

develop potential harvest restrictions to implement if the GHL were exceeded. The Council formed a GHL Committee to recommend alternative management measures for analysis that would constrain guided recreational harvests below the GHL. In April 1999, the Council identified alternatives for analysis.

In February 2000, after 7 years of discussing the guided recreational halibut fishery, the Council adopted a redefined guided recreational GHL and a system of management measures for recommendation to the Secretary. The Council's recommendation would have established a suite of varying harvest restrictions that would be triggered depending on the degree to which the GHL was exceeded. Once the GHL is reached or exceeded, these measures would be implemented by notice published in the **Federal Register**. Essentially, the Council's recommendation included a "framework" of restrictions that were explicitly designed to be implemented without proceeding through public notice and comment before becoming effective.

NMFS sent a letter to the Council on April 2, 2002, informing the Council that "[t]he current framework cannot be implemented as conceived by the Council because the Administrative Procedure Act (APA) requires that any regulatory action have prior notice and opportunity for public comment before becoming effective."

The notification process described in the proposed rule contemplated compliance with the APA in establishing the framework of harvest restrictions that would be scaled to match the extent to which the guided recreational fishery exceeded the GHL. This framework of potential restrictions, which would be automatically triggered depending on how much the GHL is exceeded, was designed by the Council to minimize the time between exceeding a GHL and the implementation of one or more restrictions. Public comment was specifically invited on the range of restrictions and the link between this range and the level that the guided recreational fishery exceeded the GHL.

This process of implementing pre-conceived and non-discretionary restrictions by notice, depending on how much the GHL is exceeded, however, would not have provided for additional public comment at the time of implementing a restriction. The NMFS letter to the Council indicated that this lack of additional public comment would not be consistent with the APA.

The public comment required by the APA can be waived only for "good cause." The harvest restrictions in the proposed rule likely could not be implemented under the "good cause" exemption of the APA. The APA provides for a "good cause" finding only when the agency finds that notice and opportunity for public comment would be impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(B)). These terms are narrowly defined. Because this "good cause" finding would need to be made at the time the harvest restrictions are implemented, NMFS could not conclude in advance that a "good cause" finding would exist in every instance the GHL was exceeded and harvest restrictions triggered. This requirement would effectively undermine the goal of the framework measures to expedite implementation of harvest restriction measures on the guided recreational fishery.

NMFS presented this letter to the Council at its April 2002 meeting, but no action was taken. NMFS sent a second letter to the Council on September 6, 2002, which further clarified factors that may affect the approval of the GHL program and suggested alternative ways to meet the Council's intent.

The September 6, 2002, letter noted that the proposed rule could be approved only if it were changed to explicitly provide for an opportunity for public comment before implementing any harvest restrictions. This change would increase the amount of time between when the GHL is exceeded and implementing any harvest restrictions, because the APA rulemaking process would require an analysis of alternatives to the proposed harvest restrictions recommended by the Council under the requirements of the Regulatory Flexibility Act, the National Environmental Policy Act, Executive Order (E.O.) 12866 (which requires a Regulatory Impact Review), and other applicable laws.

The Council discussed this letter in October 2002. The Council indicated that its preferred course of action would be to implement the GHL policy as a rule and to develop possible harvest restriction measures as necessary at a later time through a separate analytical and rulemaking process. Under this scenario, the Council would undertake its usual process of forwarding recommendations to NMFS based on analysis of alternatives each time recreational guided harvests exceed the GHL.

On December 2, 2002, NMFS informed the Council by letter that

NMFS intended to proceed as recommended by the Council in October, with a final rule to implement the GHL policy without the associated harvest restriction measures. NMFS presented this letter to the Council at its December 2002 meeting. This letter noted that if the GHL were exceeded, subsequent harvest restrictions could be implemented as needed under normal APA rulemaking with the accompanying analyses (e.g., EA/RIR/IRFA). In other words, this final rule would establish the GHL policy and require NMFS to notify the Council when a GHL is exceeded, which could serve as a trigger for subsequent rulemaking.

Hence, this final rule deviates from the proposed rule (January 28, 2002, 67 FR 3867) by omitting all of the proposed restrictions. The specific changes in this final rule from the proposed rule are described in the Changes from the Proposed Rule section of this final rule.

Guideline Harvest Level

The GHL establishes a pre-season estimate of acceptable annual harvests for the guided recreational halibut fishery in Commission areas 2C and 3A. To accommodate limited growth of the guided recreational fleet while approximating historical harvest levels, the GHL for each area is based on 125 percent of the average of 1995–99 guided recreational harvest estimates as reported by the ADF&G's Harvest Survey. The average harvest during the 1995–1999 time period was chosen as being representative of recent trends in guided fishery harvests with the additional 25 percent over this average added to accommodate limited future growth based on estimated guided fishery harvest trends. The GHLs equal 1,432,000 lb (649.5 mt) net weight in area 2C, and 3,650,000 lb (1,655.6 mt) net weight in area 3A. These amounts equate to 13.05 percent, and 14.11 percent, respectively, of the combined guided recreational and commercial allowable harvest.

The GHLs are established as a total maximum poundage, which is responsive to annual reductions in stock abundance. In the event of a reduction in either area's halibut stocks, as determined by the Commission, the area GHL is reduced incrementally in a stepwise fashion in proportion to the stock reduction. The GHL is reduced by fixed percentages if the stock abundance falls below the average 1999–2000 stock abundance. The 1999–2000 time frame was chosen because these were the two years most recent to the Council's action.