

PUBLIC REVIEW DRAFT  
**REGULATORY IMPACT REVIEW/  
INITIAL REGULATORY FLEXIBILITY ANALYSIS**

to

**REVISE the FEDERAL DEFINITION of SPORT FISHING GUIDE SERVICES**

Date: January 10, 2014

Lead Agency: NOAA Fisheries Service  
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Responsible Official: Jim Balsiger, Alaska Regional Administrator

Summary: The Council is considering a proposed action to amend the definition of “sport fishing guide services” in Federal regulations that govern the charter halibut fishery in Southeast (Area 2C) and Southcentral (Area 3A) Alaska. The intent of the action is to be more consistent with State of Alaska regulations.

The action is intended to address inconsistencies in current Federal and State of Alaska definitions pertaining to sport fishing guide services. A few businesses have developed a guide-assisted model that allows them to provide assistance to anglers during a chartered halibut fishing trip, from shore or adjacent vessels. This practice is not considered to be “sport fishing guide services” under existing Federal regulations because the guide is not on board the vessel. As a result, such anglers are allowed to fish under regulations in effect for unguided anglers, which generally are more liberal. This practice is consistent with State regulations.

In addition to the no action alternative (Alternative 1), the Council identified Alternative 2, which would revise and clarify Federal definitions for guided sport fishing, with three options. Option 1 would remove the requirement that a guide be on board the same vessel as the guided angler. Option 2 would add a definition of “compensation” to Federal regulations. The definition of compensation would be identical (Option 2a) or similar (Option 2b) to the current State definition for compensation. Option 3 would add a definition of guiding activities that would be considered “assistance” to Federal regulations. The Council may proceed with final action on Alternative 2, Option 1 alone, or Options 1 and 2, even if a preferred alternative under Option 3 cannot be identified at the time of final action. Final action is scheduled for February 2014. The agency staffs recommend Alternative 2, Option 2b if the Council adopts Alternative 2, Option 1 as its preferred alternative. The amendment, if approved by the Secretary of Commerce, would be in effect for 2015, at the earliest.

Public Comments: Public comments on this draft will be accepted through the February 2014 Council meeting.

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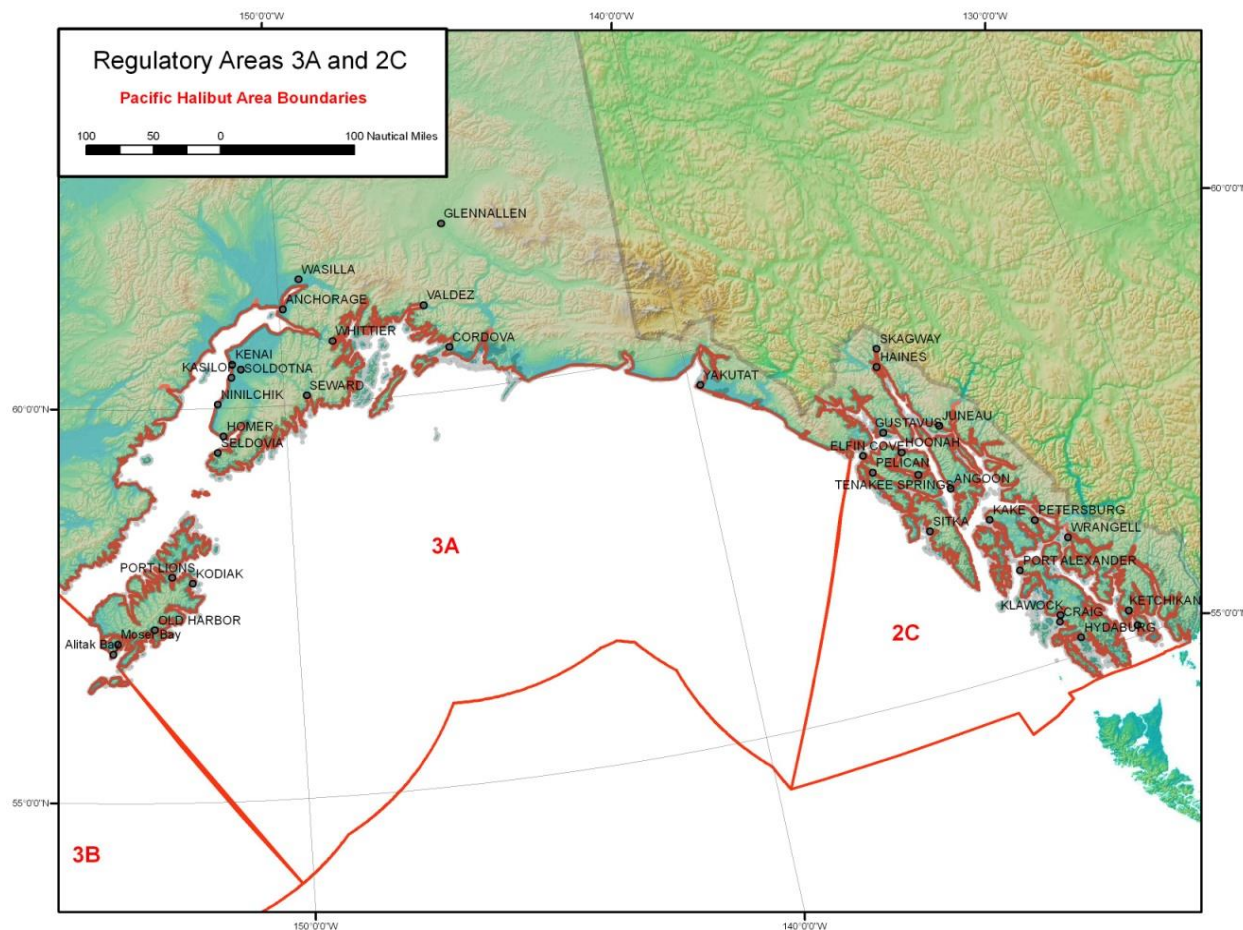
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# 1 REGULATORY IMPACT REVIEW

This document contains the Regulatory Impact Review (RIR) for a proposed amendment to regulations at 50 CFR part 300 that describe management of Pacific halibut (*Hippoglossus stenolepis*) guided sport (charter) fisheries in International Pacific Halibut Commission (IPHC) regulatory areas 2C (Southeast Alaska) and 3A (South Central Alaska) (Figure 1). The Council requested this analysis to investigate inconsistencies in current Federal and State of Alaska definitions pertaining to sport fishing guide services. This proposed regulatory amendment would address a management issue pertaining to the charter halibut fisheries, which is described in more detail in Section 1.2.



**Figure 1. IPHC Regulatory Areas for Pacific Halibut Charter Halibut Limited Access Program (Source: NOAA)**

The preparation of an RIR is required under Presidential Executive Order (E.O.) 12866 (58 FR 51735: October 4, 1993). The requirements for all regulatory actions specified in E.O. 12866 are summarized in the following statement from the E.O.:

*In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and Benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that*

*maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.*

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant.” A “significant regulatory action” is one that is likely to:

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

## **1.1 Management Authority**

The IPHC and NMFS manage fishing for Pacific halibut through regulations established under authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). The IPHC adopts regulations governing the Pacific halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea (Convention), signed at Ottawa, Ontario, on March 2, 1953, as amended by a Protocol Amending the Convention (signed at Washington, D.C., on March 29, 1979). For the U.S., regulations developed by the IPHC are subject to acceptance by the Secretary of State, with concurrence from the Secretary of Commerce. After acceptance by the Secretary of State and the Secretary of Commerce, NMFS publishes the IPHC regulations in the Federal Register as annual management measures pursuant to 50 CFR 300.62. The final rule implementing IPHC regulations for the 2013 fishing season was published March 15, 2013, at 78 FR 16423. IPHC regulations affecting sport fishing for halibut and vessels in the charter fishery in Areas 2C and 3A may be found in sections 3, 25, and 28 of that final rule.

The Halibut Act, at sections 773c (a) and (b), provides the Secretary of Commerce with general responsibility to carry out the Convention and the Halibut Act. In adopting regulations that may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act, the Secretary of Commerce is directed to consult with the Secretary of the department in which the U.S. Coast Guard is operating, currently the Department of Homeland Security.

The Halibut Act, at section 773c (c), also provides the North Pacific Fishery Management Council (Council) with authority to develop regulations, including limited access regulations, that are in addition to, and not in conflict with, approved IPHC regulations. Regulations developed by the Council may be implemented by NMFS only after approval by the Secretary of Commerce. The Council has exercised this authority in the development of subsistence halibut fishery management measures, codified at 50 CFR 300.65, and the guideline harvest level program and limited access program for charter operators in the charter fishery, codified at 50 CFR 300.67. The Council also developed the Individual Fishing Quota (IFQ) Program for the commercial halibut and sablefish fisheries, codified at 50 CFR part 679, under the authority of section 773 of the Halibut Act and section 303(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

Regulations implementing the charter fishery for Pacific halibut may be found at Subpart E - Pacific Halibut Fisheries, Section 300.61: Definitions; Section 300.65: Catch sharing plan and domestic management measures in waters in and off Alaska; Section 300.66: Prohibitions, and Section 300.67: Charter halibut limited access program, Annual Management Measures, and Guideline Harvest Levels.

## 1.2 Purpose and Need for Action

Sport fishing activities for Pacific halibut are subject to charter fishery restrictions under Federal regulations, along with other regulatory requirements, if a guide is “on board the vessel” with the charter angler and is providing “sport fishing guide services” during the fishing trip. In its report to the Council in April 2012, NOAA Office of Law Enforcement staff informed the Council of a fishing practice in Area 2C in which guides were observed providing indirect assistance to anglers during the fishing trip, likely for compensation, from adjacent vessels or shore. A person providing indirect assistance during the fishing trip, who is not on board the vessel with the anglers, is not providing sport fishing guide services under the current Federal definition. As a result, they are not subject to the charter halibut limited access program requirements in effect since 2011, nor are their clients bound by Federal regulations that limit charter anglers to more restrictive daily harvest (bag) limits and size limits than are in regulations for unguided anglers. *The policy issue before the Council is whether the described fishing practice is consistent with its management policy for the charter halibut fishing sector and whether action is required to correct any inconsistency.*

Using the fishing practices described above, anglers are able to retain halibut under more liberal bag limits and size limits for unguided (also called “self-guided” anglers, i.e., anglers who procure bare-boat rentals with no assistance provided), while still receiving assistance during the fishing trip from a nearby, sometimes tethered, vessel. Such harvests are not subject to Federal charter halibut harvest restrictions, because no guide is on board the same vessel as the angler. In contrast, State of Alaska sport fish regulations do not require a guide to be on board the same vessel as the angler for the trip to be considered guided fishing. If fishing guide services (as defined by the State) are provided to the angler, the State considers those harvests as charter removals.

The Council has expressed concern that its policy intentions for managing the charter sector may be circumvented by requiring the guide to be on board the same vessel with the angler and that some charter harvests are counted towards the unguided sector that should accrue to the charter sector. Some charter businesses developed practices that located a guide near the vessel to provide sport fishing guide services or assist anglers before the fishing trip occurred in a manner that may be considered guided, which circumvented Council intent. After reviewing a requested interagency staff discussion paper<sup>1</sup> in February 2013, the Council expressed its concern that currently legal fishing practices, or development of new fishing practices, may expand in the future if the Council takes no action to address these fishing activities. Therefore, the Council adopted a motion that expressed its intent to consider a regulatory amendment to remove the requirement that the guide be on board the same vessel as the angler and make Federal fishing regulations more consistent with State fishing regulations in this regard. The February 2013 motion also expressed the Council’s intent to define “compensation” and “assistance” in Federal regulations in the context of providing sport fishing guide services<sup>2</sup>.

All sport halibut harvest removals are being estimated and no specific conservation concern has been identified with regard to sport halibut harvest accounting.<sup>3</sup> Instead, the Council identified a policy concern; i.e., whether current Federal regulations result in implementation of a management program for the charter halibut sector that is consistent with Council intent.

The proposed action is intended only to addresses fishing activities for the charter halibut sector; **no action is proposed to regulate businesses that provide equipment for unguided (or self-guided) sport**

<sup>1</sup> <http://www.npfmc.org/wp-content/PDFdocuments/halibut/ChartHalibutDef213.pdf>

<sup>2</sup> <http://www.npfmc.org/wp-content/PDFdocuments/halibut/GuideMotion213.pdf>

<sup>3</sup> Logbook-reported harvests by fishing operations that do not meet the Federal definition can only be separated from the “truly” guided harvest if it is known that ALL harvest by this type of operation was guide-assisted. If some of it was truly “self-guided” (i.e., unguided), then the harvests cannot be separated and the guided harvest that is reported in ADF&G logbooks will be inflated. It is likely that all of the data would not be excluded.

**fishing.** Most self-guided operations were in business prior to implementation of the Charter Halibut Limited Access Program (CHLAP). One business that outfits unguided anglers with boats and gear has been in operation since 1981. Therefore, the Council’s proposed action has not been expanded to include those unguided and self-guided entities, not already covered by the CHLAP. The Council specified that action outside the CHLAP is beyond the scope of this analysis; therefore the Council intends that the proposed action would not increase the number of charter halibut permits (CHPs) initially issued under the CHLAP. The Council also specified that the proposed action would not affect the proposed Halibut Catch Sharing Plan (or the allocations to the commercial sector and charter sector therein).

To better match the perceived problem in the fishery and the proposed alternatives, the Council revised its problem statement for the proposed action in June 2013<sup>4</sup>.

*The Council has received information highlighting halibut fishing practices in Area 2C that allow anglers to circumvent the Council’s intent for daily bag and size limits for the Pacific halibut charter fishery. It may be necessary to revise and clarify Federal regulations to meet the Council’s intent to define guided halibut fishing. The current discrepancy between Federal and State regulations in the definition of sport fishing guide services not only affects the Charter Halibut Permit program but, as long as differential bag and size limits exist in Area 2C, and if they expand to Area 3A in the future, have the potential for some guided sport removals to be accounted against the non-guided sport sector.*

*A few companies have developed a guide-assisted business model that allows them to provide “sport fishing guide services” to anglers to catch halibut for compensation from shore or adjacent vessels. This practice is not considered to be “sport fishing guide services” in Federal regulations because the guide is not on board the vessel. As a result, these businesses are not required to have a Charter Halibut Limited Access Permit. Additionally, the clients (anglers) using guide-assisted services are allowed to fish under the more liberal regulations for unguided anglers.*

The purpose and need for the proposed action is to revise Federal regulations to align regulatory text regarding sport fishing guide services for Pacific halibut with State of Alaska regulations in order to keep anglers from fishing in a manner that is contrary to Council intent. Consistent language for defining sport fishing guide services under Federal and State regulations is one of the Council’s goals. It may be necessary to diverge in regulatory language, but not in effect. The lack of Federal definitions for “compensation” and “assistance” also may result in challenges for Federal enforcement staff and for the public. Clear definitions would enhance public understanding of Federal regulations implementing the Council’s management programs for Pacific halibut and enhance fairness, as some operators and anglers endeavor to harvest halibut within the boundaries of Council intent, while others seek to circumvent those constraints. However, defining specific assistance activities may incorporate a much larger user group that the Council intended and create a new inconsistency with State regulations.

### **1.3 Description of Current Management Programs**

#### **1.3.1 Charter Halibut Limited Access Program**

The CHLAP established Federal charter halibut permits (CHPs) for operators in the charter halibut fishery in Areas 2C and 3A. Beginning February 1, 2011, all vessel operators in Areas 2C and 3A with charter anglers on board must have an original, valid permit on board during every charter vessel fishing trip on which Pacific halibut are caught and retained. CHPs are endorsed for the appropriate regulatory area and the number of anglers that may catch and retain charter halibut on a trip.

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<sup>4</sup> The Council’s initial problem statement was adopted in February 2013 and included in the initial draft analysis, which may be found at: <http://www.alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/CharterDefRIR513.pdf>.



NMFS implemented this program, based on recommendations by the Council, to meet allocation objectives in the charter halibut fishery. This program provides stability in the fishery by limiting the number of charter vessels that may participate in Areas 2C and 3A. Vessel operators had to meet minimum participation requirements to receive an initial issuance of CHPs. Implementation of the CHLAP has resulted in consolidation in the charter halibut fishery as operators who did not meet the qualification criteria exited the fishery.

NMFS initially issued charter halibut permits to qualified applicants who were licensed by ADF&G and who, according to the Official Record, had at least five logbook fishing trips recording halibut effort during one of the initial qualifying years (2004 or 2005) and the recent participation year (2008). Complete regulations are published at 50 CFR 300.65, 300.66, and 300.67.

**1.3.1.1 Permit holders, Permits, and Anglers**

Table 1 shows the number of CHPs, permit holders, and angler endorsements by fishing area and type of CHP. Data will change over time as CHPs are transferred and new Community Quota Entity (CQE) and U.S. Military Morale, Welfare and Recreation Program (MWR) permits are issued. In Table 1, all CHP holders are counted once per area, even if he or she holds multiple permits. Therefore counts of CHP holders cannot be summed across areas and types because some CHP holders have permits that fall under more than one category and are counted more than once. In Area 2C, for example, 356 CHP holders were issued 533 permits with a total of 2,734 angler endorsements. This estimate does not account for multiple charter trips per day per CHP or that not every angler endorsement on a CHP will be used each trip. For both areas, over 6,600 angler endorsements have been issued, suggesting this number is the maximum number of anglers that legally may fish for halibut under charter each day

**Table 1. Distinct CHP Holders, Permits, and Anglers as of January 10, 2014** (Source: NMFS RAM)

Area	Permit Type <sup>1</sup>	CHP Holders <sup>2</sup>	Active Permits	Average CHPs per Holder	Angler Endorsements
2C	CHP	360	533	1.5	2734
	CQE	12	48	4.0	288
	MWR	1	1	1.0	Unlimited
3A	CHP	424	439	1.0	3231
	CQE	9	63	7.0	378
	MWR	3	6	2.0	Unlimited

<sup>1</sup>CHP regular permit with angler endorsements, CQE = community quota entity permits, and MWR = U.S. Military Morale, Welfare and Recreation Program permits.

<sup>2</sup>An individual CHP holder may hold more than one CHP in more than one regulatory area.

**1.3.2 Guideline Harvest Level Program**

The guideline harvest level (GHL) program was in effect for the charter halibut fishery in Area 2C and Area 3A from 2004 through 2013; it was replaced by the halibut catch sharing program in 2013 (for 2014). The GHLs represented pre-season specifications of acceptable annual halibut harvests in the charter fisheries in Areas 2C and 3A. The GHLs were benchmark harvest levels for participants in the charter halibut fishery. To accommodate some growth in the charter sector, while approximating historical levels, the Council recommended the GHLs be based on 125 percent of the average charter

halibut fishery harvest, from 1995 through 1999, in each area. For Area 2C the GHL was set at 1,432,000 lbs. net weight, and in Area 3A the GHL was set at 3,650,000 lbs. net weight. The Council recommended a system of step-wise adjustments to the GHLs to accommodate decreases and increases in halibut abundance. The Council recommended this system of GHL adjustments to provide a relatively predictable and stable harvest target for the charter halibut sector. The GHLs for 2013, effective February 1 through December 31, were set at 788,000 lbs. in Area 2C and 2,734,000 lbs. in Area 3A.

Since 2012, harvest restrictions for the charter halibut fishery in Alaska have been determined annually by the Council and the IPHC to maintain harvest by the charter halibut anglers to the GHLs. NMFS publishes these regulations each year as part of the IPHC Annual Management Measures. The following summaries of Federal regulations that governed the charter fishery is not the complete list of limitations and prohibitions specific to this program.

### 1.3.2.1 Area 2C

Data for the unguided halibut sector are provided only for comparison to the charter sector; no action is proposed to manage the unguided sector, as previously stated. The GHL did not apply to and had no regulatory effect on the unguided sport halibut fishery. The GHL in Area 2C declined every year except 2012 (Table 2, Figure 2). Area 2C charter halibut harvest exceeded its GHL during 2004 through 2010, despite management measures designed to control charter harvest in this area (Table 3). The effect of reductions to the bag limit and size limit for the charter sector, when compared with the unguided sector, is evident. The large decline in charter harvest in 2009 was due to implementation of a 1-fish bag limit. The large drop in charter catch average weight was attributed to the 37-inch maximum size limit in 2011. It is important to note that Pacific halibut size at age was declining during this time. Data are not available to determine how much of the decline in halibut mean weight in the sport fishery is attributable to regulatory restrictions or to changes in mean weight of the fish in the population.

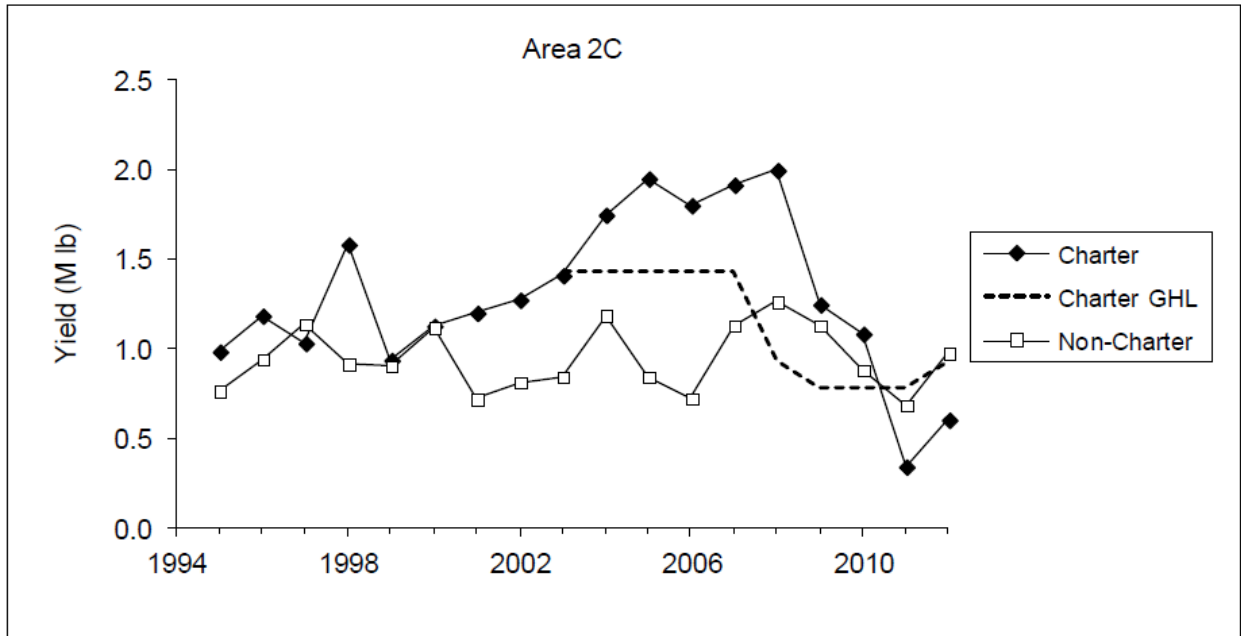
**Table 2. Area 2C Guideline Harvest Level and Estimated Charter Harvest from 2004 to 2013.**  
(Source: ADF&G)

Year	GHL in Mlbs.	Catch in Mlbs.	Charter bag/size limit
2004	1.432	1.750	2 fish per day of any size (same as for unguided anglers)
2005	1.432	1.952	2 fish per day of any size (same as for unguided anglers)
2006	1.432	1.804	2 fish per day of any size (same as for unguided anglers)
2007	1.432	1.918	2 fish per day, 1 under 32 inches (72 FR 30714)
2008	.931	1.999	2 fish per day, 1 under 32 inches
2009	.788	1.245	1 fish per day of any size <sup>1</sup> (74 FR 21194)
2010	.788	1.086	1 fish per day of any size
2011	.788	.344	1 fish per day under 37 inches (76 FR 14300)
2012	.931	.645 <sup>2</sup>	1 fish with “U45O68” reverse slot limit <sup>3</sup>
2013	.788	NA	1 fish with “U45O68” reverse slot limit <sup>3</sup>

<sup>1</sup>This rule also implemented a prohibition on harvest by the charter vessel guide and crew, and a line limit equal to the number of charter vessel anglers on board, not to exceed six lines. These prohibitions are still in place.

<sup>2</sup>preliminary estimate

<sup>3</sup>Under a reverse slot limit, retained fish must be < 45 inches (U45) or > 68 inches (O68)



**Figure 2.** Charter and non-charter halibut yield (M lb) and charter Guideline Harvest Level (GHL) in Area 2C since 1995. (Source: ADF&G).

**Table 3.** Area 2C sport halibut harvest history by sector (Source: ADF&G).

Year	Charter				Non-Charter			Total Sport Harvest		
	No. Fish	Avg. Wt. (lb)	Yield (M lb)	GHL (M lb)	No. Fish	Avg. Wt. (lb)	Yield (M lb)	No. Fish	Avg. Wt. (lb)	Yield (M lb)
1995	49,615	19.9	0.986	No GHL	39,707	19.3	0.765	89,322	19.6	1.751
1996	53,590	22.1	1.187		41,307	22.8	0.943	94,897	22.4	2.129
1997	51,181	20.2	1.034		53,205	21.4	1.139	104,386	20.8	2.172
1998	54,364	29.1	1.584		42,580	21.5	0.917	96,944	25.8	2.501
1999	52,735	17.8	0.939		44,301	20.4	0.904	97,036	19.0	1.843
2000	57,208	19.7	1.130		54,432	20.6	1.121	111,640	20.2	2.251
2001	66,435	18.1	1.202		43,519	16.6	0.721	109,954	17.5	1.923
2002	64,614	19.7	1.275	40,199	20.3	0.814	104,813	19.9	2.090	
2003	73,784	19.1	1.412	45,697	18.5	0.846	119,481	18.9	2.258	
2004	84,327	20.7	1.750	45,697	18.5	0.846	119,481	18.9	2.258	
2005	102,206	19.1	1.952	1.432	62,989	18.8	1.187	147,316	19.9	2.937
2006	90,471	19.9	1.804	1.432	60,364	14.0	0.845	162,570	17.2	2.798
2007	109,835	17.5	1.918	1.432	50,520	14.3	0.723	140,991	17.9	2.526
2008	102,965	19.4	1.999	0.931	68,498	16.5	1.131	178,333	17.1	3.049
2009	53,602	23.3	1.249	0.788	66,296	19.1	1.265	169,261	19.3	3.264
2010	41,202	26.4	1.086	0.788	65,549	17.3	1.133	119,151	20.0	2.383
2011	36,545	9.4	0.344	0.788	52,896	16.7	0.885	94,098	20.9	1.971
2012	42,436	14.3	0.605	0.931	42,202	16.2	0.685	78,747	13.1	1.029
					54,696	17.9	0.977	97,132	16.3	1.583

\*Non-charter means unguided

To ensure that the halibut stocks would continue to develop to a level that would permit optimum yield in the halibut fisheries, the Council and IPHC have recommended a number of regulatory measures in Area 2C to limit charter halibut harvest to its GHL. Currently, charter anglers in Area 2C are managed under a “reverse slot limit.” The reverse slot limit allows charter anglers to retain one halibut that is less than or equal to 45 inches or one halibut that is greater than or equal to 68 inches in length, per day. In contrast, unguided anglers in Area 2C are allowed to retain two halibut of any size, per day.

**1.3.2.2 Area 3A**

The GHL in Area 3A remained at its original level of 3.65 Mlbs. since implementation in 2004 until 2012 (Table 4, Figure 3). Due to declines in halibut biomass in the area, the GHL was reduced one step, to 3.103 Mlbs., in 2012, and reduced one additional step, to 2.734 Mlbs., in 2013. Despite the GHL reductions, charter harvest restrictions for halibut in Area 3A have not changed and charter anglers are managed under the same restrictions as unguided anglers. That is, since the GHL was implemented in 2004, charter halibut anglers in Area 3A have been bound by the same harvest restrictions as unguided anglers, i.e., a two-fish daily bag limit with no size restrictions.

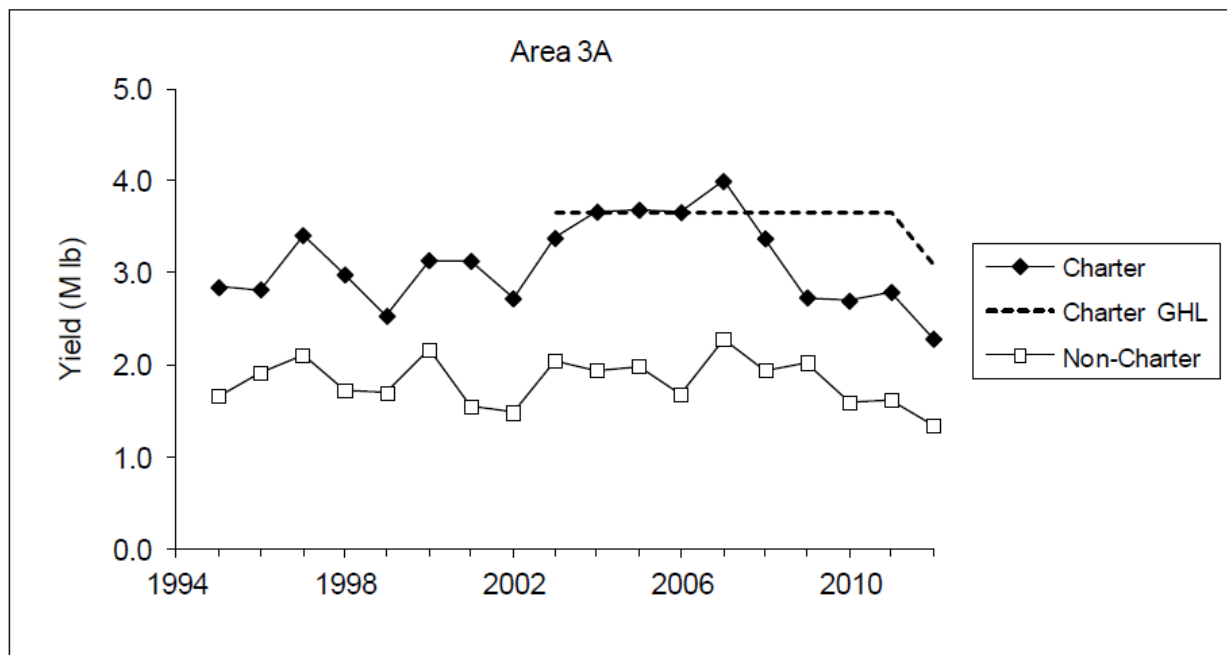
Table 5 demonstrates the differences between numbers of fish and average weight between the charter and unguided fisheries in Area 3A. Except in Kodiak, halibut harvested by charter anglers were generally larger in 2011 than halibut harvested by unguided anglers. The larger size of charter halibut is generally attributed to the knowledge and skill of the guides, or the ability of larger boats to reach fishing grounds with larger fish.

**Table 4. Area 3A Guideline Harvest Level and Estimated Charter Harvest from 2004 to 2013**

(Source: ADF&G).

<b>Year</b>	<b>GH L millions of lbs.</b>	<b>Estimated catch millions of lbs.</b>	<b>Charter bag limit</b>
2004	3.650	3.668	2 fish per day of any size (same as for unguided anglers)
2005	3.650	3.689	2 fish per day of any size (same as for unguided anglers)
2006	3.650	3.664	2 fish per day of any size (same as for unguided anglers)
2007	3.650	4.002	2 fish per day of any size (same as for unguided anglers)
2008	3.650	3.378	2 fish per day of any size (same as for unguided anglers)
2009	3.650	2.734	2 fish per day of any size (same as for unguided anglers)
2010	3.650	2.698	2 fish per day of any size (same as for unguided anglers)
2011	3.650	2.793	2 fish per day of any size (same as for unguided anglers)
2012	3.103	2.284	2 fish per day of any size (same as for unguided anglers)
2013	2.734	2.271*	2 fish per day of any size (same as for unguided anglers)

\*preliminary estimate



**Figure 3.** Charter and non-charter halibut yield (M lb) and charter Guideline Harvest Level (GHL) in Area 3A since 1995. (Source: ADF&G).

**Table 5. Area 3A sport halibut harvest history by sector** (Source: ADF&G).

Year	Charter				Non-Charter			Total Sport Harvest		
	No. Fish	Avg. Wt. (lb)	Yield (M lb)	GHL (M lb)	No. Fish	Avg. Wt. (lb)	Yield (M lb)	No. Fish	Avg. Wt. (lb)	Yield (M lb)
1995	137,843	20.6	2.845	No GHL	95,206	17.5	1.666	233,049	19.4	4.511
1996	142,957	19.7	2.822		108,812	17.6	1.918	251,769	18.8	4.740
1997	152,856	22.3	3.413		119,510	17.6	2.100	272,366	20.2	5.514
1998	143,368	20.8	2.985		105,876	16.2	1.717	249,244	18.9	4.702
1999	131,726	19.2	2.533		99,498	17.0	1.695	231,224	18.3	4.228
2000	159,609	19.7	3.140		128,427	16.9	2.165	288,036	18.4	5.305
2001	163,349	19.2	3.132		90,249	17.1	1.543	253,598	18.4	4.675
2002	149,608	18.2	2.724	93,240	15.9	1.478	242,848	17.3	4.202	
2003	163,629	20.7	3.382	118,004	17.3	2.046	281,633	19.3	5.427	
2004	197,208	18.6	3.668	134,960	14.4	1.937	332,168	16.9	5.606	
2005	206,902	17.8	3.689	127,086	15.6	1.984	333,988	17.0	5.672	
2006	204,115	17.9	3.664	114,887	14.6	1.674	319,002	16.7	5.337	
2007	236,133	16.9	4.002	166,338	13.7	2.281	402,471	15.6	6.283	
2008	198,108	17.0	3.378	145,286	13.4	1.942	343,394	15.5	5.320	
2009	167,599	16.3	2.734	150,205	13.5	2.023	317,804	15.0	4.758	
2010	177,460	15.2	2.698	124,088	12.8	1.587	301,548	14.2	4.285	
2011	184,293	15.2	2.793	128,464	12.6	1.615	312,757	14.1	4.408	
2012	173,582	13.2	2.284	113,359	11.8	1.341	286,941	12.6	3.626	

\* Non-charter means unguided

Given that bag limits have been the same for all sport anglers in Area 3A through 2013, the only benefit to circumventing the Council's intent under the status quo Federal definition prior to 2014 (under the GHL program) would have been to provide sport fishing guide services without a Federal charter halibut permit.

### 1.3.3 Halibut Catch Sharing Plan

On December 9, 2013, the National Marine Fisheries Service announced its intent to implement the Pacific Halibut Catch Sharing Plan (CSP) for the commercial and charter halibut fisheries in Area 2C and the Area 3A. The CSP will replace the GHF Program when it becomes effective on January 13, 2014.<sup>5</sup> The proposed rule for the CSP was published June 28, 2013 (78 FR 39122).

The primary objectives of the CSP are to define an annual process of allocating halibut between the charter and commercial fisheries in Area 2C and Area 3A; establish allocations that balance the differing needs of the charter and commercial sectors, varying with changing levels of annual halibut abundance; allow limited use of commercial IFQ by the charter sector above the initial charter allocation; and specify a process for determining harvest restrictions for charter anglers that are effective in limiting harvest to the annual charter fishery catch limit.

Upon implementation, the annual CSP catch limits for the commercial and charter sectors would be determined and implemented for each area by a predictable and standardized methodology, as part of the IPHC's annual management measures. If the proposed CSP is approved, NMFS would implement the sector-specific catch limits under the CSP in the annual management measures published in the *Federal Register* each year, as specified by regulations at 50 CFR 300.62.

As part of the CSP, the Council also recommended that ADF&G charter logbooks be used to estimate charter halibut harvest. The ADF&G developed the logbook program in 1998, to provide information on participation and harvest by individual vessels and businesses in charter fisheries for halibut, as well as other state-managed saltwater species. Logbook data are compiled to show where fishing occurs, the extent of participation, and the species and number of fish kept and released by individual anglers. This information is essential for regulation and management of the charter halibut fisheries in Area 2C and Area 3A. ADF&G has recently added saltwater charter logbook reporting requirements to accommodate information required to implement and enforce Federal charter halibut fishing regulations, such as the Area 2C one-halibut per day bag limit and the CHLAP.

In order to provide flexibility for commercial and charter fishery participants, the Council also recommended that the CSP authorize annual transfers of commercial halibut individual fishing quota (IFQ) as guided angler fish (GAF) to charter halibut permit holders for harvest in the charter fishery. Under the commercial IFQ Program, commercial halibut operators hold quota share (QS) that yields a specific amount of annual IFQ. GAF would offer charter vessel anglers in Area 2C or Area 3A an opportunity to receive a limited amount of IFQ from commercial QS holders to harvest halibut, in addition to or instead of, the halibut harvested under the daily bag limit for charter anglers. Charter anglers using GAF would be subject to the harvest restrictions in place for unguided sport anglers in that area, currently a two-fish of any size daily limit in Areas 2C and 3A. Halibut harvested as GAF would not be part of the charter allocation, but would be counted toward the commercial catch limit.

#### 1.3.3.1 Management Measures for 2014<sup>6</sup>

Due to meeting schedules, each year the Council considers charter halibut management measures for Area 2C and Area 3A to recommend to the IPHC as part of the CSP before the latter has determined the combined charter and commercial halibut allocation for each area at its January Annual Meeting. In lieu of final combined catch limits, results from the December 4 - 5, 2013 interim IPHC meeting<sup>7</sup> were used as a benchmark for an ADF&G analysis of potential management measures to constrain the charter halibut sectors in each area to its respective (assumed) allocation. The IPHC staff reported that the halibut exploitable biomass increased by about 9% in Area 2C. The charter allocation resulting from the "blue

<sup>5</sup> The 2012 Council motion is available at: <http://www.npfmc.org/wp-content/PDFdocuments/halibut/CSPMotion1012.pdf>.

<sup>6</sup> This section will be updated with the results of the January 13 - 17, 2014 Annual Meeting of the IPHC.

<sup>7</sup> <http://www.iphc.int/meetings-and-events/interim-meeting.html>

line” (the current IPHC harvest policy to the stock assessment) for Area 2C is 760,000 lbs. for 2014. The IPHC staff reported that the Pacific halibut exploitable biomass declined by about 20% compared to 2013 in Area 3A. The IPHC “blue line” results in a charter allocation in Area 3A of 1.78 million lbs.

Therefore the charter allocations resulting from the interim IPHC meeting (at the “blue line”) are:

Area 2C: 18.3% of the combined commercial and charter catch limit

Area 3A: 18.9% of the combined commercial and charter catch limit

Under the CSP, the charter allocations include the estimates of the amount of wastage that would occur in each fishery. The preliminary estimates of sport fishery release mortality from the charter sector accounted for 41,000 lbs. in Area 2C total and 36,000 lbs. in Area 3A<sup>8</sup>.

On December 9, 2013 the Charter Management Implementation Committee reviewed an ADF&G analysis<sup>9</sup> for setting 2014 charter halibut annual management measures and recommended management measures for Area 2C and Area 3A for 2014. The analysis accounted for estimates of wastage in each area. On December 12, 2013, the Council reviewed the ADF&G analysis and modified its committee recommendations (based on corrected information provided by its Advisory Panel and public comments). The Council based its recommendations on reference (“blue line”) allocations of 760,000 lb in Area 2C and 1.78 million lb in Area 3A and adjustments for estimates of wastage in each area.

Area 2C 1) One-fish daily bag limit and 2) Reverse slot limit of U44O76 ( $\leq 44$  inches or  $\geq 76$  inches)

If the final charter allocation is sufficiently higher than the “blue line” to accommodate a change in the reverse slot limit, adjust the size of the lower limit up one inch (for example to 45 inches). The next adjustment would be to reduce the upper limit to meet the allocation.

The rationale for these measures in Area 2C (southeast) was to stay as consistent as possible with current measures and thereby facilitate understanding by the public and the charter operators in this area. The reverse slot limit has been used in this area in recent years, and still allows for the possibility of a trophy fish.

Area 3A 1) Two-fish daily bag limit, 2) One fish of any size, with maximum size of the second fish at 29 inches, and 3) One trip per day (limit each vessel to one trip per calendar day)

If the final charter allocation is sufficiently higher than the “blue line” to remove the trip limit, the measures would be a two-fish daily bag limit, one of which is equal to or less than 29 inches. As further needed, depending on the final charter allocation, the size of the second fish may be adjusted up or down to meet the allocation.

The rationale for these measures is to maintain a two-fish limit in Area 3A (southcentral), recognizing that the second fish must be limited in size in order to stay within the projected allocation.

During its Annual Meeting on January 13 – 17, 2014, the IPHC will consider the Council recommendations for setting charter management measures for Area 2C and Area 3A when it adopts the CSP allocations for its 2014 Annual Management Measures. The Council’s recommendations include guidance on how the IPHC would adjust the Council recommendations to account for differences between the “blue line” and final combined catch limits in each area. Area 2C and Area 3A management measures for 2014 will be implemented under final rulemaking for the IPHC Annual Management Measures, likely by March 2014.

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<sup>8</sup> [http://www.npfmc.org/wp-content/PDFdocuments/halibut/ADFG\\_IPHCsportdataLetter1113.pdf](http://www.npfmc.org/wp-content/PDFdocuments/halibut/ADFG_IPHCsportdataLetter1113.pdf)

<sup>9</sup> <https://npfmc.legistar.com/View.ashx?M=F&ID=2748037&GUID=4D5B9F7C-649B-4812-86EE-0100205992A6>



### 1.3.4 Alternatives

The Council adopted alternatives and options for this analysis in February 2013<sup>10</sup>. The Council intends to amend Federal regulations to define sport fishing guide services to be consistent with State regulations in order to keep anglers from fishing in a manner that is contrary to the Council’s intent (i.e., Alternative 2, Option 1). The Council responded to comments contained in its February 2013 discussion paper that suggested that, in addition to Option 1, the Council may wish to indicate its policy intent for which activities would constitute “compensation” and “assistance” in the sport fishing guide services definition; this resulted in Alternative 2, Option 2, and Alternative 2, Option 3, to define of compensation and assistance, respectively.

The Council authorized agency staffs to propose alternate definitions under Options 2 and 3, as the Council believed that there may be other examples that it could consider. In June 2013, the Council adopted revised language under Option 2 and Option 3, based on staff recommendations to clarify and to reflect recent action by the Alaska Board of Fisheries to define compensation.

This analysis assumes that the Council may choose any combination of options and suboptions under Alternative 2. A possible scenario may be that the Council may select Alternative 2, Option 1, as its preferred alternative if it wishes to revise the definition of sport fishing guide services, even if no action is taken to define “compensation” and/or “assistance,” in Federal regulations.

*The Council may wish to clarify its intent on whether it wishes to review proposed regulatory text prior to submission of the regulatory amendment to the Secretary for approval, because regulations under the Pacific Halibut Act are not required to be “deemed”<sup>11</sup> by the Council at the time of final action. Such Council review may provide additional opportunities to refine either or both Council intent and draft regulatory text.*

#### **Alternative 1. No action**

#### **Alternative 2. Revise and clarify Federal definitions.**

Option 1. Revise the definition of sport fishing guide services to remove the language “by being on board a vessel with such person.”

Option 2. Define ‘compensation.’ within the context of sport fishing guide services.

Suboption a. The definition of ‘compensation’ would be aligned with the State of Alaska definition.

“Compensation” (1) means direct or indirect payment, remuneration, and other benefits received in return for services, regardless of the source; in this paragraph, “benefits” includes (A) wages or other employment benefits given directly or indirectly to an individual or organization, and (B) dues, payments, fees, and other remuneration given directly or indirectly to a fishing club, business, organization, or individual who provides sport fishing guide services; (2) does not include reimbursement for the *actual* daily expenses for fuel, food, or bait;

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<sup>10</sup> The Council’s initial suite of alternatives was adopted in February 2013 and included in the initial draft analysis, which may be found at: <http://www.npfmc.org/wp-content/PDFdocuments/halibut/CharterDefRIR513.pdf>.

<sup>11</sup> The Council policy is to “deem” proposed regulations that clearly and directly flow from the provisions of its motions for preferred alternatives to be necessary and appropriate in accordance with section 303(c), and therefore the Council authorizes the Executive Director and the Chairman to review the draft proposed regulations, when provided by NMFS, to ensure that the proposed regulations to be submitted to the Secretary under section 303(c) are consistent with these instructions. The Council typically chooses for the Executive Director and Chairman, or their designees (i.e., Council staff), review the regulations and alert the Council should there be any items of concern.



Suboption b. The definition of ‘compensation’ would be aligned with the State of Alaska definition, with one word substitution.

“Compensation” means direct or indirect payment, remuneration, or other benefits received in return for services, regardless of the source; in this paragraph, “benefits” includes wages or other employment benefits given directly or indirectly to an individual or organization, and any dues, payments, fees, or other remuneration given directly or indirectly to a fishing club, business, organization, or individual who provides sport fishing guide services; and does not include reimbursement for the *reasonable* daily expenses for fuel, food, or bait;

Option 3. Define ‘assistance’ within the context of sport fishing guide services.

“Assistance” means accompanying or physically<sup>12</sup> directing the sport fisherman in sport fishing activities during any part of a sport fishing trip.

### 1.3.5 Alternative 1, Status Quo

Alternative 1 is the status quo. Taking no action would result in retaining Federal regulations that implement the Council’s design of, and intent for, managing the charter halibut fishery, including the CHLAP and the CSP. The Council adopted the No Action Alternative as a baseline against which to evaluate the effects of its proposed alternative and options.

The 2009 NMFS decision memorandum to the proposed rule for regulations to implement the CHLAP Program acknowledged that a shift to “unguided” angling could occur as a result of requiring the guide to be on board the vessel. The memo specified that,

*“A charter vessel is a vessel used for hire in sport fishing for halibut, but does not include a vessel without a hired operator. The proposed action would not apply to an unguided or independent angler... In its review of this proposed rule, NOAA General Counsel expressed concern regarding our intent to have this action apply only to charter operations that have the charter vessel guide on board the vessel. This may result in charter operators shifting their business model to unguided fishing boat rentals. Although this may in fact occur, I believe that this policy issue needs to be addressed through the Council process and in consultation with the State of Alaska before we consider broadening the scope of the regulations to encompass any sectors other than charter operations with a guide on board. Although State of Alaska regulations regarding sport fishing can be interpreted to apply more broadly than our intent with the proposed rule, I do not expect this difference to lead to substantial confusion for the sport fishing community because the Federal rules would clearly apply only to charter operations with a guide on board. Additionally, NMFS has not analyzed the effects of broadening the proposed rule to apply to various types of indirectly assisted recreational fishing operations. Our preliminary research into this issue suggests that it may be complex and controversial to define which types of entities could be affected by a broader regulation. This supports exploring the matter further through the Council process rather than introducing it to the public through the proposed rule.”*

The ADF&G statewide harvest survey (SWHS) has been used to estimate charter halibut harvests under the GH program<sup>13</sup> for Area 2C and Area 3A. Because the SWHS relies on harvest information provided by the angler, the classification of harvest depends on how the angler chooses to report it. There is information to indicate that some clients of charter businesses that fish from a separate vessel report their

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<sup>12</sup> Physical assistance during a trip would not include such acts as someone motoring over in a separate boat or phoning/radioing to make sure the anglers are safe. If assistance is given *before* the trip it would not be considered “guiding” under this action.

<sup>13</sup> The Council used SWHS estimates as the basis for determining the GHs for Area 2C and Area 3A.

harvest as guided and some report it as unguided. Therefore, a portion of this harvest is being reported as guided even though it does not meet the Federal definition of sport fishing guide services.

ADF&G charter logbook data will be used to determine charter halibut harvests under the CSP beginning in 2014<sup>14</sup>. ADF&G requires licensed guides that are compensated for providing assistance to clients to catch halibut to report that halibut catch in the logbook, even if the guide is not on board the same vessel as the clients. ADF&G staff can use logbook data to detect businesses in Area 2C whose clients routinely harvest two halibut per day, and it is presumed that these are charter operations that provide assistance to anglers from a separate vessel. If it is known that all fishing trips by these businesses were conducted with the guide in a separate vessel, these harvests could conceivably be excluded when logbooks are used to estimate charter harvests under the CSP. However, there is no information contained in the logbook itself that would indicate when the guide is on board the same vessel as the anglers or in a separate vessel.

### 1.3.5.1 Current Definitions

Federal regulations include three definitions that are relevant for determining whether more restrictive charter daily bag limits apply to anglers on board the vessel in Area 2C (and possibly in the future in Area 3A). These definitions are “charter vessel angler,” “charter vessel guide,” and “sport fishing guide services.” Only the latter definition is the subject of the proposed action. The definitions at § 300.61 are as follows:

*Charter vessel angler, for purposes of §§ 300.65(d), 300.66, and 300.67, means a person, paying or non-paying, using the services of a charter vessel guide.*

*Charter vessel guide, for purposes of §§ 300.65(d), 300.66 and 300.67, means a person who holds an annual sport guide license issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services.*

*Sport fishing guide services, for purposes of §§ 300.65(d) and 300.67, means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being on board a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.*

NMFS interprets “services” in the definition of “charter vessel angler” to mean “sport fishing guide services.” Under this interpretation, a person who takes or attempts to take halibut would only be a charter vessel angler if that person is receiving sport fishing guide services from a charter vessel guide. According to the definition for “sport fishing guide services,” a person would be considered a charter vessel angler only if that person was receiving assistance to catch and retain halibut from a charter vessel guide who is on board the same vessel and being compensated to assist the person to take or attempt to take halibut.

The Council record for development of the CHLAP is silent on whether a guide must be on board the vessel to be subject to charter halibut fishing regulations, and the Council’s analysis supporting the CHLAP did not explicitly address whether the guide would be expected to be on board. Therefore, it is appropriate for the Council to state its intent through this proposed action.

### 1.3.5.2 Analysis of Impacts, Alternative 1

Taking no action is believed to result in an unknown, but relatively small number of anglers fishing under unguided sport fishing regulations (2 fish of any size), rather than the more restrictive charter fishing

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<sup>14</sup> The State might exclude certain logbook data under the status quo. The State could exclude all data for businesses known to routinely guide anglers from a separate vessel, but not without violating State confidentiality statutes because the harvest of fewer than 4 businesses could be obtained by subtraction from the total. In addition, there are many businesses that occasionally report harvest of more than 2 halibut per angler. The degree to which these represent reporting errors versus occasional instances of guiding from a separate vessel is unknown.

regulations (e.g., one fish, U45/O68 reverse slot limit implemented for 2013 in Area 2C). It is likely that some additional poundage of halibut would be harvested under more liberal bag and size limits by these anglers, at least a portion of which would be counted under the SWHS as charter removals. With logbook monitoring under the proposed CSP, all of this harvest would be logged as charter harvest, even though it does not meet the Federal definition of charter harvest. Therefore, the status quo may result in continued inaccuracies in accounting of sport removals by sector.

The SWHS estimates sport halibut harvest in numbers of fish, not pounds of fish. It does not account for all removals in terms of biomass, because some unguided harvest is assigned the charter average weight and some charter harvest is assigned the unguided average weight due to reporting practices. It is also not a census, thus, response rates, reporting errors, etc., result in varying confidence intervals around the sample estimate. Under the CSP and using logbooks, guide assisted harvest would be counted as charter harvests and assigned the charter average weight. The SWHS estimate of unguided harvest would likely still be slightly lower, because some of the harvest by guide-assisted anglers whose guides are not on board is reported as charter harvest.

The Council may determine its tolerance for the potential for these harvests to be misreported by an angler who may be confused as to whether he or she is fishing under guided or unguided sport regulations (although the angler's intentions may sometimes be inferred by harvests of one or two fish per day).

The Council may determine that the problem in the fishery is limited in scope. It may determine it is not cost effective to address at this time. It also may determine the business model of operations that are the intended subjects of this action is a legal business model, and does not need to be restricted. Further, it may determine that creating and maintaining consistency between State and Federal regulations is not necessary, because those agencies are managing different fisheries.

### **1.3.6 Alternative 2**

The Council's February 2013 motion indicated its intent that Alternative 2 would align all regulations regarding sport fishing guide services for Pacific halibut with the State of Alaska regulations (see Section 1.6.4. for other regulations that would be revised under Alternative 2, Option 1). Such alignment would eliminate any differences in the regulations for halibut and state-managed species. The Council may choose any combination of the options and suboptions under Alternative 2, and it noted that none are mutually exclusive. This is interpreted to mean that the Council may select Option 1 by itself, Options 1 and 2, or Options 1, 2, and 3. It is unlikely that the Council would select Option 2 and/or Option 3, without Option 1.

#### **1.3.6.1 Option 1. Change Federal definition of "sport fishing guide services"**

##### **1.3.6.1.1 Federal regulations**

Definitions of charter vessel angler, charter vessel guide, and sport fishing guide services in Federal regulations are important for tracking and managing charter halibut harvests in Area 2C, because charter anglers are subject to more restrictive daily bag and size limits than are in place for unguided anglers.

The current Federal definition of sport fishing guide services is given in Section 1.3.5.1. The Council and agency staffs agree on the proposed regulatory language for Alternative 2, Option 1 under consideration in this analysis. While not necessary for continued enforcement of current Federal regulations, the Council expressed interest in addressing what it considers to be fishing activities that are contrary to its intent for management of the charter halibut sector. Option 1 proposes to revise the definition, by removing the words "by being on board a vessel with such person," to read:

*Sport fishing guide services, for purposes of §§ 300.65(d) and 300.67, means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish during any part of a*

*charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.*

### 1.3.6.1.2 State regulations

The following definitions in State statute relate to this issue<sup>15</sup>.

Sec. 16.40.299. Definitions.

In AS 16.40.260 - 16.40.299,

- (1) *“sport fishing guide” means a person who is licensed to provide sport fishing guide services to persons who are engaged in sport fishing;*
- (2) *“sport fishing guide services” means assistance, for compensation or with the intent to receive compensation, to a sport fisherman to take or to attempt to take fish **by accompanying or physically directing the sport fisherman in sport fishing activities during any part of a sport fishing trip**; “sport fishing guide services” does not include*
  - (A) *sport fishing services; or*
  - (B) *services provided by an assistant, deckhand, or similar person who works directly under the supervision of and on the same vessel as a sport fishing guide;*
- (3) *“sport fishing services” means the indirect provision of assistance, for compensation or with the intent to receive compensation, to a person engaged in sport fishing in taking or attempting to take fish or shellfish by a business that employs a sport fishing guide to provide sport fishing guide services to the person during any portion of a sport fishing trip; “sport fishing services” does not include*
  - (A) *an activity for which a sport fishing guide license is required; or*
  - (B) *booking and other ancillary services provided by a tour broker or agent to a sport fishing services operator.*

### 1.3.6.1.3 Analysis of Impacts of Alternative 2 Option 1

Federal enforcement staff has reported that they are able to enforce current regulations; therefore, the Council must determine whether action under Alternative 2 reflects its intent for management of the charter halibut sector.

ADF&G examined charter logbook data from Area 2C in an effort to quantify the practice of guiding from a separate vessel during the period 2009 through 2012. Specifically, logbook data were examined for all instances of reported daily halibut harvests of two halibut per person in each year. During this period, the charter halibut daily bag limit in Area 2C was one halibut, while the unguided daily bag limit was two halibut. The underlying assumption in this analysis is that a charter business would be unlikely to routinely allow or report harvest of two halibut per client unless that business was confident that its operation did not meet the Federal definition of “sport fishing guide services”. These data give a general indication of the number of businesses in Area 2C that provided sport fishing guide services under the state definition, but that did not meet the Federal definition of sport fishing guide services because the guide is not on board the same vessel as the angler.

The number of businesses in Area 2C that reported at least one instance of an angler harvesting two halibut per angler ranged from 21 in 2012 to 34 in 2010 (Column B in Table 6).<sup>16</sup> Column C filters these businesses to include only those with reported instances of anglers harvesting two halibut per day that

<sup>15</sup> The State definition differs from the current Federal definition (see bolded text).

<sup>16</sup> A preliminary, in-season update for 2013 may be provided by ADF&G at final action in October 2013.

made up more than 5 percent<sup>17</sup> of their total angler-days for the year. Applying this filter resulted in 3 to 7 businesses that met these criteria during 2009 through 2012. Column D applies a filter to Column C to include only businesses with a reported annual harvest of at least 20 halibut taken by an angler harvesting 2 halibut per day. These two filters attempt to drop occasional or rare reports of two halibut per angler from the estimate of businesses in Area 2C that provided guide-assisted halibut fishing that did not meet the Federal definition. Assuming that businesses listed under Column B include some misreporting, and Columns C and D each apply a filter to further discount the activity from a general business practice of complying with Federal regulations for the charter sector, then a minimum of one to three businesses are estimated to have routinely offered guide-assisted halibut fishing that did not meet the Federal definition of guide services between 2009 and 2012. Public testimony indicates the practice is more widespread. Should we add that caveat? The logbooks may not reveal the true extent of the behavior.

For Area 3A, harvest data could not be used to identify businesses that may have exploited the guide on board provision, because bag limits were identical for guided and unguided anglers. Instead, these businesses were identified using logbook data where halibut were reported harvested but no CHP number was reported. The logic behind this was that harvest reporting was required under State regulations, but a CHP would not have been needed under Federal regulations if the guide was not on board the same vessel as the anglers.

**Table 6. Summary of charter businesses that reported harvests of two halibut per person from Area 2C by year, 2009-2012** (Source: ADF&G).

A  Year	B  Number of businesses that reported at least one angler kept 2 halibut/day	C  Number of businesses from Column B that reported > 5% of total angler-days were anglers that kept 2 halibut/day	D  Number of businesses from Column C where the total annual harvest of 2 halibut/day > 20 fish
2009	28	4	1
2010	34	7	2
2011	25	3	3
2012	21	4	3

In 2011, 16 businesses made at least one trip with halibut harvested and no CHP number recorded. Of these 16 businesses, 13 made only one trip with halibut harvest and no CHP reported. Only one business did not have a CHP, but reported only 5 trips with halibut harvest. In 2012, 46 businesses reported from 1 to 4 trips with halibut harvest and no CHP number recorded. Of these businesses, all had permits and recorded permit numbers on at least 80% of all their trips. **In summary, 2011 and 2012 logbook data for Area 3A did not clearly identify any businesses that routinely reported trips in which halibut were harvested and no CHP number was recorded.**

There are also many businesses that provide bare-boat rentals, and businesses that provide both guided halibut fishing (with a CHP) and unguided halibut fishing. If the bare-boat rentals or unguided halibut fishing do not involve guides physically directing the anglers on where or how to fish during the trip, and

<sup>17</sup> Five percent was used to eliminate misreporting or *de minimus* instances of businesses exceeding the bag limit.

for compensation, such fishing does not meet either the State or Federal definition of guiding,<sup>18</sup> and there are no logbook or other data to indicate the magnitude of that practice.

While logbook data may be used to identify some operators that have routinely guided from a separate vessel, it cannot identify the number of operators that are doing so, but not reporting those halibut harvests in the logbook as required by the State. Therefore the logbook data analysis provides a minimum estimate of cases that may be of concern to the Council.

It is not possible to use SWHS data to estimate the numbers of anglers that harvested halibut. Survey responses are by household, and while the number of anglers in each household is reported, the number that caught halibut on any given trip is not. In addition, many households harvested halibut on both guided and unguided trips, so the counts by sector can't be separated. ADF&G can provide the number of licensed guided anglers that harvested a halibut, by year and IPHC area, using charter logbook data if the Council believes that this information would be helpful in selecting its preferred alternative. This number will be less than the number of guided anglers that harvested halibut, because individual youth anglers are not identifiable in the logbook data.

The SWHS provides estimates of guided and unguided sport halibut harvest in numbers of fish. Harvest in units of weight must be estimated by multiplying by average weight. Because some unguided harvest is reported in the SWHS as guided, it is multiplied by the charter average weight. On the other hand, some guided harvest may be mistakenly reported as unguided and the unguided average weight is used. Under Alternative 2, and upon use of the logbook with implementation of the CSP, halibut harvest currently considered unguided under Federal rules because the guide is operating from a separate vessel would be counted as charter harvests, and would be assigned the proper charter average weight. The SWHS estimate of unguided harvest would likely still be slightly lower, because some of the harvest by "guides" who are not on board is reported as charter harvest. All participants would benefit from clearly articulated rules regarding fishing behavior and reporting requirements.

**Summary** Adoption of Alternative 2 as the Council's preferred alternative would eliminate the distinction between guided and "guide assisted" anglers who are charter fishing from a different vessel than the guide or with assistance from shore. It would result in only guided (charter) and non-charter (unguided) fishing by anglers. Eliminating the guide on board provision should make interpretation of logbook data clearer. Under Alternative 2, the State definition of sport fishing guide services would continue to require that the guide accompany or physically direct anglers, for compensation, during any part of the fishing trip.

As stated previously, businesses that support "self-guided" fishing, but do not hold CHPs, will have to either purchase CHPs or change the services they provide so that they refrain from assisting or directing clients in the taking of halibut. If they are providing truly self-guided fishing, ideally their clients would continue to report their harvest in the SWHS as unguided. The Council cannot prevent people from mis-reporting their harvest in the SWHS, nor can it prevent businesses from failing to fill out logbooks or calling their operations self-guided, even if they meet the proposed Federal definition for sport fishing guide service under Alternative 2, Option 1.

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<sup>18</sup> Some examples may include: 1) vessels that serve or carry one or more smaller unguided boats. They also recover the smaller craft but do not assist the anglers after releasing the craft. No compensation for guiding occurs; 2) land-based or floating lodges that provide boats without guides, with no compensation specifically for guiding. In some cases, the angler may fish on a charter boat the first day, and then fish from an unguided skiff on subsequent trips; and 3) outfitters that may provide boats, gear, remote lodging, and fishing advice, but not fishing assistance for compensation during the fishing trip.

### 1.3.6.2 Option 2. Add Federal definition for “compensation”

#### 1.3.6.2.1 Federal regulations

Federal regulations under the status quo do not define “compensation” in the context of the charter halibut fishery. The lack of such a definition creates challenges for Federal enforcement staff and for the public. NMFS recognizes that compensation for sport fishing guide services can take many forms. For purposes of applying the regulations at 50 CFR Part 300.61, 300.65, 300.66, and 300.67, NMFS evaluates the specific circumstances of a fishing trip to determine if a charter vessel guide is receiving compensation for providing persons with assistance to take or attempt to take halibut.

Compensation is generally defined as something given or received as payment or remuneration, as for a service. For purposes of the definition of “sport fishing guide services” at § 300.61, compensation is not strictly limited to a monetary exchange, and can include a trade of goods or services in exchange for taking someone fishing. Therefore, assistance for compensation is not limited to situations where persons are directly compensating someone for sport fishing guide services. The definition of “sport fishing guide services” at § 300.61 does not require any person on board the vessel to be individually compensating the person providing assistance for this definition to be applicable. If the charter vessel guide is compensated in any way to provide assistance, then that charter vessel guide is providing sport fishing guide services under § 300.61.

Federal regulations include third party compensation (i.e., the compensator does not have to be part of the fishing trip) as compensation to a charter vessel guide, for purposes of determining whether halibut fishing activities are subject to charter fishery restrictions.

The analysis includes two suboptions for the Council to consider: Suboption a would add a Federal definition for compensation that matches the State definition; and Suboption b would add a Federal definition that substitutes the word “reasonable” for “actual” expenses from the State definition. The complete text for these suboptions is listed in Section 1.3. State regulations

While ADF&G and the Department of Public Safety consider third-party compensation to be “guided,” until recently State regulations did not explicitly state this. ADF&G and the Department of Public Safety jointly submitted a proposal to the Board of Fisheries for the 2012/2013 proposal cycle to clarify that the intent is to include all types of remuneration. The proposed language defines compensation for sport fishing guide services to include third party compensation, as well as non-monetary compensation (remuneration), but excludes reimbursement for fuel, supplies, etc. This definition was adopted by the Board in March 2013, and went into effect on June 1, 2013:

*5 AAC 75.995(b) In AS 16.40.299 and this chapter, unless the context requires otherwise, “compensation”*

- (1) means direct or indirect payment, remuneration, or other benefits received in return for services, regardless of the source; in this paragraph “benefits” includes*
  - (A) wages and other employment benefits given directly or indirectly to an individual or organization; and*
  - (B) dues, payments, fees, and other remuneration given directly or indirectly to a fishing club, business, organization, or individual who provides sport fishing guide services;*
- (2) does not include reimbursement for the **actual** daily expenses for fuel, food, or bait.*

#### 1.3.6.2.2 Analysis of Impacts, Alternative 2 Option 2

Federal enforcement staff has reported that they are able to enforce current regulations; therefore the Council must determine whether action under Alternative 2 reflects its intent for management of the charter halibut sector.

The Board of Fisheries was advised by ADF&G and Department of Public Safety to use ‘actual’ expenses, because they can be documented with a receipt, whereas ‘reasonable’ was deemed more

subjective. Federal enforcement staff identified that the State's proposed definition of compensation as it relates to sport fishing guide services places the burden on enforcement staff to determine "actual" daily expenses. Federal staff advised replacing "actual" with "reasonable" in order to provide more flexibility to enforcement staff (See Section 1.6.4). The Council's adoption of Option 2 for inclusion in this analysis is consistent with the Federal staff's suggestion. Both the State definition (using "actual" under Option 2a) and the proposed Federal staff's recommendation (using "reasonable" under Option 2b) are included in the analysis for Council consideration.

The agency staffs recommend Alternative 2, Option 2b if the Council adopts Alternative 2, Option 1 as its preferred alternative.

### **1.3.6.3 Option 3. Assistance**

#### **1.3.6.3.1 Federal regulations**

Federal regulations do not define "assistance" for the charter halibut fishery. The lack of a Federal definition for "assistance" may result in challenges for Federal enforcement staff and for the public. Federal, State, and Council staffs spent considerable time debating which activities might constitute assistance, but could not reach consensus. Many services offered by businesses that provide bare boat rentals could be considered "assistance" and it is difficult to distinguish between the business model of operations that are the intended subjects of this action and other acceptable models.

Some examples of assistance that could be considered guiding activities were considered by the Council in the initial review draft of this analysis in its determination of whether to proceed with Option 3. For example, a quick internet search of bare boat rentals in Southeast Alaska found that many offered a GPS unit, fishing gear, radios, etc. If an angler fishing aboard a self-guided bare boat rental were to call back to the lodge for advice, one might question whether the angler would be receiving "assistance for compensation...to take or attempt to take a fish." If the Council were to adopt such a definition it also likely would restrict the bare boat, unguided sport fishing industry. If that is not the Council's intent, it should provide a list of services under a definition of assistance that only would apply to guided anglers and not to bare boat rentals.

Such services would be further constrained, as the Federal definition of sport fishing guide services specifies that assistance must occur *during* any part of a fishing trip. A "charter vessel fishing trip" is defined in Federal regulations at § 300.61 as follows:

*Charter vessel fishing trip, for purposes of §§ 300.65(d), 300.66, and 300.67, means the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is on board and the offloading of one or more charter vessel anglers or any halibut from that vessel.*

Therefore, activities that might be considered assistance under Option 3 must occur after gear is deployed and before fish or charter anglers are offloaded.

A variety of activities were examined by interagency staffs to determine if the Council could identify specific fishing activities that could be incorporated into Federal regulations to define assistance. One problem that is easily identified in attempting to catalogue a finite list of fishing activities that define assistance is how complete that list might be, and whether specifying such activities results in numerous amendments to the regulations as previously unlisted activities could be considered for inclusion, thus necessitating a new regulatory amendment and rulemaking process. Federal and State enforcement staff noted that determination of guided assistance would often not depend on a single activity or factor, but rather a combination of factors that, taken together, would indicate that a guide was compensated for providing assisting to the client in a manner intended to result in the taking of halibut. Therefore, the staffs recommend that the Council not adopt specific fishing activities as part of the Federal definition of a "sport fishing guide services." State regulations



The State does not have a separate definition for “assistance.” However, the definition of assistance is embedded in the definition for sport fishing guide services as “accompanying or physically directing the sport fisherman in sport fishing activities during any part of a sport fishing trip.” In June 2013, the Council modified Option 3 to reflect a similar definition. This option could potentially be adopted without creating a new inconsistency; however even if language is verbatim from the state language is adopted, there is a possibility that the language may be interpreted and enforced differently.

The term “physically directing” may not necessarily provide any more concrete regulatory guidance than the term “assistance” because it may still be subject to varying interpretations. A guide that is explaining how to properly bait a hook or “find the bottom” to a client may not necessarily be considered “physically” directing as much as it could be considered “verbally” directing. Often guides are not “directing” anglers as much as they are teaching skills or techniques, sharing knowledge or experiences or actually doing a task for an angler themselves. The Council could consider adopting language “accompanying or directing” which includes explaining, teaching, demonstrating or doing a task for an angler.”

#### **1.3.6.3.2 Analysis of Impacts of Alternative 2 Option 3**

Federal enforcement staff has reported that it is able to enforce current regulations; therefore the Council must determine whether action under Alternative 2 reflects its intent for management of the charter halibut sector. Implementation of a Federal definition of assistance could create additional inconsistency between State and Federal definitions, which the Council may determine is contrary to its problem statement.

In general, State regulations require that charter logbooks be completed whenever anglers receive sport fishing guide services from adjacent vessels or shore, because the State definition of “sport fishing guide services” does not require the guide to be aboard the vessel with clients. As long as bag limits for the charter and unguided sector differ, State staff can use logbook data to identify businesses whose clients routinely harvest under Federal rules for the unguided sector.

Different standards of evidence are required for litigation by Federal and State enforcement agencies. The State has a criminal enforcement system where the burden of proof is “beyond a reasonable doubt.” The Magnuson-Stevens Act enforcement scheme is based primarily on civil administrative enforcement proceedings where the burden of proof is “by a preponderance” of evidence. The Federal burden of proof is significantly easier to meet than the State burden. So, the State may be more constrained in how they administer their regulations.

In addition, it may be easier for a State regulation to be undercut by a criminal court decision, since the State magistrate/judge can determine that the State regulation is unclear or has some other infirmity. Conversely, the Administrative Law Judges in the civil administrative system do not have authority to rule on the validity of a regulation. So, those are two very good reasons why - even if precisely the same words in both the State and Federal regulations were used – the way those regulations are enforced may differ.

Also, State and Federal enforcement mentioned that while some activities may not be considered assistance by themselves, officers look at the sum of all the activities that might be considered assistance and make a subjective decision based on those particular circumstances.

#### **1.3.7 Conclusions**

None of the alternatives are likely to change fishing patterns or harvest amounts to an extent that would result in an impact on the halibut stock or other environmental impacts. A small, but unquantifiable, amount of sport halibut removals would be affected by the proposed action after implementation of the CSP under any of the options under Alternative 2.

If businesses are no longer allowed to guide anglers from a separate boat, these businesses will have to become true bare boat rentals (unguided) or purchase CHPs (guided). If they become bare boat rentals, it is possible that more of the business clients will correctly report their harvest as unguided in the SWHS. If they become *bona fide* charter operators, it is likely that more of the clients will report their harvest as guided harvest in the SWHS and harvests reported in logbooks will better represent harvest that meets the Federal definition of charter harvest.

Data are scarce to quantify potential impacts of the alternatives. Positive impacts are expected to occur from a clearly articulated policy by the Council, so that all charter halibut fishery participants are treated fairly and are regulated under consistent State and Federal rules. These positive impacts, however, could be diminished if Council action results in new, unintended inconsistencies with State regulations or other Federal regulations or unintentionally creates more public confusion.

The Council may select Alternative 2, Option 1 as its Preferred Alternative, if it can demonstrate a net benefit of the proposed action. The Council may determine that Alternative 2, Option 1 may still offer an improvement in clarifying Council intent for management of the charter halibut sector. The Council also may adopt Alternative 2, Option 1 with or without definitions for compensation and assistance (Alternative 2, Options 2 and 3).

<b>Table 11. Summary of the effects of the Proposed Action.</b>				
	<b>Alternative 1. No Action</b>	<b>Alternative 2. Revise Federal regulations that define sport fishing guide services</b>		
		<b>Option 1. Sport fishing guide services</b>	<b>Option 2. Compensation</b>	<b>Option 3. Assistance</b>
<b>Who may be affected?</b>	Baseline	All Pacific halibut guides and anglers in Area 2C and Area 3A have the potential to be affected by clarification of Council intent, and revisions to Federal regulations; however, currently small, but potentially increasing, number of charter halibut guides and anglers may be affected by adhering to more restrictive size and bag limits upon implementation of the CSP and use of State logbooks to estimate charter halibut removals in 2014. ADF&G logbook data suggest that only a few business operators may be affected to the degree that they would be required to change their business activities, but the data may underestimate the number.		
<b>Impacts to the resource</b>	Baseline	<p>When used to account for charter halibut removals upon implementation of the CSP, all ADF&amp;G logbook data would meet the Federal definition of charter harvest. Therefore, there is no conservation concern regarding unaccounted halibut removals.</p> <p>A <i>de minimus</i> amount of halibut poundage could be unharvested by restricting indirectly assisted halibut harvests. This small amount would be the difference (in lb) between the harvest by guided anglers (under proposed management measures that restrict the size of halibut harvested with a guide) and unguided anglers (under a bag limit of two fish of any size) by an unknown, but believed to be small number of anglers who engage in indirectly assisted fishing activities that are currently legal, but which may circumvent Council intent.</p>		
<b>Benefits</b>	Baseline	Creates greater consistency between State and Federal regulations; reduces public confusion.		
		Currently limited to just a few businesses, this practice may grow in the future; therefore, the Council will decide whether action is warranted to enhance implementation of its policy.  Decreased incentives to take indirectly assisted fishing trips instead of guided trips decreases safety concerns that less experienced boaters will self-guide.		

<b>Table 11. Summary of the effects of the Proposed Action.</b>				
	<b>Alternative 1. No Action</b>	<b>Alternative 2. Revise Federal regulations that define sport fishing guide services</b>		
		<b>Option 1. Sport fishing guide services</b>	<b>Option 2. Compensation</b>	<b>Option 3. Assistance</b>
<b>Costs</b>	Baseline	<p>Indirectly assisted fishing practices would no longer allow an angler to fish under more liberal bag limits and size limits for unguided anglers in Area 2C and Area 3A (beginning in 2014).</p> <p>Incentives for indirectly assisted fishing practice to expand would be reduced.</p> <p>Businesses might need to purchase CHPs or, if they decide to become bare boat rentals, might lose clients because the clients are no longer provided with the same level of assistance.</p> <p>May create new inconsistencies with other Federal regulations implementing the CHLAP and CSP.</p>	<p>May be difficult to define in a way that would not also result in changes to fishing practices of bare boat rental companies.</p>	<p>May increase public confusion if a list of legal forms of assistance is added to Federal regulations in the absence of similar State regulations, depending on the text selected by the Council.</p> <p>Difficult to define in a way that would not also result in changes to fishing practices of bare boat rental companies.</p> <p>May create inconsistency between State and Federal regulations, depending on the text selected by the Council.</p>
<b>Net benefits</b>	Baseline	<p>Would mitigate any incentive to expand the use of this fishing practice in Area 2C or in Area 3A.</p>	<p>May enhance objectives of Option 1.</p>	<p>May enhance objectives of Option 1 or Option 2.</p>
<b>Action objectives</b>	Does not meet problem statement	<p>Best meets the objectives as outlined in the problem statement for the proposed action.</p>	<p>May enhance attainment of the objectives of this action.</p>	<p>Unlikely to enhance the objectives of this action.</p>

## 2 Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA), first enacted in 1980, and codified at 5 U.S.C. 600-611, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: 1) to increase agency awareness and understanding of the impact of their regulations on small business; 2) to require that agencies communicate and explain their findings to the public; and 3) to encourage agencies to use flexibility and to provide regulatory relief to small entities.

The RFA emphasizes predicting significant adverse impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts, while still achieving the stated objective of the action. When an agency publishes a proposed rule, it must either, 1) “certify” that the action will not have a significant adverse effect on a substantial number of small entities, and support such a certification declaration with a “factual basis,” demonstrating this outcome, or, 2) if such a certification cannot be supported by a factual basis, prepare and make available for public review an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact of the proposed rule on small entities.

This IRFA has been prepared instead of seeking certification. Analytical requirements for the IRFA are described below in more detail. The IRFA must contain:

1. A description of the reasons why action by the agency is being considered;
2. A succinct statement of the objectives of, and the legal basis for, the proposed rule;
3. A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
4. A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule;
6. A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
  - a. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
  - b. The clarification, consolidation or simplification of compliance and reporting requirements under the rule for such small entities;
  - c. The use of performance rather than design standards;
  - d. An exemption from coverage of the rule, or any part thereof, for such small entities.

The “universe” of entities to be considered in an IRFA generally includes only those small entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment of the industry, or portion thereof (e.g., user group, gear type, geographic area), that segment would be considered the universe for purposes of this analysis.

The RFA emphasizes predicting significant adverse economic impacts on small entities (e.g., businesses) as a group, distinct from other entities, which may result from regulations being proposed. Since the RFA is applicable to businesses, non-profit organizations, and governments, charter anglers fall outside of the

scope of the RFA. Therefore, they will not be discussed in the RFA context. The focus of the RFA section is the charter halibut businesses and the commercial QS holders in Areas 2C and 3A.

## **2.1 A description of the reasons this action is being considered**

The Pacific halibut resource is fully utilized by subsistence, personal-use, sport, commercial and charter fishermen in Areas 2C and 3A. NMFS has implemented a guideline harvest level (GHL) program and a limited entry program for the charter sector (CHLAP) in Area 2C and Area 3A. A major motive in developing those programs was to stabilize charter halibut harvests. The reason for this proposed action is to revise Federal regulations to align regulatory text regarding sport fishing guide services for halibut with State of Alaska regulations in order to keep anglers from fishing in a manner that is contrary to Council intent for regulation of the charter halibut fisheries in these areas. The problem statement is discussed in greater detail in Section 1.2.

## **2.2 Objective of proposed action and its legal basis**

As stated in more detail in Section 1.2 and Section 2.1, the proposed action is intended to revise Federal regulations to align regulatory text regarding sport fishing guide services for Pacific halibut with State of Alaska regulations, in order to keep anglers from fishing in a manner that is contrary to Council intent. Clear definitions would enhance public understanding of Federal regulations implementing the Council's management programs for Pacific halibut and enhance fairness. Most operators and anglers endeavor to harvest halibut within the boundaries of Council intent. Anecdotal information suggests some others may be operating in a way that circumvents that intent.

## **2.3 Description of the alternatives considered**

A complete list of the alternatives and options is contained in Section 1.3.4. That section is incorporated here by reference. The main alternatives are identified below.

Alternative 1. No action

Alternative 2. Revise and clarify the Federal definition of sport fishing guide services.

## **2.4 What is a small entity?**

The RFA recognizes and defines three kinds of small entities: (1) small businesses, (2) small non-profit organizations, and (3) and small government jurisdictions.

Small businesses. Section 601(3) of the RFA defines a 'small business' as having the same meaning as 'small business concern' which is defined under Section 3 of the Small Business Act. 'Small business' or 'small business concern' includes any firm that is independently owned and operated and not dominant in its field of operation. The SBA has further defined a "small business concern" as one "organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor... A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust, or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture."

The SBA has established size criteria for all major industry sectors in the U.S. The SBA specifies that for marinas and charter/party boats, a small business is one with annual receipts, from all sources, including affiliates, not in excess of \$7.0 million.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Quota corporations authorized by 42 U.S.C. 9805, are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

Affiliation may be based on stock ownership when (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50% or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock; or (2) If two or more persons each owns, controls or has the power to control less than 50% of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners control the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations. The RFA defines a “small organization” as any nonprofit enterprise that is independently owned and operated and is not dominant in its field.

Small governmental jurisdictions. The RFA defines “small governmental jurisdictions” as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000.

## **2.5 Description and estimate of the number of small entities directly regulated by the proposed action**

Some businesses operating in the charter halibut fisheries in Area 2C and Area 3A may be directly regulated by this proposed action. The action would directly regulate all halibut CHLAP holders who are eligible to participate in the charter sector and are currently required under Federal regulations to be on board the same vessel as the angler for whom he or she is providing sport fish guide services (i.e., under the proposed action they would no longer be required to be on board the vessel). It also would affect those businesses that do not hold a CHP, but are providing guided services while not on board the same vessel as the angler to whom he or she is providing sportfish guide services (i.e., under the proposed action they would be required to hold a CHLAP). A review of ADF&G data suggests that only a few such businesses can be documented; however, the Council is concerned that the practice could expand, if not restricted under the proposed action.

For the purpose of this discussion, the entities may be divided into two, mutually exclusive groups. One group includes operators that hold CHPs and are required to be on board the same vessel as their guided angler; those clients are subject to more restrictive harvest measures under the CSP. A second group includes operations that do not hold CHPs, but indirectly assist anglers while not on board the same vessel. These operations are, at present, legally exempt from requirements to hold a CHLAP, and their clientele are not subject to more restrictive bag limits for guide assisted anglers.

The Council analysis<sup>19</sup> and final rule<sup>20</sup> for the CHLAP concluded that almost all of the charter businesses are believed to be small entities. This conclusion is based on a SBA threshold of \$7.0 million in gross revenues on an annual basis for facilities offering sport services, including guided fishing services (NAICS 713990). Some of the largest of these entities, which are lodges, may be considered large entities under SBA standards, but that cannot be confirmed. For the reasons discussed above, this analysis assumes that all directly regulated operations are small, for RFA purposes.

Section 1.3.1.1 provides a detailed description of the current charter halibut fishery and the number of CHLAP holders in each area. The charter fleet is a fairly homogeneous group with similar operating characteristics and vessel sizes, with the exception of a few larger 'headboat' style vessels, and lodges that operate several vessels in conjunction with other services. The vast majority of charter halibut vessels is between 25 ft and 50 ft in length and carries up to six clients each. While these vessels are very similar in size, the operations have different annual participation patterns in the fishery.

A previous EA/RIR/IRFA developed to provide information on implementing a halibut charter IFQ program provided information on catch by vessel (NPFMC 2005). That analysis reports the halibut catch, by owner, during 1999. According to those data, about 175 vessels in Area 3A and 240 vessels in Area 2C harvested fewer than 100 halibut each. Therefore, over one-third of the fleet harvested fewer than 100 halibut that year. These vessels retained an average of 5 and 9.6 halibut per trip in Areas 2C and 3A, respectively, according to 1999 logbook data. To retain 100 halibut at these rates, vessels would need to make 20 trips in Area 2C and 10.4 trips in Area 3A. At \$1,000 per trip (\$200 per person and assuming, on average, five clients) this amounts to \$10,000 to \$20,000 per vessel operated. These charter operators likely spend only part of the year taking halibut clients fishing, given that number of trips and the gross revenue it would generate. The remainder of the year they may have been offering charters for other types of fishing, sightseeing, kayaking, hunting, or camping activities. Alternatively, these owners may only be part-time participants in the charter business. During the remainder of the year they may hold other jobs outside of the guided charter boat field. No information is presently available with which to ascertain, much less quantify, these other employment and/or revenue sources.

The four owners with the largest catch histories harvested over 4,000 halibut, on average, in Area 2C and just under 3,800 halibut in Area 3A during 1999 (NPFMC 2005). At an estimated 20 lbs. per fish, this equates to 80,000 lbs. of halibut for those four Area 2C operations on average, and 76,000 lbs. for the four Area 3A vessel operators on average. The largest of these companies, which are lodges, may be considered large entities under SBA standards, but that cannot be confirmed. All of the other 800-plus charter operations are assumed to be small entities, based upon SBA criteria, since they would be expected to have gross revenues from halibut chartering of less than \$7.0 million on an annual basis. Data on all other sources of earnings, including affiliates, worldwide, should be added to charter receipts. Unfortunately, these data are not available. Therefore, it is possible that the number of directly regulated small entities subject to this action is overestimated.

Chapter 2.0 of NPFMC (2005) contains more detailed breakdowns on the businesses that operated in 2004 and 2005. Some information presented reports the number of vessels that a business submitted logbooks for during the year, the maximum number of clients carried, number of trips taken, and port

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<sup>19</sup> [http://www.alaskafisheries.noaa.gov/analyses/halibut/draft-rir-frfa\\_082610.pdf](http://www.alaskafisheries.noaa.gov/analyses/halibut/draft-rir-frfa_082610.pdf)

<sup>20</sup> <http://www.alaskafisheries.noaa.gov/frules/75fr554.pdf>



where the trip terminated. Additional information on the economic characteristics of vessels operating in the Cook Inlet portion of Area 3A has been described by Hermann et al. (2001).

The CHLAP was created to limit the number of vessels that may operate at one time in the halibut charter fleet in Area 2C and Area 3A. Issuing CHPs effectively limited the number of vessels, but is not expected to constrain the amount of halibut retained in the charter halibut fishery to historical levels identified under the CSP). Because CHP holders may increase the number of trips they take in a year or increase the average number of clients carried per trip (up to their maximum permit endorsement), they have the capacity to exceed their sector allocation. The charter fleet could potentially increase their harvests as much as five-fold under the CHLAP, if the maximum number of clients associated the CHLAP charter their services. The original CHLAP was determined to impose no adverse economic impact upon this directly regulated universe of small entities; therefore, relaxing the restriction that required a guide to be on board the vessel also is expected to impose no adverse impact on these same small entities. The proposed action, however, may adversely impact those guides that are not on board the charter vessel.

## **2.6 Recordkeeping requirements**

No additional reporting requirements have been identified. This proposed action does not change data collection requirements for any sport sector, but may increase the number of businesses required to complete ADFG saltwater charter logbooks. Some businesses may need to obtain CHPs to continue operating. A more detailed version of potentially affected Federal regulatory text is provided under Appendix 2.

## **2.7 Relevant Federal rules that may duplicate, overlap or conflict with the proposed action**

Removing the guide on board requirement from the Federal definition under Alternative 2, Option 1, would affect several IPHC annual management measures and Federal regulations at 50 CFR part 300, as described below. NMFS may identify and propose additional regulatory revisions during the rulemaking process.

### **IPHC Annual Management Measures**

If the Council recommends Alternative 2, Option 1, NMFS would coordinate with the IPHC to ensure that revised Federal regulations are consistent with the following IPHC annual management measures.

IPHC regulations define a charter vessel as “a vessel used for hire in sport fishing for halibut, but not including a vessel without a hired operator.” There is currently no Federal definition for a charter vessel.

IPHC regulations at section 25(7) state “The operator of a charter vessel shall be liable for any violations of these Regulations committed by a passenger aboard said vessel.” Currently, this is interpreted to mean that the charter vessel operator is responsible for any violations by charter vessel anglers during a charter vessel fishing trip. NMFS expects that this regulation would need to be changed or a Federal regulation would need to be added to specify who is responsible for violations made by guide-assisted anglers without a guide onboard.

### **Charter Halibut Limited Access Program**

If the Council recommends Alternative 2, Option 1, NMFS would revise Federal regulations at §300.67 governing the use of charter halibut permits during a charter halibut fishing trip. Current regulations require the operator of a vessel with one or more charter vessel anglers on board that are catching and retaining halibut to have an original valid charter halibut permit on board the vessel. If the guide on board requirement were removed under Alternative 2, Option 1, charter anglers could be on a vessel without a guide and, presumably, without a charter halibut permit. NMFS would need to revise Federal regulations

to (1) link anglers to a specific charter halibut permit, and (2) specify the person responsible for ensuring that charter anglers are retaining halibut under the authority of a valid charter halibut permit.

*If the Council recommends Alternative 2, Option 1, NMFS assumes the person providing sport fishing guide services would be responsible for complying with regulations at § 300.67 for the use of charter halibut permits during a charter halibut fishing trip.*

### **Guided Angler Fish Program**

Under the Area 2C and Area 3A halibut catch sharing plan, charter operators are authorized to lease commercial halibut IFQ as guided angler fish for use in the charter fishery. To authorize GAF use in the charter fishery, NMFS issues a GAF permit to a person who holds a valid charter halibut permit. A GAF permit is assigned to only one charter halibut permit, and a legible copy of a GAF permit and the assigned charter halibut permit must be carried on board the vessel used to harvest GAF at all times that GAF are retained on board and must be presented for inspection on request of any authorized officer. Additionally, charter guides are required to mark GAF halibut by clipping the lobes of the tail fin, and completing reporting requirements in the ADF&G saltwater charter logbook, on the GAF permit, and electronically.

Under Alternative 2, Option 1 of the proposed action, NMFS would need to revise GAF regulations to (1) link anglers to a specific GAF permit, and (2) specify the person responsible for ensuring that charter anglers are retaining GAF under the authority of a valid GAF permit.

*If the Council recommends Alternative 2, Option 1, NMFS assumes the person providing sport fishing guide services would be responsible for complying with regulations at § 300.65 for the use of GAF during a charter halibut fishing trip.*

### **Recordkeeping and Reporting Requirements**

If the Council recommends Alternative 2, Option 1, NMFS would revise Federal regulations at §300.65(d) that describe recordkeeping and reporting requirements for charter halibut operators. The majority of recordkeeping and reporting requirements in this section of the regulations pertain to recording information in the ADF&G saltwater charter logbook and in the GAF electronic reporting system for each charter fishing trip. Under these regulations, (1) the charter guide is responsible for complying with the reporting requirements, and (2) the person whose business was assigned an Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook is responsible for ensuring that the charter vessel guide complies with the reporting requirements.

*If the Council recommends Alternative 2, Option 1, NMFS assumes these same persons would be responsible for complying with recordkeeping and reporting requirements for charter halibut fishing trips.*

## **2.8 Description of any significant alternatives to the proposed action that would minimize any significant economic impact of the proposed rule on small entities**

Almost all of the entities directly regulated under this action are assumed to be small under the SBA definition. Because the proposed action serves to benefit the small entities that are directly regulated under the proposed action by clarifying Federal fishery regulations to better align with Council intent and State of Alaska fishery regulations, no significant negative economic impacts are expected on CHP holders; however guides that are not on board would be required to change their fishing practices under the proposed action. Thus, NOAA Fisheries is not aware of any alternatives, in addition to the alternatives considered herein, that would more effectively meet these RFA criteria, at a lower economic cost to directly regulated entities.

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## Appendix 1. Federal Definitions

A complete list of definitions relevant to this management program can be found at [50 CFR 300.61 or 300.67\(f\)](#).

**Angler Endorsement:** the maximum number of charter vessel anglers that may catch and retain halibut on board the vessel. It is the number of *authorized anglers* on your CHP.

**Change (ownership):** NMFS considers a change in business structure, such as new shareholders or partners, to be a new business entity and requires CHPs to be transferred to the new entity. For a CHP holder, “change” also occurs when the individual dies or business entity dissolves. “Change” invalidates a non-transferable CHP.

**Charter halibut permit (CHP):** a permit issued by NMFS to owners of charter vessel businesses, bearing endorsements for operating in Areas 2C or 3A, and for the number of charter vessel anglers authorized to catch and retain Pacific halibut during a charter vessel fishing trip.

**Charter vessel angler:** a person, paying or nonpaying, using the services of a charter vessel guide.

**Charter vessel fishing trip:** the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is on board and the offloading of one or more charter vessel anglers or any halibut from that vessel.

**Charter vessel guide:** a person who holds an annual sport guide license issued by ADF&G; or a person who provides sport fishing guide services.

**Charter vessel operator:** the person in control of the vessel during a charter vessel fishing trip.

**Community Quota Entity (CQE):** a nonprofit organization that (1) did not exist prior to April 10, 2002; (2) represents at least one eligible community that is listed below; and (3) has been approved by the Regional Administrator ([50 CFR 679.2](#)). A nonprofit may apply at any time and is required to submit an annual report to NMFS. Communities currently eligible to form a nonprofit to receive a community CHP under ([50 CFR 300.67\(k\)\(2\)](#)) are listed below:

*Area 2C:* Angoon, Coffman Cove, Edna Bay, Hollis, Hoonah, Hydaburg, Kake, Kasaan, Klawock, Metlakatla, Meyers Chuck, Pelican, Point Baker, Port Alexander, Port Protection, Tenakee Springs, Thorne Bay, Whale Pass.

*Area 3A:* Akhiok, Chenega Bay, Halibut Cove, Karluk, Larsen Bay, Nanwalek, Old Harbor, Ouzinkie, Port Graham, Port Lyons, Seldovia, Tatitlek, Tyonek, Yakutat.

**International Pacific Halibut Commission (IPHC):** A public international organization established in 1923 by a convention between the United States and Canada, originally called the International Fisheries Commission. The IPHC is responsible for conservation of Pacific halibut in waters off Canada and the United States.

**National Marine Fisheries Service (NMFS, a.k.a NOAA Fisheries):** Responsible for managing the fisheries and enforcing regulations under authority of the Secretary of Commerce and the National Oceanic and Atmospheric Administration (NOAA). NMFS is the permitting body that maintains the Official Record.

**North Pacific Fishery Management Council (NPFMC):** is responsible for allocating resources to fisheries programs. NPFMC and NMFS work together to manage Federal fisheries off Alaska; NPFMC makes recommendations to NMFS, and NMFS approves, implements, and administers them.

**Official Record:** the information prepared by NMFS on participation in charter halibut fishing in Areas 2C and 3A that NMFS used to implement the Charter Halibut Limited Access Program and evaluate applications for CHPs.

**Sport fishing guide services:** assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being on board a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.

## Appendix 2. CHANGES TO AND CONFLICTS WITH EXISTING AND PROPOSED REGULATIONS

Removing the guide on board requirement from the Federal definition would affect several IPHC annual management measures and Federal regulations at 50 CFR part 300.

### IPHC Annual Management Measures

IPHC regulations define a charter vessel as “a vessel used for hire in sport fishing for halibut, but not including a vessel without a hired operator.” There is currently no Federal definition for a charter vessel.

IPHC regulations at section 25(7) state “The operator of a charter vessel shall be liable for any violations of these Regulations committed by a passenger aboard said vessel.” Currently, this is interpreted to mean that the charter vessel operator is responsible for any violations by charter vessel anglers during a charter vessel fishing trip. NMFS expects that this regulation would need to be changed or a Federal regulation would need to be added to specify who is responsible for violations made by guide-assisted anglers without a guide onboard.

### §300.65 Catch sharing plan and domestic management measures in waters in and off Alaska

Regulations at § 300.65(d) describe ADF&G saltwater charter logbook reporting requirements for charter halibut operators. The affected paragraphs are listed below:

(d)(iv) *Recordkeeping and reporting requirements in Area 2C.* Each charter vessel angler and charter vessel guide **onboard a vessel** in Area 2C must comply with the following recordkeeping and reporting requirements (see paragraphs (d)(2)(iv)(A) and (B) of this section) by the end of the day or by the end of the charter vessel fishing trip, whichever comes first:

(d)(iv)(A) *Charter vessel angler signature requirement.* Each charter vessel angler who retains halibut caught in Area 2C must acknowledge that his or her information and the number of halibut retained (kept) are recorded correctly by signing the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook data sheet on the line number that corresponds to the angler's information.

(d)(iv)(B)(3) *Angler sport fishing license number and printed name.* Before a charter vessel fishing trip begins, record for each charter vessel angler the Alaska Sport Fishing License number for the current year, resident permanent license number, or disabled veteran license number, and print the name of each paying and nonpaying charter vessel angler **onboard** that will fish for halibut. Record the name of each angler not required to have an Alaska Sport Fishing License or its equivalent.

(d)(iv)(B)(6) *Angler signature.* The charter vessel guide is responsible for ensuring that charter vessel anglers comply with the signature requirements at paragraph (d)(2)(iv)(A) of this section.

Removing the requirement that the guide be on board the same vessel as the angler would create several inconsistencies with these regulations at §300.65(d) that would need to be resolved. First, the guide would still be responsible for filling out the ADF&G saltwater charter logbook, unless the Council recommends changing this requirement. Guides are currently required to record the numbers of halibut caught and kept, as well as the regulatory area where the majority of fish were caught or targeted. Second, if the guide were responsible for ensuring that the anglers sign the logbook, the guide would need to be present when the guide-assisted anglers returned to the dock. It is possible that anglers would leave without reporting to the guide and signing the logbook, putting the guide in a difficult position of being responsible for finding them. NMFS expects that the recordkeeping and reporting requirements at §300.65(d) would need to be changed so that guide-assisted anglers would be responsible for 1) listing their names and license numbers in the logbook before the fishing trip begins; 2) reporting to the guide the number of halibut caught and kept in logbook by the end of the day in which the charter halibut fishing trip took place; and 3) signing the logbook.

### **§ 300.66 Prohibitions**

Two current prohibitions at § 300.66 would be affected by Alternative 2. Paragraph 300.66(r) states that it is prohibited to

“be an operator of a vessel with one or more charter vessel anglers on board that are catching and retaining halibut without an original valid charter halibut permit for the regulatory area in which the vessel is operating.”

If the guide on board requirement were removed, charter anglers could be on a vessel without a guide and, presumably, without a charter halibut permit. Regulations would need to be changed to specify which vessels are required to carry a charter halibut permit. Permits may need to be issued to vessels without a guide in order to link the anglers to a charter halibut permit.

Similarly, paragraph 300.66(v) prohibits being

“an operator of a vessel in Area 2C or Area 3A with one or more charter vessel anglers on board that are catching and retaining halibut without having on board the vessel a State of Alaska Department of Fish and Game Saltwater Charter Logbook that specifies the following: (1) The person named on the charter halibut permit or permits being used on board the vessel; (2) The charter halibut permit or permits number(s) being used on board the vessel; and (3) The name and State issued boat registration (AK number) or U.S. Coast Guard documentation number of the vessel.”

This paragraph may not need to be changed as it would still apply to traditional charter vessel operations. NMFS would need to determine how logbook, charter halibut permit, and vessel registration information requirements would apply to guide-assisted anglers on separate vessels.

### **§ 300.67 Charter halibut limited access program**

Regulations at § 300.67 govern the Charter Halibut Limited Access Program. Under the general permit requirements at paragraph 300.67(a)(1),

“In addition to other applicable permit and licensing requirements, any operator of a vessel with one or more charter vessel anglers catching and retaining Pacific halibut on board a vessel must have on board the vessel an original valid charter halibut permit or permits endorsed for the regulatory area in which the vessel is operating and endorsed for at least the number of charter vessel anglers who are catching and retaining Pacific halibut. Each charter halibut permit holder must insure that the operator of the permitted vessel complies with all requirements of §§ 300.65 and 300.67.”

If the definition of sport fishing guide services were changed so that the vessel operator was no longer necessarily the guide, then the “operator of a vessel with one or more charter vessel anglers” could also be a charter vessel angler.

Paragraph 300.67(a)(3) states that a charter halibut permit is valid for up to the maximum number of charter vessel anglers for which the charter halibut permit is endorsed. Under the change proposed in Alternative 2 Option 1, it is unclear if the charter halibut permit holder would be limited to renting gear and vessels to the number of anglers endorsed on the permit.

### **Catch Sharing Plan Regulations**

The catch sharing plan (CSP) for Area 2C and 3A regulations would also be affected by Alternative 2. The CSP has a component that would allow charter operators to lease commercial IFQ as guided angler fish (GAF) for use in the charter fishery. As proposed, the GAF program would require that GAF permits be on board the vessel used to harvest GAF. Charter vessel guides would be required to mark GAF halibut by clipping the lobes of the tail fin, and completing reporting requirements in the ADF&G

saltwater charter logbook, on the GAF permit, and electronically. If the Council recommends Alternative 2, NMFS would need to determine how GAF would be used on “guide-assisted” vessels and how to modify the GAF program to ensure that GAF are properly accounted for.

Other conflicts may be identified during the public review and rulemaking processes and will be addressed by NMFS staff during rulemaking.