

2000. The notification of intent to participate should identify the organization the person represents (if any), the names of all participants from that organization planning to participate, and a phone number at which the registrant can be reached. FRA reserves the right to limit active conference participation to those persons who have registered in advance.

Issued in Washington, DC on April 18, 2000.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 000331092-0092-01; I.D. 030100F]

**RIN 0648-AM42**

#### Fisheries of the Exclusive Economic Zone Off Alaska; License Limitation Program for the Scallop Fishery

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement Amendment 4 to the Fishery Management Plan for the Scallop Fishery off Alaska (FMP), which would create a license limitation program (scallop LLP) for the scallop fishery. If adopted, this program would limit the number of participants and reduce fishing capacity in the scallop fishery off Alaska. This action is proposed to achieve the conservation and management goals for the scallop fishery and is intended to further the objectives of the FMP.

**DATES:** Comments on the proposed rule must be submitted on or before June 5, 2000.

**ADDRESSES:** Comments on this proposed rule should be submitted to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802-1668, Attn: Lori Gravel. Comments may also be sent via facsimile (fax) to 907-586-7465. Comments will not be accepted if submitted via e-mail or Internet. Courier

or hand delivery of comments may be made to NMFS in the Federal Building, Room 453, Juneau, AK. Copies of Amendment 4 to the Scallop FMP, and the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for the amendment are available from the North Pacific Fishery Management Council, 605 West 4<sup>th</sup> Ave., Suite 306, Anchorage, AK 99501-2252; telephone 907-271-2809.

**FOR FURTHER INFORMATION CONTACT:**

Gretchen Harrington, 907-586-7228, or gretchen.harrington@noaa.gov.

**SUPPLEMENTARY INFORMATION:** The North Pacific Fishery Management Council (Council) prepared the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Under the FMP, management of all aspects of the scallop fishery, except limited access, is delegated to the State of Alaska (State). Federal regulations governing the scallop fishery appear at 50 CFR parts 600 and 679. State regulations governing the scallop fishery appear in the Alaska Administrative Code (AAC) at 5 AAC Chapter 38—Miscellaneous Shellfish.

State regulations establish guideline harvest levels (GHL) for different scallop registration areas, fishing seasons, open and closed fishing areas, observer coverage requirements, bycatch limits, gear restrictions, and measures to limit processing efficiency (including a ban on the use of mechanical shucking machines and a limitation on crew size). The gear regulations limit vessels to using no more than two, 15-ft (4.5 m) dredges, except in Cook Inlet (State Registration Area H) where vessels are limited to using a single 6-ft (1.8 m) scallop dredge.

The Council has submitted Amendment 4 for Secretarial review, and a Notice of Availability of the amendment was published March 8, 2000 (65 FR 12500) with comments on the FMP amendment invited through May 8, 2000. Comments may address the FMP amendment, the proposed rule, or both, but must be received by May 8, 2000, to be considered in the approval/disapproval decision on the FMP amendment.

#### Management Background and Need for Action

##### *Historic Management of the Scallop Fishery*

The scallop resource off Alaska has been commercially exploited for more than 30 years. Weathervane scallop stocks off Alaska were first commercially explored by a few vessels in 1967. The fishery grew rapidly over

the next 2 years with about 19 vessels harvesting almost 2 million lb (907.2 metric tons (mt)) of shucked meats. Since then, vessel participation and harvests have fluctuated greatly, but have remained below the peak participation and harvests experienced in the late 1960s. Between 1969 and 1991, about 40 percent of the annual scallop harvest came from State waters. Since 1991, Alaska scallop harvests have increasingly occurred in Federal waters. Before 1990, about two-thirds of the scallop harvest was taken off Kodiak Island and about one-third from the Yakutat area, with harvests from other areas making minor contributions to overall landings. The increased harvests in the 1990s occurred with new exploitation in the Bering Sea. The fishery has occurred almost exclusively in Federal waters in recent years, but some fishing in State waters occurs off Yakutat, Dutch Harbor, and Adak.

Before the early 1990s, the Council concluded that the State's scallop management program provided sufficient conservation and management of the Alaska scallop resource and did not need to be duplicated by Federal regulation. The State concurred with this position under the premise that all vessels participating in the Alaska scallop fishery were registered under the laws of the State and fell under the State's management jurisdiction.

##### *Initial Federal Involvement in the Fishery*

By 1992, fishery participants and management agencies developed growing concerns about excessive fishing capacity and exploitation in the scallop fishery. The Council was presented with information indicating that the stocks of weathervane scallops were fully exploited and that any increase in fishing effort could be detrimental to the stocks. Information indicated that dramatic changes in age composition had occurred during the period 1980-1990, with commensurate declines in harvest. In the early 1990s, many fishermen abandoned historical fishing areas and searched for new areas to maintain catch levels. Increased numbers of small scallops were reported in the catch. These events raised conservation concerns because scallops are highly susceptible to local depletion and boom/bust cycles worldwide.

The perceived need to limit access to the fishery was the primary motivation for the Council to begin its consideration of Federal management of the scallop fishery in 1992. The Council believed that Federal action was necessary because existing State statutes precluded a State vessel moratorium

and, at that time, the State did not have authority under the Magnuson-Stevens Act to restrict access in Federal waters. The Council began analysis of a variety of options for Federal management of the scallop fishery in Federal waters off Alaska, and a vessel moratorium was proposed as an essential element of a Federal management regime to stabilize the size and capacity of the scallop fleet while the Council considered permanent limited entry alternatives for the fishery. In September 1993, the Council tentatively identified its preferred alternative for a Federal FMP for the scallop fishery—a Federal vessel moratorium and shared management authority with the State. A draft FMP and analysis were released to the public in November 1993.

In April 1994, the Council and its advisory bodies reviewed the draft FMP, received public testimony, and adopted the draft FMP for the scallop fishery, which proposed to establish a vessel moratorium and delegate most other routine management measures to the State. Under the draft FMP, non-limited access measures would be delegated to the State based on the premise that all vessels fishing for scallops in the Federal waters off Alaska also would be registered with the State. The Council recognized the potential problem of unregistered vessels fishing in Federal waters, but noted that all vessels fishing for scallops in Federal waters were registered in Alaska and that no information was available to indicate that vessels would not continue to register with the State.

#### *Unregulated Fishing and the Closure of Federal Waters*

During the time proposed regulations to implement the Council's proposed FMP were being developed, a vessel, which was presumed to have canceled its State registration, began fishing for scallops in Federal waters in the Prince William Sound Registration Area. The State previously had closed these waters to fishing by State-registered vessels because the GHL level of 50,000 lb (22.7 mt) of shucked meats had been taken. The State was unable to stop this uncontrolled fishing activity due to uncertainty whether the vessel was fishing outside State jurisdiction. The U.S. Coast Guard boarded the vessel in question and was informed that 54,000 lb (24.5 mt) of shucked scallop meats were on board. This amount, combined with the 50,000 lb (22.7 mt) of shucked meats already taken by State-registered vessels meant that the State's GHL for the Prince William Sound Registration Area was exceeded by over 100 percent.

On February 17, 1995, the Council held an emergency teleconference to address concerns about uncontrolled fishing for scallops in Federal waters by vessels fishing outside the States's jurisdiction. The Council requested that NMFS implement an emergency rule to close Federal waters to fishing for scallops to prevent overfishing of the scallop stocks. NMFS approved the Council's request and closed Federal waters off Alaska to fishing for scallops by emergency rule on February 23, 1995 (60 FR 11054, March 1, 1995).

After the unregulated fishing event that warranted the emergency rule, the Council and NMFS determined that the Council's draft FMP was no longer appropriate. As a result, the draft FMP was not submitted for review by NMFS. To respond to the need for Federal management of the scallop fishery once the emergency rule expired, the Council prepared a second draft FMP and adopted it. That FMP was subsequently approved by NMFS on July 26, 1995. The only management measure authorized and implemented under the FMP was an interim 1 year closure of Federal waters off Alaska to fishing for scallops (60 FR 42070, August 15, 1995). The interim closure prevented uncontrolled fishing for scallops in Federal waters while the Council developed a Federal scallop management program. The Council recommended this approach because the suite of alternative management measures necessary to support a controlled fishery for scallops in Federal waters could not be prepared, reviewed, and implemented before the emergency rule expired.

#### *Amendment 1: State-Federal Management Regime*

During 1995, the Council prepared Amendment 1 to the FMP to replace the interim closure with a joint State-Federal management regime. Amendment 1 was approved by NMFS on July 10, 1996 (61 FR 38099). Amendment 1 established a joint State-Federal management regime under which NMFS implemented Federal scallop regulations that duplicated most State scallop regulations, including definitions of scallop registration areas and districts, scallop fishing seasons, closed waters, gear restrictions, efficiency limits, crab bycatch limits, scallop catch limits, inseason adjustments, and observer coverage requirements. This joint State-Federal management regime was designed as a temporary measure to prevent unregulated fishing in Federal waters until changes in the Magnuson-Stevens Act would enable the Council to

delegate management of the fishery to the State. Federal waters were re-opened to fishing for scallops on August 1, 1996.

#### *Amendment 2: Vessel Moratorium*

On March 5, 1997, NMFS approved Amendment 2 to the FMP, which established a temporary moratorium on the entry of new vessels into the scallop fishery in Federal waters off Alaska. NMFS published a final rule implementing the vessel moratorium on April 11, 1997 (62 FR 17749). To qualify its owner for a moratorium permit, a vessel must have made a legal landing of scallops during 1991, 1992, or 1993, or during at least 4 separate years from 1980 through 1990. The moratorium remains in effect through June 30, 2000, or until replaced by a permanent limited access system. Eighteen vessel owners qualified for moratorium permits under the Federal vessel moratorium.

#### *Amendment 3: Delegate Management Authority to the State*

While the joint State-Federal management regime established under Amendment 1 enabled NMFS to reopen the EEZ to fishing for scallops, it proved to be cumbersome in practice. Every management action, including inseason openings and closures, had to be coordinated so that State and Federal actions were simultaneously effective. State scallop managers were constrained in their ability to rapidly implement management decisions because they had to coordinate each action with NMFS and provide sufficient lead-time for publication of the action in the **Federal Register**.

The purpose of maintaining duplicate regulations at the State and at the Federal level was to prevent unregulated fishing by vessels not registered under the laws of the State. By 1997, the State-Federal management regime established under Amendment 1 no longer was necessary to prevent unregulated fishing for scallops in Federal waters because the Sustainable Fisheries Act of 1996 amended section 306 of the Magnuson-Stevens Act to provide authority for the FMP to delegate to the State management responsibility for the scallop fishery in Federal waters off Alaska.

Amendment 3 delegated to the State the authority to manage all aspects of the scallop fishery in Federal waters, except limited access, including the authority to regulate vessels not registered under the laws of the State. The final rule implementing Amendment 3 was published on July 17, 1998 (63 FR 38501). Amendment 3 simplified scallop management in the

Federal waters off Alaska by eliminating the unnecessary duplication of regulations at the State and Federal levels.

#### *Amendment 5: Essential Fish Habitat (EFH)*

Amendment 5 to the FMP responds to new EFH requirements of section 303 of the Magnuson-Stevens Act. The notice of approval of Amendment 5 was published on April 26, 1999 (64 FR 20216). This amendment describes and identifies EFH for the scallop fishery, includes provisions to minimize to the extent practicable adverse effects on such habitat caused by fishing, and identifies other actions to encourage the conservation and enhancement of such habitat.

#### *Amendment 6: Overfishing Definitions*

Amendment 6, also required by recent changes in the Magnuson-Stevens Act, amended the FMP by redefining overfishing, optimum yield (OY), and maximum sustainable yield for the scallop resource. Amendment 6 was approved on March 3, 1999 (64 FR 11390). This amendment improved management of the scallop fisheries by providing the tools to (1) prevent overfishing; (2) achieve OY on a continuing basis; and (3) minimize bycatch. Amendment 6 also added information to the FMP on the State's bycatch monitoring and reduction programs such as at-sea catch sampling, area closures, bycatch limits, and gear restrictions.

#### *Amendment 4: License Limitation Program*

The Council adopted Amendment 4 to the FMP in February 1999. If approved and implemented as proposed, an LLP would replace the existing Federal moratorium program on the entry of new vessels to the scallop fishery, which is scheduled to expire on June 30, 2000.

The Council designed Amendment 4 in response to extensive public testimony that the scallop fishery suffered from excessive harvesting capacity. In 1996, members of the scallop industry submitted a proposal to the Council for an LLP. Industry members proposed an LLP to limit access to the fishery because they believed that they would suffer economic hardship if latent moratorium permits were activated. "Latent" permits refer to permits for vessels that received a moratorium permit but that currently are not active in the fishery. Public testimony indicated that fishermen could not break even (i.e., their average costs of fishing for scallops

would not at least equal their average gross income from scallops landed), if the number of vessels fishing for scallops increased. This conclusion is supported by the economic analysis in the EA/RIR/IRFA for Amendment 4 and is demonstrated by recent participation in the fishery of an average of nine vessels since 1995.

Beginning February 1998, the Council reviewed participation, and other data from the scallop fishery, considered public testimony, and developed a problem statement and alternatives for analysis of an LLP to replace the existing vessel moratorium.

The Council developed six alternatives and two options for the LLP. These alternatives ranged from no action to a program that would issue nine licenses, which is half the number of moratorium permits. The alternatives and options are described in the EA/RIR/IRFA (see **ADDRESSES**). Under the Council's preferred alternative the qualification criteria for initial allocation of licenses, if adopted, would result in a total of nine licenses. The Council adopted the most restrictive alternative and options to create an LLP that would reduce the number of participants in the fishery and eliminate growth in harvesting capacity. The Council's intention is to reduce effort to approach a sustainable fishery with maximum net benefits to the Nation, as required by the Magnuson-Stevens Act. This proposed rule would implement the Council's preferred alternative and options.

#### **Operational Aspects**

##### *1. General*

The LLP would limit access to the commercial scallop fisheries in the exclusive economic zone (EEZ) off Alaska. A qualified person who applies as prescribed would receive a license(s) that would authorize that person to catch and retain scallops. Initial allocation of licenses would be based on the eligibility qualifications discussed here.

##### *2. Nature of Scallop LLP Licenses and Qualification Periods*

A scallop LLP license is a permit that grants the person named on the license (i.e., the license holder) the privilege of catching and retaining scallops in Federal waters off Alaska. Once initially issued using criteria discussed here, a scallop LLP license would be transferable, subject to NMFS approval, to an eligible transferee(s). Each license would specify certain endorsements and limitations, including the name and address of the license holder, the

maximum length overall (MLOA) of the vessel on which the license could be used, and (as appropriate) limitations on scallop dredging gear that could be deployed from the vessel. A scallop LLP license would represent a privilege (not a property right) that could be amended or revoked at any time without compensation.

A scallop LLP license would be initially issued to an eligible applicant who held, on February 8, 1999 (the date of Council action), either a State or Federal moratorium permit and who used the permit to make legal landings of scallops in the qualifying period. The qualifying period for the scallop LLP would be from January 1, 1996, through October 9, 1998. Legal landings of scallops would have to be made in at least 2 of the 3 calendar years during this period. A legal landing is defined in regulations (§ 679.2) as a landing in compliance with Federal and State commercial fishing regulations in effect at the time of the landing.

A license would authorize the license holder to catch and retain scallops in Federal waters off Alaska. The license holder could be an individual or a corporate person consistent with the definition of "person" in the Magnuson-Stevens Act, and the license holder would not be required to be on board a vessel when it is catching and retaining scallops. An original copy of the scallop LLP license would be required to be onboard the vessel at that time. Although a scallop LLP license would not be vessel specific, the length overall of any vessel that is catching and retaining scallops under the terms of the license would be constrained by the MLOA specified on the license. In addition, the license would specify any gear limitations. The license also would be transferable, subject to NMFS review and approval of an application to transfer the license and the eligibility of the proposed transferee to receive a license by transfer.

A scallop LLP license would replace the existing scallop moratorium permit and would require possession of a moratorium permit as a criterion for a license. To qualify for a Federal scallop moratorium permit, a vessel must have made a minimum of 1 legal landing of scallops harvested from any waters off Alaska during 1991, 1992, or 1993, or during at least 4 separate years from 1980 through 1990 (§ 679.4(g)(3)).

The State moratorium qualification period was established either for a Statewide moratorium permit or a Cook Inlet moratorium permit. For the Statewide moratorium qualification period, a vessel owner must have harvested and landed at least 1,000 lb

(0.45 mt) of scallops from State waters during 1995 or 1996, and during each of at least 4 years between 1984 and 1996, inclusive. For the Cook Inlet moratorium qualification period, a person must have harvested and landed at least 1,000 lbs (0.45 mt) of scallops from Cook Inlet during 1994 or 1996, and during each of at least 3 years between 1984 and 1996, inclusive.

The scallop LLP eligibility criteria that require an applicant to have held a moratorium permit and to have made legal landings of scallops during the scallop LLP qualifying period are designed to account for past and recent participation in the scallop fishery. A key criterion for qualifying for a scallop LLP license is being named on a State or Federal moratorium permit. Hence, persons who were eligible for a vessel moratorium permit but did not apply or receive one could not now be eligible for a scallop LLP license. Also, the proposed requirement to have an original scallop LLP license on board while catching and retaining scallops would prevent a license holder from using more than one vessel at once for that purpose, unless the license holder was named on more than one license (see "ownership caps" below).

### 3. Gear Endorsements

Generally, the proposed scallop LLP licenses would have no area or gear endorsements. Scallop LLP licenses would authorize their holders to catch and retain scallops in all waters off Alaska that are open for scallop fishing. However, licenses premised on the legal landings of scallops harvested only from Cook Inlet (State Registration Area H) during the qualifying period would have a gear endorsement that would limit allowable gear to a single 6-foot (1.8 m) dredge when fishing for scallops in any area. Otherwise, licenses premised on the legal landings of scallops harvested from other areas outside Cook Inlet during the qualifying period would have no gear endorsement. Existing State regulations limit gear size to two 15-foot (4.5 m) dredges in all other areas. The purpose of this restriction is to prevent expansion in overall fishing capacity by not allowing relatively small operations in Cook Inlet to increase their fishing capacity. Persons who qualified from Cook Inlet scallop harvests would be allowed to operate in any area open to scallop fishing.

### 4. Vessel Length

The length overall (LOA) of a vessel is defined at § 679.2. Each scallop LLP license would specify the maximum LOA (MLOA) of a vessel that could be used under the authority of the license.

The specified MLOA would be equal to the LOA of the longest vessel used by the applicant to make legal scallop landings during the qualifying years. The purpose of the MLOA provision is to restrict growth of harvesting capacity in the fishery, thus furthering the goals of the LLP.

### 5. Harvest Requirements

A legal landing is defined at § 679.2 as a landing in compliance with Federal and State commercial fishing regulations in effect at the time of the landing. Only legal landings of scallops would qualify the applicant for a scallop LLP license. To qualify for a scallop license, the applicant would be required to have used his/her moratorium permit on a qualified vessel to make one legal landing of scallops in each of any 2 calendar years from January 1, 1996, through October 9, 1998.

### 6. Scallop LLP License Recipients

A license would be issued only to an eligible applicant meeting the eligibility criteria described here. In addition, an eligible applicant would have to have been eligible on February 8, 1999 (the date of final Council action on the LLP), to document a fishing vessel under Chapter 121 of Title 46, U.S.C. This law establishes criteria regarding the citizenship of a person who may own a U.S. fishing vessel. The proposed regulation would require that the same citizenship standards apply to the eligibility for a scallop LLP license. Actual ownership of a fishing vessel under this statute on February 8, 1999, however, would not be required.

### 7. Application Process for Scallop LLP Licenses

A one-time application period of no less than 15 days would be specified by notification in the **Federal Register**. If the LLP is approved, NMFS anticipates that the application period for LLP licenses will be in May or June of 2000. All applications for licenses would have to be submitted during the time period specified for applying for a license. Applications postmarked after the ending date for the application period would be denied.

To evaluate and verify an applicant's eligibility claim, NMFS would compile an official LLP record for the scallop LLP containing information on qualified persons who hold moratorium permits and used the permits to participate in the scallop fishery during the qualifying period. The official scallop LLP record would contain only complete and verifiable information that would be used for the purpose of determining eligibility for a license, including

information on vessels that participated in the scallop fishery during the relevant time periods, vessel ownership, and the dates, location, and numbers of qualifying landings of scallops made by those vessels.

If a scallop LLP application is submitted during the application period, NMFS would compare the claims on the application with the official LLP record. If the claims on the application are supported by the information in the official LLP record, the application would be approved and, following the expiration of the application period, the licence could be issued. If the claims are not verified using information in the official LLP record, the applicant would be so notified and would be provided 60 days to submit information (or evidence) to support the unverified claims. For example, an applicant could provide State fish tickets to verify legal landings not found in the official LLP record. Or, an applicant could provide a sales contract verifying vessel ownership. Unsubstantiated or incompletely verified claims would not be accepted. If an applicant demonstrates that the claims submitted in the application are correct and sufficient to qualify the applicant for a license, NMFS could issue a license to the applicant at the conclusion of the evidentiary period.

If information in the application is not substantiated or verified at the conclusion of the 60-day evidentiary period, NMFS would issue an initial administrative determination (IAD) including reasons why the application is not accepted. Applicants then would be provided with an opportunity to appeal that IAD to the NMFS Office of Administrative Appeals, under § 679.43.

During the pendency of an administrative adjudication leading to a final agency action, NMFS would issue an interim (temporary, non-transferable) licence to an applicant who was authorized to participate in the fishery in the year before the IAD is issued and who makes a credible claim to eligibility under the scallop LLP regulations. A decision to withhold an interim licence could be appealed to the Office of Administrative Appeals. An applicant who was issued a license the previous year would be eligible for a non-transferable interim license pending the final resolution of his or her claim pursuant to the license renewal provisions of 5 U.S.C. 558. The non-transferable interim license would authorize the applicant to catch and retain scallops and would be effective until final agency action. At that time, the person who appealed would receive either a transferable license, or no

license, depending on the final agency action.

#### *8. Transfer Process for Scallop LLP Licenses*

The transfer process for scallop LLP licenses would enable a license holder to request a transfer of an LLP license to any person (designated transferee) who meets the eligibility requirements. Eligibility requirements would include (1) the designated transferee being eligible to document a fishing vessel under Chapter 121, Title 46, U.S.C., (2) the parties to the transfer having no fines, civil penalties, other payments due and outstanding, or outstanding permit sanctions resulting from Federal fishing violations, and (3) the transfer not causing the designated transferee to exceed a two-license limit contained in the Council's preferred alternative (see "Ownership Caps" below).

A complete application would have to be submitted to the Administrator, Alaska Region, NMFS (Regional Administrator) for approval before a transfer could occur. Application forms would be available on request. NMFS would return incomplete applications to the applicant and would identify specific information that is necessary to make the application complete. Information that would be required in the application includes (1) identification information for all parties to the transfer, (2) identification number of the license to be transferred, (3) declaration that the designated transferee is a U.S. Citizen, (5) a copy of the contract or sales agreement for the transfer, (6) other information the Regional Administrator may require, and (7) the notarized signatures of the parties to the transfer.

This proposed rule also would provide for transfers pursuant to requests by court order, operation of law, or the terms of a security agreement. This provision considers that some transfers might not be voluntarily requested by the license holder. Under those circumstances, the Regional Administrator would review the information in the transfer application or other document and determine whether the requested transfer would conflict with other provisions of the scallop LLP regulations.

#### *9. Ownership Caps*

A person, corporation, or entity would be prohibited from holding more than two scallop licenses at one time. A person who holds two scallop licenses could not receive an additional scallop license by transfer until the number of

scallop licenses which that person holds is less than two.

The two-license ownership cap is intended to prevent, as required by national standard 4 of the Magnuson-Stevens Act, any person from obtaining an excessive share of harvest privileges in the scallop fishery. The Council determined that holding more than two scallop LLP licenses would constitute an excessive share in the context of this relatively small fishery.

#### **Consistency With Section 303(b)(6) of the Magnuson-Stevens Act**

Any FMP or FMP amendment that establishes a limited access system to achieve OY must take into account the factors listed in section 303(b)(6) of the Magnuson-Stevens Act. These factors include (1) present participation in the fishery, (2) historical fishing practices in, and dependence on, the fishery, (3) the economics of the fishery, (4) the capability of fishing vessels in the fishery to engage in other fisheries, (5) the cultural and social framework relevant to the fishery and any affected fishing communities, and (6) any other relevant considerations.

The administrative record for the scallop LLP is replete with examples of the Council considering the issues enumerated in the section 303(b)(6) guidelines. The requirement for a moratorium permit and the qualifying period requirement is an example of the Council balancing present participation in the fishery and historical practices in, and dependence on, the fishery. The Council chose legal landings in multiple years, 1996 through 1998, as the qualification for present participation.

The economics of the fishery was taken into account primarily through the breakeven analysis. The breakeven analysis in the EA/RIR/IRFA provides an estimate of the scallop harvest necessary to cover annual operating and fixed costs of typical scallop fishing vessels and indicates relative profitability of an average vessel in the scallop fishery. The analysis demonstrates that the breakeven point depends primarily on two factors, the exvessel price paid for scallops and the total landings of scallops. Based on the analysis, the Council estimated that about nine vessels would be able to operate in the fishery at the breakeven level assuming total landings of 1.3 million lb (590 mt) and an exvessel price of \$6.02 per lb. More vessels would be able to participate at the breakeven level if harvest quotas or prices increased and fewer if they decreased. Recent landings (1996–97) have been less than the assumed breakeven volume although the average

price has been slightly higher than the assumed breakeven exvessel price. Based on these recent data, only about six vessels could participate in the fishery at the breakeven level.

Overcapitalization in the industry and excessive harvesting capacity is an endemic condition in many fisheries that reduces the value of those fisheries to the Nation and potentially leads to other biological and efficiency problems. Authorizing more vessels to operate in the scallop fishery than could on average breakeven, arguably would be authorizing excess harvesting capacity. The Council took this matter into account in consideration of the economics of the fishery. Hence, the Council's recommended qualification criteria likely would result in more vessels qualified to operate in the scallop fishery especially in years of low scallop abundance; however, significantly fewer would be authorized under the LLP than under the current moratorium.

The concern for the capability of a vessel displaced from one fishery to enter another fishery is for the individual owner of that displaced vessel and not the fishery as a whole. Most vessels in the scallop fisheries are unique; making the necessary modifications to them so that they could enter other fisheries may be prohibitive. Some of the vessels that participate in the Alaska scallop fishery also participate in scallop fisheries in other regions of the country. Therefore, vessels that do not qualify for a license under this LLP program may qualify for licenses to fish for scallops in other regions, such as the Atlantic scallop fishery.

The Council carefully evaluated the cultural and social framework relevant to the scallop fishery, and the impacts of the scallop LLP on coastal communities. Public testimony before the Council exemplified the need for a limited access program to ensure a valuable and productive scallop fishery in the future.

#### **Fisheries Impact Statement**

Section 303(a)(9) of the Magnuson-Stevens Act requires any FMP or FMP amendment to include a fishery impact statement, which assesses, specifies, and describes the likely effects of the proposed conservation and management measures on participants in the affected fisheries, fishing communities, and participants in fisheries in adjacent areas.

The scallop LLP would place limitations on current participants in the affected fisheries. First, current participants in the Cook Inlet scallop

fishery would be limited to using a single 6-ft (1.8 m) dredge in all waters. Second, vessel replacements and upgrades would be limited by the MLOA specified on the license. Third, and most important, current participants would have to meet the specific eligibility criteria of the LLP to receive a license authorizing participation in the scallop fishery.

Although the scallop LLP would exclude some current participants who did not fish during the qualifying period, these excluded persons could gain access to the affected fisheries by obtaining a license through transfer. Likewise, new entrants into the fishery can obtain a license through transfer.

The GHs for the affected fisheries are not expected to change if the scallop LLP were implemented. Implementation of the scallop LLP also would not affect fishery product flow, total revenues derived from the affected fisheries, or regional distribution of vessel ownership. The scallop LLP will ameliorate, but not totally eliminate, overcapacity, overcapitalization, and vessel safety concerns perpetuated under status quo management.

Due to the geographical location of the affected fisheries, no scallop fisheries exist in adjacent areas under the authority of other regional fishery management councils. However, participants in fisheries in other areas could face increased pressures from new entrants excluded from the affected fisheries. This increased pressure is expected to be nominal, in any case, because of the increasingly small number of open access scallop fisheries available in the EEZ off the coast of the United States. In fact, the scallop LLP is intended to prevent just the opposite effect (i.e., a surge of new entrants to the scallop fisheries in the EEZ off Alaska) resulting from persons who have been excluded from fisheries in other parts of the EEZ.

### Classification

At this time, NMFS has not determined that this proposed rule is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, will take into account the data, views, and comments received during the comment period.

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

The Council prepared an EA/RIR/IRFA for the scallop LLP, which describes the management background, the purpose and need for action, the management alternatives, and the socio-economic impacts of the alternatives. It

estimates the total number of small entities affected by this action, and analyzes the economic impact on those small entities as required by the Regulatory Flexibility Act. The IRFA describes the economic impacts this proposed rule, if adopted, would have on small entities. A summary of the IRFA follows:

All fishing operations that would be affected by this proposed rule are considered to be small entities. The proposed rule would apply to any entity that wanted to fish for scallops after June 30, 2000. NMFS estimates this number to be 18. The two principal impacts on small fishing enterprises due to this proposal would be an exclusion of some existing scallop vessels from the fishery and a limitation on the entry of new vessels.

The LLP may restrict the ability of new, small entities to enter the fishery, although access is not denied because the licenses would be transferable. New entrants could purchase licenses, however, this would increase the entry costs into the scallop fishery. Alternatively, small fishing firms owning non-qualifying vessels may experience a decrease in value of their investment to the extent that the vessel's opportunities have been limited. The impact of license limitation is to restrict the opportunities of some vessel owners, yet offer a stabilized economic environment for affected small businesses that qualify for continued participation in the Alaska scallop fishery. The benefits would accrue to vessels remaining in the fishery by preventing a further erosion of per-vessel net returns and operating efficiency.

The scallop LLP also would impact those small entities that only fished inside of Cook Inlet during the qualifying period by limiting the size of dredge the vessel could operate in the future to a single 6-ft (1.8 m) dredge. Those small entities could use their licenses to harvest scallops statewide and would not be limited to harvesting scallops in Cook Inlet.

No known Federal rules duplicate, overlap, or conflict with the proposed rule. The LLP would supersede the existing Federal moratorium program for the scallop fisheries.

This proposed rule would impose recordkeeping and reporting requirements on affected vessels by requiring collection of information through license and transfer applications. These requirements are necessary to provide information to NMFS for the implementation and management of the scallop LLP.

The Council considered the following alternatives that could reduce economic impacts on small entities.

The Council considered alternatives ranging from complete open access to a variety of limited entry programs with ranges from 9–11 vessels. The combinations of individual vessels that would qualify under the alternatives also varies. The Council also considered different criteria for area endorsements that would have resulted in different vessels gaining access to different fishing areas. Because this proposed rule would address allocation of a limited resource, alternatives that would minimize economic impacts on any one small entity would necessarily increase economic impacts on all other small entities. The Council's preferred alternative to address the overcapitalized scallop fishery would affect small entities more negatively than the alternatives that were not preferred.

Options for vessel reconstruction and replacement include:

No restrictions on reconstruction or replacement; MLOA of 120 percent of the LOA of the vessel on January 23, 1993; and MLOA of 120 percent of the LOA of the vessel on which the permit was used in 1996 or 1997. The Council's preferred alternative would not allow increases in vessel length. The MLOA would be the LOA of the qualifying vessel on February 8, 1999, unless the moratorium permit was used on a longer vessel in the recent qualifying period, in which case the MLOA would be limited to the LOA of the longest vessel used in the recent qualifying period.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a valid Office of Management and Budget (OMB) Control Number.

This proposed rule contains collection-of-information requirements subject to review and approval by OMB under the PRA. These collection-of-information requirements have been submitted to OMB for approval. Public reporting burden for this collection of information is estimated to be an average of 2 hours per response for an application for initial issuance, 1 hour per response for an application for transfer, and 4 hours per response for an appeal. These response times include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data

needed, and completing and reviewing the collection of information.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS (see ADDRESSES), and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC. 20503 (Attn: NOAA Desk Officer).

The President has directed Federal agencies to use plain language in their communications with the public, including regulations. To comply with that directive, we seek public comment on any ambiguity or unnecessary complexity arising from the language used in this proposed rule.

#### List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and record keeping requirements.

Dated: April 13, 2000.

**Andrew A. Rosenberg,**

*Deputy Asst. Administrator for Fisheries,  
National Marine Fisheries Service.*

For reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as follows:

#### PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

2. In § 679.1, paragraphs (j)(3) and (j)(4) are added to read as follows:

##### § 679.1 Purpose and scope.

\* \* \* \* \*

(j) \* \* \*

(3) Regulations in this part implement the license limitation program for the commercial scallop fishery in the EEZ off Alaska.

(4) Regulations in this part govern the commercial fishing for scallops by vessels of the United States using authorized gear within the EEZ off Alaska.

3. In § 679.2, the definition for "Scallop License" is added in

alphabetical order and the definitions "Eligible applicant", "License holder", "Maximum LOA (MLOA)" paragraph (1) and the first sentence in paragraph (2) introductory text, and "Official LLP record" are revised, and in the definition "Qualified Person", paragraph (2) is revised and paragraph (3) is added to read as follows:

##### § 679.2 Definitions.

\* \* \* \* \*

*Eligible applicant* means a qualified person who submitted an application during the application period announced by NMFS and:

(1) For a groundfish license or crab species license, who owned a vessel on June 17, 1995, from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5), unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition; or

(2) For a groundfish license or crab species license, to whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained; or

(3) For a crab species license, who was an individual who held a State of Alaska permit for the Norton Sound king crab summer fishery in 1993 and 1994, and who made at least one harvest of red or blue king crab in the relevant area during the period specified in § 679.4(k)(5)(ii)(G), or a corporation that owned or leased a vessel on June 17, 1995, that made at least one harvest of red or blue king crab in the relevant area during the period in § 679.4(k)(5)(ii)(G), and that was operated by an individual who was an employee or a temporary contractor; or

(4) For a scallop license, who qualifies for scallop license as specified at § 679.4(g)(2) of this part; or

(5) Who is an individual that can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794 (a).

\* \* \* \* \*

*License holder* means the person who is named on a currently valid

groundfish license, crab species license, or scallop license.

\* \* \* \* \*

*Maximum LOA (MLOA)* means:

(1) With respect to the scallop license limitation program, the MLOA is equal to the length overall on February 8, 1999, of the longest vessel used to make legal landings of scallops during the scallop LLP qualification period January 1, 1996, through October 9, 1998, specified at § 679.4(g)(2)(iii) of this part.

(2) With respect to the groundfish and crab species license limitation program, the LOA of the vessel on June 24, 1992, unless the vessel was less than 125 ft (38.1 m) on June 24, 1992, then 1.2 times the LOA of the vessel on June 24, 1992, or 125 ft (38.1 m), whichever is less. \* \* \*

\* \* \* \* \*

*Official LLP record* means the information prepared by the Regional Administrator about vessels that were used to participate in the groundfish or crab fisheries during qualified periods for the groundfish and crab License Limitation Program (LLP) specified at § 679.4(k) and in the scallop fisheries during the qualifying periods for the scallop LLP specified at § 679.4(g). Information in the official LLP record includes vessel ownership information, documented harvests made from vessels during the qualification periods, and vessel characteristics. The official LLP record is presumed to be correct for the purpose of determining eligibility for licenses. An applicant for a license under the LLP will have the burden of proving that information submitted in an application that is inconsistent with the official LLP record is correct.

\* \* \* \* \*

*Qualified Person* means:

\* \* \* \* \*

(2) *With respect to the groundfish and crab species license limitation program*, a person who was eligible on June 17, 1995, to document a fishing vessel under Chapter 121, Title 46, U.S.C.

(3) *With respect to the scallop license limitation program*, a person who was eligible on February 8, 1999, to document a fishing vessel under Chapter 121, Title 46, U.S.C.

\* \* \* \* \*

*Scallop license* means a license issued by NMFS that authorizes the license holder to catch and retain scallops pursuant to the conditions specified on the license.

\* \* \* \* \*

4. In § 679.4, paragraph (g) is revised to read as follows:

##### § 679.4 Permits.

\* \* \* \* \*



(g) *Scallop License Limitation Program (LLP).*—(1) *General requirements.*

In addition to the permit and licensing requirements prescribed in this part, each vessel within the EEZ off Alaska that is catching and retaining scallops, must have an original scallop LLP license on board at all times it is catching and retaining scallops. This scallop LLP license, issued by NMFS, authorizes the person named on the license to catch and retain scallops in compliance with regulations of the State of Alaska and only with a vessel that does not exceed the MLOA specified on the license and the gear designation specified on the license.

(2) *Qualifications for a scallop LLP license.* A scallop LLP license will be issued to an eligible applicant who:

- (i) Is a qualified person;
  - (ii) Was named on a State of Alaska scallop moratorium permit or Federal scallop moratorium permit on February 8, 1999;
  - (iii) Used the moratorium permit held on February 8, 1999 to make legal landings of scallops in each of any 2 calendar years from January 1, 1996, through October 9, 1998; and
  - (iv) Submitted a complete application for a scallop license during the application period specified pursuant to paragraph (g)(4) of this section.
- (3) *Scallop license conditions and endorsements.* A scallop license authorizes the license holder to catch and retain scallops only if the vessel length and gear used do not exceed the vessel length and gear endorsements specified on the license.
- (i) An MLOA will be specified on the scallop license equal to the LOA on February 8, 1999, of the longest vessel used to make legal landings of scallops during the scallop LLP qualifying period specified in paragraph (g)(2)(iii) of this section.

(ii) If the eligible applicant was a moratorium permit holder with a Scallop Registration Area H (Cook Inlet) endorsement and did not make a legal landing of scallops caught outside of Area H during the qualification period specified in paragraph (g)(2)(iii) of this section, the license will have a gear endorsement restricting gear to a single 6 ft (1.8 m) dredge in all areas.

(4) *Application for a scallop license.*

(i) *General.* The Regional Administrator will issue a scallop license to an applicant if a complete application is submitted by or on behalf of the applicant during the specified application period, and if that applicant meets all the criteria for eligibility in this part. An application that is postmarked or hand delivered after the ending date for the application period

for the scallop LLP specified in the **Federal Register** will be denied. An application form will be sent to the last known address of the person identified as an eligible applicant by the official LLP record. An application form may be requested from the Regional Administrator.

(ii) *Application Period.* For the scallop license, an application period of no less than 15 days will be specified by notification in the **Federal Register** and other information sources deemed appropriate by the Regional Administrator.

(iii) *Contents of application.* To be complete, an application for a scallop license must be signed and dated by the applicant, or the individual representing the applicant, and contain the following information, as applicable:

- (A) Scallop Moratorium Permit number under which legal landings of scallops were made during the qualification period specified in paragraph (g)(2)(iii) of this section;
- (B) Name, business address, telephone number, FAX number, and social security number or tax ID number of the applicant, and whether the applicant is a U.S. citizen or a U.S. business;
- (C) Name of the managing company, if any;
- (D) Evidence of legal landings in the qualifying years and registration areas;
- (E) For the vessel(s) being used as basis for eligibility for a license, the name, state registration number (e.g., ADF&G number), the USCG documentation number, and valid evidence of the LOA on February 8, 1999, of the longest vessel used by the applicant during the qualification period specified in paragraph (g)(2)(iii) of this section.

(iv) *Successor-in-interest.* If an applicant is applying as the successor-in-interest to an eligible applicant, an application, to be complete, also must contain valid evidence proving the applicant's status as a successor-in-interest to that eligible applicant and:

- (A) Valid evidence of the death of that eligible applicant at the time of application, if the eligible applicant was an individual; or
- (B) Valid evidence that the eligible applicant is no longer in existence at the time of application, if the eligible applicant is not an individual.

(v) *Application evaluation.* The Regional Administrator will evaluate an application submitted during the specified application period and compare all claims in the application with the information in the official LLP record. Claims in the application that are consistent with information in the official LLP record will be accepted by

the Regional Administrator. Inconsistent claims in the application, unless verified by evidence, will not be accepted. An applicant who submits inconsistent claims, or an applicant who fails to submit the information specified in paragraphs (g)(4)(iii) and (g)(4)(iv) of this section, will be provided a 60-day evidentiary period pursuant to paragraph (g)(4)(vii) of this section to submit the specified information, submit evidence to verify his or her inconsistent claims, or submit a revised application with claims consistent with information in the official LLP record. An applicant who submits claims that are inconsistent with information in the official LLP record has the burden of proving that the submitted claims are correct.

(vi) *Additional information or evidence.* The Regional Administrator will evaluate additional information or evidence to support an applicant's inconsistent claims submitted within the 60-day evidentiary period pursuant to paragraph (g)(4)(vii) of this section. If the Regional Administrator determines that the additional information or evidence meets the applicant's burden of proving that the inconsistent claims in his or her application are correct, the official LLP record will be amended and the information will be used in determining whether the applicant is eligible for a license. However, if the Regional Administrator determines that the additional information or evidence does not meet the applicant's burden of proving that the inconsistent claims in his or her application is correct, the applicant will be notified by an initial administrative determination, pursuant to paragraph (g)(4)(viii) of this section, that the applicant did not meet the burden of proof to change the information in the official LLP record.

(vii) *60-day evidentiary period.* The Regional Administrator will specify by letter a 60-day evidentiary period during which an applicant may provide additional information or evidence to support the claims made in his or her application, or to submit a revised application with claims consistent with information in the official LLP record, if the Regional Administrator determines that the applicant did not meet the burden of proving that the information on the application is correct through evidence provided with the application. Also, an applicant who fails to submit information as specified in paragraphs (g)(4)(iii) and (g)(4)(iv) of this section will have 60 days to provide that information. An applicant will be limited to one 60-day evidentiary period. Additional information or evidence, or a revised application,



received after the 60-day evidentiary period specified in the letter has expired will not be considered for purposes of the initial administrative determination.

(viii) *Initial administrative determinations (IAD)*. The Regional Administrator will prepare and send an IAD to the applicant following the expiration of the 60-day evidentiary period if the Regional Administrator determines that the information or evidence provided by the applicant fails to support the applicant's claims and is insufficient to rebut the presumption that the official LLP record is correct, or if the additional information, evidence, or revised application is not provided within the time period specified in the letter that notifies the applicant of his or her 60-day evidentiary period. The IAD will indicate the deficiencies in the application, including any deficiencies with the information, the evidence submitted in support of the information, or the revised application. The IAD will also indicate which claims cannot be approved based on the available information or evidence. An applicant who receives an IAD may appeal pursuant to § 679.43. An applicant who avails himself or herself of the opportunity to appeal an IAD will not receive a transferable license until after the final resolution of that appeal.

(ix) *Issuance of a non-transferable license*. The Regional Administrator will issue a non-transferable license to the applicant on issuance of an IAD if required by the license renewal provisions of 5 U.S.C. 558. A non-transferable license authorizes a person to catch and retain scallops as specified on the non-transferable license, and will have the specific endorsements and designations based on the claims in his or her application. A non-transferable license will expire upon final agency action.

(5) *Transfer of a Scallop License*. (i) *General*. The Regional Administrator will approve the transfer of a scallop license if a complete transfer application is submitted to Restricted Access Management, Alaska Region, NMFS, and if the transfer meets all the eligibility criteria as specified in paragraph (g)(5)(ii) of this section. An application form may be requested from the Regional Administrator.

(ii) *Eligibility criteria for transfers*. A scallop license can be transferred if:

(A) The designated transferee is eligible to document a fishing vessel under Chapter 121, Title 46, U.S.C.;

(B) The parties to the transfer do not have any fines, civil penalties, other payments due and outstanding, or outstanding permit sanctions resulting from Federal fishing violations;

(C) The transfer will not cause the designated transferee to exceed the license cap in § 679.7(i); and

(D) The transfer does not violate any other provision specified in the part.

(iii) *Contents of transfer application*. To be complete, an application for a scallop license transfer must be signed by the licence holder and the designated transferee, or the individuals representing them, and contain the following information, as applicable:

(A) Name, business address, telephone number, FAX number, and social security number or tax ID number, of the license holder and of the designated transferee;

(B) License number and total price being paid for the license;

(C) Certification that the designated transferee is a U.S. Citizen, or a U.S. corporation, partnership, or other association;

(D) A legible copy of a contract or sales agreement that specifies the license to be transferred, the license holder, the designated transferee, the monetary value or the terms of the license transfer; and

(E) Other information the Regional Administrator deems necessary for measuring program performance.

(iv) *Incomplete applications*. The Regional Administrator will return an incomplete transfer application to the applicant and identify any deficiencies if the Regional Administrator determines that the application does not meet all the criteria identified in paragraph (g)(5) of this section.

(v) *Transfer by court order, operation of law, or as part of a security agreement*. The Regional Administrator will transfer a scallop license based on a court order, operation of law, or a security agreement if the Regional Administrator determines that the transfer application is complete and the transfer will not violate any of the provisions of this section.

5. In § 679.7, paragraphs (i)(3), and (i)(7) are revised, and new paragraphs (i)(1)(iv) and (i)(8) are added to read as follows:

#### § 679.7 Prohibitions.

\* \* \* \* \*

(i) \* \* \*

(1) \* \* \*

(iv) Hold more than two scallop licenses in the name of that person at any time.

\* \* \* \* \*

(3) Conduct directed fishing for crab species without an original valid crab license, except as provided in § 679.4(k)(2)

\* \* \* \* \*

(7) Lease a groundfish, crab species, or scallop license; or

(8) Catch and retain scallops:

(i) Without an original valid scallop license on board;

(ii) Using a vessel with a MLOA greater than that specified on the scallop license;

(iii) Using dredge gear contrary to a gear limitation specified on the scallop license.

6. In § 679.43, paragraphs (a) and (p) are revised to read as follows:

#### § 679.43 Determinations and appeals.

(a) *General*. This section describes the procedure for appealing initial administrative determinations made under part 679 of this title.

\* \* \* \* \*

(p) *Issuance of a non-transferable license*. A non-transferable license will be issued to a person upon acceptance of his or her appeal of an initial administrative determination denying an application for a license for license limitation groundfish, crab species under § 679.4(k) or scallops under § 679.4(g). This non-transferable license authorizes a person to conduct directed fishing for groundfish, crab species, or catch and retain scallops and will have specific endorsements and designations based on the person's claims in his or her application for a license. This non-transferable license expires upon the resolution of the appeal.

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