

(3) Additional information concerning the range, distribution, and population size of this species;

(4) Current or planned activities in the subject area and their possible impacts on the mountain yellow-legged frog or its habitat.

Author: The primary author of this notice is Glen Knowles (see **ADDRESSES** section).

Authority: The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: May 15, 2000.

Elizabeth H. Stevens,

Acting Manager, California/Nevada Operations Office.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 000504124-0124-01; I.D. 011900B]

RIN 0648-AK11

Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Prohibition on the Use of Set Net Fishing Gear

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

ACTION: Proposed rule.

SUMMARY: NMFS proposes regulations to prohibit the use of set net (gillnet and trammel nets) fishing gear to take groundfish species in portions of the exclusive economic zone (EEZ) (also known as the fishery management area) adjacent to state waters at four areas off California. Groundfish fisheries in the fishery management area are managed under the Fishery Management Plan for Groundfish Fisheries off the West Coast (Groundfish FMP). California has jurisdiction over fishing for groundfish and other species both within State waters and, with respect to State registered vessels, in the EEZ off California as long as State regulations are not in conflict with Federal regulations. This action would achieve consistency between regulations in waters under California jurisdiction and those in the EEZ. This action is intended to promote effective and consistent conservation of groundfish stocks and California managed species throughout their range and to avoid

unnecessary bycatch of California-managed species that might otherwise be harvested in the closed areas but discarded.

DATES: Comments must be submitted by June 19, 2000.

ADDRESSES: Comments on the proposed rule should be sent to Rodney R. McInnis, Acting Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802.

FOR FURTHER INFORMATION CONTACT: Svein Fougner, Sustainable Fisheries Division, Southwest Region, NMFS, 562-980-4040.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) authorizes regional fishery management councils to prepare and submit fishery management plans (FMPs) to the Secretary of Commerce (Secretary) for approval and implementation. An FMP may incorporate the relevant fishery conservation and management measures of the coastal states, to the extent they are consistent with the National Standards, the other provisions of the Magnuson-Stevens Act, and any other applicable law.

The Groundfish FMP was prepared by the Pacific Fishery Management Council (Council) and approved by the Secretary of Commerce in 1982. The FMP covers fisheries for over 80 species, including species that are taken in the EEZ and in State waters off California, Oregon and Washington. In the absence of Federal regulations under the Magnuson-Stevens Act a state may continue to apply its own regulations to fishers registered under the laws of that State even if they are fishing in the EEZ. Further, even for a fishery managed under an FMP, a state's regulations that affect fishing for managed species may remain in force as long as they do not conflict with the Federal regulations governing that fishery.

The Council recognized that there could be instances in which it might be desirable or necessary to adjust Federal regulations (pertaining to) fishing for species under the FMP to be consistent with state regulations to achieve effective conservation of groundfish as well as non-groundfish stocks that occur in both the EEZ and state waters. Therefore, the FMP contains procedures whereby state regulations can be reviewed by the Council to determine that state regulations are consistent with the FMP. The Council, after making such a determination, may request that Federal regulations be promulgated to ensure consistency in letter and effect.

This is the case with this proposed rule. As provided by the FMP, the Council reviewed for consistency with the goals and objectives of the FMP, California regulations prohibiting the use of set nets in certain EEZ waters adjacent to California waters. In deference to California's historical management of halibut and white croaker and in the interest of sound and consistent fishery management, the Council recommended that NMFS implement regulations to prohibit set net fishing for groundfish species in the portions of the EEZ in the areas currently closed under California law.

There are four California closures that would be affected by this proposed rule:

(1) The portion of the fishery management area in an area between a line extending 245° magnetic from the most westerly point of the west point of the Point Reyes headlands in Marin County and the westerly extension of the California-Oregon boundary; (2) any waters in the fishery management area which are 40 fathom (fm) or less deep at mean lower low tide between a line extending 245° magnetic from the most westerly point of the west point of the Point Reyes headlands in Marin County and a line extending 225° magnetic from Pillar Point at half Moon Bay in San Mateo County, and 60 fm or less deep at mean lower low tide between a line extending 225° magnetic from Pillar Point at Half Moon Bay in San Mateo County to a line extending 220° magnetic from the mouth of Waddell Creek in Santa Cruz County; (3) any waters in the fishery management area that are 30 fm or less deep at mean lower low tide within the portion of California District 18 north of a line extending due west from Point Sal in Santa Barbara County; and (4) any waters in the fishery management area that are less than 35 fm deep in the area between a line running 180° true from Point Fermin and a line running 270° true from the south jetty of Newport Harbor. This last area is called Huntington Flats.

The primary goal of closures (1) through (3) was to minimize entanglement and drowning of protected birds and marine mammals off central California. Federal studies confirm that the take of sea otters and harbor porpoises has decreased significantly since California established set net closures in coastal waters. Closure (4) was the result of the Marine Resources Protection Act (MRPA), which was adopted through voters' approval of a ballot initiative (Proposition 132) in 1990. As in central California, several set net prohibitions in southern California were motivated

by the desire to minimize the adverse impacts of set net fishing on nontarget marine mammals, rockfish, and lingcod resources. However, at Huntington Flats, the primary emphasis was on public concern for state species, particularly California halibut, rather than protected species or targeted groundfish.

"Set net" is a term used in California law to define "any net or line used to take fish that is anchored to the bottom on each end and is not free to drift with the tide or current." This generic term includes gillnets and trammel nets as specified in Federal regulations: "Set net: A stationary, buoyed, and anchored gillnet or trammel net" (50 CFR 660.302(17)). A "gillnet" is defined in Federal regulations as "a rectangular net that is set upright in the water" (50 CFR 600.10(i)); a "trammel net" is defined as "a gillnet made with two or more walls joined to a common float line" (50 CFR 660.302(20)). Set nets work by gilling or entangling fish in their mesh.

Laws regulating set nets in the EEZ off California have typically been enacted by the California legislature to prevent drowning of marine birds and mammals, to conserve fishery resources, and to reduce fisheries conflicts. In 1990, California voters approved the MRPA, which prohibits the use of set nets to take rockfish in the EEZ. It also prohibits the use of set nets to take all species of fish in California waters along the mainland shore, within 1 mile of the offshore Channel Islands south of Point Arguello and in an area of the EEZ less than 35 fm deep at the Huntington Flats between the ports of San Pedro, Los Angeles County, and Newport Beach, Orange County.

Federal regulations implementing the FMP prohibit the use of set nets in the EEZ north of 38° N.lat. (Point Reyes, Marin County) but are silent on whether California's set net laws involving the take of groundfish continue to apply in the EEZ south of 38° N. lat. The current regulations do not specifically authorize California to regulate set nets in the EEZ south of 38° N.lat.

The absence of Federal groundfish regulations that specifically address California laws resulted in a Federal district court challenge by the Los Angeles Commercial Fishermen's Association (LACFA) on the legality of California's enforcement of set net prohibitions on the take of groundfish in the EEZ in the Huntington Flats area. On November 22, 1996, the LACFA obtained a court order that prohibited California from enforcing the MRPA prohibition on the use of set nets at Huntington Flats, and authorized set net permittees to fish for all commercial

species of fish, not just groundfish, with set nets in the EEZ at Huntington Flats in waters less than 70 fm deep. This temporary restraining order was extended by a preliminary injunction issued March 20, 1997.

The purpose of this proposed action is to resolve the unintended conflict between the lack of Federal regulations under the FMP, which is silent on the use of set nets south of 38° N.lat. and California regulations, which prohibit the use of set nets both in State waters and some areas inside the EEZ. The set net closures are intended to conserve a number of non-groundfish species and non-fish living marine resources that are managed under California regulations and are taken in some areas incidental to fishing for groundfish. This proposed action should resolve this legal dispute and allow lifting of the injunction, allowing effective enforcement of the California law and regulations and conservation of the fish and non-fish species involved.

This action is consistent with the Magnuson-Stevens Act and especially with National Standards 7 and 9. National Standard 7 provides that management shall minimize duplication and costs in the conservation of fishery resources. The proposed action will reduce the cost of administering and enforcing state conservation and management measures in the identified areas by providing a single set of consistent measures. National Standard 9 provides that conservation and management measures shall, to the extent practicable, minimize bycatch and, to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. This National Standard requires Councils to consider the bycatch effects of existing and planned conservation and management measures. Set net gear is relatively non-selective gear, and though groundfish may be the target species, there is often bycatch of other, non-groundfish species such as California halibut (much of which is dead and therefore wasted). The proposed action will reduce this bycatch of species managed under California regulations in both California waters and the EEZ.

The proposed action also promotes conservation Objective 4 of the FMP, which is to control the impacts of the groundfish fishery on non groundfish species to maintain their long-term reproductive health where conservation problems have been identified for non-groundfish species and the best scientific information shows that the groundfish fishery has a direct impact on the ability of those species to maintain their long-term reproductive

health. The FMP authorizes the Council to consider establishing management measures to reduce fishing mortality of non-groundfish species for documented conservation reasons. In this instance, fishers are currently able to fish for groundfish with set net gear in the identified areas, and non-groundfish will be taken incidental to groundfish. Those non-groundfish species will either be killed and discarded or will be retained illegally; in either case, there will be fishing mortality above that which the state would allow in its management program for those non-groundfish species. The proposed action is designed to eliminate this mortality from bycatch of non-groundfish species while minimizing disruption of the groundfish fishery; it will not preclude achievement of any quota, harvest guideline, or allocation of groundfish.

In addition to the preferred action, two alternatives to address this issue were considered by the Council. The "no action" alternative would have resulted in the Council not recommending any regulations. The second alternative would have set Federal regulations the same as State laws for three areas off central California but allowed the continued use of set nets to take groundfish in the EEZ at Huntington Flats off southern California. The Council ultimately concluded that the lack of a determination affirming the consistency of Federal and California regulations left a legal void that impaired enforcement of California laws and regulations to conserve non-groundfish species and other living marine resources.

Classification

The proposed action is consistent with the requirements of the Magnuson-Stevens-Act and the Groundfish FMP. The proposed action will not result in, or promote overfishing of, any groundfish stocks or other species. The proposed action should reduce bycatch of non-groundfish species in the area closed to set net fishing. There may be some improved protection of essential fish habitat for groundfish species in the areas closed to set net fishing. The proposed action will eliminate confusion about applicable regulations in the area while enhancing the enforcement of California regulations. There will be no duplication of effort.

NMFS prepared an initial regulatory flexibility analysis (IRFA) that describes the impacts that the proposed rule, if adopted, would have on small entities. A copy of this analysis is available from NMFS (see ADDRESSES). A summary of the analysis follows.

The direct effect of this Federal action would be to prohibit fishing for groundfish species using set net gear in the EEZ in the Huntington Flats area. This will affect fishers who have used set net gear in the waters to be closed. It is noted that four areas would be closed; however, direct effects of the action would only be felt at Huntington Flats, as there apparently has been no set net fishing in the other three areas for many years. Therefore, no new effects would be felt from the closure of those 3 years by Federal regulation. This action is not expected to affect processors since other gear types continue to land Federal species in this area at levels comparable to those before the closure.

The category of small businesses possibly affected by the proposed regulation is the 89 vessels that reported set net landings from the Huntington Flats area between 1990 and 1995. Owners of 33 of the 89 vessels held gill and trammel net permits in the 1996–1997 season, and thus may be directly affected by this rule by not being able to fish for groundfish in the EEZ at depths less than 35 fm in the Huntington Flats area. These 33 permit holders represent 14 percent of California's total of 235 gill and trammel net permit-holders. While an evaluation of the effects on individual vessels has not been conducted, estimates for the group of vessels show that the reduction in gross revenues for most vessels is likely to be well below 5 percent. An analysis for the proposed action showed that, for a subset of active set net vessels, an average of 30 percent of total annual value by vessel comes from set net fishing in the Huntington Flats area. The remaining 70 percent is taken by other gear types or in other areas. Of the average vessel's annual value of landings from Huntington Flats (30 percent of the total from all areas and gear types), the value of groundfish species represents only 4.5 percent. This represents the value of groundfish species caught in the entire Huntington Flats area, and thus includes the EEZ outside the closure in question (beyond depths of 35 fm). The proposed action allows for set net fishing for groundfish at depths deeper than 35 fm, and public testimony from LACFA indicates up to seven vessels can successfully operate outside 35 fm (see Section 4.2). Further, the proposed action does not prohibit the use of other gear or fishing for other species within or outside the closure area. Based on this analysis, it is expected the closure of Federal waters out to 35 fm at the Huntington Flats area will result in an average reduction of 1.4

percent of annual gross revenue by vessel.

In addition to the proposed action, two alternatives were considered. The first, a "no action" alternative, would impose the least burden on small entities. However, this alternative would leave the inconsistency between California and Federal regulations in place and would greatly increase the difficulty of enforcing California regulations at Huntington Flats. There could be significant bycatch and discard mortality of state-managed species taken in association with groundfish. Further, if set net fishing were to resume in the other three areas, there could be adverse effects on marine mammals and seabirds. The other alternative would adopt the proposed Federal closures for the three areas in which California's action has already resulted in elimination of set net fishing, while allowing set net fishing to continue at Huntington Flats. This alternative would reinforce California's closures and maintain protection for marine mammals and seabirds. However, it would also maintain the inconsistency between State and Federal regulations at Huntington Flats, creating enforcement difficulties for the California and possibly result in significant bycatch and discard mortality as set net fishers could retain groundfish but not state-managed species taken in this portion of the EEZ. Therefore, this alternative was rejected.

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

An informal consultation was conducted under section 7 of the Endangered Species Act and it was determined that the proposed action is not likely to adversely affect any listed species or adversely affect any critical habitat designated for any listed species.

The proposed action should reduce the potential for entanglement of marine mammals in set nets in the area to be closed to set net fishing and therefore is consistent with the Marine Mammal Protection Act.

This action is being proposed in response to a request from California that was endorsed by the Council. The action will make California regulations and Federal regulations consistent and will thus facilitate sound conservation of state-managed resources as well as federally-managed resources. No new costs are imposed on California. Thus, the proposed action is consistent with E.O. 13132 of August 4, 1999.

List of Subjects in 50 CFR Part 660

Administrative practice and procedure, American Samoa, Fisheries,

Fishing, Guam, Hawaiian Natives, Indians, Northern Mariana Islands, Reporting and recordkeeping requirements.

Dated: May 12, 2000.

Andrew A. Rosenberg,
Deputy Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 660 as follows:

PART 660—FISHERIES OFF WEST COAST STATES AND IN THE WESTERN PACIFIC

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

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

2. In § 660.322, paragraph (d) is revised to read as follows:

§ 660.322 Gear restrictions.

* * * * *

(d) *Set nets.* Fishing for groundfish with set nets is prohibited in the following portions of the fishery management area:

- (1) Waters north of 38° N.lat.;
- (2) The area between a line extending 245° magnetic from the most westerly point of the west point of the Point Reyes headlands in Marin County and the westerly extension of the California-Oregon boundary;
- (3) Waters which are 40 fm or less deep at mean lower low tide between a line extending 245° magnetic from the most westerly point of the west point of the Point Reyes headlands in Marin County and a line extending 225° magnetic from Pillar Point at half Moon Bay in San Mateo County, and 60 fm or less deep at mean lower low tide between a line extending 225° magnetic from Pillar Point at Half Moon Bay in San Mateo County to a line extending 220° magnetic from the mouth of Waddell Creek in Santa Cruz County;
- (4) The portion of California District 18 north of a line extending due west from Point Sal in Santa Barbara County in waters 30 fm or less deep at mean lower low tide in the portion of the EEZ between a line extending due west from Point Sal in Santa Barbara County and a line extending due south from Point San Luis in San Luis Obispo County; and
- (5) In waters less than 35 fm deep between a line running 180° true from Point Fermin and a line running 270° true from the south jetty of Newport Harbor.

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