accordance with §§ 21.7130 through 21.7135 and § 21.7050 under chapter 30.

(Authority: 38 U.S.C. 1808(f), 1780).

(b) *Election of payment at the chapter 30 rate subsequent to induction into a rehabilitation program.* * * *

(1) The commencing date determined under § 21.7131 in the case of a veteran who has elected payment at the chapter 30 rate; or

* * * * *

(e) *Effect of chapter 34 program termination.* * * *

(2) A veteran entitled to chapter 30 benefits based on his or her chapter 34 eligibility as of December 31, 1989, and whose election of chapter 34 rates terminated as of the date under paragraph (e)(1) of this section must, if the individual desires payment at the chapter 30 rate, elect such payment.

(Authority: 38 U.S.C. 1411(a))

16. Section 21.340, paragraph (c) and its authority citation are revised to read as follows:

§ 21.340 Introduction.

* * * * *

(c) *Election of benefits at the chapter 30 rate.* If a veteran elects to receive a subsistence allowance paid at the chapter 30 rate, the effect of absences is determined under §§ 21.7139 and 21.7154.

(Authority: 38 U.S.C. 1508(f) and 1510)

[FR Doc. 92–29184 Filed 12–2–92; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 414

[BPD–742–F]

RIN 0938–AF19

Medicare Program; Continuous Use of Durable Medical Equipment

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule responds to public comments on the October 9, 1991 interim final rule with comment period that set forth the Secretary's determination, required under section 1834(a)(7)(A) of the Social Security Act, of the meaning of the term "continuous" as that term is used in defining a period of continuous use for which we make payments for durable medical equipment.

EFFECTIVE DATE: This final rule is effective January 4, 1993.

FOR FURTHER INFORMATION CONTACT: William Long, (410) 966–5655.

SUPPLEMENTARY INFORMATION:

I. Background

Section 4062(b)(1) of the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100–203) added section 1834 to the Social Security Act (the Act) to provide for a completely restructured Medicare payment methodology for durable medical equipment (DME) and orthotic and prosthetic devices. Section 1834 of the Act, as amended by section 411(g)(1) of the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100–360), section 608(d)(22)(A) of the Family Support Act of 1988 (Pub. L. 100–485), and sections 6112 and 6140 of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239), sets forth special payment rules for DME, prosthetics, and orthotics furnished on or after January 1, 1989. Section 4152 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) amends the payment rules for DME items furnished on or after January 1, 1991.

More specifically, sections 1834 (a)(2) through (a)(5), section 1834(a)(7), and section 1834(h) of the Act set forth six separate classes of DME, orthotics, and prosthetics and describe how the fee schedule for each class is established. The six classes of items are:

- Inexpensive and other routinely purchased DME.
- Items requiring frequent and substantial servicing.
- Customized items.
- Oxygen and oxygen equipment.
- Prosthetic and orthotic devices.
- Other items of DME (capped rental items).

Under section 1834(a)(7)(A)(i) of the Act, payment is made on a monthly basis for the rental of items of DME (capped rental items) that are not paid for under the other four classes of items set forth in sections 1834(a) (2) through (5) of the Act. For DME items furnished on or after January 1, 1989, payment for a capped rental item may not exceed a period of continuous use of longer than 15 months. If a beneficiary's continuous use of an item of DME exceeds 15 months, we pay a capped rental payment only for the first 15 months. After the 15-month period, the supplier retains ownership of the item and must continue to provide the item without any charge to the beneficiary until medical necessity ends or Medicare coverage ceases.

For capped rental DME items furnished on or after January 1, 1991, section 1834(a)(7)(A)(i) of the Act, as amended by section 4152(c)(2) of Public Law 101–508, requires that in the 10th continuous month during which payment is made for a capped rental item, a supplier must give individual beneficiaries the option to enter into a purchase agreement. If a beneficiary accepts this purchase option, the period of continuous use for which capped rental payments can be made under section 1834(a)(7)(A)(i) of the Act is limited to 13 months.

Section 1834(a)(7)(A) of the Act requires that the Secretary determine the meaning of the term "continuous" as that term is used in defining a period of continuous use for which we make payments for capped rental DME items. Recently, the United States District Court for the District of Puerto Rico, in *Medics, Inc.* v. *Sullivan*, 766 F. Supp. 47 (D.P.R. 1991), ordered us to define the word "continuous" as used in section 1834(a)(7) of the Act through notice and comment rulemaking. In order to comply with the court order, we published on October 9, 1991 an interim final rule with comment period that added a new § 414.230 to set forth our determination of what constitutes a period of continuous use for purposes of delineating the period for which we make payment for capped rental items under section 1834(a)(7) of the Act. This Final rule responds to public comments received on the October 9, 1991 interim final rule (56 FR 50821).

II. Provisions of the Interim Final Rule

In the October 9, 1991 interim final rule, we defined "continuous use" as a period that begins with the first month of medical need and continues until the patient's medical need for a particular item of equipment ceased. That period could be interrupted for reasons other than a termination of medical need, such as a hospitalization. During an interruption, the capped rental period will not be terminated but temporarily suspended. For example, if a beneficiary rents an item of equipment for 12 months and is then hospitalized for 60 days and the beneficiary's medical need for the equipment does not cease, upon his or her discharge from the hospital, the beneficiary will be considered to be in the 13th month of rental for purposes of calculating the capped rental period. Moreover, for the two months the beneficiary was hospitalized, no separate payment under Medicare Part B will be made for the item of equipment.

If a period of interruption is extensive, the supplier may wish to retrieve the item of equipment during that period and return the item after the interruption. If, however, the

beneficiary does not use an item for longer than 60 days plus the days remaining in the last paid rental month, a new capped rental period begins upon the beneficiary's resumption of use and the physician's recertification of medical necessity. A recertification must include a new prescription and a statement describing the reason for the interruption and demonstrating that medical necessity ended. If no recertification is submitted by the supplier, a new capped rental period will not begin.

The period of continuous use for capped rental items may also be affected if a beneficiary moves or requires a change in suppliers. Once the initial rental period starts, a move by the beneficiary, either permanent or temporary, or a change of supplier, will not result in a new rental episode or a break in the period of continuous use. If the period had already expired, we will not make any additional payments. However, in the event that the medical needs of the beneficiary change, necessitating an equipment change either through a change to different equipment or the addition of equipment, a new capped rental period begins for the new or additional equipment. A new capped rental period will not begin for base equipment that is modified by an addition.

If the beneficiary's medical necessity is interrupted after the 15-month period, the rules governing continuous medical need, discussed above, will also apply. That is, the beneficiary's period of continuous use after the initial 15-month period also could be interrupted occasionally by various factors (such as hospitalization) without being terminated. However, claims for equipment that are submitted after the 15-month cap has been reached and which purport to be for a new period of medical necessity will be subjected to an intense carrier medical review.

In this final rule, we are adopting the provisions as set forth in the October 9, 1991 interim final rule.

III. Response to Public Comments

In response to the interim final rule, we received three timely items of correspondence. We have summarized the comments and are presenting them below along with our responses.

A. Continuous Use

Comment: One commenter stated that the regulations should be clarified to specify that a period of continuous use is in effect for the duration of the particular diagnosis that indicates the beneficiary's medical need for a particular piece of DME. Thus, if a beneficiary is diagnosed with a new medical condition, a new coverage period should begin even though the condition requires use of the same equipment.

Response: Section 1834(a)(7)(A)(i) of the Act specifies that payment shall be made "during the period of medical need." The Act does not refer to the duration of the beneficiary's diagnosis; therefore, we do not believe this provision was intended to allow a new 15-month rental period to begin each time a particular diagnosis changes.

B. Temporary Interruption

Comment: Two commenters objected to the provision that permits a temporary interruption in the period of continuous use. One commenter stated that any interruption in the period of medical need should constitute a break in continuous use, rather than our policy that passage of a 60-day period constitutes a break in continuous use. The other commenter suggested that the terms "continuous use" and "temporarily suspended" are incompatible and should not be linked.

Response: Section 412.230(c) specifies that a period of continuous use allows for a temporary interruption in the use of equipment. We anticipate that there will be breaks in medical necessity of 60 days or less for various reasons that would not warrant a cessation in the period of continuous use and the beginning of a new rental period. For example, a beneficiary who has rented a wheelchair for 14 months is hospitalized in a cardiac care unit for a week. During the hospital stay, the beneficiary does not have a medical need for a wheelchair since he is confined to bed. If this comment were adopted, the period of continuous use would end, and a new 15-month rental period would begin when the beneficiary is discharged from the hospital. Our October 9, 1991 interim final rule (54 FR 50822) makes clear that during an interruption the capped rental period is not terminated but "temporarily suspended" pending resumption of medical need. We believe the purpose of section 1834(a)(7)(A)(i) of the Act is to limit payment to a period of continuous use including temporary interruptions. We find no evidence that Congress intended that suppliers be paid for an additional 15-month period every time there is a temporary break in medical necessity.

Comment: One commenter stated that the 60-day period of temporary interruption is unreasonable in that it imposes upon the supplier an obligation to continue to supply the equipment without any compensation.

Response: Although we believe it will be very infrequent that equipment remains in a beneficiary's home for a full 60-day period during a temporary interruption, suppliers are permitted to retrieve the equipment during temporary interruptions and rent it to other patients. In most cases, a beneficiary is hospitalized for less than 30 days and the supplier is paid the full month's rent. Thus, it will be infrequent that the supplier goes uncompensated for any period of time.

C. New Equipment

Comment: A commenter suggested that the regulations be clarified to indicate that a new period of continuous use should begin for equipment that is added to a base piece of equipment.

Response: We have clarified § 414.230(f) accordingly. If the beneficiary's medical needs were to change, necessitating the addition of equipment, a new capped rental period would begin for the additional equipment. However, a new capped rental period will not begin for the base equipment.

D. General

Comment: A commenter requested that HCFA allow suppliers access to its common working file, so that they may obtain coverage history to determine if beneficiaries have previously rented equipment. If the supplier provides equipment on an assigned basis without securing a waiver of liability, it has no effective recourse if it discovers that the beneficiary has provided incorrect information about prior coverage. The commenter also suggested that suppliers be given waiver of liability protection when they are unaware that a beneficiary has previously rented equipment.

Response: The option to furnish equipment rests with the supplier. Since the supplier is able to communicate with the beneficiary prior to furnishing medical equipment, we believe that the supplier should be responsible for determining whether a beneficiary has ever rented equipment. HCFA is responsible for ensuring both that it does not pay for equipment after the appropriate rental period and that it does not pay for services furnished to a patient who is not entitled to Medicare benefits. Granting suppliers a waiver of liability would undermine both of these principles.

Comment: A commenter suggested that Medicare pay for items of equipment that are lost or stolen during a temporary suspension of the rental period.

Response: Medicare does not insure suppliers against loss or theft. Lost or stolen items should be covered by the supplier's business insurance.

Comment: One commenter stated that this rule should not apply to unassigned claims.

Response: Section 1834(a) of the Act applies to all claims, both assigned and unassigned. Otherwise, it would be relatively easy for suppliers to circumvent the 15-month rental provision by refusing to accept assignment for the 15th rental month. If this commenter's suggestion were adopted, the supplier could then charge for indefinite rentals on an unassigned basis. That is, there would be no limitation on the number of rental months, and we would continue to be billed on a monthly rental basis as long as medical need continued.

Comment: A commenter recommended that we change Medicare policy to expand coverage for the purchase of capped rental items of durable medical equipment because it would save money for beneficiaries and the Medicare trust fund.

Response: The Act does not permit payment for the purchase of capped rental items of DME, except as provided for by section 1834(a)(7)(A). Section 1834(a)(7)(A) provides only for the option to purchase power driven wheelchairs during the first rental month and for the option to purchase other capped rental equipment during the 10th rental month. Therefore, we have no discretion with regard to this suggestion.

IV. Confirmation of Interim Final Regulations

We are confirming as final regulations, with amendments to § 414.230(f) as discussed above, the interim final regulations published October 9, 1991 (56 FR 50821).

V. Regulatory Impact Statement

A. Executive Order 12291

Executive Order 12291 (E.O. 12291) requires us to prepare and publish a regulatory impact analysis for any final rule that meets one of the E.O. criteria for a "major rule"; that is, that will be likely to result in—

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The impact of this final rule on the Medicare program and on DME distributors and manufacturers is expected to be less than $100 million per year over the next five fiscal years. For this reason, we have determined that a regulatory impact analysis meeting the requirements of E.O. 12291 is not required. Therefore, we have not prepared one.

B. Regulatory Flexibility Analysis

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities.

In 1989, total Medicare expenditures for capped rental items of DME equalled approximately $350 million. We expect that the policy on continuous use of DME that we are confirming in this final rule will affect only a small portion of the transactions involving capped rental DME. Although it is possible that some highly specialized DME manufacturers or suppliers may experience significant effects as a result of this policy, we cannot determine whether the effects will be detrimental or beneficial because we lack data on individual company sales or on practice patterns with respect to equipment rentals. Overall, however, the impact of this final rule on the $3.9 billion DME industry will be insignificant. Thus we have determined, and the Secretary certifies, that this final rule will not meet the criteria of the RFA for requiring a regulatory flexibility analysis. Therefore, we have not prepared one.

Section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a final rule may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. Since we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on the operations of a substantial number of small rural hospitals, we have not prepared a rural hospital impact statement.

VI. Paperwork Reduction Act

As noted in the October 9, 1991 interim final rule (56 FR 50821), §§ 414.230 (d) and (f) contain information collection requirements subject to review by the Executive Office of Management and Budget (OMB) under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3511). We have submitted a copy of the interim final rule to OMB for its review of these information collection requirements.

List of Subjects in 42 CFR Part 414

End-stage renal disease (ESRD), Durable medical equipment (DME), Health professions, Laboratories, Medicare.

The interim rule amending 42 CFR Part 414 that was published on October 9, 1991 (56 FR 50823), is adopted as final with the following change:

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

1. The authority citation for part 414 continues to read as follows:

Authority: Secs. 1102, 1833(a), 1834(a), 1861(n), 1871, and 1881 of the Social Security Act (42 U.S.C. 1302, 1395l(a), 1395m(a), 1395x(n), 1395hh, and 1395rr).

Subpart D—Payment for Durable Medical Equipment and Prosthetic and Orthotic Devices

2. In subpart D, § 414.230, paragraph (f) is revised to read as follows:

§ 414.230 Determining a period of continuous use.

* * * * *

(f) *New equipment.* If a beneficiary changes equipment or requires additional equipment based on a physician's prescription, and the new or additional equipment is found to be necessary, a new period of continuous use begins for the new or additional equipment. A new period of continuous use does not begin for base equipment that is modified by an addition.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: August 17, 1992.

William Toby,

Acting Deputy Administrator, Health Care Financing Administration.

Approved: October 13, 1992.

Louis W. Sullivan,

Secretary.

[FR Doc. 92–29178 Filed 12–2–92, 8:45 am]

BILLING CODE 4120–01–M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1180

[Ex Parte No. 282 (Sub-No. 12)]

Transfer or Operation of Lines of Railroads in Reorganization

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: The Commission amends the procedures to be followed in allowing transfers or operations of lines of bankrupt rail carriers under bankruptcy reorganization. The existing procedures are obsolete. The revised procedures indicate how the limited class of applications involving transfer and operation of lines of bankrupt carriers under plans of reorganization will be handled in the future and provide for modification of procedures and deadlines to comply with court-imposed time constraints.

EFFECTIVE DATE: The rules are effective January 4, 1993.

FOR FURTHER INFORMATION CONTACT: Joseph Levin, (202) 927–6287 or Richard Felder (202) 927–5610 [TDD for hearing impaired, (202) 927–5721].

SUPPLEMENTARY INFORMATION: The existing rules in 49 CFR Part 1180, subpart B, provide procedures to be used to allow transfers or operations of lines of bankrupt rail carriers under sections 5(b) and 17(b) of the Milwaukee Railroad Restructuring Act (45 U.S.C. 904 and 915) by railroads in reorganization under former section 77 of the Bankruptcy Act. When these became obsolete, the Commission proposed to change them by notice of proposed rulemaking published on September 25, 1991, at 56 FR 48510.

After comments were received, the Commission modified the proposed rules by notice published on July 17, 1992, at 57 FR 31693. The Commission now adopts the modified proposed rules as final rules. The final rules indicate how the limited class of applications involving transfer and operation of lines of bankrupt carriers involving a plan of reorganization under 11 U.S.C. 1172 will be handled in the future. They provide for modification of procedures and deadlines to comply with court-imposed time constraints. The full text of the final rules are set forth below.

Additional information is contained in the Commission's decision. To obtain a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927–5721.]

Environmental and Energy Considerations

The Commission concludes that this section will not significantly affect either the quality of the human environment or the conservation of energy resources.

Regulatory Flexibility Act Certification

Under 5 U.S.C. 605(b), the Commission concludes that its action in adopting the final rules will not have a significant impact on a substantial number of small entities. The Commission preliminarily concluded in both prior notices, as more fully explained in the underlying decisions, that the proposed regulations would not have a significant economic impact on a substantial number of small entities, since the general purpose of the proposals was only to allow more flexible procedures for the transfer or operations of the involved rail lines. None of the comments filed argued that the proposal would have a significant impact on small entities. The final rules merely subject the limited class of applications involving transfer and operation of lines of bankrupt carriers under plans of reorganization to the procedures which would be applicable if no bankruptcy reorganization were involved.

List of Subjects in 49 CFR Part 1180

Railroads.

Decided: November 23, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

Sidney L. Strickland, Jr.,

Secretary.

For the reasons set forth in the preamble, title 49, chapter X, part 1180 of the Code of Federal Regulations is amended as follows:

PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

1. The authority citation for part 1180 is revised to read as follows:

Authority: 49 U.S.C. 10321, 10505, 11341, 11343–11346; 5 U.S.C. 553 and 559; and 11 U.S.C. 1172.

2. Subpart B of part 1180 is revised to read as follows:

Subpart B—Transfer or Operation of Lines of Railroads in Reorganization

§ 1180.20 Procedures.

(a) Transactions under 11 U.S.C. 1172, for the transfer or operation of lines of bankrupt railroads under a plan of reorganization are governed by the following procedures:

(1) If the buyer or operator is not a carrier, the Notice of Exemption procedures in subpart D of part 1150 of this title.

(2) If the buyer or operator is a carrier, either:

(i) The application procedures in subpart A of this part; or,

(ii) The procedures in part 1121 of this title for a petition to exempt the transaction from prior approval requirements of 49 U.S.C. 11343, et seq.

(b) The Commission will establish or modify its existing procedures and deadlines as necessary in each proceeding to comply with appropriate orders of the Bankruptcy Court.

(c) Under 11 U.S.C. 1172(c)(1), the Commission is required to provide affected employees with adequate protection. The Commission will impose the minimum levels required by 49 U.S.C. 11347, unless a need is shown for different levels of protection.

(d) All applications, notices, and petitions for exemption within the scope of § 1180.20(a) shall advise the Commission that the proposed transaction involves the transfer or operation of lines in reorganization.

[FR Doc. 92–29338 Filed 12–2–92; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 671

[Docket No. 921105–2305]

King and Tanner Crab Fisheries of the Bering Sea and Aleutian Islands

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Interim final rule; request for comments.

SUMMARY: NMFS is issuing an interim final rule that supersedes State of Alaska (State) pot limit regulations in the exclusive economic zone (EEZ) of the Bering Sea and Aleutian Islands Area (BSAI). This action is necessary because NMFS has determined that the pot limit regulations adopted by the State for the king and Tanner crab fisheries of the BSAI are inconsistent

with provisions of the Fishery Management Plan for the Commercial King and Tanner Crab Fisheries in the BSAI (FMP). The intended effect of this action is to further the goals and objectives of the North Pacific Fishery Management Council (Council) with respect to the FMP by superseding State pot limit regulations in the EEZ that are inconsistent with the FMP.

DATES: Effective November 30, 1992. Comments on the interim final rule must be received by NMFS at the following address on or before January 4, 1993.

ADDRESSES: Comments may be sent to Ronald J. Berg, Chief, Fisheries Management Division, (Attn. Lori Gravel), Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, or delivered to the Federal Building Annex, Suite 6, 9109 Mendenhall Mall Road, Juneau, Alaska. Individual copies of the environmental assessment (EA) and Federalism Assessment may also be obtained from this address. Comments on the EA are requested.

FOR FURTHER INFORMATION CONTACT: Raymond E. Baglin, Fishery Management Biologist, Alaska Region, NMFS, at 907–586–7228.

SUPPLEMENTARY INFORMATION:

Description of the FMP

The commercial king and Tanner crab fisheries in the EEZ of the BSAI are managed under the FMP. The FMP was prepared by the Council under the Magnuson Fishery Conservation and Management Act (Magnuson Act). It is a framework FMP that, with Council and Secretarial oversight, delegates management of the crab resources in the BSAI to the State. It was approved by the Secretary of Commerce (Secretary) and became effective on June 2, 1989.

Section 9 of the FMP provides the interested public with a procedure for appeal to the Secretary of any State preseason fisheries actions alleged to be inconsistent with the FMP, Magnuson Act, or any other applicable Federal laws. First, an interested person who objects to a State crab regulation must petition the Alaska Board of Fisheries (Board) under the State Administrative Procedure Act for the repeal of a State crab regulation and/or the adoption of a consistent regulation. If, and only if, a person obtains an adverse ruling from the Board, the person may appeal the regulation to the Secretary. The Crab Interim Action Committee (CIAC) will review the regulation prior to the Secretary deciding on the appeal.

The CIAC was established by the Council pursuant to section 2 of the FMP to provide oversight and Council review of State regulatory actions that are promulgated by the Board. The CIAC has no authority to grant or reject an appeal. A function of the CIAC is to comment in writing on preseason appeals to assist the Secretary with the review of State crab regulations to determine if they are consistent with the FMP, the Magnuson Act, and other Federal laws.

Under section 9.3 of the FMP, if the Secretary makes a preliminary determination that the State regulations are inconsistent with the FMP, the Magnuson Act, or any other applicable Federal laws, then the Secretary will publish a proposed rule that is consistent, together with the reasons for the rule, and request comments for 30 days. The Secretary must also provide actual notice of the proposed rule to the Council and the Commissioner of the Alaska Department of Fish and Game (ADF&G). The FMP allows the State 20 days to request an informal hearing. The Secretary may withdraw the proposed rule if the Secretary ultimately decides that the State regulations in question are consistent. If the Secretary determines that the regulations are inconsistent, the Secretary may publish a final rule that would supersede the State regulations in the EEZ.

The FMP allows for an expedited review when necessary to make a Federal rule effective in a timely fashion. The Secretary must notify the Council and the Commissioner of ADF&G of the use of an expedited review. In an expedited review, the Secretary will provide for comment by the Council (or a committee of the Council) and the Commissioner of ADF&G, if at all possible. However, if necessary, the Secretary can immediately publish in the **Federal Register** an interim final rule that supersedes any State regulation in the EEZ that the Secretary finds is inconsistent. The Secretary will then request comments on the interim final rule before issuing a final rule. The authority of the Secretary in these matters has been delegated to the Assistant Administrator for Fisheries, NOAA (Assistant Administrator) and the Director, Alaska Region, NMFS.

Among the management measures authorized by the FMP are pot limits. Section 8.2.7 of the FMP lists seven factors that the State can consider when establishing pot limits. Under the FMP, only special types of situations warrant the use of pot limits. It describes two such situations, although others may exist. The first is to prevent wastage as a result of pots lost to advancing ice cover. The second is to control the harvest in a fishery when only a small guideline harvest limit (GHL) is available. Section 8.2.7 also states that "[p]ot limits must be designed in a nondiscriminatory manner. For example, pot limits that are a function of vessel size can be developed which affect large and small vessels equally."

State Pot Limit Regulations

During March 3–5, 1992, the Board met to consider gear limitations for king and Tanner crab in response to a request submitted by a portion of the crab industry and data presented by the ADF&G staff indicating that levels of gear deployed in these fisheries were creating conservation and management difficulties. Prior to its deliberations, the Board considered reports and presentations by staff from ADF&G, NMFS, University of Alaska, and the State Attorney General's Office on the fisheries, pot gear usage and loss, impacts of alternative pot limits, State/Federal responsibilities frameworked in the FMP, and an overview of the FMP criteria and the Magnuson Act. The Board also received public testimony from 30 individuals and a working group that was composed of 10 fishermen and processors.

The Board found the following facts, identified in staff reports and through public testimony, to be specific issues of concern:

(1) Bristol Bay red king crab fishery and Tanner crab fishery—Recent increases in vessels and gear in Bristol Bay have led to derby-style king crab fishing with short seasons (7 days in 1991) that are difficult to manage. The ADF&G staff indicated that a season length of at least 2 weeks was required to properly manage the fishery in-season. The Board noted a similar situation in the Tanner crab fishery.

(2) Norton Sound red king crab, Pribilof Islands red and blue king crab, and St. Matthew blue king crab fisheries—The potential level of effort is so high in relation to GHL, that the ability to manage these fisheries and prevent overfishing has been lost.

(3) Snow crab fishery—Fast moving ice conditions have caused excessive pot loss, which has resulted in increased crab mortality and habitat degradation. The State has been unsuccessful in enforcing its biodegradable escape panel regulation, which was intended to reduce mortality associated with lost pots.

The Board considered various management options including: (1) closing fisheries; (2) changing dates of fisheries; (3) trip limits; (4) exclusive or super-exclusive registration areas; (5) requiring pre-registration and dividing up the GHL in some manner: and (6) pot

limits. The Board considered two types of pot limits. The first type was a single uniform limit on all participating vessels regardless of the size of the vessel and its harvesting capacity. The second type was limits on individual vessels or classes of vessels in proportion to vessel length. The Board determined that uniform pot limits was its preferred management alternative.

The Board established the following uniform pot limits that became effective under State law on June 19, 1992:

5 AAC 34.825. LAWFUL GEAR

(e) During a commercial king crab season in Statistical Area T (Bristol Bay), an aggregate of no more than 250 king crab pots may be operated from a vessel registered to fish king crab.

(f) Instead of the requirements of 5 AAC 34.050(e)(3), in Statistical Area T replacement of lost identification tags is permitted if the vessel operator and three crew members, in person, submit to the ADF&G office in Dutch Harbor a sworn statement or affidavit describing how the tags were lost and listing the numbers of the lost tags.

5 AAC 34.925. LAWFUL GEAR

(i) During a commercial king crab season in Statistical Area Q (Bering Sea), an aggregate of no more than 100 king crab pots may be operated from a vessel registered to take king crab.

(j) Instead of the requirements of 5 AAC 34.050(e)(3), in Statistical Area Q replacement of lost identification tags is permitted if the vessel operator and three crew members, in person, submit to the ADF&G office in Dutch Harbor a sworn statement or affidavit describing how the tags were lost and listing the numbers of the lost tags.

5 AAC 35.525. LAWFUL GEAR

(j) During a commercial tanner crab season in the Bering Sea District, an aggregate of no more than 250 tanner crab pots may be operated from a vessel registered to fish tanner crab.

(4) The department may replace tags lost during the season if the vessel operator submits a sworn statement or affidavit describing how the tags were lost and listing the numbers of tags; however, for the Bering Sea District only, the vessel operator and three crew members shall, in person, submit to the ADF&G office in Dutch Harbor a sworn statement or affidavit describing how the tags were lost and listing the numbers of the lost tags.

Appeal of the Board's Preferred Management Alternative

On May 5, 1992, the Coalition of Bering Sea Crab Fishermen (Coalition) petitioned the Board for reconsideration of the pot limit regulations. In a letter dated June 17, 1992, the Board said that it considered the petition but did not find an emergency per the "Joint Board Petition Policy" (5 AAC 96.625), and thus denied the petition without reviewing its merits.

On June 30, 1992, the Coalition appealed the Board's decision to adopt regulations limiting the number of pots that may be carried aboard vessels in certain BSAI king and Tanner crab fisheries to NMFS. The Coalition challenged the State pot limit regulations on the grounds that they are inconsistent with the FMP, the Magnuson Act, and other applicable Federal laws. The Coalition alleged that uniform pot limits: (1) Violate section 8.2.7 of the FMP because they discriminate against large vessels in favor of small to medium vessels; (2) fail to meet national standard 5 of the Magnuson Act because their principal effect is to redistribute effort away from larger vessels to smaller vessels without a clear gain in terms of reduced amount of gear or longer seasons; (3) fail to meet national standard 7 of the Magnuson Act because uniform pot limits are unenforceable and thus do not minimize costs; and (4) are inconsistent with other applicable Federal laws, namely, E.O. 12291, the Regulatory Flexibility Act, and the equal protection guarantees of the U.S. Constitution because, in part, the potential benefits of uniform pot limits do not outweigh the potential costs, most of the regulatory burden is imposed on one class of vessels, and only the efficiency of larger vessels is reduced. The Coalition requested that NMFS immediately supersede the State pot limit regulations in an expedited manner.

The CIAC met on August 26, 1992, to review the appeal presented by the Coalition. During its meeting, the CIAC reviewed the purposes and function of the FMP. The CIAC received a briefing on the appeals process from NOAA General Counsel, a summary of the Board action and findings presented by ADF&G staff, a synopsis of the content of the appeal by NOAA General Counsel, and a history and description of the FMP by Council and NMFS staff. The CIAC received public testimony from seven individuals, including the applicant Coalition. The State also commented on the appeal.

At the meeting, the CIAC spent some time examining the need for pot limits. In this regard, some members felt that one of the problems in evaluating the adequacy of the Board's uniform pot limits is the vastly different circumstances of the individual crab fisheries. Whereas the Bristol Bay red king crab fishery has a GHL of 10.3 million pounds (4,672 metric tons (mt)), the Tanner and snow crab fisheries, with GHLs of 39.2 million (17,781 mt) and 207 million pounds (93,894.5 mt) for the 1992/1993 fishing season, offer greatly different conservation concerns. The CIAC was unable to reach consensus on its written comments to the Secretary to assist her in making determinations about the pot limits. CIAC members agreed to submit their individual comments in writing. Their submissions and the entire report are included in Appendix 1 of the EA prepared for this action.

Section 8.2.7 of the FMP provides that "[p]ot limits must be designed in a non-discriminatory manner. For example, not limits that are a function of vessel size can be developed which affect large and small vessels equally." NMFS concludes that this provision prohibits pot limits that adversely affect or burden only large vessels and that the FMP requires the economic burden imposed by pot limits to be shared equally by large and small vessels alike.

NMFS has reviewed an economic analysis by J. Greenberg, M. Herrmann, and P. Hooker that was presented to the Board (attached to EA). That analysis concluded that the uniform pot limits adopted by the Board cause an adverse economic impact only upon the larger crab vessels that have the capacity to carry more pots than those allowed by the uniform pot limits. The analysis demonstrated that medium and small vessels experience little or no adverse economic impact as a result of the pot limits. These conclusions are not in dispute.

NMFS has reviewed the report from the CIAC, the concerns raised by each member, the findings of the Board, and other background information. NMFS has determined that the uniform pot limits of 250 and 100 pots, which the State imposed on all vessels regardless of their size, are inconsistent with section 8.2.7 of the FMP.

Based on the factors summarized above, NMFS concludes that the challenged pot limit regulations impermissibly discriminate against large vessels in violation of the FMP, and in accordance with section 9.3 of the FMP, publishes this interim final rule to supersede those regulations in the EEZ of the BSAI.

Classification

The Assistant Administrator determined that this rule is necessary for the conservation and management of crab fisheries in the EEZ of the BSAI, and that it is consistent with the

Magnuson Act and other applicable laws.

The Assistant Administrator also finds that the reasons summarized above justifying promulgation of this rule make it contrary to the public interest to provide notice and opportunity for prior comment or to delay for 30 days its effective date under sections 553(b) and (d) of the Administrative Procedure Act. Some crab fisheries subject to the State's pot limit regulations have already commenced. This rule must be made effective immediately to remove the economic burden that the State's pot limit regulations have imposed on large vessels and to allow sufficient time for vessel operators to plan for upcoming crab fishery openings. The public has had an opportunity to comment on the State pot limit regulations, and their consistency with the FMP, Magnuson Act, and other applicable law at the Board meeting in March 1992 and at the CIAC meeting in August 1992. At each meeting, public testimony was received. Additional comment on this interim final rule will be accepted for a period of 30 days after the effective date.

This interim final rule is exempt from the normal review procedures of E.O. 12291. This rule is being reported to the Director of the Office of Management and Budget with an explanation of why it is not possible to follow the regular procedures of that Order for the reason set forth in the preamble of this interim final rule.

Because neither the Administrative Procedure Act, nor any other statute, requires public notice and opportunity to comment upon this rule, no regulatory flexibility analysis is required.

NMFS has determined that this interim final rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal management program of the State of Alaska. This determination has been submitted for review by the responsible State agencies under section 307 of the Coastal Zone Management Act.

The Alaska Region, NMFS, prepared an EA for this action. The Assistant Administrator found that no significant impact on the human environment would result from implementation of this rule. A copy of the EA may be obtained (see **ADDRESSES**).

NMFS has determined that the management measures implemented under this interim final rule would not adversely affect endangered or threatened species. Therefore, further consultation pursuant to section 7 of the Endangered Species Act is not required for the implementation of this rule

This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

The Federalism Implementation Officer of the Department of Commerce has certified that this action is consistent with the federalism principles, criteria, and requirements set forth in Sections 2 through 5 of E.O. 12612. A copy of the Federalism Assessment prepared for this action may be obtained (see **ADDRESSES**).

List of Subjects in 50 CFR Parts 671

Fisheries, Reporting and recordkeeping requirements.

Dated: November 27, 1992.

William W. Fox, Jr.,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR chapter VI is amended by adding part 671 to read as follows:

PART 671—KING AND TANNER CRAB FISHERIES OF THE BERING SEA AND ALEUTIAN ISLANDS

Subpart A—General Provisions

Sec.

671.1 Purpose and scope.
671.2 Definitions.

Subpart B—Management Measures

671.20 Pot limits.

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

Subpart A—General Provisions

§ 671.1 Purpose and scope.

The purpose of this part is to supersede State of Alaska regulations applicable to the commercial king and Tanner crab fisheries of the Bering Sea and Aleutian Islands in the EEZ that are determined to be inconsistent with the Fishery Management Plan for the Commercial King and Tanner Crab Fisheries of the Bering Sea and Aleutian Islands, the Magnuson Fishery Conservation and Management Act, or other applicable Federal law

§ 671.2 Definitions.

In addition to the definitions in the Magnuson Fishery Conservation and Magnuson Act and in § 620 2 of title 50, CFR, *Bering Sea and Aleutian Islands Area* means those waters of the exclusive economic zone off the west coast of Alaska lying south of Point Hope (68°21′ N. latitude), and extending south of the Aleutian Islands for 200 nautical miles west of Scotch Cap Light (164°44′36″ W. longitude).

Subpart B—Management Measures

§ 671.20 Pot limits.

State of Alaska pot limits shall not apply to vessels fishing for red king crab (*Paralithodes camtschatica*), blue king crab (*P. platypus*), brown (or golden) king crab (*Lithodes aequispina*), Tanner crab (*Chioneocetes bairdi*), and snow crab (*C. opilio*) in the Bering Sea and Aleutian Islands Area.

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