

Guidelines amount, but less than 200% of the applicable Federal Poverty Guidelines amount (and who may be found to be financially eligible under duly adopted exceptions to the annual income ceiling in accordance with sections 1611.3, 1611.4 and 1611.5).

**Victor M. Fortuno,**

*Vice President for Legal Affairs, General Counsel & Corporate Secretary.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 0612243163-7151-01]

RIN 0648-AU59

#### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Shrimp Fisheries of the Gulf of Mexico; Revisions to Bycatch Reduction Devices and Testing Protocols

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

**ACTION:** Final rule.

**SUMMARY:** In accordance with the framework procedures for adjusting management measures specified in regulations implementing the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico (Gulf FMP) and the Fishery Management Plan for the Shrimp Fishery of the South Atlantic Region (South Atlantic FMP), NMFS issues this final rule to consolidate and make modifications to the Bycatch Reduction Device Testing Manuals (Manual) for the Gulf of Mexico and the South Atlantic regions. This final rule also revises the bycatch reduction device (BRD) certification criterion for the western Gulf of Mexico and certifies additional BRDs. The intended effect of this final rule is to improve bycatch reduction in the shrimp fisheries and better meet the requirements of national standard 9.

**DATES:** This final rule is effective March 14, 2008.

**ADDRESSES:** Copies of the Final Regulatory Flexibility Analysis (FRFA) and the consolidated and revised Bycatch Reduction Device Testing Manual are available from the Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; phone: 727-824-5305; fax: 727-824-5308.

Comments regarding the approved collection-of-information requirements contained in this final rule should be submitted in writing to Jason Rueter at the Southeast Regional Office address (above) and to David Rostker, Office of Management and Budget (OMB), by e-mail at David\_Rostker@omb.eop.gov, or by fax to 202-395-7285.

**FOR FURTHER INFORMATION CONTACT:** Steve Branstetter, telephone: 727-824-5305, fax: 727-824-5308, e-mail: [Steve.Branstetter@noaa.gov](mailto:Steve.Branstetter@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The fisheries for shrimp in the exclusive economic zone (EEZ) of the Gulf of Mexico (Gulf) and the South Atlantic are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and regulations at 50 CFR part 622. The regulations implement the Gulf FMP prepared by the Gulf of Mexico Fishery Management Council (GMFMC) and the South Atlantic FMP prepared by the South Atlantic Fishery Management Council (SAFMC).

On October 12, 2007, NMFS published the proposed rule to revise the bycatch reduction device testing protocols for the Gulf and South Atlantic regions, revise the BRD certification criterion for the western Gulf, and certify additional BRDs (72 FR 58031). Public comment on the proposed rule was requested through November 13, 2007. The rationale for the measures contained in this final rule is provided in the preamble to the proposed rule and is not repeated here.

#### Comments and Responses

The following is a summary of the comments NMFS received on the proposed rule and NMFS' respective responses. Three comment letters were received during the comment period. In addition, a non-governmental organization submitted comments signed by 1,266 individuals in support of the proposed action.

**Comment 1:** NMFS should implement the proposed changes as part of a comprehensive plan to address the significant amount of bycatch associated with this fishery and help end overfishing and rebuild the red snapper stock.

**Response:** This rulemaking is part of a comprehensive plan addressing bycatch in the shrimp fishery and overfishing of the red snapper resource. This rulemaking to provide additional BRDs to the fishery will support additional actions taken by the GMFMC and NMFS. In 2006, the GMFMC recommended, and NMFS

implemented, an individual fishing quota (IFQ) for the commercial Gulf red snapper fishery; in general, IFQs tend to help reduce fishing mortality. To better control overall effort in the shrimp fishery, the GMFMC recommended, and NMFS implemented, a moratorium on the issuance of Federal shrimp vessel permits. Approximately 2,000 vessels qualified for a moratorium permit; this is a substantial reduction from the number of vessels participating in the fishery in the past. In addition, the GMFMC recommended, and NMFS is currently considering several actions to end overfishing of red snapper by 2010 and rebuild the stock by 2032. The recommended actions include a substantial reduction in the total allowable catch for the directed commercial and recreational red snapper fishery, harvesting restrictions to restrain the recreational fishery to its quota, and possible time-area closures for the shrimp fishery to reduce bycatch mortality on juvenile red snapper.

**Comment 2:** The proposed changes to increase flexibility in the field testing procedures for experimental BRDs should substantially improve the practicability of the testing criteria and procedures that currently exist. Many of the changes will better allow research to be adapted to the real-world practical realities of shrimp trawling and, as a consequence, will encourage more fishermen to participate in testing new BRD designs and configurations.

**Response:** The procedures prescribed for testing BRDs in the field were rigorous in an attempt to reduce the statistical uncertainty of the results. However, these rigorous field sampling procedures and the inflexible statistical procedures hindered the successful certification of several BRD designs that showed promise at reducing substantial amounts of bycatch. This discourages innovative developments to improve BRDs.

**Comment 3:** Replacing the current tow time restrictions with a more realistic requirement for such adjustments to be reasonable will allow fishermen to adapt to local fishing conditions and successfully complete a test on an experimental BRD. However, the proposed rule indicated any tow time changes made during a field test would need to be approved by the Regional Administrator (RA) at the conclusion of the test, and the changes may be disapproved. There should be a more deliberate process for the applicant and NMFS to resolve what the acceptable limits will be on tow time adjustments. This should be done on a case-by-case basis before the testing begins and as part of the initial design

of the operations plan. This will avoid the situation of after-the-fact rejections of the tests by the RA and the resulting wasted time and resources.

*Response:* It is the responsibility of the applicant to make logical and reasonable proposals for tow times in the research plan submitted to the RA requesting a Letter of Authorization to conduct a test on an experimental BRD. The research plan should also include a "contingency" plan if any of the primary procedures have to be changed during a test. Changes to the tow time made during a test should follow a similar logical and reasonable rationale. Even under the best pre-planned event, there may be a need to make such a change during a test. For example, the total catch taken during a tow may be greater than what was anticipated in the applicant's proposal. Under such conditions, shorter tow times would produce manageable quantities of catch for sampling. Under the new procedures, when the final test results are submitted to NMFS for review, the applicant would simply need to document the need for such a change, and provide a good rationale for such change. The rationale for the change would be reviewed by the RA, in consultation with Southeast Fisheries Science Center staff, on a case-by-case basis.

*Comment 4:* The current requirement to rotate gear between the port and starboard sides every four to six tows (Gulf) or daily (South Atlantic) to eliminate net or side bias is highly impracticable and has presented a serious obstacle to participation in the testing program. The proposed change would allow the applicant to propose an acceptable rotational schedule that still ensures equal numbers of tows will be conducted with the BRD candidate on both sides. In the case of a quad-rig (4-net) vessel, NMFS should additionally allow the applicant to use the candidate BRD in one of the two nets on each side of the vessel, simultaneously, as an alternative means to eliminate bias that might result from testing on just one side of the vessel. This will help eliminate the numerous practical difficulties associated with rotating gear.

*Response:* BRD testing is conducted by comparing the differences in the catch and bycatch of two nets towed simultaneously by a single vessel, where one net contains an experimental BRD, the other net has no BRD. Assuming the two nets have equal or similar fishing efficiencies, the differences in catch and bycatch between the two nets can be attributed to the inclusion of the experimental BRD in one net. In reality, no two nets will have identical fishing

efficiencies, nor will each net encounter exactly the same number of each species during a tow. Therefore, the paired tests will always have some, albeit minor, bias between nets. The requirement to rotate the experimental BRD from one net to another on a regular basis is intended to negate this bias. Additionally, there may be some differences in the catch between outboard and inboard nets in a quad-rig system, especially for the inboard net located behind the try net. Comparisons of the catch of an inboard net to the catch of an outboard net adds another variable for consideration. For this reason, to make the paired comparison as balanced as possible, the procedure has always designated the two outboard nets be used as experimental and control nets. Nevertheless, NMFS does not automatically exclude the proposed concept to place an experimental BRD in a net on both sides of the vessel, and compare the catch of those nets against the catch of the other two nets that do not contain a BRD. The revisions to the testing procedures are intended to provide the applicant with the flexibility to make a reasonable proposal for a scientifically and statistically valid experiment.

#### Classification

The Administrator, Southeast Region, NMFS, determined that this rule is necessary for the conservation and management of the shrimp fisheries in the Gulf and the South Atlantic regions and is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be significant for purposes of Executive Order 12866.

A FRFA was prepared. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS responses to those comments, and a summary of the analyses completed to support the action. A copy of this analysis is available from NMFS (see **ADDRESSES**).

This final rule will modify the procedures for field testing BRD candidates for use in the Gulf and South Atlantic EEZ commercial shrimp fisheries, will modify the bycatch reduction criterion for certifying BRDs for use in the penaeid shrimp fishery in the Gulf EEZ west of Cape San Blas, Florida (western Gulf), and certify new BRDs for the fisheries.

The purpose of this final rule is to implement more practical field testing procedures for BRD certification candidates and to establish a realistic bycatch reduction threshold for the Gulf EEZ commercial shrimp fishery.

No significant issues were raised by public comments in response to the IRFA. Therefore, no changes were made in the final rule as a result of such comments.

The primary entities that are expected to apply for the BRD certification process are state government, academic, and not-for-profit entities. Independent commercial shrimp operations in either the Gulf or South Atlantic may also be included among applicants. In addition to being potential testing applicants, Gulf shrimp vessels are expected to be indirectly impacted by the modification to the bycatch reduction criterion. NMFS estimates up to 24 applicants will apply for the BRD certification process during the first year and a smaller number in following years. While the identity of entities that might pursue future BRD testing cannot be determined with any certainty, based on past applicants, BRD testing is expected to be undertaken by NMFS, the Texas Parks and Wildlife Department, the Florida Department of Environmental Protection, Texas A&M University, the University of Georgia, the Gulf and South Atlantic Fisheries Foundation, Inc., other institutions, and owners of shrimp vessels.

There are approximately 700 vessels permitted to operate in the South Atlantic EEZ commercial shrimp fishery. The most current assessment of the South Atlantic commercial shrimp fishery covers the period 2000–2002 and encompasses vessels that operated in both state and EEZ waters. While this assessment covered a larger universe of vessels, an average of approximately 1,900 vessels per year, and different economic conditions, it represents the best profile available at this time. Over this period, average gross revenue per vessel ranged from approximately \$71,000 to approximately \$81,000. The highest gross revenue per vessel from all commercial harvesting activities did not exceed \$1.0 million.

For the Gulf EEZ, as of March 26, 2007, a moratorium permit is required to fish for shrimp. Based on the number of permits issued and number of applications being processed as of November 8, 2007, approximately 2,000 vessels are expected to be issued moratorium permits.

An evaluation of revenue distribution within the Gulf EEZ commercial shrimp fleet by vessel size indicates substantial differences in yearly average revenues between large (at least 60 ft (18.3 m) in length) and small vessels. For the large vessel group, average annual revenues per vessel in 2004 was approximately \$140,000, while the comparable value for small vessels was approximately

\$27,000. Across all vessels, the average annual gross revenue per vessel was approximately \$110,000. Maximum yearly gross revenue reported by a qualifying vessel was approximately \$1,046,000.

On average, small vessels are also smaller in regards to most of their physical attributes (e.g., they use smaller crews, fewer and smaller nets, have less engine horsepower and fuel capacity). Small vessels are also older on average. Large vessels tend to be steel-hulled, whereas fiberglass hulls are most prominent among small vessels, though steel and wood hulls are also common. Nearly two-thirds of large vessels have freezing capabilities while few small vessels have such equipment. Small vessels still rely on ice for refrigeration and storage, though more than one-third of large vessels also rely on ice. Some vessels are so small that they rely on live wells for storage.

An important difference between large and small Gulf EEZ commercial shrimp vessels is with respect to their dependency on the food shrimp fishery. The percentage of revenues arising from food shrimp landings is approximately 81 percent for large vessels, but only approximately 58 percent for small vessels. Thus, on average, large vessels are more dependent than their smaller counterparts on the food shrimp fishery. However, dependency on food shrimp is more variable within the small vessel sector than the large vessel sector. Many small vessels are quite dependent on food shrimp landings, while others illustrate little if any dependency.

Finally, according to recent projections, on average, both small and large Gulf EEZ commercial shrimp vessels are experiencing significant economic losses, ranging from a -27 percent rate of return (net revenues or total fixed and variable costs) in the small vessel sector to a -36 percent rate of return in the large vessel sector (-33 percent on average for the fishery as a whole).

The Small Business Administration (SBA) defines a small organization as any not-for-profit enterprise that is independently owned and operated and not dominant in its field of operation. This definition includes private educational institutions. The SBA also defines a small governmental jurisdiction as the government of cities, counties, towns, townships, villages, school districts, or special districts with a population less than 50,000. Finally, the SBA defines a small business in the commercial fishing activity as an entity that is independently owned and operated, is not dominant in its field of operation (including its affiliates), and

has average annual total receipts not in excess of \$4.0 million annually (NAICS codes 114111 and 114112, finfish and shellfish fishing).

While the identity of entities that might pursue BRD testing cannot be determined with any certainty, based on past applicants, BRD testing is expected to be undertaken by NMFS, the Texas Parks and Wildlife Department, the Florida Department of Environmental Protection, Texas A&M University, the University of Georgia, the Gulf and South Atlantic Fisheries Foundation, Inc., other institutions, and owners of shrimp vessels. The state agencies are extensions of the respective state governments and, as such, clearly exceed the SBA population thresholds for small government entities. Similarly, both Texas A&M University and the University of Georgia are, as public universities, extensions of the respective state government educational systems, with staff being state employees, and, therefore, are similarly classified as large entities. Any private college or university, or non-profit organization that might apply for the BRD testing process is determined for the purpose of this analysis to be a small entity because private educational institutions and small non-profit organizations are generally understood to be smaller in terms of student population, staff, and operational budgets than public institutions. Based on the maximum annual revenue information for Gulf and South Atlantic commercial shrimping operations, vessels that may participate in the certification program are determined to be small business entities for the purpose of this analysis. It is unknown what portion of the estimated maximum 24 entities expected to apply for the certification program the first year, and fewer entities in subsequent years, would be small or large entities.

All entities that receive the Gulf EEZ commercial shrimp fishery moratorium permit may be indirectly affected by the Gulf bycatch reduction criterion. Based on the maximum revenue information for Gulf EEZ commercial shrimping operations, all such vessels are determined, for the purpose of this analysis, to be small business entities.

The measures in this final rule do not affect the reporting or record-keeping requirements for shrimp vessels. This final rule only modifies the performance standards used in BRD certification and does not require new record or report preparation.

The outcome of "significant economic impact" can be ascertained by examining two issues: disproportionality and profitability.

The disproportionality question is: do the final regulations place a substantial number of small entities at a significant competitive disadvantage to large entities? Revision to the Manual is not expected to result in any direct or indirect adverse economic impacts on any affected entities since the reporting burden per applicant will not increase and the revisions, in and of themselves, will not cause any BRDs to be certified, provisionally certified, or decertified in future actions. Therefore, the issue of disproportionate impacts does not apply to this component of the final rule.

Similarly, the change to the Gulf EEZ commercial shrimp fishery bycatch reduction criterion will not result in any direct adverse economic impacts on participants in the Gulf EEZ commercial shrimp fishery. However, the change in the bycatch reduction criterion is expected to generate indirect impacts on vessels in this fishery as a result of future certification, provisional certification, or decertification actions. All of these vessels have been determined to be small business entities. Thus, the issue of disproportionality does not apply to this component of the final rule.

The certifications and provisional certifications will affect all vessels in the Gulf EEZ commercial shrimp fishery, as well as some vessels in the South Atlantic EEZ commercial shrimp fishery. Because all of these entities are determined to be small entities, the issue of disproportionality does not apply to this component of the final rule.

The profitability question is: do the regulations significantly reduce profit for a substantial number of small entities?

The revision of the Manual will not directly affect fishery participation or harvest because it merely establishes procedures under which research and gear development may proceed. The bycatch reduction criterion for the Gulf EEZ commercial shrimp fishery will also not result in any direct adverse economic impacts on fishery participants because it is an administrative action.

In addition to the Modified Jones-Davis BRD, the bycatch reduction criterion will allow for the extended funnel BRD to be provisionally certified for use in the Gulf EEZ shrimp fishery, and the composite panel BRD to be provisionally certified for use in the Gulf and South Atlantic EEZ shrimp fisheries. However, these three BRDs are not presently certified for use by the fleet in the western Gulf, are more costly to purchase, and produce greater shrimp loss, on average, than the predominantly

used fisheye-type BRDs. As such, no shrimp vessel owners are expected to switch from their current BRDs to these BRDs and no direct impacts are expected to result from the certification or provisional certification of these BRDs.

The bycatch reduction criterion will, however, result in decertification of some currently used BRDs through subsequent regulatory action. Decertification of currently used BRDs will require the use of alternative certified or provisionally certified BRDs, with associated re-gearing costs. Among the BRDs currently in use, the maximum first-year re-gearing cost that could be incurred as a result of future decertification would be that associated with the Jones-Davis BRD, which is the most expensive remaining certified BRD, with an estimated cost of \$425 per BRD, and would range from \$2,550 per vessel for six BRDs to \$4,250 per vessel for 10 BRDs, or between 2.3 percent and 3.8 percent of an average vessel's annual revenues. Lowest BRD replacement costs would be associated with a Modified Jones-Davis BRD, with an estimated cost of \$300 per BRD, or \$1,800 to \$3,000 per vessel. Not all vessels would be required to acquire new BRDs, however, since not all current BRDs would be decertified, and the cheapest and currently most commonly used BRD, a fisheye-type BRD, could continue to be used in a different configuration. Although potential resultant shrimp loss would have to be figured into the decision, some fishermen may elect to retain but move the fisheye BRD as opposed to purchasing a different BRD, thus incurring no replacement costs for the gear itself.

Since different BRDs produce different rates of shrimp retention, the decision of which BRD to use impacts gross revenues as well as operational and gear costs. Depending upon the BRD type currently used and the BRD type that might be selected as a replacement, reductions in average annual gross revenues of up to 3 percent have been projected for small vessels and 2 percent for many large vessels. Actual performance would vary, however, as individual vessels adopt the BRD that best meets their skill and fishing behavior in order to minimize costs and maximize revenues. All associated costs will directly accrue, however, only to a subsequent rule and not to the current action.

This final rule will certify the Modified Jones-Davis BRD for the Gulf and South Atlantic EEZ shrimp fisheries, provisionally certify the extended funnel BRD to be used in the

Gulf EEZ shrimp fishery, and provisionally certify the composite panel BRD to be used in the Gulf and South Atlantic EEZ shrimp fisheries. No direct adverse economic impacts will accrue to fishermen in either the Gulf or South Atlantic EEZ shrimp fisheries as a result of these changes because no vessels will be required to use these BRDs. The certification or provisional certification of these BRDs will increase the options available to vessels. Use of these BRDs will be at the discretion of individual fishermen and adoption of the gear would only be expected to occur where it was expected to result in improved economic outcomes.

Two alternatives, the final rule and the status quo, were considered for the action to modify the Manual. The status quo would continue overly restrictive and inflexible testing procedures and would not achieve NMFS' objectives.

Three alternatives, including the status quo, were considered for the change in the BRD bycatch reduction criterion. Two alternatives contained multiple options, resulting in eight effective alternatives. As previously discussed, changing the criterion is an administrative action and would not simultaneously decertify BRDs currently in use or require immediate replacement. Decertification, with attendant costs, however, will occur through subsequent action.

The first alternative to the final bycatch reduction criterion, the status quo, is a specific juvenile red snapper fishing mortality reduction. Maintaining the status quo will result in the decertification of all currently certified BRDs except the Jones-Davis BRD for use in the Gulf. Current data indicate these BRDs do not meet the status quo bycatch reduction criterion. Decertification of these BRDs under the status quo would induce greater industry-wide replacement costs than the bycatch reduction criterion of this final rule because the final rule will allow more BRD options than the single Jones-Davis BRD.

The second alternative to the final bycatch reduction criterion would continue to base the bycatch reduction target on juvenile red snapper, similar to the status quo, but would consider three different minimum thresholds in catch-per-unit-effort (CPUE). The two lower minimum thresholds, 12 percent and 20 percent reductions in juvenile red snapper CPUE, would be expected to allow continued use of the fisheye BRD, resulting in no direct or indirect adverse economic impacts. Neither threshold, however, would meet the objective of the Magnuson-Stevens Act requirement that bycatch be reduced to the extent

practicable. The final rule alternative has been identified to improve overall finfish bycatch reduction including juvenile red snapper at rates higher than specified by these alternatives. The highest red snapper bycatch reduction minimum threshold, a 30 percent reduction in juvenile red snapper CPUE, would be expected to result in the same effects as the status quo, because it has not been demonstrated this goal is achievable, resulting in greater indirect adverse economic impacts than the bycatch reduction criterion of this final rule.

The third alternative to the final bycatch reduction criterion would base the bycatch reduction criterion on all finfish species and considered four minimum thresholds, ranging from 10 to 40 percent. The final rule will establish a 30-percent finfish bycatch reduction minimum threshold. The two lower finfish bycatch reduction minimum thresholds, 10 percent and 20 percent, would be expected to allow continued use of fisheye BRDs, resulting in no direct or indirect adverse economic impacts. However, neither threshold would meet the Magnuson-Stevens Act requirement of achieving bycatch reduction to the extent practicable because several available BRDs are already achieving a 30-percent reduction in finfish bycatch. The highest finfish bycatch reduction minimum threshold, 40 percent, would not be expected to result in any direct adverse economic impacts but would be expected to result in indirect increased gear costs equal to those of the status quo, resulting in greater indirect adverse economic impacts than the bycatch reduction criterion of this final rule. This alternative would also set an excessive standard that few BRD designs could achieve.

Copies of the FRFA are available from NMFS (see **ADDRESSES**).

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare an FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." As part of this rulemaking process, NMFS prepared a fishery bulletin, which also serves as a small entity compliance guide. The fishery bulletin will be sent to all vessel permit holders in the Gulf and South Atlantic shrimp fisheries.

This final rule contains approved collection-of-information requirements--namely, the BRD certification process, consisting of applications for pre-

certification or certification of a new BRD, pre-certification adjusting, the testing itself, the submission of the test results, application for observer position, and references for observers, subject to the Paperwork Reduction Act (PRA). These collection-of-information requirements have been approved by OMB under Control Number 0648-0345. The public reporting burden for this collection of information which includes the application, pre-certification phase, testing, and submission of results, is estimated to average 222 hours per test. The public reporting burden for applying for an observer position will average 1 hour per response, and the burden for obtaining references will average 1 hour per response. The collection consists of an Application Form, Vessel Information Form, Gear Specification Form, TED/BRD Specification Form, Station Sheet Form, Species Characterization Form, Length Frequency Form, and Condition and Fate Form. The average response time for each of these forms is 20 minutes, except for the Species Characterization Form which has a 2.8-hour response time and the Application Form which has a 2.3-hour response time. In addition, 4 hours will be needed to prepare the final report. These burden estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of the collection-of-information requirement, including suggestions for reducing the burden, to NMFS and to OMB (see ADDRESSES).

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

#### List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: February 7, 2008.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

#### PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.41, paragraph (h) is removed and reserved and paragraph (g) is revised to read as follows:

##### § 622.41 Species specific limitations.

\* \* \* \* \*

(g) *BRD requirement for Gulf and South Atlantic shrimp.* On a shrimp trawler in the Gulf EEZ or South Atlantic EEZ, each net that is rigged for fishing must have a BRD installed that is listed in paragraph (g)(2) of this section and is certified or provisionally certified for the area in which the shrimp trawler is located, unless exempted as specified in paragraphs (g)(1)(i) through (iv) of this section. A trawl net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to a sled, door, or other device that spreads the net, or to a tow rope, cable, pole, or extension, either on board or attached to a shrimp trawler.

(1) *Exemptions from BRD requirement*—(i) *Royal red shrimp exemption.* A shrimp trawler is exempt from the requirement to have a certified or provisionally certified BRD installed in each net provided that at least 90 percent (by weight) of all shrimp on board or offloaded from such trawler are royal red shrimp.

(ii) *Try net exemption.* A shrimp trawler is exempt from the requirement to have a certified or provisionally certified BRD installed in a single try net with a headrope length of 16 ft (4.9 m) or less provided the single try net is either placed immediately in front of another net or is not connected to another net.

(iii) *Roller trawl exemption.* A shrimp trawler is exempt from the requirement to have a certified or provisionally certified BRD installed in up to two rigid-frame roller trawls that are 16 ft (4.9 m) or less in length used or possessed on board. A rigid-frame roller trawl is a trawl that has a mouth formed by a rigid frame and a grid of rigid vertical bars; has rollers on the lower horizontal part of the frame to allow the trawl to roll over the bottom and any obstruction while being towed; and has no doors, boards, or similar devices attached to keep the mouth of the trawl open.

(iv) *BRD certification testing exemption.* A shrimp trawler that is authorized by the RA to participate in the pre-certification testing phase or to

test a BRD in the EEZ for possible certification, has such written authorization on board, and is conducting such test in accordance with the “Bycatch Reduction Device Testing Manual” is granted a limited exemption from the BRD requirement specified in this paragraph (g). The exemption from the BRD requirement is limited to those trawls that are being used in the certification trials. All other trawls rigged for fishing must be equipped with certified or provisionally certified BRDs.

(2) *Procedures for certification and decertification of BRDs.* The process for the certification of BRDs consists of two phases—an optional pre-certification phase and a required certification phase. The RA may also provisionally certify a BRD.

(i) *Pre-certification.* The pre-certification phase allows a person to test and evaluate a new BRD design for up to 60 days without being subject to the observer requirements and rigorous testing requirements specified for certification testing in the “Bycatch Reduction Device Testing Manual.”

(A) A person who wants to conduct pre-certification phase testing must submit an application to the RA, as specified in the “Bycatch Reduction Device Testing Manual.” The “Bycatch Reduction Device Testing Manual”, which is available from the RA, upon request, contains the application forms.

(B) After reviewing the application, the RA will determine whether to issue a letter of authorization (LOA) to conduct pre-certification trials upon the vessel specified in the application. If the RA authorizes pre-certification, the RA’s LOA must be on board the vessel during any trip involving the BRD testing.

(ii) *Certification.* A person who proposes a BRD for certification for use in the Gulf EEZ or South Atlantic EEZ must submit an application to test such BRD, conduct the testing, and submit the results of the test in accordance with the “Bycatch Reduction Device Testing Manual.” The RA will issue a LOA to conduct certification trials upon the vessel specified in the application if the RA finds that: The operation plan submitted with the application meets the requirements of the “Bycatch Reduction Device Testing Manual”; the observer identified in the application is qualified; and the results of any pre-certification trials conducted have been reviewed and deemed to indicate a reasonable scientific basis for conducting certification testing. If authorization to conduct certification trials is denied, the RA will provide a letter of explanation to the applicant, together with relevant recommendations

to address the deficiencies resulting in the denial. To be certified for use in the fishery, the BRD candidate must successfully demonstrate a 30 percent reduction in total weight of finfish bycatch. In addition, the BRD candidate must satisfy the following conditions: There is at least a 50-percent probability the true reduction rate of the BRD candidate meets the bycatch reduction criterion and there is no more than a 10-percent probability the true reduction rate of the BRD candidate is more than 5 percentage points less than the bycatch reduction criterion. If a BRD meets both conditions, consistent with the "Bycatch Reduction Device Testing Manual", NMFS, through appropriate rulemaking procedures, will add the BRD to the list of certified BRDs in paragraph (g)(3) of this section; and provide the specifications for the newly certified BRD, including any special conditions deemed appropriate based on the certification testing results.

(iii) *Provisional certification.* Based on data provided consistent with the "Bycatch Reduction Device Testing Manual", the RA may provisionally certify a BRD if there is at least a 50-percent probability the true reduction rate of the BRD is no more than 5 percentage points less than the bycatch reduction criterion, i.e. 25 percent reduction in total weight of finfish bycatch. Through appropriate rulemaking procedures, NMFS will add the BRD to the list of provisionally certified BRDs in paragraph (g)(3) of this section; and provide the specifications for the BRD, including any special conditions deemed appropriate based on the certification testing results. A provisional certification is effective for 2 years from the date of publication of the notification in the **Federal Register** announcing the provisional certification.

(iv) *Decertification.* The RA will decertify a BRD if NMFS determines the BRD does not meet the requirements for certification or provisional certification. Before determining whether to decertify a BRD, the RA will notify the appropriate Fishery Management Council in writing, and the public will be provided an opportunity to comment on the advisability of any proposed decertification. The RA will consider any comments from the Council and public, and if the RA elects to decertify the BRD, the RA will proceed with decertification via appropriate rulemaking.

(3) *Certified and provisionally certified BRDs*—(i) *Certified BRDs.* The following BRDs are certified for use in the Gulf EEZ and South Atlantic EEZ unless indicated otherwise.

Specifications of these certified BRDs are contained in Appendix D to this part.

- (A) Fisheye.
- (B) Gulf fisheye.
- (C) Jones-Davis.
- (D) Modified Jones-Davis.
- (E) Expanded mesh.
- (F) Extended funnel -South Atlantic EEZ only.

(ii) *Provisionally certified BRDs.* The following BRDs are provisionally certified for use in the areas and for the time periods indicated. Specifications of these provisionally certified BRDs are contained in Appendix D to this part.

(A) Extended funnel- Gulf EEZ only; through February 16, 2010.

(B) Composite panel -Gulf EEZ and South Atlantic EEZ; through February 16, 2010.

\* \* \* \* \*

■ 3. In Appendix D to part 622, sections F and G are added to read as follows:

**Appendix D to Part 622—  
Specifications for Certified BRDs**

\* \* \* \* \*

**F. Modified Jones-Davis.**

1. *Description.* The Modified Jones-Davis BRD is a variation to the alternative funnel construction method of the Jones-Davis BRD except the funnel is assembled by using depth-stretched and heat-set polyethylene webbing instead of the flaps formed from the extension webbing. In addition, no hoops are used to hold the BRD open.

2. *Minimum Construction and Installation Requirements.* The Modified Jones-Davis BRD must contain all of the following.

(a) *Webbing extension.* The webbing extension must be constructed from a single rectangular piece of 1 5/8-inch (4.1-cm) stretch mesh number 30 nylon with dimensions of 39 1/2 meshes by 150 meshes. A tube is formed from the extension webbing by sewing the 39 1/2-mesh-sides together.

(b) *Funnel.* The funnel must be constructed from two sections of 1 5/8-inch (4.1-cm) heat-set and depth-stretched polypropylene or polyethylene webbing. The two side sections must be rectangular in shape, 25 meshes on the leading edge by 21 meshes deep. The 25-mesh leading edge of each polyethylene webbing section must be sewn evenly two meshes in from the front of the extension webbing starting 25 meshes from the top center on each side. The 21-mesh edge must be sewn to the extension webbing on a 9-bar and 1-mesh angle in the top and bottom, forming a V-shape funnel.

(c) *Cutting the escape opening.* The leading edge of the escape openings must be located within 18 inches (45.7 cm) of the posterior edge of the turtle excluder device (TED) grid. The area of the escape opening must total at least 635 in<sup>2</sup> (4,097 cm<sup>2</sup>). Two escape openings, 6 meshes wide by 12 meshes deep, must be cut 4 meshes apart in the extension webbing, starting at the top center extension seam, 7 meshes back from the leading edge, and 30 meshes to the left and to the right (total of four openings). The four escape openings must be double selvaged for strength.

(d) *Cone fish deflector.* The cone fish deflector is constructed of 2 pieces of 1 5/8-inch (4.1-cm) polypropylene or polyethylene webbing, 40 meshes wide by 20 meshes in length and cut on the bar on each side forming a triangle. Starting at the apex of the two triangles, the two pieces must be sewn together to form a cone of webbing. The apex of the cone fish deflector must be positioned within 12 inches (30.5 cm) of the posterior edge of the funnel.

(e) *11-inch (27.9-cm) cable hoop for cone deflector.* A single hoop must be constructed of 5/16-inch (0.79-cm) or 3/8-inch (0.95-cm) cable 34 1/2 inches (87.6 cm) in length. The ends must be joined by a 3-inch (7.6-cm) piece of 3/8-inch (0.95-cm) aluminum pipe pressed together with a 1/4-inch (0.64-cm) die. The hoop must be inserted in the webbing cone, attached 10 meshes from the apex and laced all the way around with heavy twine.

(f) *Installation of the cone in the extension.* The apex of the cone must be installed in the extension within 12 inches (30.5 cm) behind the back edge of the funnel and attached in four places. The midpoint of a piece of number 60 twine (or at least 4-mesh wide strip of number 21 or heavier webbing) 3 ft (1.22 m) in length must be attached to the apex of the cone. This piece of twine or webbing must be attached within 5 meshes of the aft edge of the funnel at the center of each of its sides. Two 12-inch (30.5-cm) pieces of number 60 (or heavier) twine must be attached to the top and bottom of the 11-inch (27.9-cm) cone hoop. The opposite ends of these two pieces of twine must be attached to the top and bottom center of the extension webbing to keep the cone from inverting into the funnel.

**G. Composite Panel.**

1. *Description.* The Composite Panel BRD is a variation to the alternative funnel construction method of the Jones-Davis BRD except the funnel is assembled by using depth-stretched and heat-set polyethylene webbing with square mesh panels on the inside

instead of the flaps formed from the extension webbing. In addition, no hoops are used to hold the BRD open.

2. *Minimum Construction and Installation Requirements.* The Composite Panel BRD must contain all of the following:

(a) *Webbing extension.* The webbing extension must be constructed from a single rectangular piece of 1 1/2-inch to 1 5/8-inch (3.8-cm to 4.1-cm) stretch mesh number 30 nylon with dimensions of 24 1/2 meshes by 150 to 160 meshes. A tube is formed from the extension webbing piece by sewing the 24 1/2-mesh sides together. The leading edge of the webbing extension must be attached no more than 4 meshes from the posterior edge of the TED grid.

(b) *Funnel.* The V-shaped funnel consists of two webbing panels attached to the extension along the leading edge of the panels. The top and bottom edges of the panels are sewn diagonally across the extension toward the center to form the funnel. The panels are 2-ply in design, each with an inner layer of 1 1/2-inch to 1 5/8-inch (3.8-cm to 4.1-cm) heat-set and depth-stretched polyethylene webbing and an outer layer constructed of 2-inch (5.1-cm) square mesh webbing (1-inch bar). The inner webbing layer must be rectangular in shape, 36 meshes on the leading edge by 20 meshes deep. The 36-mesh leading edges of the polyethylene webbing should be sewn evenly to 24 meshes of the extension webbing 1 1/2 meshes from and parallel to the leading edge of the extension starting 12 meshes up from the bottom center on each side. Alternately sew 2 meshes of the polyethylene webbing to 1 mesh of the extension webbing then 1 mesh of the polyethylene webbing to 1 mesh of the extension webbing toward the top. The bottom 20-mesh edges of the polyethylene layers are sewn evenly to the extension webbing on a 2 bar 1 mesh angle toward the bottom back center forming a v-shape in the bottom of the extension webbing. The top 20-mesh edges of the polyethylene layers are sewn evenly along the bars of the extension webbing toward the top back center. The square mesh layers must be rectangular in shape and constructed of 2-inch (5.1-cm) webbing that is 18 bars or squares on the leading edge. The depth of the square mesh layer must be no more than 2 inches (5.1 cm) less than the 20 mesh side of the inner polyethylene layer when stretched taught. The 18 bar leading edge of each square mesh layer must be sewn evenly 1 bar to 2 meshes of the 36-mesh leading edge of the polyethylene section and the sides are sewn evenly (in length) to the 20-mesh edges of the

polyethylene webbing. This will form a v-shape funnel using the top of the extension webbing as the top of the funnel and the bottom of the extension webbing as the bottom of the funnel.

(c) *Cutting the escape opening.* There are two escape openings on each side of the funnel. The leading edge of the escape openings must be located on the same row of meshes in the extension webbing as the leading edge of the composite panels. The lower openings are formed by starting at the first attachment point of the composite panels and cutting 9 meshes in the extension webbing on an even row of meshes toward the top of the extension. Next, turn 90 degrees and cut 15 points on an even row toward the back of the extension webbing. At this point turn and cut 18 bars toward the bottom front of the extension webbing. Finish the escape opening by cutting 6 points toward the original starting point. The top escape openings start 5 meshes above and mirror the lower openings. Starting at the leading edge of the composite panel and 5 meshes above the lower escape opening, cut 9 meshes in the extension on an even row of meshes toward the top of the extension. Next, turn 90 degrees, and cut 6 points on an even row toward the back of the extension webbing. Then cut 18 bars toward the bottom back of the extension. To complete the escape opening, cut 15 points forward toward the original starting point. The area of each escape opening must total at least 212 in<sup>2</sup> (1,368 cm<sup>2</sup>). The four escape openings must be double selvaged for strength.

**NOTE:** The "Bycatch Reduction Device Testing Manual" is published, excluding the Manual's appendices, as an appendix to this document. See the contact under **ADDRESSES** to obtain a complete Manual.

The following appendix will not appear in the Code of Federal Regulations.

#### **Appendix—Bycatch Reduction Device Testing Manual**

##### **Definitions**

*Bycatch reduction criterion* is the standard by which a BRD candidate will be evaluated. To be certified for use by the shrimp fishery in the Exclusive Economic Zone off the southeastern United States (North Carolina through Texas), the BRD candidate must demonstrate a successful reduction of total finfish bycatch by at least 30 percent by weight.

*Bycatch reduction device (BRD)* is any gear or trawl modification designed to allow finfish to escape from a shrimp trawl.

*BRD candidate* is a BRD to be tested for certification for use in the commercial shrimp fishery of southeastern United States.

*Certified BRD* is a BRD that has been tested according to the procedure outlined herein and has been determined by the RA as having met the bycatch reduction criterion.

*Control trawl* means a trawl that is not equipped with a BRD during the evaluation.

*Evaluation and oversight personnel* means scientists, observers, and other technical personnel who, by reason of their occupation or scientific expertise or training, are approved by the RA as qualified to evaluate and review the application and testing process.

*Experimental trawl* means the trawl that is equipped with the BRD candidate during an evaluation.

*Net or side bias* means when the net(s) being fished on one side of the vessel demonstrate a different catch rate (fishing efficiency) than the net(s) being fished on the other side of the vessel during paired-net tests.

*Observer* means a person on the list maintained by the RA of individuals qualified (see Appendix H) to supervise and monitor a BRD certification test.

*Paired-net test* means a tow during certification trials where a control net and an experimental net are fished simultaneously, and the catches and catch rates between the nets are compared.

*Provisional Certification Criterion* means a secondary benchmark which would allow a BRD candidate to be used for a time-limited period in the southeastern shrimp fishery. To meet the criterion, the BRD candidate must demonstrate a successful reduction of total finfish bycatch by at least 25 percent by weight.

*Provisionally certified BRD* means a BRD that has been tested according to the procedure outlined herein and has been determined by the RA as having met the provisional certification criterion. A BRD meeting the provisional certification criterion would be certified by the RA for a period of 2 years.

*Regional Administrator (RA)* means the Southeast Regional Administrator, National Marine Fisheries Service.

*Required measurements* refers to the quantification of gear characteristics such as the dimensions and configuration of the trawl, the BRD candidate, the doors, or the location of the BRD in relation to other parts of the trawl gear that are used to assess the performance of the BRD candidate.

*Sample size* means the number of successful tows (a minimum of 30 tows per test are required).

*Shrimp trawler* means any vessel that is equipped with one or more trawl nets whose on-board or landed catch of shrimp is more than 1 percent, by weight, of all fish comprising its on-board or landed catch.

*Successful tow* means that the control and experimental trawl were fished in accordance with the requirements set forth herein and the terms and conditions of the letter of authorization, and there is no indication problematic events, such as those listed in Appendix D-5, occurred during the tow to impact or influence the fishing efficiency (catch) of one or both nets.

*Tow time* means the total time (hours and minutes) an individual trawl was fished (i.e.,

the time interval beginning when the winch is locked after deploying the net overboard, and ending when retrieval of the net is initiated).

*Trawl* means a net and associated gear and rigging used to catch shrimp. The terms trawl and net are used interchangeably throughout this Manual.

*Try net* means a separate net pulled for brief periods by a shrimp trawler to test for shrimp concentrations or determine fishing conditions (e.g., presence or absence of bottom debris, jellyfish, bycatch, and seagrasses).

*Tuning a net* means adjusting the trawl and its components to minimize or eliminate any net or side bias that exists between the two nets that will be used as the control and experimental trawls during the certification test.

## I. Introduction

This Bycatch Reduction Device Testing Manual (Manual) establishes a standardized process for evaluating the ability of bycatch reduction device (BRD) candidates to meet the established bycatch reduction criterion, and be certified for use in the EEZ by the southeastern shrimp fishery. BRDs are required for use in shrimp trawls fished shoreward of the 100-fathom (183-meter) depth contour in the Gulf of Mexico, and within the EEZ of the South Atlantic region.

Various BRD requirements also exist in state waters in the South Atlantic and off Florida and Texas in the Gulf of Mexico. Persons wishing to conduct BRD candidate evaluations exclusively in state waters do not need to apply to NMFS for authorization to conduct these tests, but should contact the appropriate state officials for authorizations. However, for data collected in such evaluations to be considered by NMFS for certification, the operations plan and data collection procedures must meet the criteria established in this Manual.

## II. BRD Candidate Evaluations

### A. Application

Persons interested in evaluating the efficiency of a BRD candidate must apply for, receive, and have on board the vessel during the evaluation, a Letter of Authorization (LOA) from the Regional Administrator (RA). To receive an LOA, the applicant must submit the following documentation to the RA: (1) a completed application form (Appendix A); (2) a brief statement of the purpose and goal of the activity for which the LOA is requested; (3) an operations plan (see Section C below) describing the scope, duration, dates, and location of the test, and methods that will be used to conduct the test; (4) an 8.5-inch x 11-inch (21.6-cm x 27.9-cm) diagram drawn to scale of the BRD design; (5) an 8.5-inch x 11-inch (21.6-cm x 27.9-cm) diagram drawn to scale of the BRD in the shrimp trawl; (6) a description of how the BRD is supposed to work; (7) a copy of the testing vessel's U.S. Coast Guard documentation or its state registration; and (8) a copy of the testing vessel's Federal commercial shrimp vessel permit.

An applicant requesting an LOA to test an unapproved turtle excluder device (TED) as a BRD (including modifications to a TED that

would enhance finfish exclusion) must first apply for and obtain from the RA an experimental TED authorization pursuant to 50 CFR 223.207(e)(2). Applicants should contact the Protected Resources Division of NMFS' Southeast Regional Office for further information. The LOA applicant must include a copy of that authorization with the application.

Incomplete applications will be returned to the applicant along with a letter from the RA indicating what actions the applicant may take to make the application complete.

There is no cost to the applicant for the RA's administrative expenses such as reviewing applications, issuing LOAs, evaluating test results, or certifying BRDs. However, all other costs associated with the actual testing activities are the responsibility of the applicant, or any associated sponsor. If an application for an LOA is denied, the RA will provide a letter of explanation to the applicant, together with relevant recommendations to address the deficiencies that resulted in the denial.

### B. Allowable Activities

Issuance of an LOA to test a BRD candidate in the South Atlantic or Gulf of Mexico allows the applicant to remove or disable the existing certified BRD in one outboard net (to create a control net), and to place the BRD candidate in another outboard net in lieu of a certified BRD (to create an experimental net). All other trawls under tow during the test must have a certified BRD, unless these nets are specifically exempted in the LOA. All trawls under tow during the test must have an approved TED unless operating under an authorization issued pursuant to 50 CFR 223.207(e)(2), whereby the test is being conducted on an experimental TED. The LOA, and experimental TED authorization if applicable, must be on board the vessel while the test is being conducted. The term of the LOA will be 60 days; should circumstances require a longer test period, the applicant may apply to the RA for a 60-day extension.

### C. Operations Plan

An operations plan should be submitted with the application describing a method to compare the catches of shrimp and fish in a control net (net without a BRD candidate installed) to the catches of the same species in an experimental net (a net configured identically to the control net but also equipped with the BRD candidate).

The applicant may choose to conduct a pre-certification test of a prototype BRD candidate. A pre-certification test would be conducted when the intent is to assess the preliminary effectiveness of a prototype BRD candidate under field conditions, and to make modifications to the prototype BRD candidate during the field test. For pre-certification testing, the operations plan must include only a description of the scope, duration, dates, and location of the test, along with a description of methods that will be used to conduct the test. No observer is required for a pre-certification test, but the applicant may choose to use an observer to maintain a written record of the test. The applicant will maintain a written record for both the control and experimental net during

each tow. Mandatory data collection is limited to the weight of the shrimp catch and the weight of the total finfish catch in each test net during each tow. These data must be submitted to NMFS at the conclusion of the test. Although not required, the applicant may wish to incorporate some or all the certification test requirements listed below.

For a BRD candidate to be considered for certification, the operations plan must be more detailed and address the following topics:

(1) The primary assumption in assessing the bycatch reduction efficiency of the BRD candidate during paired net tests is that the inclusion of the BRD candidate in the experimental net is the only factor causing a difference in catch from the control net. Therefore, the nets to be used in the tests must be calibrated (tuned) to minimize, to the extent practicable, any net or side bias in catch efficiency prior to beginning a test series, and tuned again after any gear modification or change. Additional information on tuning shrimp trawls to minimize bias is available from the Harvesting Technology Branch, Mississippi Laboratories, Pascagoula Facility, 3209 Frederic Street, Pascagoula, MS 39568 1207; phone (601) 762 4591.

(2) A standard tow time for a proposed evaluation should be defined. Tow times must be representative of the tow times used by commercial shrimp trawlers. The applicant should indicate what alternatives will be considered should the proposed tow time need adjustment once the test begins.

(3) A minimum sample size of 30 successful tows using a specific BRD candidate design is required for the statistical analysis described in Section F. No alterations of the BRD candidate design are allowed during a specific test series. If the BRD candidate design is altered, a new test series must be started. If a gear change (i.e., changing nets, doors, or rigging) is required, the nets should be tuned again before proceeding with further tests to complete the 30-tow series. Minor repairs to the gear (e.g., sewing holes in the webbing; replacing a broken tickler chain with a new one of the same configuration) are not considered a gear change.

(4) For tests conducted on twin-rig vessels, biases that might result from the use of a try net should be reduced to the extent practicable. Total fishing times for a try net must be a consistent percentage of the total tow time during each tow made in the test.

(5) To incorporate any net or side bias that remains after the tuning tows (e.g., the effect of a try net), or to accommodate for bias that develops between the control and experimental nets during the test, the operations plan should outline a timetable ensuring that an equal number of successful tows are made with the BRD candidate employed in both the port and starboard nets.

(6) Mandatory data to be collected during a test includes: (1) detailed gear specifications as set forth in Appendices B and C, and (2) pertinent information concerning the location, duration and catch from individual tows as set forth in Appendices D and F.

(7) Following each paired tow, the catches from the control and experimental nets must

be examined separately. This requires that the catch from each net be kept separate from each other, as well as from the catch taken in other nets fished during that tow. Mandatory data collections include recording the weight of the total catch of each test net (control and experimental nets), the catch of shrimp (i.e., brown, white, pink, rock, or other shrimp by species) in each test net, and the catch of total finfish in aggregate in each test net.

(8) When recording the detailed information on the species found in the catch, if the catch in a net does not fill one standard 1-bushel [ca. 10 gallon] (30 liters) polyethylene shrimp basket (ca. 70 lb) (31.8 kg), but the tow is otherwise considered successful, data must be collected on the entire catch of the net, and recorded as a "select" sample (see Appendices D and F), indicating that the values represent the total catch of the particular net. If the catch in a net exceeds 70 lb (31.8 kg), a well-mixed sample consisting of one standard 1-bushel [ca. 10 gallon] (30 liters) polyethylene shrimp basket must be taken from the total catch of the net. The total weight of the sample must be recorded, as well as the weights (and numbers as applicable) of the various species or species groups found within that sample. These sample values can then be extrapolated to estimate the quantity of those species or species groups found in the total catch of the particular net.

(9) Although not a criterion for certification, applicants testing BRD candidates are encouraged to collect additional information that may be pertinent to addressing bycatch issues in their respective regions. For example, in the western Gulf of Mexico applicants are especially encouraged to collect information on red snapper. If the applicant chooses to collect these data, the total ("select") catch of the target species from each test net (not just from the sample) should be recorded along with lengths for as many individuals per net per tow as set forth in Appendices E and F. Additional information in regard to the catch can be recorded on forms such as Appendix G.

The operations plan should address what the applicant will do should it become necessary to deviate from the primary procedures outlined in the operations plan. The plan should describe in detail what will be done to continue the test in a reasonable manner that is consistent with the primary procedures. For example, it may become necessary to alter the pre-selected tow time to adapt to local fishing conditions to successfully complete the test. Prior to issuing a LOA, the RA may consult with evaluation personnel to review the acceptability of these proposed alterations.

#### D. Observer Requirements

It is the responsibility of the applicant to ensure that a qualified observer (see Appendix H) is on board the vessel during the certification tests. A list of qualified observers is available from the RA. Observers may include employees or individuals acting on behalf of NMFS, state fishery management agencies, universities, or private industry who meet the minimum requirements

outlined in Appendix H. Any change in information or testing circumstances, such as replacement of the observer, must be reported to the RA within 30 days. Under 50 CFR 600.746, when any fishing vessel is required to carry an observer as part of a mandatory observer program under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801, *et seq.*), the owner or operator of the vessel must comply with guidelines, regulations, and conditions to ensure their vessel is adequate and safe to carry an observer, and to allow normal observer functions to collect information as described in this Manual. A vessel owner is deemed to meet this requirement if the vessel displays one of the following: (i) a current Commercial Fishing Vessel Safety Examination decal, issued within the last 2 years, that certifies compliance with regulations found in 33 CFR chapter I, and 46 CFR chapter I; (ii) a certificate of compliance issued pursuant to 46 CFR 28.710; or (iii) a valid certificate of inspection pursuant to 46 U.S.C. 3311. The observer has the right to check for major safety items, and if those items are absent or unserviceable, the observer may choose not to sail with the vessel until those deficiencies are corrected.

#### E. Reports

A report on the BRD candidate test results must be submitted by the applicant or associated sponsor before the RA will consider the BRD for certification. The report must contain a comprehensive description of the tests, copies of all completed data forms used during the tests, and photographs, drawings, and similar material describing the BRD. The captain, vessel owner, or the applicant must sign and submit the cover form (Appendix I). The report must include a description and explanation of any unanticipated deviations from the operations plan which occurred during the test. These deviations must be described in sufficient detail to indicate the tests were continued in a reasonable manner consistent with the approved operations plan procedures. Applicants must provide information on the cost of materials, labor, and installation of the BRD candidate. In addition, any unique or special circumstances of the tests, such as special operational characteristics or fishing techniques which enhance the BRD's performance, should be described and documented as appropriate.

#### F. Certification

The RA will determine whether the required reports and supporting materials are sufficient to evaluate the BRD candidate's efficiency. The determination of sufficiency would be based on whether the applicant adhered to the prescribed testing procedure or provided adequate justification for any deviations from the procedure during the test. If the RA determines that the data are sufficient for evaluation, the BRD candidate will be evaluated to determine if it meets the bycatch reduction criterion. In making a decision, the RA may consult with evaluation and oversight personnel. Based on the data submitted for review, the RA will determine the effectiveness of the BRD candidate, using appropriate statistical procedures such as

Bayesian analyses, to determine if the BRD candidate meets the following conditions:

(1) There is at least a 50-percent probability that the true reduction rate of the BRD candidate meets the bycatch reduction criterion (i.e., the BRD candidate demonstrates a best point estimate [sample mean] that meets the certification criterion); and

(2) There is no more than a 10-percent probability that the true reduction rate of the BRD candidate is more than 5 percentage points less than the bycatch reduction criterion.

To be certified for use in the fishery, the BRD candidate will have to satisfy both conditions. The first condition ensures that the observed reduction rate of the BRD candidate has an acceptable level of certainty that it meets the bycatch reduction criterion. The second condition ensures the BRD candidate demonstrates a reasonable degree of certainty that the observed reduction rate represents the true reduction rate of the BRD candidate. This determination ensures the operational use of the BRD candidate in the shrimp fishery will, on average, provide a level of bycatch reduction that meets the established bycatch reduction criterion. Interested parties may obtain details regarding the hypothesis testing procedure to be used by contacting the Harvesting Technology Branch, Mississippi Laboratories, Pascagoula Facility, 3209 Frederic Street, Pascagoula, MS 39568 1207; phone (228) 762 4591. Following a favorable determination of the certification analysis, the RA will certify the BRD (with any appropriate conditions as indicated by test results) and add the BRD to the list of certified BRDs in the **Federal Register** through appropriate rulemaking procedures.

In addition, based on the data provided, the RA may provisionally certify a BRD candidate through appropriate rulemaking procedures based on the following condition:

There is at least a 50-percent probability that the true reduction rate of the BRD candidate is no more than 5 percentage points less than the bycatch reduction criterion (i.e., the BRD candidate demonstrates a best point estimate [sample mean] within 5 percentage points of the bycatch reduction criterion).

A provisional certification will be effective for 2 years from the date of publication in the **Federal Register** of a determination of provisional certification. This time period will allow additional wide scale industry evaluation of the BRD candidate, during which additional effort would be made to improve the efficiency of the BRD to meet the certification criterion.

#### III. BRDs Not Certified and Resubmission Procedures

The RA will advise the applicant, in writing, if a BRD is not certified. This notification will explain why the BRD was not certified and what the applicant may do to either modify the BRD or the testing procedures to improve the chances of having the BRD certified in the future. If certification was denied because of insufficient information, the RA will explain what information is lacking. The applicant must

provide the additional information within 60 days from receipt of such notification. If the additional information is not provided within 60 days, the application will be deemed abandoned. If the RA subsequently certifies the BRD, the RA will announce the certification in the **Federal Register**.

#### IV. Decertification of BRDs

The RA will decertify a BRD whenever NMFS determines a BRD no longer satisfies the bycatch reduction criterion. Before determining whether to decertify a BRD, the RA will notify the appropriate Fishery Management Council in writing, and the public will be provided an opportunity to comment on the advisability of any proposed decertification. The RA will consider any comments from the Council and public, and if the RA elects to proceed with decertification of the BRD, the RA will publish proposed and final rules in the **Federal Register** with a comment period of no less than 15 days on the proposed rule.

A provisionally certified BRD is valid for use in the fishery for 2 years from the date of publication of a notice in the **Federal Register**. If no new data are submitted to indicate the efficiency of the BRD has been improved, the RA will remove the BRD from the list of provisionally certified BRDs.

#### V. Interactions with Sea Turtles

The following section is provided for informational purposes. Sea turtles are listed under the Endangered Species Act as either endangered or threatened. The following procedures apply to incidental take of sea turtles under 50 CFR 223.206(d)(1):

“Any sea turtles taken incidentally during the course of fishing or scientific research activities must be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water according to the following procedures:

(A) Sea turtles that are actively moving or determined to be dead (as described in paragraph (B)(4) below) must be released over the stern of the boat. In addition, they must be released only when fishing or scientific collection gear is not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels.

(B) Resuscitation must be attempted on sea turtles that are comatose or inactive by:

(1) Placing the turtle on its bottom shell (plastron) so that the turtle is right side up and elevating its hindquarters at least 6 inches (15.2 cm) for a period of 4 to 24 hours. The amount of elevation depends on the size of the turtle; greater elevations are needed for larger turtles. Periodically, rock the turtle gently left to right and right to left by holding the outer edge of the shell (carapace) and lifting one side about 3 inches (7.6 cm) then alternate to the other side. Gently touch the eye and pinch the tail (reflex test) periodically to see if there is a response.

(2) Sea turtles being resuscitated must be shaded and kept damp or moist but under no circumstance be placed into a container holding water. A water-soaked towel placed over the head, carapace, and flippers is the most effective method in keeping a turtle moist.

(3) Sea turtles that revive and become active must be released over the stern of the boat only when fishing or scientific collection gear is not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels. Sea turtles that fail to respond to the reflex test or fail to move within 4 hours (up to 24, if possible) must be returned to the water in the same manner as that for actively moving turtles.

(4) A turtle is determined to be dead if the muscles are stiff (rigor mortis) and/or the flesh has begun to rot; otherwise, the turtle is determined to be comatose or inactive and resuscitation attempts are necessary.

Any sea turtle so taken must not be consumed, sold, landed, offloaded, transhipped, or kept below deck.”

[FR Doc. E8-2679 Filed 2-12-08; 8:45 am]

**BILLING CODE 3510-22-S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 070213033-7033-01]

RIN 0648-XF55

#### Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Processors Using Hook-and-Line Gear in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific cod by catcher processors using hook-and-line gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season allowance of the 2008 Pacific cod total allowable catch (TAC) allocated to catcher processors using hook-and-line gear in the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), February 8, 2008, through 1200 hrs, A.l.t., June 10, 2008.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Hogan, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S.

vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of the 2008 Pacific cod TAC allocated to catcher processors using hook-and-line gear in the BSAI is 27,979 metric tons (mt) as established by the 2007 and 2008 final harvest specifications for groundfish in the BSAI (72 FR 9451, March 2, 2007) and revision (72 FR 71802, December 19, 2007). See § 679.20(a)(7)(ii)(A)(4), § 679.20(a)(7)(iv)(A)(2), § 679.20(c)(3)(iii), and § 679.20(c)(5).

In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that the A season allowance of the 2008 Pacific cod directed fishing allowance allocated to catcher processors using hook-and-line gear in the BSAI has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher processors using hook-and-line gear in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

#### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by catcher processors using hook-and-line gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 6, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by section 679.20 and is exempt from review under Executive Order 12866.

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