable in the proposed rule. Other measures, such as hard sector caps and the use of performance standards, are not similarly evaluated.

**Response:** *PMCC v. Evans* addressed Amendment 13, which as mentioned above, NMFS approved on December 21, 2001. This final rule implements Amendment 18, which NMFS approved on September 6, 2006. The Four Organizations have quoted the agency’s record for Amendment 13. NMFS analyses for Amendment 18 are separate from its analyses for Amendment 13.

In its National Standard 9, the Magnuson-Stevens Act requires bycatch to be minimized to the extent practicable. The issue of which management measures are and are not practicable at this time or into the future is central to Amendment 18, its program for bycatch minimization into the future, and to Federal regulations as amended through this final rule. The bycatch mitigation EIS, completed in September 2004, discussed the practicability of each of the alternatives when weighed against each other.

NMFS and the Council dealt further with practicability through the development of Amendment 18, which recommends different bycatch minimization measures in different fisheries and sectors, as practicable. The Council finalized Amendment 18 at its November 2005 meeting. For that meeting, NMFS provided the Council with a draft practicability analysis that evaluated the practicability of Amendment 18 within a framework of the Federal guidelines on National Standard 9 at § 660.350(d)(3). Those guidelines provide factors that should be considered when determining

whether a conservation and management measure minimizes bycatch or bycatch mortality to the extent practicable. It became clear from Council discussions, however, that the Council and the public were more focused on evaluating the practicability of particular management tools, such as fleet capacity reduction or sector bycatch caps. Therefore, NMFS revised its practicability analysis to evaluate major bycatch accounting and minimization tools, in order to better inform the agency’s decision on Amendment 18 under the Magnuson-Stevens Act and for the Record of Decision on the EIS. The final practicability analysis is available from NMFS’s Northwest Region (see **ADDRESSES**) and the portions of that document that addressed vessel incentives, sector bycatch caps, full retention programs, and gear restrictions and catch incentives for lower bycatch gear are provided here, since The Four Organizations explicitly mentioned those four potential management tools. NMFS addressed some practicability issues associated with sector bycatch caps in its response to Comment 5; that discussion is supplemented here.

The Magnuson-Stevens Act provides for a deliberative fishery management council process, followed by a Federal rulemaking process, both with multiple opportunities for public review and comment on fishery management concepts as they are developed in the Council and on the Federal regulations that implement Council recommendations. Other laws, such as NEPA and the Regulatory Flexibility Act (RFA,) require that NMFS and the Council analyze the potential effects of fishery management actions on the physical, biological, and socio-economic environment, and particularly on small business entities within the socio-economic environment. In completing the analytical documents needed to assess the Council’s recommendation on a preferred alternative for the bycatch mitigation EIS and on Amendment 18 language, NMFS evaluated the meaning of the requirement to minimize bycatch “to the extent practicable” in light of the current state of the groundfish fishery. The evaluative processes required by the Magnuson-Stevens Act, NEPA, RFA, and other applicable law, provide the framework for the agency’s reasoned decision-making on both the EIS’s preferred alternative and approval of Amendment 18.

The Magnuson-Stevens Act does not define what is meant by “to the extent practicable” when referring to the requirement to minimize bycatch. For the purposes of this discussion, NMFS

defines practicable for bycatch minimization measures to mean a measure that is "reasonable and capable of being done in light of available technology and economic considerations." In other words, it may be possible to imagine a particular management tool, or to have seen it used in other fisheries, without that management tool being practicable for the West Coast groundfish fishery in particular. This definition is consistent with standard dictionaries, and with the intent of Congress, as expressed in the Congressional Record on the Sustainable Fisheries Act, "The use of the term 'to the extent practicable' was chosen deliberately by both the Senate and the House. Both bodies recognize that bycatch can occur in any fishery, and that complete avoidance of mortality is impossible. Councils should make reasonable efforts in their management plans to prevent bycatch and minimize its mortality. However, it is not the intent of the Congress that the councils ban a type of fishing gear or a type of fishing in order to comply with this standard. 'Practicable' requires an analysis of the cost of imposing a management action; the Congress does not intend that this provision will be used to allocate among fishing gear groups, nor to impose costs on fishermen and processors that cannot be reasonably met." (104 Cong. Rec., H11437 (1996).) The agency's definition of the term practicable has also been tested in court and affirmed for bycatch minimization and essential fish habitat (EFH) protection for Federal fishery management off New England (*Oceana v. Evans*, No. 04-0811 (ESH) (Mar. 9, 2005).)

The Council addressed the question of practicability when making its final decision on Amendment 18. At its November 2005 meeting, the Council finalized FMP amendatory language for Amendment 18 and reviewed a draft work plan for future bycatch minimization measures intended to follow on Amendment 18. Council members particularly addressed sector bycatch caps in discussing potential future management measures, saying that, collectively, NMFS, the states, and the industry do not have the "resources, money, or infrastructure to manage by sector caps." Council members expressed an interest in looking at sector bycatch caps for future management, but viewed them as impracticable to implement right now. As explained in the proposed rule for this action, the Council wished to build a management infrastructure for implementing sector bycatch caps

where practicable in the future, but also concentrate right now on bycatch minimizing management measures that are more practicable in the near term. In particular, the Council cited two activities that could be done in the near term to minimize bycatch using existing personnel, funds, and management infrastructure: requiring permits in the open access fishery and evaluating the process by which observer and landings data are collected and analyzed for use in the management process. NMFS and the Council have followed up with both of these issues and NMFS anticipates shortly publishing an advance notice of proposed rulemaking on permitting the open access fishery.

NMFS has also fully considered the practicability of a more comprehensive observer program throughout the process of developing Amendment 18 and concurrent regulatory programs. In addition to the bycatch mitigation EIS, NMFS has evaluated observer coverage in two Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analyses (EA/RIR/IRFAs) for observer requirements in the groundfish fishery: a 2000 EA/RIR/IRFA on "An Observer Program for Catcher Vessels in the Pacific Coast Groundfish Fishery," and a 2003 EA/RIR/IRFA on the "Implementation of an Observer Program for At-Sea Processing Vessels in the Pacific Coast Groundfish Fishery." NMFS has analyzed additional monitoring mechanisms in two EA/RIR/IRFAs on vessel monitoring systems, and is currently drafting an EA/RIR/IRFA on implementing electronic monitoring (camera observation) requirements for the shore-based sector of the whiting fishery. These EA/RIR/IRFAs, which have been discussed in the Council process and made available to the public both through the Council and NMFS notice-and-comment processes, evaluate the costs and appropriateness of the different types of monitoring mechanisms for different fishery management goals.

For the practicability analysis on NMFS's decision on Amendment 18, NMFS evaluated the costs of the various monitoring programs currently in place against the expected cost of 100 percent observer coverage. Current WCGOP costs to address the non-whiting portion of the groundfish fleet are approximately \$4.5 million per year. NMFS estimates that expanding WCGOP coverage so that all vessels were required to carry an observer whenever they are fishing would cost approximately \$13.3 million per year, a significant cost when compared against the commercial fishery's total 2004 ex-

vessel revenue of \$61 million. NMFS considers implementing WCGOP to be both a practicable observer program to implement, and an appropriate approach to observer coverage for this fishery. An observer program that costs over a fifth of the fishery's revenue is not a program that is "reasonable and capable of being done in light of current technology and economic considerations," particularly bearing in mind the many other costs associated with the science, management, and enforcement programs needed to support this fishery. The remaining paragraphs in this response to Comment 6 are excerpted or summarized from the practicability analysis and provide the agency's reasons for determining particular management measures to be practicable or impracticable at this time.

**Vessel incentive programs.** A vessel incentive program reduces bycatch by rewarding "clean" vessels with greater economic opportunity, thereby encouraging vessels to reduce their amount of bycatch. The Council discussed a type of vessel incentive program that would grant higher landings limits to vessels that voluntarily carry and pay for observers. Amendment 16-1 put a mandatory observer program into the FMP. Federal regulations at 50 CFR 660.314(c)(2) state "When NMFS notifies the vessel owner, operator, or permit holder, or the vessel manager of any requirement to carry an observer, the vessel may not take and retain, possess, or land any groundfish without carrying an observer."

Observers that are required to be carried onboard vessels as part of a statistical sampling program are observing vessels behaving within the framework of regulations that apply to the fleet as a whole. This type of observer sampling plan allows data from the observed portion of the fleet to be expanded to provide bycatch estimates for the whole fleet.

NMFS does not support an incentive program wherein vessels that voluntarily carry an observer are permitted to access higher landings limits than otherwise allowed, because such a program could undermine NMFS's observer sampling plan. Observers carried on a portion of the fleet under an incentive program that allows vessels to operate outside of the normal regulatory framework do not generate data that are useful to modeling the whole fleet's behavior. Thus, while an incentive-based observer program may be beneficial to the particular participating vessels, it is not necessarily beneficial, and could even be harmful, to the statistical validity of NMFS's sampling program design,

which provides data that support bycatch modeling on the groundfish fisheries. In addition to these scientific concerns, even if vessels were to pay for observers outside of the WCGOP program, NMFS would need to pay for the infrastructure to train the observers and process and analyze their data—a benefit to the participating vessels, but not to the fishery as a whole. For these reasons, NMFS does not consider an incentive-based observer program to be a practicable bycatch minimization measure for implementation in the groundfish fishery.

*Discard caps or bycatch limits.*

Discard caps or total catch limits reduce bycatch by restricting fisheries when those limits are reached. A vessel cap works similarly to a vessel incentive in that target fishing can occur so long as the vessel does not reach a particular cap. This essentially rewards a vessel or fleet with fishing opportunity if they fish cleanly. The Council's preferred alternative includes the use of this mechanism for reducing bycatch when practicable. In addition, bycatch limits have been in place for the Pacific whiting fishery since 2004.

NMFS uses the term "bycatch limit," rather than "discard cap," because a bycatch limit is more appropriate in a multi-species fishery, where species that are incidentally caught may be retained or discarded. Either term may be confusing, since the Magnuson-Stevens Act defines bycatch as only those fish that are discarded, whereas the groundfish FMP views bycatch species as those species that may not have been one of the target species, but which were taken incidentally to the targeted species. In the case of overfished species, NMFS and the Council manage the fishery to minimize the total catch of each overfished species, including the discards of those species. The term "discard cap" might be more appropriate for a fishery where a single species is targeted and all non-target species are discarded. West Coast groundfish fisheries are multi-species fisheries and management measures are intended to either ensure that non-target species are avoided (e.g. the Rockfish Conservation Areas,) or to allow non-target species to be retained when caught in common with target species (e.g. trip limits for minor slope rockfish in association with fixed gear sablefish limits.)

NMFS quoted Amendment 18's provisions for sector total catch limit programs in the response to Comment 5, above. NMFS also provided an example of how bycatch limits work under the current management system, which relies on inseason catch projections,

rather than on real-time catch estimates, to calculate current catch. The only groundfish fishery sector with total catch limits based on near real-time data for both landings and discards is the whiting fishery. In 2004, NMFS first implemented overfished species bycatch limits for canary and darkblotched rockfish taken incidentally in the Pacific whiting fishery via emergency rule and inseason action (August 3, 2004, 69 FR 46448, and; October 6, 2004, 69 FR 59816). The final rule for the 2005–2006 groundfish specifications and management measures implemented bycatch limits for canary and widow rockfish taken incidentally in the 2005 and 2006 Pacific whiting fisheries (December 23, 2004, 69 FR 77012.) NMFS subsequently implemented a bycatch limit for darkblotched rockfish in the 2006 Pacific whiting fishery on July 1, 2006 (71 FR 37844, July 3, 2006.) These limits apply to the non-tribal whiting fishery, in which two of the three participating sectors have at least 100 percent observer coverage, the catcher-processor and mothership sectors. The shore-based whiting sector, which consists of catcher vessels that deliver their catch to processing plants on land, has been managed in 2004–2006 under an EFP that requires vessels to carry electronic monitoring (EM) systems. On whiting catcherboats, EM systems were used to monitor whether vessels were retaining all of their catch or discarding a portion of catch, since this fishery is known to have relatively low bycatch rates and is assumed to maximize its retention of all fish caught. As applied in this fishery, EM technology is not capable of estimating species-specific discards for trawl fisheries at this time; however, it may provide an independent source of information for estimating total catch.

Several practical considerations make implementing near real-time bycatch limits practicable for the whiting fishery, but would make them impracticable for the remainder of the groundfish fleet. Near real-time monitoring would be required to implement near real-time bycatch limits. West Coast groundfish trawl vessels, which tend to be larger than non-trawl vessels, have an average size of about 70 feet in length overall. Vessels of this size have limited deck space for catch sampling, and restricted bunk space for accommodating observers on overnight trips. Some vessels that operate in nearshore waters are so small, under 20 feet in length overall, that vessel operators take their boats out alone, not having space for crew, let alone observers. By contrast,

the catcher-processor and mothership vessels that participate in the at-sea whiting fishery carry two observers apiece and are all at least 125 feet in length overall, with some are over 250 feet in length overall. Also unlike the whiting fishery, the multi-species groundfish fishery has not been very profitable for many of its participants in recent years, which at times means that vessel owners cannot afford to keep their vessels in optimal condition. Since WCGOP's inception in 2001, NMFS has had to refuse to deploy observers on several vessels that have failed to meet observer safety regulations at 50 CFR 600.746(c) and 660.314(d)(2).

Unlike the whiting fishery, where whiting is the sole target species, the rest of the groundfish fleet tends to target multiple species simultaneously. This means that inseason whiting fishery management requires that managers track fewer than ten species for real-time management issues, while inseason management of the non-whiting groundfish fisheries would require tracking 30+ species or species groups for total catch. Similar to the needs for an IFQ program, the shoreside landings monitoring infrastructure, including the fish ticket system, would need to be greatly expanded to support the data processing speed that would be required to implement a near real-time bycatch limit program for the non-whiting fisheries. Finally, the number of boats in the whiting fishery is relatively small, roughly 40–50 in all three non-tribal sectors, with landings occurring at few ports. Tracking these few vessels and ports is much more straightforward than would be the case in the overall groundfish fishery, which has over a thousand vessels making landings in dozens of ports coastwide.

Regardless of the type of bycatch limit implemented, moving the bycatch limit program beyond the whiting fishery would require that the Council allocate the species intended to be limited between the fishing sectors. Species or species groups that are currently subject to allocations are managed with sector-specific total catch limits, are monitored inseason for their landed catch and modeled for total catch based on past landed catch and bycatch rates, and are closed if those allocations are achieved. For all species except Pacific whiting and sablefish, the allocations are primarily between the limited entry and open access portions of the commercial fishery. These are relatively large sectors, which means that the activities of one portion of a sector may affect the fishing opportunities of another portion of the sector. For example, inseason modeling in 2005 indicated that the

summer flatfish trawl fisheries had taken more petrale sole than had been expected from pre-season modeling, which led the Council to close the fall/winter directed petrale sole fishery.

The Council is developing a multi-species inter-sector allocation EIS that would support transitioning the trawl fleet to an IFQ program. This EIS would also support dividing available groundfish harvest into smaller sector harvest levels than are used under current management. The groundfish fishery's current standardized bycatch reporting methodology is adequate to support the management system of pre-season, inseason, and post-season total catch evaluation, coupled with inseason management measures revisions. If available groundfish harvest is divided into smaller sectors, NMFS and the Council will need to re-evaluate the fishery's standardized bycatch reporting methodology to determine how to best match the monitoring efforts to management needs.

As total available harvest is divided into smaller percentage shares, the coverage level of associated fishery monitoring usually needs to increase. In a fishery managed with vessel-specific total catch limits, such as in an IFQ program, participating vessels may need 100 percent coverage of at-sea fishing activities. NMFS anticipates that expanding fishery monitoring to support a vessel-specific total catch limit program would cost \$13.3 million annually, or nearly \$9 million more than the current observer program. That level of funding is not currently available from management agencies. Although other regions have implemented industry-funded observer programs, establishing that type of system requires an adequate study of appropriate checks and balances, assurances that such a program would not encourage the misreporting of observed catch, and an infrastructure to support the training of observers and analysis of observer data. In some fisheries, at-sea monitoring could be managed with EM systems, which may cost less, but those systems would have to be tested for their usability with each particular type of fishery. NMFS, the States, and the whiting industry are in the third year of testing EM systems for the shore-based sector of the whiting fishery.

Fishery or sector total catch limits, in the form of OYs, harvest guidelines, and sector allocations, are part of the current management process and are managed through the pre-season/inseason/post-season evaluation process described above. Dividing current sector allocations into smaller percentages

would require the development of the inter-sector allocation EIS, which is underway. Vessel-specific total catch limits would also rely first on harvest allocation between sectors, and then on harvest allocation between individual vessels. The FEIS's preferred alternative supports sector total catch limits, where practicable. The "hard" sector caps recommended by The Four Organizations are not now practicable for the groundfish fishery.

*Full or maximized retention programs.* Full or maximized retention programs are designed to eliminate the discard of species caught during fishing activities by requiring fishers to retain species that are caught. Full or maximized retention programs require a different monitoring system than a fishery managed with landing limits for various species. Complete full retention may be a problem in some situations because of safety or other operational reasons; therefore, NMFS is also considering maximized retention programs that would require complete retention of catch except in certain specified circumstances and vessels using best fishing practices to reduce discard. NMFS, the States, and the whiting industry are experimenting with a maximized retention and EM program in the shore-based whiting fishery through an EFP, as discussed above. In a full- or maximized-retention fishery, observers or EM devices are answering a yes/no question: Did the vessel retain all of its catch taken in a particular trip? Operating a fishery with that management question requires higher monitoring coverage than in a fleet sampled for bycatch rates, but less sophisticated evaluation of fishing activities. For example, WCGOP observers are not simply used to determine whether catch is retained, but are instead deployed to determine how much catch is discarded, the species composition of the discarded fish, and collect biological data from discard species. An EM system may be an effective mechanism for answering the yes/no question in a less costly manner, but it cannot collect information at the same sophistication level as that collected by a human observer. Conversely, deploying a human observer simply to answer a yes/no question could be an impractical use of limited staff resources.

Amendment 18 supports the implementation of full retention programs where practicable. The Council is developing a maximized retention management program for the shore-side sector of the whiting fishery, and will next consider that program at its November 2006 meeting. Such

management is appropriate for the whiting fishery, because the delay in catch refrigeration that would result from the time needed to sort catch at sea would impair the quality of the target species' flesh for sale. Full retention management may not be appropriate or practicable for other fisheries, particularly under the current rockfish rebuilding regime. Some of the rebuilding rockfish have a high enough market value that a program to require full retention might backfire by providing vessels with incentives to target rebuilding species so as to ensure that they are part of the total catch that is required to be retained.

Although full retention may lead to improved accounting of total catch, it does not eliminate bycatch, as defined in the Magnuson-Steven Act. Fish that are not sold would be regarded as if they were discarded. Many fish that are currently discarded at sea are not landed because they do not meet minimum standards for size or quality that are established by individual processors. NMFS cannot require processors to buy fish for which they have no market. Potential full- or maximized-retention programs need to be evaluated with these practical considerations in mind if they are to be effective at minimizing bycatch to the extent practicable.

*Gear restrictions.* Gear restrictions minimize bycatch in several ways, by: Restricting gears that are prone to catching bycatch species to operating in certain areas; requiring that certain gears be modified so that they either allow bycatch species to escape the gear once caught, or so that they prevent non-target species from being caught on or by the gear; or, requiring a certain gear type be used that is less prone to catching bycatch species. Gear restrictions that either reduce groundfish bycatch, or reduce bycatch in the groundfish fisheries have been implemented for several West Coast fisheries. The State-managed pink shrimp trawl fishery is subject to a finfish excluder device requirement, which is an alteration to the trawl net that allows finfish to escape out of the top of the net before the trawl net's final collection point for shrimp. For groundfish trawl, NMFS prohibits the use of large footrope trawl gear in waters inshore of a boundary line approximating the 100 fm (183 m) depth contour, a measure to prevent vessels from accessing the more rocky habitat where several overfished species congregate. And, north of Cape Mendocino and shoreward of the RCA, trawlers are required to use a selective flatfish trawl net that has been designed

so that it greatly reduces the retention of most rockfish species. Use of this gear has allowed trawlers to retain more of the abundant flatfish species while reducing incidental catch of rockfish. These newer restrictions to aid in rockfish rebuilding are in addition to NMFS regulations that have long been in place to minimize juvenile fish bycatch through a trawl minimum mesh size requirement, and to prevent lost fishpots from ghost fishing (which may be considered a form of bycatch) by requiring those pots to be constructed so that at least a portion of the pot's netting is biodegradable.

Some gear modifications may be appropriate to reduce bycatch in one fishery, but inapplicable and impracticable for another fishery. For example, finfish excluder devices are practicable for reducing finfish bycatch in the pink shrimp trawl fishery, but those same devices are not practicable for shrimp trawl vessels in regions of southern California because the excluders get plugged with sea cucumbers and are rendered ineffective. NMFS has implemented the gear restrictions that are known to be practicable bycatch reduction measures. The FMP provides incentives for experimental fishing that supports development of new and modified gear types by placing its highest priority for experimental harvest set-asides on bycatch reducing experimental measures. NMFS will continue to ensure that future gear modification requirements are adequately tested and studied for their practicability prior to implementation.

*Comment 7:* The Four Organizations believe that the proposed rule fails to provide a rational basis for dismissing measures as impracticable. National Standard 9 guidelines for determining the practicability of a certain bycatch reduction measure allow for some balancing of conservation and economics. However, as the Ninth Circuit recently affirmed "[t]he purpose of the Act is clearly to give conservation of fisheries priority over short-term economic interests \* \* \* [t]he Act sets this priority in part because the longer-term economic interests of fishing communities are aligned with the conservation goals set forth in the Act." *Natural Resources Defense Council v. NMFS*, 421 F.3d 872 (9th Cir. 2005) [hereinafter *NRDC v. NMFS*]. The particular importance of bycatch reduction for rebuilding overfished species underlies the need to implement bycatch measures that may involve short-term economic costs in order to create a more economically viable,

efficient and sustainable fishery over the medium- to long-term.

The benefits to both industry and the environment of reducing bycatch through many of the measures analyzed in the PEIS very likely could outweigh the short-term inconvenience and cost that would be involved. NMFS needs to not only consider the costs but also the economic benefits of implementing those measures. For example, the Council's basis for determining that several measures, such as sector and vessel caps and individual quotas (IQs), are currently impracticable is the lack of a sufficient observer program. (71 FR 36506 at 36510, "An IQ program with specific bycatch limits would be dependent upon a more intense level of monitoring than is practicable under the current management regime \* \* \*.") Not only does NMFS fail to explain why a more intense level of monitoring is not currently practicable, but it actually ignores consideration of many of the economic benefits of bycatch reduction that it had considered previously in its EIS, and thus breaches the agency's duty under the APA to give reasoned consideration to the relevant factors and to articulate a rational connection between the facts found and choice made.

The Four Organizations believe that the economic analysis involved in a practicability determination must include the costs of running an inefficient and wasteful fishery absent more effective bycatch measures, in addition to the cost of implementing those more effective measures. The inconvenience of changing business as usual and the costs of administering a transition to a more efficient management regime are only part of the equation and do not, by themselves, make something impracticable.

*Response:* NMFS discussed overfished species rebuilding and the agency's actions in response to court orders from *NRDC v. NMFS* in the preamble to the proposed rule to implement Amendment 16-4 and the 2007-2008 groundfish harvest specifications and management measures, published September 29, 2006 (71 FR 57764). Amendment 16-4 and its implementing regulations revise the rebuilding plans for seven rockfish species, in accordance with the court's direction in *NRDC v. NMFS* so that the rebuilding periods are as short as possible, taking into account the status and biology of the stocks and the needs of fishing communities. In *NRDC v. NMFS*, the court discusses the issue of whether the conservation needs of managed stocks are aligned with the economic interests of fishing

communities, " \* \* \* [M]ay the Agency [NMFS] extend the rebuilding period beyond the shortest possible rebuilding time to account for the needs of fishing communities? It would be possible to resolve the ambiguity by concluding that the [Magnuson-Stevens] Act as a whole makes it clear that the needs of fishing communities are perfectly aligned with the environmental goal of rebuilding fish stocks in as short a time as possible. But if this were the case, the language 'the needs of fishing communities' would be redundant (as these needs would be no different than the need to rebuild stocks in as short a time as possible) \* \* \*. There is therefore an ambiguity in this part of the statute, requiring interpretation." The court also noted that " \* \* \* undoubtedly the short-term economic interests of fishing communities diverge in some respects from the needs of fish species."

In *NRDC v. NMFS*, the court spoke to the bycatch of species managed under a rebuilding plan, saying, "Section 1854(e)(4)(i) [of the Magnuson-Stevens Act,] then, allows the Agency [NMFS] to set limited quotas that would account for the short-term needs of fishing communities (for example, to allow for some fishing of plentiful species despite the inevitability of bycatch), even though this would mean that the rebuilding period would take longer than it would under a total fishing ban." As detailed in the EIS for Amendment 16-4 and the 2007-2008 groundfish harvest specifications and management measures, NMFS and the Council anticipate that implementing Amendment 16-4 will cause some short-term economic harm to fishing communities in the form of foregone fishing opportunity for abundant species that co-occur with rebuilding species. Amendments 16-4 and 18 place a priority on conservation, but also take both the short- and long-term needs of fishing communities into account. The Magnuson-Stevens Act does not require that NMFS implement conservation measures that completely disregard the short-term needs of fishing communities.

As part of Comment 7, The Four Organizations have provided a partial quote from the preamble to the proposed rule to implement Amendment 18, "An IQ program with specific bycatch limits would be dependent upon a more intense level of monitoring than is practicable under the current management regime \* \* \*." They then interpret their partial quote to mean that NMFS believes that a more intense level of monitoring is not practicable in the fishery, and that IQ

programs are therefore, impracticable. However, the section of the preamble that they quote is actually a discussion of the current Council process to develop an IQ program for the trawl fishery, including an explanation of how that process links with Amendment 18 and its provisions for IQ and vessel-specific total catch limits. The explanation states in full, "Amendment 18 revises the FMP to specify that individual fishing quota programs 'would be established for the purposes of reducing fishery capacity, minimizing bycatch, and to meet other goals of the FMP.' An IQ program with specific bycatch limits would be dependent upon a more intense level of monitoring than is practicable under the current management regime and could be designed using the FMP's guidance on vessel-specific total catch limit programs." This section of the preamble to the Amendment 18 proposed rule does not, therefore, characterize a more intense level of monitoring as a bar to implementing an IQ program, but rather as an integral part of the implementation of such a program. The cost and practicability of implementing the type of observer program that would be associated with an IQ program, and the reasons that NMFS is not implementing such a program at this time, are discussed above in the response to Comment 6. The Council is in the process of developing an EIS to analyze such a program, see: <http://www.pcouncil.org/groundfish/gfifq.html>. The Council's EIS and IQ program development process is ongoing, and the Council and its advisory bodies will be working on a trawl IQ program in several meetings over the coming fall and winter.

Finally, in Comment 7, The Four Organizations provide NMFS with what they believe to be appropriate elements to an economic analysis for a practicability determination. National Standard 9 Guidelines do not define the phrase "to the extent practicable" or require or recommend any specific types of economic analyses such as those suggested by the Four Organizations. However, these Guidelines do list the factors that the Councils are to consider in making decisions related to bycatch. Among the factors listed in the Guidelines, the following are included: Impacts on affected stocks; incomes accruing to participants in directed fisheries in both the short term and the long term; incomes accruing to participants in fisheries that target the bycatch species, which include non-consumptive uses of bycatch species and existence values, as

well as recreational values; impacts on other marine organisms; changes in fishing, processing, disposal, and marketing costs; changes in fishing practices and behavior of fishermen; and changes in research, administration, and enforcement costs and management effectiveness. Chapter 4 of the EIS and the practicability analysis provide an assessment of these factors. For example, Chapter Four contains Table 4.6.1. which provides a relative ranking of the bycatch reduction methods (tools) for each alternative used to reduce bycatch and bycatch mortality, and to address accountability issues; Table 4.6.2. ranks alternatives by their effectiveness at reducing bycatch, enforcing and monitoring bycatch measures, and reducing compliance costs to industry and Table 4.7.1 which summarizes the effects of the alternatives on the social and economic environment. The practicability analysis contains a discussion of observer costs and potential ex-vessel values for the groundfish fisheries in a fishery that has seen declining revenues, increased fuel costs, and has a trawl sector that is being taxed at 5 percent to repay a government financed buyback loan. For example, Table 2 provides conceptual estimates of at-sea observers, VMS, enforcement costs, and other cost estimates according to various scenarios such as maintaining the status quo, Sector Bycatch Caps, and IFQs.

NMFS does not agree that the current management scheme is "wasteful and inefficient." As explained above, NMFS has minimized bycatch to the extent practicable by implementing bycatch reduction measures, including but not limited to: Large-scale time-area closures, gear restrictions on use and requirements for configuration, and bycatch limits for appropriate fisheries. As also explained above, the Council and NMFS are developing additional programs, such as the maximized retention and monitoring program for the shore-based whiting fishery, an IQ program for the trawl fishery, and a permitting program for the open access fishery, each of which is being designed in part to either directly or indirectly minimize bycatch. However, as assessed in the practicability analysis, the benefits to the resource that might be derived from implementing a "hard" bycatch cap program beyond the whiting fishery do not significantly exceed those of the current pre-season/inseason/post-season catch evaluation and management measures adjustment system described in the response to Comment 5 enough to outweigh the extremely high cost of monitoring and

implementing such a program for the fishery. Since the groundfish fishery is divided into six cumulative limit periods each year and is managed with 5–6 opportunities per year for management measure adjustment based on best available data, the West Coast groundfish fisheries do not carry the same risks as derby fisheries, nor would they derive the same benefits from a "hard" bycatch cap program as would derby fisheries.

The practicability analysis includes a projection, that should all the overfished species be restored to MSY levels, that the entire commercial groundfish fishery may reach on a average basis, ex-vessel revenues of \$100 million. However, the current ex-vessel revenues are about \$61 million, annually. Expanding observer coverage to 100 percent of the trawl fleet alone would cost \$13.3 million or nearly \$9 million more than the current program. Note that these figures do not include vessel fuel costs, other operating costs, State landing fees, Federal buyback loan repayment fees, or the costs to the States, tribes, and Federal governments for the day-to-day management of such a program.

Therefore, the analyses contained with the NEPA document are consistent with the National Standard Guidelines. NMFS does agree that an increase in cost does not necessarily make something impracticable. However, if a change in the management system cannot be covered by available funding sources (either existing sources or from potentially new sources of funding), that management system simply cannot be implemented, and is therefore not only impracticable but also impossible. Such is the case with 100 percent observer coverage. Requiring fish harvesters to provide such funding via an ex-vessel tax, (limited by Congress to 3 percent of ex-vessel value, and limited only to fisheries managed with IQ programs,) will not be sufficient to cover the cost of that program. Available funding from management agencies is also not sufficient to support such a program. Increasing the funds associated with observer coverage by 200 percent is not a matter of inconvenience but a real budgetary resource problem.

The practicability analysis shows that the costs of several management systems are substantial when compared to the exvessel revenue generated by the fishery. NMFS considered this factor in determining whether to implement these additional management systems at this time, in addition to considering the appropriate factors in the National Standard Guidelines, as described above in the response to Comments 5 and 6.

*Comment 8:* The Four Organizations believe that Amendment 18 does not provide clear objectives, targets, or performance standards for minimizing bycatch. For measures that require interim steps before they can be deemed practicable, the rule should identify the obstacles to achieving those interim steps and contain a plan and schedule for taking those steps. Notwithstanding the declaration that the preferred alternative represented all “practicable” measures to minimize bycatch and bycatch mortality, proposed Amendment 18 fails to implement many of the measures because they are deemed not yet practicable. The EIS explains that the Council “anticipates phasing in” some of these measures, such as sector bycatch caps, but neither the Council nor NMFS has yet to explain the steps or timeline for such a phase in. The closest the Council or NMFS get to committing to a timeline is by explaining that the monitoring and enforcement infrastructure necessary to implement hard sector caps will be established “over the next several years.” Nearly two years later, neither the Council nor NMFS has clarified steps or a timeline for implementation.

The preferred alternative from the EIS, the one that NMFS considers practicable, includes the use of performance standards as a way of measuring progress in reducing bycatch. The EIS explains that such performance standards “could be based on low catch or catch rates of overfished species, low bycatch of non-groundfish species, or other factors.” However, the EIS also explains that it plans to define such standards “at a later date.” Neither Amendment 18 nor the proposed rule discusses the use of performance standards or goals as a way of reducing bycatch rates over time. This is a significant oversight that NMFS should require the Council to remedy or should do so itself. NMFS and/or the Council must explain this gap and must either commit to defining and adopting such standards or provide reasons for failing to do so. The agency cannot claim that performance standards are practicable on the one hand, yet completely neglect the issue in the implementation of its bycatch plan.

Examples of quantitative bycatch performance standards could include the following: “within x years, the ratio of total bycatch to total catch will be reduced by y percent” or, “within x years, regulatory discards will be reduced to y percent of total landings.” A bycatch reduction plan could also include evaluating discard ratios and the reasons for discards by sector, with a commitment to mitigate the most

severe bycatch problems, and encouraging shifts from high-bycatch gears to lower ones. If, for example, most discarding is the result of trip limits, NMFS should evaluate phasing out trip limits. Or, if particular areas/seasons/gears have very high bycatch ratios, then time/area/gear closures might be the most effective reduction measures.

*Response:* The Magnuson-Stevens Act requires that bycatch be minimized to the extent practicable, which NMFS interprets to mean “to the extent that a management measures is reasonable and capable of being done in light of available technology and economic considerations.” As NMFS has discussed throughout this preamble in the responses to several comments, NMFS has determined that Amendment 18 meets that requirement to implement currently practicable bycatch minimization measures in the FMP and Federal regulations. Amendment 18 also goes beyond the Magnuson-Stevens Act’s requirements by revising the FMP so that the FMP includes both those bycatch minimization measures that are currently practicable and bycatch minimization measures that are not now practicable, but which may become practicable at a future time.

As detailed above in the response to Comment 3, NMFS and the Council have implemented many management measures since 2001 to minimize bycatch. The Council looks for new ways to minimize bycatch in all of its groundfish management efforts, and recognizes that a requirement to “minimize” a type of fishing effect on a natural resource is an ongoing process. In other words, while Amendment 18 minimizes bycatch to the extent currently practicable, the Council is also looking for new ways to continue to further minimize bycatch by making additional bycatch minimization tools practicable in the future. To that end, the Council is developing a bycatch work plan that is intended to prioritize implementation of bycatch minimization measures that are not practicable at this time, but which may become practicable at a future time. As with all of the Council’s work planning documents, any timeline in the bycatch work plan could be subject to revision based on emergency need to address other issues. For example, the Council dropped much of its previously-scheduled workload on groundfish and other species groups in the September 2005 through June 2006 period in order to devote adequate time and attention to responding to the court’s order in *NRDC v. NMFS*.

The Council reviewed its draft work plan at its September meeting and recommended that, for its November 2006 meeting, the work plan be revised to include timelines for potential additional bycatch minimization measures. At each of its meetings, the Council reviews and updates timelines for all of the issues within its major areas of responsibility: Groundfish FMP, Salmon FMP, Coastal Pelagic Species FMP, Highly Migratory Species FMP, Pacific Halibut Catch Sharing Plan, and Habitat and Marine Reserves issues. Among the many issues it will deal with at its November 2006 meeting, the next groundfish fishery bycatch minimization program the Council will address is a maximized retention and electronic monitoring program for the shore-based whiting fishery. The Council will also begin discussing an inter-sector groundfish harvest allocation at its November 2006 meeting, which would need to be completed before hard sector-specific bycatch limits or an IQ program could be considered or implemented.

Alternative 5 of the EIS, “Individual Fishing (Catch) Quotas and Increased Retention” discusses an IQ program in which “some or all of overfished stock’s OYs would be reserved for vessels with the best bycatch performance.” Alternative 7, the preferred alternative, includes elements from Alternative 5, which it articulates as “support the future use of Individual Fishing Quota programs for appropriate sectors of the fishery.” The full text of the Council’s preferred alternative from the EIS is provided above in the response to Comment 4. As the Council develops IQ programs, where practicable for particular sectors of the commercial groundfish fishery, it may set bycatch performance standards for participants in those IQ fisheries. Quantitative bycatch performance standards of the type suggested by The Four Organizations were not analyzed in EIS, were not part of the preferred Alternative, and are not part of Amendment 18 or the FMP. However, NMFS does not believe that quantitative bycatch performance standards that establish requirements such as those suggested by the Four Organizations would necessarily reflect the best scientific information that becomes available in the future, such as new recruitment information and new stock assessments.

The groundfish fishery is managed with several performance measures that reduce bycatch for different fishing gears. Groundfish trawl gear has minimum mesh size requirements intended to minimize the bycatch of

juvenile groundfish (50 CFR 660.381(b)(2)). Groundfish pot gear is required to have biodegradable escape panels to prevent lost pots from ghost fishing (50 CFR 660.382(b)(3) and 660.383(b)(4)). Groundfish trawl gear is also separated into large and small footrope gear, with large footrope gear being prohibited for use shoreward of the 100 fm (183 m) depth contour, so as to prevent large footrope gear from operating in more vulnerable rockfish habitat (50 CFR 660.306(h)(6)). And, small footrope trawl gear used north of 40°10' N. lat. must comply with selective flatfish trawl gear design standards developed to minimize rockfish bycatch in nearshore flatfish trawl fisheries (50 CFR 660.381(b)(5)(i)). In addition, pot gear must possess a biodegradable escape mechanism to prevent lost pots from ghost fishing.

The EIS's preferred alternative does include a statement that, in addition to other elements, "baseline accounting of bycatch by sector shall be established for the purpose of establishing future bycatch program goals." This preferred alternative element is similar to the suggestion from The Four Organizations that "[a] bycatch reduction plan could also include evaluating discard ratios and the reasons for discard by sector. \* \* \*" One of the two measures that the Council identified as practicable to work on in the near-term, is evaluating the speed at which observer and other fishery data enters the Council management process, in order to determine where and how data delivery time might be improved. At the Council's June 2006 meeting, NMFS reported to the Council on observer data delivery timelines and their reliance on data delivery timelines from comparative State-collected data, such as data from trawl logbooks and fish tickets (which are not received real-time). At the Council's September 2006 meeting, NMFS reported to the Council with an update on its bycatch estimation methodologies.

The Four Organizations also suggest "a commitment to mitigate the most severe bycatch problems, and encouraging shifts from high-bycatch gears to lower ones." NMFS and the Council have and will continue to respond to bycatch problems as they are identified, consistent with our responsibility under the FMP and the statute in order to sustainably manage fisheries. The EIS's preferred alternative does not explicitly address gear shifting, but the Council is considering allowing shifts in gear types used as part of its analysis for a trawl IQ program.

Finally, The Four Organizations suggest that "if particular areas/seasons/gears have very high bycatch ratios, then time/area/gear closures might be the most effective reduction measures." NMFS already manages the groundfish fishery with significant time/area/gear closures and cumulative limits based on catch ratios between target and bycatch species, which are designed to minimize bycatch and minimize fishing effects on EFH, as detailed above in the response to Comment 3.

*Comment 9:* For overfished species, the OY serves as a *de facto* bycatch limit because such species are not directly targeted by the fishery. However, The Four Organizations believe that this approach has the Magnuson-Stevens Act's mandate backwards. Instead of using the OY as a limit, and maximizing the catch of healthier co-occurring stocks while minimizing bycatch of overfished species, the Council uses the OY for overfished species as a target. Thus, the selection of OY for overfished species, as deduced from the rebuilding parameters contained in the rebuilding plans, is the driver for how much bycatch of overfished species occurs. However, the law does not allow NMFS to maximize bycatch of overfished species to the highest level that can be justified under the rebuilding plans. The law requires that the agency rebuild overfished species as quickly as possible. Reducing bycatch of overfished species is an essential component of rebuilding those species in the shortest possible time period.

*Response:* As stated above in the response to Comment 8, NMFS has discussed its approach to overfished species rebuilding in the proposed rule to implement Amendment 16-4 and the 2007-2008 groundfish harvest specifications and management measures (71 FR 57764, September 29, 2006). The Magnuson-Stevens Act defines "optimum yield" as follows: "The term 'optimum', with respect to the yield from a fishery, means the amount of fish which—(A) Will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; (B) is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor; and (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery."

The West Coast groundfish fishery is a mixed-stock fishery, with many

healthy stocks co-occurring with overfished stocks. Overfished species are required to be rebuilt as quickly as possible, taking into account the status and biology of the stocks, the needs of fishing communities, and the interaction of the overfished stocks within the marine environment. The Four Organizations are correct in asserting that West Coast fisheries are managed so that overfished species are not target species in any fisheries. Since 2000, NMFS and the Council have implemented harvest specifications and management measures that limit harvest of overfished species to the amount necessary to allow some targeted fishing for the healthy fish stocks that co-occur with overfished species. This policy of preventing the fisheries from having full access to the OYs of healthy stocks that co-occur with overfished species is necessary in order to constrain the incidental catch of overfished species. NMFS recently published a proposed rule to implement Amendment 16-4, which would set overfished species rebuilding plans for 2007 and beyond. Although Amendment 16-4 continues to eliminate target fishing and minimizing bycatch of overfished species, this amendment takes a new approach of considering the interactions of the overfished species with each other and setting fishery management measures to ensure the strongest protections for the least productive of the overfished stocks.

Preventing only the directed catch of overfished species does not allow those stocks to rebuild as quickly as possible; therefore, the indirect catch of those stocks needs to also be limited. NMFS agrees that "[r]educing bycatch of overfished species is an essential component of rebuilding those species in the shortest possible time period." That approach has been the cornerstone of NMFS and Council rebuilding efforts, as evidenced by the many regulations imposed on the fishery to minimize overfished species bycatch—see response to Comment 3, above. A notable result of this policy has been the increasing biomass trends for West Coast overfished species; one of the formerly overfished species, lingcod, has been rebuilt. Another result of this policy has been that fishing communities have not had full access to many of the healthy groundfish stocks, and thus have not been able to achieve the OYs for those species. NMFS, therefore, disagrees with The Four Organizations' assertion that NMFS's groundfish policies are intended to "maximize bycatch of overfished species to the highest level that can be

justified under the rebuilding plans.” The proposed rule to implement Amendment 16–4 and the Final EIS analyzing overfished species rebuilding plans more fully describe the approach NMFS and the Council are using to rebuild all seven overfished species collectively through target fishery elimination and bycatch minimization.

*Comment 10:* The Four Organizations believe that the standardized total catch reporting methodology and observer program are inadequate. The MSA requires that all FMP’s shall “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.” 16 U.S.C. 1853(a)(11). The reports on Pacific groundfish discards to date have been incomplete, unclear, untimely, and inconsistent from year to year. Total mortality estimates, including discards, for 2003–2005 were only first provided by NMFS in June 2006. Moreover, discard estimates are still lacking for many species (such as sharks, skates, crab and many rockfish species), reported discards are not presented by fishery and gear type, and they have been reported inconsistently from year to year, making trend evaluation impossible.

NMFS must provide consistent and accurate estimates of discards, including all marine life discarded by fishery and gear type. Consistent with Amendment 18’s requirement that catch data be made available for more precise inseason management, information should be collected, analyzed, and made public on as close to a real-time basis as possible, but certainly no less than once annually. This level of reporting is necessary to make informed decisions that protect marine ecosystems and promote sustainable fisheries. The Four Organizations request that NMFS hold an annual meeting to discuss the requested discard reports as a way to review the data and find out where improvements can be made. Another reason for improving the accuracy and timeliness of bycatch data is to provide fishermen with a proactive opportunity to avoid areas and seasons with high bycatch rates. The Four Organizations support the Council’s efforts to investigate how to increase the frequency with which observer and total catch data are made available to the Council and the public. The Council has identified several steps in the data aggregation process that need to be reviewed for efficiency. This is a step in the right direction and the Council and NMFS should move expeditiously to implement such steps.

*Response:* Amendment 16–1 established an observer program

requirement in the FMP. Amendment 18 revises and expands Section 6.4 of the FMP, “Standardized Total Catch Reporting and Compliance Monitoring Program.” Under Amendment 18, the FMP continues to require the observer program that has been in place for the non-whiting groundfish fisheries since 2001 and for the at-sea whiting fisheries since 1991.

As discussed in the preamble to the proposed rule for this action and noted by The Four Organizations, NMFS is working to meet the Council’s priority request that the agency review observer data delivery speed with the aim of identifying where that rate of data delivery may be improved. Observer data collection and the calibration of observer data with associated data from State fish tickets and logbooks is a joint agency process between NMFS, the three States, the four groundfish tribes, and the Pacific States Marine Fisheries Commission. Total catch estimation requires that the agencies work together to assess catch from directed and incidental commercial groundfish fisheries, recreational fisheries, tribal fisheries, and scientific research groundfish take. The Council process brings the different data-gathering agencies together; therefore, NMFS is working with the Council and its advisory bodies to improve total catch data delivery so that total catch estimates may be provided on a regular and annual basis. NMFS agrees with the suggestion of The Four Organizations that the agency hold a meeting to discuss the results of observer data collection, analysis, and reporting with interested parties. NMFS will coordinate with the Council to set a first meeting that is open to the public, and available to Council and State participation, for Spring 2007.

*Comment 11:* The Four Organizations believe that the standardized total catch reporting methodology and observer program are inadequate. Other regions have already demonstrated that real-time access to observer data by fishermen is a practicable means of minimizing bycatch. For example, both the Alaska groundfish fishery and the at-sea whiting fishery in the Pacific region use real-time data with great success. The Four Organizations are disappointed that there is no similar effort to move towards real-time or near real-time access to information. There is no excuse for not considering the practicability of these measures that provide fishermen such a powerful tool to reduce bycatch.

*Response:* NMFS addressed the impracticability of implementing the type of observer program used in the

Alaska groundfish fishery and the at-sea whiting fishery in the response to Comment 6, above. The fisheries that The Four Organizations cite as examples to follow in designing a standardized total catch reporting methodology have significant operational differences from the West Coast groundfish non-whiting fishery. An at-sea reporting system such as that used in Alaska or the West Coast at-sea whiting sectors is not applicable to the West Coast groundfish fisheries in part because the usual size of the West Coast groundfish vessels is quite small (usually less than 60 feet (18.3 m) and in many cases less than 20 feet (6.1 m) in length) as compared with the Alaska fleet, where vessels are typically greater than 125 feet (38.1 m) in length. The facilities on the small West Coast vessels reflect this small size. Alaska fleet vessels go to sea for weeks at a time, and have computers with a dependable power source and adequate communication systems. West Coast groundfish vessels, by contrast, go to sea for an average of 5 days, and many have limited power and communication systems. Alaska and at-sea whiting vessels have the space to host two observers who can share collection and data submission duties. West Coast groundfish vessels, by contrast, cannot accommodate more than one observer, who must then be available to sample the catch around the clock or for long periods of time. The catch of many of the Alaskan fisheries are higher volume than the West Coast groundfish fishery, but relatively pure, making bycatch sampling more straightforward. West Coast groundfish fisheries, by contrast, are heterogeneous with tens of species in a single haul. Over 60 of the 90+ species managed by the West Coast groundfish FMP are rockfish, many of which are similar in appearance, making correct identification more time consuming. These challenges to mounting an observer program for the West Coast groundfish fisheries have not prevented WCGOP from developing a sampling plan adequate to estimate bycatch in the groundfish fisheries. Observer programs must be tailored to the fisheries they are designed to observe; no single sampling plan is adequate and practicable for all fisheries.

*Comment 12:* Amendment 16–1, now part of the FMP, commits NMFS to publishing, among other things, “a description of the observer coverage plan in the **Federal Register**.” FMP at 6.4.1.1. Notwithstanding the stated commitment to develop an observer plan that is sufficient “to assess the amount and type of bycatch occurring in

the fishery.” The Four Organizations believe that NMFS is still relying on the observer plan developed in 2001. They also believe that the scope of the observer plan continues to limit the quality and accuracy of the bycatch data on which the Council relies to manage the fishery and the bycatch minimization measures that the Council and NMFS deem currently practicable.

**Response:** NMFS agrees that the 2001 observer coverage plan the agency had previously posted on-line needed to be updated to include current observer coverage priorities and efforts in the West Coast groundfish fishery. NMFS has updated the observer coverage plan to reflect current practices and posted it online at: <http://www.nwfsc.noaa.gov/research/divisions/fram/observer/index.cfm>. As explained below, NMFS disagrees with the comment about the quality and accuracy of the bycatch data.

**Comment 13:** The Four Organizations request that NMFS implement 100 percent observer coverage for optimal monitoring and inseason management of Pacific groundfish fisheries. In a report on necessary observer coverage levels, it was determined through simulation studies and literature review that if 100 percent observer coverage is not attainable, at least 20 percent observer coverage (of total catch) is necessary for reasonable estimates of common species (species making up 35 percent of total catch) and at least 50 percent observer coverage is necessary for precise and accurate estimates of rare species, such as overfished rockfish. (Babcock, E.A., E.K. Pikitch, and C.G. Hudson, “How Much Observer Coverage is Enough to Adequately Estimate Bycatch?” Oceana (2003), [hereinafter Oceana Report] ). Since Pacific Coast groundfish fisheries intercept rare, overfished species, NMFS should require at least 50 percent observer coverage, and preferably 100 percent coverage, in order to have an accurate assessment of bycatch. Robust at-sea monitoring is essential for implementing all practicable bycatch measures.

**Response:** The Four Organizations have asked that NMFS require at least 50 percent observer coverage, preferably 100 percent. The impracticability of 100 percent observer coverage in the West Coast groundfish fisheries is addressed above in the responses to Comments 6 and 11. This response to Comment 13 will focus on the applicability of the Oceana Report to the West Coast groundfish fishery, and on the conclusion of The Four Organizations (one of these organizations is Oceana) that this report requires NMFS to implement 50–100 percent observer

coverage for the West Coast groundfish fleet for observer coverage to be considered adequate for estimating total catch. NMFS’s Northeast Fisheries Science Center rebutted many of the arguments in the Oceana Report in its Reference Document 05–09, “NEFSC Bycatch Estimation Methodology: Allocation, Precision, and Accuracy (available online at: <http://www.nefsc.noaa.gov/nefsc/publications/crd/crd0509/>) This response to Comment 13 addresses the Oceana Report as it may or may not apply to the West Coast groundfish fishery.

In the 2005 groundfish fishery, over 90 percent of West Coast groundfish shoreside landings by volume were whiting landed in the shore-based whiting fishery. As mentioned above in the response to Comment 6, the shore-based whiting sector is monitored via an EFP requiring maximized retention and electronic monitoring. Of the non-whiting 2005 groundfish landings, just under 27,000 mt of fish, 80 percent of the landings by weight were made by trawl vessels. (The 2005 non-pollock groundfish catch from the Gulf of Alaska and Bering Sea, by contrast, exceeded 500,000 mt of fish.) WCGOP began operations in 2001 by focusing coverage on the trawl fleet because of its relatively higher percentage of landings. Since that time, WCGOP has expanded coverage to the limited entry fixed gear fishery and several of the open access fisheries that take groundfish incidentally.

Most West Coast groundfish vessels do not participate only in the groundfish fishery in any given year. Instead, they employ a mixed fishing strategy, moving between target fisheries, depending on which seasons are open at what times. One of the major reasons that the groundfish fishery is managed as a year-round fishery is that groundfish is one of the few West Coast species groups that has few natural seasonal constraints on availability. For example, the Dungeness crab season primarily occurs in the winter when crab shells have hardened, while the start and end of the summer albacore tuna season is less predictable and dependent on albacore migrations in association with ocean climate conditions. Observer coverage percentages are a factor of the number of observers deployed over the number of vessels participating in the observed fishery. Because the number of observers WCGOP deploys is relatively constant, while the number of vessels making groundfish landings in any one cumulative limit period varies, observer coverage percentages vary according to

the number of vessels participating in the fishery.

WCGOP summarizes observer data, including coverage percentages, in regular reports to the Council and the public (see <http://www.nwfsc.noaa.gov/research/divisions/fram/observer/databreport/index.cfm>). The September 2005 report on trawl observer activities through April 2005 shows that WCGOP sampled 27 percent of non-whiting trawl landings, by volume, in 2004 (Table 1). Following the non-whiting trawl fleet, NMFS prioritized observer coverage on limited entry vessels with sablefish endorsements, which have permits to participate in the larger-volume primary sablefish fishery. The February 2005 report on the sablefish-endorsement limited entry fixed gear fishery shows that WCGOP sampled 13 percent of longline landings and 15 percent of pot landings, by volume in 2004 (Table 1).

Open access groundfish fisheries do not have Federal permits, and many do not have State permits, which makes it difficult for NMFS to identify a population of vessels to be sampled. As discussed above, this inability to identify the pool of possible open access fishery participants spurred the Council to put a high priority on permitting the fishery as a bycatch accounting measure for its bycatch work plan. NMFS works with the States to secure permission to place Federal observers on vessels participating in State-managed fisheries that take groundfish incidentally and to make progress toward identifying total landings by various open access fishery components. This final rule includes a provision to authorize NMFS to place its observers on open access vessels, which will better facilitate agreements with the States, and will give NMFS the authority to better sample vessels in the directed open access groundfish fishery.

The commenters state their belief that a 50–100 percent sampling level is needed to track overfished species in the West Coast groundfish fishery. However, the level of sampling that is needed to achieve precision in documenting relatively rare species depends on whether observers are sampling from and measuring total catch or only the portion of the catch that is discarded. In the West Coast non-whiting fishery, landings records are relied upon to document retained catch. By concentrating on discarded catch, WCGOP observers are able to more thoroughly determine the species and amounts of all fish that are discarded. Therefore, even though some species may be infrequently encountered, when they are encountered on an observed vessel, there is a higher likelihood that

they will be documented. In other fisheries, like some off Alaska, where observers draw small samples of the catch to measure the total catch of all species, there is a greater chance that infrequently occurring species will be missed. Another potential concern with regard to infrequently occurring species is the degree to which all hauls (or sets) on observed trips are sampled. WCGOP observers sample nearly every haul on all observed trips.

As described in the response to Comment 5, NMFS used the 2004 observer data to finalize post-season estimates of 2004 total catch, to revise inseason bycatch rate estimates in 2005 and 2006, and to inform pre-season bycatch rate projections for the 2007–2008 fisheries. The process of using observer data to project bycatch pre-season, and then revising bycatch rate estimates inseason once a new year's worth of observer data becomes available, can cause fluctuations in fishery management. If new observer data are introduced inseason and new bycatch rate calculations are different from those made pre-season, the fisheries may have to be adjusted to prevent OYs from being exceeded.

The best empirical evidence of the adequacy of the current bycatch reporting methodology is the pattern of fishery management fluctuations since NMFS first began using observer data to inform management in 2003. This shift to using new observer data to help manage the fishery caused some fluctuations in fishery management, such that severe catch and area restrictions were needed to constrain catch in the last quarter of 2003 (68 FR 60865, October 24, 2003.) The 2004 fishing year began with the fishery modeled for bycatch using that first year's worth of observer data, with further observer data supplementing the model mid-year. However, NMFS still did not have enough observer data years pre-season to prevent year-end fishery closures in reaction to observer data received inseason. The 2004 fishery ended with nearshore trawl closures to protect canary rockfish and a petrale sole fishery elimination to protect darkblotched rockfish (69 FR 59816, October 6, 2004.)

For the 2005 fishery, the design of which was informed by two years' worth of observer data and two years experience working with that data, the Council and NMFS again implemented a seasonally-varied combination of RCAs and trip limits (69 FR 77012, December 23, 2004.) By the end of 2005, NMFS again had to restrict the trawl fishery to constrain bycatch, but there was an important difference in 2005

from prior years: In 2003 and 2004, year-end restrictions were needed because observer data had showed higher than previously-predicted bycatch rates; in 2005, year-end restrictions were needed because the target species were being caught at a faster-than-predicted rate, so the fisheries were constrained to keep both target species and bycatch species within their OYs (70 FR 58066, October 5, 2005; 70 FR 72385, December 5, 2005.)

The 2006 fishery has been the second year in a two-year management cycle. The Council and NMFS took action in December 2005 (70 FR 72385) and February 2006 to modify the 2006 limits and area closures with best available data from 2005 and prior years (71 FR 8489, February 17, 2006.) As of the Council's September 2006 meeting, total catch from the 2006 trawl fishery was below pre-season predicted levels for both targeted and bycatch species. NMFS was able to modestly increase previously set trip limits for petrale sole and sablefish for the November–December period to allow the fisheries access to OYs for those target species without exceeding overfished species OYs (71 FR 58289, October 3, 2006.) As discussed in the preamble to the October inseason action, the Council and NMFS reduced the whiting fishery's canary rockfish bycatch limit in order to accommodate the higher-than-expected canary rockfish research catch.

Few statistical sampling programs are subject to the immediate real world testing given to fisheries observer data used in fishery management. Instead of waiting for several years' worth of observer data before using the data to inform management, the agency placed a priority on beginning the use of observer information for more informed management on bycatch minimization as soon as possible. Each year that NMFS collects observer data, the agency's confidence in the statistical information about intra-annual variability in bycatch rates improves. This increasing confidence in observer data allows the agency to better predict how the fishery and fish stocks will behave in different seasons within the fishing year. Over time, NMFS expects that a longer time series of data will illustrate inter-annual variability of bycatch rates in response to changing environmental conditions. Over the life of the observer program, observer coverage in the trawl fleet has been in the 20–40 percent range, with many thousands of fishing trips observed. It is true that a greater percentage coverage would have provided NMFS with more vessel-specific data points, but such

coverage would not have created a faster solution to the specific challenge of West Coast groundfish management—which is to project fishing activities in a multi-species fishery with seasonal variability in target and bycatch species migrations, so that time- and area-appropriate bycatch minimization measures may be applied when and where they will have their greatest positive benefits to the resource. Observer programs must be designed for the species managed, for the fishing vessels observed, and to support a specific management system. NMFS's data collection and analysis methods have proven their adequacy for management in the rigorous test of inseason management.

*Comment 14:* Bycatch reduction should apply to all species, not just overfished and protected ones. The Four Organizations believe that the proposed rule fails to implement all practicable bycatch minimization measures for non-overfished species. The preamble to NMFS's National Standard Guidelines acknowledges that “[t]he definition of ‘fish’ in the Magnuson-Stevens Act includes finfish, shellfish, and invertebrate species, and all other forms of marine animal and plant life except marine mammals and birds; by extension, bycatch applies to these forms of marine life.” 63 FR 24212, at 24224 (May 1, 1998). The proposed rule to implement Amendment 18 incorporates depth-based management measures, particularly the setting of closed areas as a tool to minimize bycatch of overfished species, prevent overfishing of any groundfish species, and minimize the incidental catch of prohibited and protected species. Area closures are an important tool that has likely reduced bycatch in Pacific groundfish fisheries and their use should be continued to minimize the bycatch of all marine life. The Four Organizations are interested in whether the Council currently uses the habitat suitability data from the essential fish habitat EIS and Amendment 19 in order to calibrate spatial and/or temporal closures to maximize the protection of overfished species, precautionary zone species, and other managed species, as well as benthic invertebrates like corals.

*Response:* As discussed above in the response to Comment 5, NMFS places its highest bycatch minimization priority on constraining the incidental catch of overfished groundfish species. However, many of the bycatch reduction measures detailed in the response to Comment 3 benefit species other than overfished species. For example, the RCAs prevent catch of many continental shelf species, not just the overfished

continental shelf species. In 2005, the fisheries took approximately 60 mt of the 958 mt OY for minor shelf rockfish, and approximately 891 mt of the 3,871 mt OY for yellowtail rockfish (per Pacific Fisheries Information Network, see: [http://www.psmfc.org/pacfin/ber\\_index.html](http://www.psmfc.org/pacfin/ber_index.html).) Management measures for 2005, in response to information on shortspine thornyhead overfishing in 2003, resulted in underharvests (OYs not achieved) of shortspine thornyhead and co-occurring species longspine thornyhead, Dover sole, and sablefish. And, as acknowledged by The Four Organizations, Amendment 18 and this final rule expand the use of area closures so that they may be used to prevent overfishing of groundfish species not managed with rebuilding plans, and to protect prohibited species, among other uses.

The Four Organizations also refer to "habitat suitability data" in this comment. Amendment 19 to the FMP, which NMFS approved on March 8, 2006, addressed groundfish EFH. In developing Amendment 19, the Council considered developing what they called "habitat suitability probability values" (HSP values) for groundfish species. These HSP values were intended to illustrate links between particular groundfish species and their particular habitats. The intent of developing these species-specific values was to look, in aggregate, at where all of the groundfish species managed under the FMP are found in their habitats at their different life stages. The Council and its Scientific and Statistical Committee (SSC) found, however, that there were insufficient data on all groundfish species and all of their life stages to set life stage or species-specific HSP values. Amendment 19 ultimately looked at aggregated information on all groundfish to delineate a collective EFH for all groundfish species, rather than setting species-specific EFHs. HSP values and the fathom depth contours that inform RCA designation use some common data. However, given the SSC's review of the HSP value system, NMFS is not comfortable using HSP values to define closures to minimize bycatch of overfished species at this time.

The Four Organizations also mention benthic invertebrates, such as coral. The EFH EIS describes the habitats of structure-forming benthic invertebrates, where known. Structure-forming benthic invertebrates occur both within and outside of the 51 EFH Conservation Areas, and both within and outside of the Rockfish Conservation Areas.

*Comment 15:* The proposed rule explains that the use of vessel monitoring systems (VMS) is an

important component to enforcing the "wide variety of marine closed areas" that are themselves important bycatch minimization measures (71 FR 36506, at 36511.) Amendment 18 would authorize the use of VMS in the FMP, but not require it. Instead, the Council plans on issuing a proposed rule sometime in "summer 2006" to mandate the use of VMS within the open-access fishery. The Four Organizations wish to know why this requires a separate process? If VMS is a practicable bycatch minimization measure, or, in the least, supports the implementation of other bycatch measures, NMFS should include the requirement to use VMS in the FMP itself and should not wait to do so.

*Response:* Groundfish limited entry vessels, which make the majority (over 90 percent) of commercial groundfish landings, have been required to carry and use VMS units since January 1, 2004 (68 FR 62374, November 4, 2003.) The Council had recommended this initial coverage in the limited entry fishery with the expectation that coverage requirements would be expanded to the open access fishery. The bycatch mitigation EIS was a program-level EIS, assessing broad-scale programs for the future of groundfish bycatch minimization. The Council evaluated alternatives for requiring the use of VMS via a separate National Environmental Policy Act process, with an Environmental Assessment specific to the purpose and need for that action. The separate processes were needed to ensure that the specific analysis of a requirement for open access vessels to carry VMS did not get lost in the midst of the more broad-scale bycatch EIS. NMFS intends to publish a proposed rule to implement VMS in the open access fisheries as soon as possible.

#### Changes From the Proposed Rule

NMFS made changes to regulatory language in 50 CFR 660.314 in order to clarify regulatory text. These changes do not alter the effects of that text, or the persons or organizations to which they apply. NMFS also added changes to regulatory language at 50 CFR 660.306 and 660.370 in accordance with a comment received from Washington Department of Fish and Wildlife, as detailed above in the response to Comment 1.

#### Classification

The Administrator, Northwest Region, NMFS, has determined that Amendment 18 and this final rule are necessary for the conservation and management of the Pacific Coast groundfish fishery and that

they are consistent with the Magnuson-Stevens Act and other applicable laws.

NMFS prepared an FEIS in support of this action. The FEIS was filed with the Environmental Protection Agency on September 17, 2004. A notice of availability for this FEIS was published on September 24, 2004 (69 FR 57277). In approving Amendment 18, on September 6, 2006, NMFS issued a ROD identifying the selected alternative. A copy of the ROD is available from NMFS (see **ADDRESSES**).

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

NMFS prepared a final regulatory flexibility analysis (FRFA) as part of the regulatory impact review. The FRFA incorporates the IRFA, the comments and responses to the proposed rule, and a summary of the analyses completed to support the action. A copy of the FRFA is available from NMFS (see **ADDRESSES**) and a summary of the FRFA, per the requirements of 5 U.S.C. 604(a), follows: Amendment 18 is intended to respond to court orders in *Pacific Marine Conservation Council v. Evans*, 200 F.Supp.2d 1194 (N.D. Calif. 2002) by bringing the Pacific Fishery Management Council's bycatch mitigation program into the FMP. During the comment period for the proposed rule, NMFS received two letters of comment, but neither of these letters addressed the IRFA, although one letter directly or indirectly addressed the economic effects of the rule, as discussed above in the responses to Comments 6–9. Approximately 1,511 vessels participated in the West Coast commercial groundfish fisheries in 2003. Of those, about 498 vessels were registered to limited entry permits issued for either trawl, longline, or pot gear. All but 10–20 of the 1,511 vessels participating in the groundfish fisheries are considered small businesses by the Small Business Administration. In the 2001 recreational fisheries, there were 106 Washington charter vessels engaged in salt water fishing outside of Puget Sound, 232 charter vessels active on the Oregon coast, and 415 charter vessels active on the California coast. Although some charter businesses, particularly those in or near large California cities, may not be small businesses, all are assumed to be small businesses for purposes of this discussion.

This action is not expected to have significant impacts on small entities. The alternatives considered for this action are detailed in the proposed rule to implement Amendment 18. The Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) on

"An Observer Program for Catcher Vessels in the Pacific Coast Groundfish Fishery" analyzed the effects of implementing an observer program in the West Coast groundfish fishery on the environment, economy, and small businesses. A description of the costs associated with compliance of the proposed rules with regard to Federal observer regulations was summarized in that document. The requirements that (1) Groundfish fishery management measures take into account the co-occurrence ratios of overfished species with more abundant target stocks; (2) the allowance of the use of depth-based closed areas a routine management measure for preventing the overfishing of any groundfish species by minimizing the direct or incidental catch of that species; and (3) the allowance of the use of depth-based closed areas as a routine management measure for minimizing the bycatch of any prohibited or protected species taken incidentally in the groundfish fishery do not increase the costs associated with reporting, record-keeping, or other compliance requirements directly. There are no recordkeeping, reporting, or other compliance issues forthcoming from the proposed rule.

NMFS issued Biological Opinions under the Endangered Species Act (ESA) on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999, pertaining to the effects of the Pacific Coast groundfish FMP fisheries on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementation of the FMP for the Pacific Coast groundfish fishery was not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS reinitiated a formal ESA section 7 consultation under the ESA in 2005 for both the Pacific whiting

midwater trawl fishery and the groundfish bottom trawl fishery. The December 19, 1999 Biological Opinion had defined an 11,000 Chinook incidental take threshold for the Pacific whiting fishery. During the 2005 Pacific whiting season, the 11,000 fish Chinook incidental take threshold was exceeded, triggering reinitiation. Also in 2005, new data from the West Coast Groundfish Observer Program became available, allowing NMFS to complete an analysis of salmon take in the bottom trawl fishery.

NMFS prepared a Supplemental Biological Opinion dated March 11, 2006, which addressed salmon take in both the Pacific whiting midwater trawl and groundfish bottom trawl fisheries. In its 2006 Supplemental Biological Opinion, NMFS concluded that catch rates of salmon in the 2005 whiting fishery were consistent with expectations considered during prior consultations. Chinook bycatch has averaged about 7,300 over the last 15 years and has only occasionally exceeded the reinitiation trigger of 11,000. Since 1999, annual Chinook bycatch has averaged about 8,450. The Chinook ESUs most likely affected by the whiting fishery has generally improved in status since the 1999 section 7 consultation. Although these species remain at risk, as indicated by their ESA listing, NMFS concluded that the higher observed bycatch in 2005 does not require a reconsideration of its prior "no jeopardy" conclusion with respect to the fishery. For the groundfish bottom trawl fishery, NMFS concluded that incidental take in the groundfish fisheries is within the overall limits articulated in the Incidental Take Statement of the 1999 Biological Opinion. The groundfish bottom trawl limit from that opinion was 9,000 fish annually. NMFS will continue to monitor and collect data to analyze take levels. NMFS also reaffirmed its prior determination that implementation of the Groundfish FMP is not likely to jeopardize the continued existence of any of the affected ESUs.

Lower Columbia River coho (70 FR 37160, June 28, 2005) and the Southern Distinct Population Segment (DPS) of green sturgeon (71 FR 17757, April 7, 2006) were recently listed as threatened under the ESA. As a consequence, NMFS has reinitiated its Section 7 consultation on the PFMC's Groundfish FMP. After reviewing the available information, NMFS concluded that, in keeping with Section 7(a)(2) of the ESA, allowing the fishery to continue under Amendment 18 to the FMP would not result in any irreversible or irretrievable commitment of resources that would

have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.

Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In accordance with E.O. 13175, this rule was developed after meaningful consultation and collaboration with the tribal representative on the Pacific Council and tribal officials from the tribes affected by this action.

#### List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: November 6, 2006.

**Samuel D. Rauch III,**

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

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

#### PART 660—FISHERIES OFF WEST COAST STATES

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

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

■ 2. In § 660.306, paragraph (a)(7) is revised to read as follows:

##### § 660.306 Prohibitions.

\* \* \* \* \*

(a) \* \* \*

(7) Fail to sort, prior to the first weighing after offloading, those groundfish species or species groups for which there is a trip limit, size limit, scientific sorting designation, quota, harvest guideline, or OY, if the vessel fished or landed in an area during a time when such trip limit, size limit, scientific sorting designation, quota, harvest guideline, or OY applied.

\* \* \* \* \*

■ 3. In § 660.314, paragraphs (c)(2), and (f)(1)(v)(B) are revised to read as follows:

##### § 660.314 Groundfish observer program.

\* \* \* \* \*

(c) \* \* \*

(2) *Catcher vessels.* When NMFS notifies the owner, operator, permit holder, or the manager of a catcher vessel of any requirement to carry an observer, the catcher vessel may not be used to fish for groundfish without carrying an observer.

(i) For the purposes of this section, the term "catcher vessel" includes all of the following vessels (except vessels described in paragraphs (c)(1) and (c)(3) of this section):

(A) Any vessel registered for use with a Pacific Coast groundfish limited entry permit that fishes off the States of Washington, Oregon, or California seaward of the baseline from which the territorial sea of the United States is measured out to the seaward edge of the EEZ (*i.e.*, 0–200 nm offshore).

(B) Any vessel other than a vessel described in paragraph (c)(2)(i)(A) of this section that is used to take and retain, possess, or land groundfish in or from the EEZ.

(C) Any vessel that is required to take a Federal observer by the applicable State law.

(ii) *Notice of departure—Basic rule.* At least 24 hours (but not more than 36 hours) before departing on a fishing trip, a vessel that has been notified by NMFS that it is required to carry an observer, or that is operating in an active sampling unit, must notify NMFS (or its designated agent) of the vessel's intended time of departure. Notice will be given in a form to be specified by NMFS.

(A) *Optional notice—Weather delays.* A vessel that anticipates a delayed departure due to weather or sea conditions may advise NMFS of the anticipated delay when providing the basic notice described in paragraph (c)(2)(ii) of this section. If departure is delayed beyond 36 hours from the time the original notice is given, the vessel must provide an additional notice of departure not less than 4 hours prior to departure, in order to enable NMFS to place an observer.

(B) *Optional notice—Back-to-back fishing trips.* A vessel that intends to make back-to-back fishing trips (*i.e.*, trips with less than 24 hours between offloading from one trip and beginning another), may provide the basic notice described in paragraph (c)(2)(ii) of this section for both trips, prior to making the first trip. A vessel that has given such notice is not required to give additional notice of the second trip.

(iii) *Cease fishing report.* Within 24 hours of ceasing the taking and retaining of groundfish, vessel owners, operators, or managers must notify NMFS or its designated agent that fishing has ceased. This requirement applies to any vessel that is required to carry an observer, or that is operating in a segment of the fleet that NMFS has identified as an active sampling unit.

\* \* \* \* \*

(f) \* \* \*

(1) \* \* \*

(v) \* \* \*

(B) *Annual general endorsements.* Each observer must obtain an annual general endorsement to their

certification prior to his or her first deployment within any calendar year subsequent to a year in which a certification training endorsement is obtained. To obtain an annual general endorsement, an observer must successfully complete the annual briefing, as specified by the Observer Program. All briefing attendance, performance, and conduct standards required by the Observer Program must be met.

\* \* \* \* \*

■ 4. In § 660.370, paragraphs (b), (c)(3), and (h)(6) introductory text are revised to read as follows:

**§ 660.370 Specifications and management measures.**

\* \* \* \* \*

(b) *Biennial actions.* The Pacific Coast Groundfish fishery is managed on a biennial, calendar year basis. Harvest specifications and management measures will be announced biennially, with the harvest specifications for each species or species group set for two sequential calendar years. In general, management measures are designed to achieve, but not exceed, the specifications, particularly optimum yields (harvest guidelines and quotas), commercial harvest guidelines and quotas, limited entry and open access allocations, or other approved fishery allocations, and to protect overfished and depleted stocks. Management measures will be designed to take into account the co-occurrence ratios of target species with overfished species, and will select measures that will minimize bycatch to the extent practicable.

(c) \* \* \*

(3) *All fisheries, all gear types, depth-based management measures.* Depth-based management measures, particularly the setting of closed areas known as Groundfish Conservation Areas, may be implemented in any fishery that takes groundfish directly or incidentally. Depth-based management measures are set using specific boundary lines that approximate depth contours with latitude/longitude waypoints found at § 660.390–.394. Depth-based management measures and the setting of closed areas may be used: to protect and rebuild overfished stocks, to prevent the overfishing of any groundfish species by minimizing the direct or incidental catch of that species, to minimize the incidental harvest of any protected or prohibited species taken in the groundfish fishery, to extend the fishing season; for the commercial fisheries, to minimize disruption of traditional fishing and marketing patterns; for the recreational

fisheries, to spread the available catch over a large number of anglers; to discourage target fishing while allowing small incidental catches to be landed; and to allow small fisheries to operate outside the normal season.

\* \* \* \* \*

(h) \* \* \*

(6) *Sorting.* Under § 660.306(a)(7), it is unlawful for any person to “fail to sort, prior to the first weighing after offloading, those groundfish species or species groups for which there is a trip limit, size limit, scientific sorting designation, quota, harvest guideline, or OY, if the vessel fished or landed in an area during a time when such trip limit, size limit, scientific sorting designation, quota, harvest guideline, OY applied.” The States of Washington, Oregon, and California may also require that vessels record their landings as sorted on their State fish tickets. This provision applies to both the limited entry and open access fisheries. The following species must be sorted in 2005 and 2006:

\* \* \* \* \*

■ 5. In § 660.373, paragraphs (c)(1), (c)(2), and (d) are revised to read as follows:

**§ 660.373 Pacific whiting (whiting) fishery management.**

\* \* \* \* \*

(c) \* \* \*

(1) *Klamath River Salmon Conservation Zone.* The Klamath River Salmon Conservation Zone is an area off the northern California coast intended to protect salmon from incidental catch in the whiting fishery. The Klamath River Conservation Zone is defined by straight lines connecting the following specific latitude and longitude coordinates in the order listed:

(i) 41°38.80' N. lat., 124°07.49' W. long.;

(ii) 41°38.80' N. lat., 124°23.00' W. long.;

(iii) 41°26.80' N. lat., 124°19.26' W. long.;

(iv) 41°26.80' N. lat., 124°03.80' W. long.; and connecting back to 41°38.80' N. lat., 124°07.49' W. long.

(2) *Columbia River Salmon Conservation Zone.* The Columbia River Salmon Conservation Zone is an area off the northern Oregon and southern Washington coast intended to protect salmon from incidental catch in the whiting fishery. The Columbia River Salmon Conservation Zone is defined by straight lines connecting the following specific latitude and longitude coordinates in the order listed:

(i) 46°18.00' N. lat., 124°04.50' W. long.;

(ii) 46°18.00' N. lat., 124°13.30' W. long.;

(iii) 46°11.10' N. lat., 124°11.00' W. long.;

(iv) 46°13.58' N. lat., 124°01.33' W. long.; and connecting back to 46°18.00' N. lat., 124°04.50' W. long.

(d) *Eureka area trip limits*. Trip landing or frequency limits may be established, modified, or removed under

§ 660.370 or § 660.373, specifying the amount of Pacific whiting that may be taken and retained, possessed, or landed by a vessel that, at any time during a fishing trip, fishes in the Eureka management area (from 43°00.00' to 40°30.00' N. lat.) shoreward of a

boundary line approximating the 100 fm (183 m) depth contour, as defined with latitude/longitude coordinates at § 660.393.

\* \* \* \* \*

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