

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 000822244-0291-02; I.D. 082100B]

RIN 0648-AO66

Fisheries off West Coast States and in the Western Pacific; Western Pacific Pelagic Fisheries; Hawaii-based Pelagic Longline Area Closure

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

ACTION: Emergency interim rule; request for comments.

SUMMARY: NMFS makes changes to an emergency interim rule published on August 25, 2000, governing the Hawaii-based pelagic longline fishery. The changes, which are only applicable to the Hawaii-based pelagic longline fishery when fishing in Area C, as designated under that rule, expressly prohibit directing longline fishing effort toward the harvest of swordfish. The changes require vessels to set their main longline so that the deepest point between any two floats is greater than 100 m (328.1 ft), prohibit the possession of lightsticks on board vessels, require permit holders or operators to donate to charity at least 30 percent of their gross revenues from the sale of incidentally caught swordfish, and require each longline vessel operator to have aboard the vessel an observer waiver form issued by NMFS if the vessel fishes without an observer. The intent of this action is to ensure that swordfish are not targeted by the Hawaii longline fishery in Area C and to reduce adverse impacts on sea turtles while NMFS prepares a comprehensive environmental impact statement (EIS) that analyzes the environmental effects of fishing activities conducted under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (FMP).

DATES: This emergency interim rule is effective from November 3, 2000, through February 21, 2001, except for the suspension of § 660.22 (hh) and § 660.33 (d)(4), and for the addition of § 660.22 (kk) and § 660.33 (d)(7), which are effective December 4, 2000 through February 21, 2001. Comments must be received no later than 5 p.m., local time, on December 18, 2000.

ADDRESSES: Written comments on this action must be mailed to Dr. Charles

Karnella, Administrator, NMFS, Pacific Islands Area Office (PIAO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700; or faxed to 808-973-2941. Comments will not be accepted if submitted via e-mail or the Internet.

Copies of the regulatory impact review (RIR) may be obtained from Dr. Charles Karnella, PIAO. Send comments regarding any ambiguity or unnecessary complexity arising from the language used in this rule to Dr. Charles Karnella.

FOR FURTHER INFORMATION CONTACT:

Alvin Katekaru at 808-973-2937.

SUPPLEMENTARY INFORMATION: By this action, NMFS changes an emergency interim rule (65 FR 51992) published on August 25, 2000, governing the Hawaii-based pelagic longline fishery. These changes apply only to the Hawaii-based longline fishery operating in Area C, one of the three designated longline fishing restricted areas established by the August 25, 2000, emergency interim rule. Area C, which encompasses the main and Northwestern Hawaiian Islands, is defined as all waters bounded on the south by 0° lat., on the north by 28° N. lat., on the east by 137° W. long., and on the west by 173° E. long.. NMFS makes these changes in response to allegations made by Plaintiffs in *Center for Marine Conservation v. NMFS*, Civ. No. 99-00152 (DAE) that NMFS did not adequately comply with the August 4, 2000, Order Further Amending Order Modifying Provisions of Order of Injunction (August 4, 2000, Order) issued by the U.S. District Court for the District of Hawaii (Court). Plaintiffs complained to the Court that the August 25, 2000, emergency interim rule did not ensure that swordfish would not be targeted by the Hawaii-based longline fishery in Area C. Further, Plaintiffs alleged that the 20-percent standard that NMFS used to implement the Court's requirement that any "profits" from the landing and sale of swordfish incidentally caught in Area C be "donated to charity", did not ensure that all profits would be donated to charity.

The intent of the August 25, 2000, emergency interim rule was to prohibit any fishing activity by the Hawaii-based longline fishery in Area C that targeted swordfish. To clarify that intent, NMFS is hereby revising that rule to expressly prohibit directing any longline fishing effort toward the harvest of swordfish in Area C. NMFS also is revising that rule to require vessels registered for use with a Hawaii longline limited access permit and fishing for pelagic management unit species in Area C, to deploy longline gear so that the deepest point of the longline between any two floats reaches

a depth greater than 100 m (328.1 ft) below the sea surface. This change is intended to ensure that hooks are not set at shallow depths where they would target swordfish. Longline sets are identified as shallow or deep depending on how deep the main longline sags between floats. In a study conducted by NMFS on longline gear sag depths in the Hawaii pelagic longline fishery, it was found that 95 percent of the shallow sets had mainline sag depths shallower than 101 m (331.4 ft), with an average of 52.2 m (171.3 ft). Nearly 90 percent of the swordfish harvested in Area C were caught in shallow sets. On the other hand, 95 percent of the deep longline sets targeting bigeye tuna had a mainline sag depth deeper than 109 m (357.6 ft), with an average of 221 m (725.1 ft). NMFS has determined that requiring vessels to deploy their longlines so that the deepest part of the mainline between any two floats is at a depth greater than 100 m (328.1 ft) will effectively prevent them from targeting swordfish.

Finally, NMFS is changing the provision in the August 25, 2000, emergency interim rule requiring that 20 percent of the gross revenue from the sale of swordfish caught incidentally in Area C be donated to IRS-approved charitable organizations to a provision requiring that at least 30 percent of the gross revenue from the sale of all such swordfish be donated to IRS-approved charitable organizations. This change will ensure that fishery participants have no economic incentive to target swordfish in Area C. The 30 percent of gross revenues standard is much higher than the 3.7-percent profit margin for the average tuna longline vessel based on total revenue less all operating and fixed costs. Moreover, it is also substantially higher than the average tuna longline vessel's 20.6-percent annual return on operating and repair costs.

In addition to the changes made in response to the Plaintiff's complaint, NMFS is changing other provisions of the August 25, 2000, emergency interim rule to facilitate enforcement of the longline fishing restrictions in Area C. First, the measure prohibiting the use of lightsticks is changed to a prohibition on the possession of lightsticks. This provision has the same effect on the targeting of swordfish as a use prohibition but is easier to enforce since it relies on evidence of possession at any time in Area C, rather than evidence of actual fishing with lightsticks in Area C. Second, NMFS is adding a provision to require all longline vessels exempted from carrying NMFS-approved observers for specific fishing trips to

have on board the vessel a valid observer waiver form issued by NMFS. This requirement will enable U.S. Coast Guard and NMFS enforcement agents to monitor compliance of the observer requirements during at-sea inspections of longline vessels operating in Area C.

Criteria for Issuing an Emergency Interim Rule

This emergency interim rule meets NMFS policy guidelines for the use of emergency interim rules (62 FR 44421, August 21, 1997). Also, it realizes benefits that outweigh the value of prior notice, opportunity for public comment, and deliberative consideration expected under the normal rulemaking process.

Recent, Unforeseen Events or Recently Discovered Circumstances

Emergency action is necessary to address, in a timely manner, concerns regarding NMFS's August 25, 2000 emergency interim rule implementing the Court's August 4, 2000 Order. Emergency action is also necessary to facilitate enforcement of the emergency interim rule.

Immediate Benefits

Although there are many variables that make it difficult to predict the effects of this fishery upon different sea turtle populations, NMFS anticipates this action will have a positive benefit sea turtles by further reducing the potential for turtles being caught by Hawaii-based longline vessels.

Classification

The Assistant Administrator for Fisheries, NOAA (AA) has also determined that this emergency interim rule is consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and other applicable laws. NMFS prepared an environmental assessment (EA) for the August 25, 2000, emergency interim rule that describes the impact on the human environment of that rule and found that no significant impact would result from the implementation of it. The changes made by the present action clarify the intent of that rule and will facilitate its enforcement. The changes will not cause any significant impact on the human environment.

NMFS also prepared a regulatory impact review for the August 25, 2000, action which assessed its economic costs and benefits. That assessment used calculations from an input-output model of the Hawaii commercial fishery (Sharma, 1999), and showed that in 1998 the Hawaii longline fishery (valued at \$46.7 million in ex-vessel revenues) had a total impact on Hawaii

business sales of \$113 million. The changes made by the present action to the emergency interim rule are expected to have an additional impact on vessel operators who have customarily targeted species other than bigeye tuna, as the requirement that longline gear must be deployed at a depth greater than 100 m (328.1 ft) effectively bans the targeting, in Area C, of yellowfin tuna as well as swordfish. Due to the lack of detailed data, the precise economic impact of the new longline set depth requirement cannot be calculated. However NMFS longline logbook data for 1998-1999 show that approximately 10 percent of the sets in Area C (1,739 of 19,964) targeted yellowfin tuna. This includes sets taken by 74 vessels over the 2-year period, i.e., roughly half of all the vessels that were active during the 2 years.

Nonetheless, the impact of this emergency interim rule is expected to be relatively small because the yellowfin tuna fishery is primarily a summer fishery and has ended for this year and the bigeye tuna fishery, a winter and spring fishery, is about to commence. This emergency interim rule does, however, further reduce the ability of swordfish fishermen to utilize similar gear-setting techniques in Area C and will increasingly require purchase of a line-shooter. Some vessels, however, will operate out of California until NMFS completes the EIS and the emergency interim rule is replaced by final rule.

The Assistant Administrator for Fisheries (AA) finds, for good cause, that under 5 U.S.C. 553(b)(B) providing prior notice and opportunity for public comment for this action is unnecessary given that the Court ordered the actions in the August 25, 2000 emergency interim rule, and that this action is necessary to clarify the intent of the August 25, 2000 rule and to facilitate its enforcement, and the delay associated with providing prior notice and opportunity for public comment would be contrary to the public interest.

Similarly, the AA finds, for good cause, under 5 U.S.C. 553(d)(3), that delaying the effectiveness of this rule for 30 days would be contrary to the public interest. Accordingly, the AA is making this rule effective upon publication in the **Federal Register**, except for the lightstick provisions. The AA is delaying the effectiveness of the provisions prohibiting the possession of lightsicks for 30 days to allow time for any vessel which has a lightstick on board during a current fishing trip to off-load the lightsticks when the vessel returns to port. This delay will not compromise the regulation's effect on

the targeting of swordfish since the prohibition on the use of lightsticks will remain in effect.

Under section 305(c) of the Magnuson-Stevens Act, this emergency interim rule will remain in effect for not more than 180 days (until February 21, 2001, based on the effective date of the emergency interim rule published on August 25, 2000). It may be extended for one additional period of not more than 180 days.

Because this emergency interim rule is not required to be published with prior notice and opportunity for public comment under 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act do not apply.

This emergency interim rule has been determined to be not significant for purposes of Executive Order 12866.

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

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: October 30, 2000.

William T. Hogarth,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is amended 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 § 660.22, paragraph (hh) is suspended and new paragraphs (kk), (ll), and (mm) are added to read as follows:

§ 660.22 Prohibitions.

* * * * *

(kk) Possess lightsticks on a longline vessel within the Hawaii emergency longline closed Area C in violation of § 660.33 (d)(7).

(ll) Fail to carry onboard the vessel or to make available for inspection by an authorized officer an observer waiver form issued by the Administrator,

Pacific Islands Area Office, NMFS, or a designee of the Administrator as required under § 660.33(e)(2).

(mm) Direct longline fishing effort toward the harvest of swordfish in Hawaii emergency longline closed Area C.

3. In § 660.33, paragraphs (d)(4), (d)(5), and (e)(2) are suspended, and new paragraphs (d)(7), (d)(8), (d)(9), and (e)(7) are added to read as follows:

§ 660.33 Hawaii emergency closure.

* * * * *

(d) * * *

(7) A vessel registered for use under a Hawaii longline limited access permit may not possess lightsticks during a

fishing trip where part (or all) of the trip involves fishing in Area C.

(8) Within 30 days of each landing of swordfish caught by longline gear in Area C, the permit holder or operator of a vessel registered for use under a Hawaii longline limited access permit must donate to charity at least 30 percent of the total gross revenues from the sale of such swordfish.

(9) Any longline gear deployed after November 3, 2000 by a vessel registered for use under a Hawaii longline limited access permit, fishing for Pacific pelagic management unit species in Area C, must be deployed such that the deepest point of the main longline between any two floats, i.e., the deepest point in each sag of the main line, is at a depth greater

than 100 m (328.1 ft or 54.6 fm) below the sea surface.

(e) * * *

(7) A vessel registered for use with a Hawaii longline access permit may not use longline gear in Area C without a NMFS-approved observer aboard the vessel, unless it is issued a written waiver on a per trip basis by the Administrator, Pacific Islands Area Office, NMFS, or a designee. The waiver must be on board the vessel and made available for inspection by an authorized officer at any time during the trip for which the waiver is valid.

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