

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 600**

[Docket No. 071121736-91118-03]

RIN 0648-AR78

Magnuson-Stevens Act Provisions; Experimental Permitting Process, Exempted Fishing Permits, and Scientific Research Activity

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

ACTION: Final rule.

SUMMARY: NMFS issues new and revised definitions for certain regulatory terms, and procedural and technical changes to the regulations addressing scientific research activities, exempted fishing, and exempted educational activities under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). This action is necessary to provide better administration of these activities and to revise the regulations consistent with the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA). NMFS intends to clarify the regulations, ensure necessary information to complete required analyses is requested and made available, and provide for expedited review of permit applications where possible.

DATES: Effective September 24, 2009.

ADDRESSES: Written comments regarding burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be sent to Alan Risenhoover, Director, Office of Sustainable Fisheries, 1315 East-West Highway, SSMC3, Silver Spring, MD 20910, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 (Attn: NOAA Desk Officer), or email to David_Rostker@omb.eop.gov, or fax to (202) 395-7285.

Copies of the categorical exclusion (CE) prepared for this action are available from NMFS at the above address or by calling the Office of Sustainable Fisheries, NMFS, at 301-713-2341.

FOR FURTHER INFORMATION CONTACT: Jason Blackburn at 301-713-2341, or by e-mail at jason.blackburn@noaa.gov.

SUPPLEMENTARY INFORMATION:**Background and Need for Action**

On January 12, 2007, the MSRA was enacted. Section 204 of the MSRA added a new Cooperative Research and Management Program section (section 318) to the MSA. Section 318(d) of the revised MSA requires that the Secretary, through NMFS, "promulgate regulations that create an expedited, uniform, and regionally-based process to promote issuance, where practicable, of experimental fishing permits." Under the 1996 exempted fishing regulations, exempted and experimental fishing were treated synonymously as the terms had been used interchangeably in the regions. (March 15, 1996, 61 FR 10712 and May 28, 1996, 61 FR 26435) This rulemaking continues the practice of using the terms interchangeably.

A proposed rule with revisions and updates to the regulations addressing scientific research activities, exempted fishing, and exempted educational activities was published in the **Federal Register** on December 21, 2007 (72 FR 72657), with a comment period ending on March 20, 2008. An extension of the comment period was published on March 18, 2008 (73 FR 14428) that extended the comment period to April 4, 2008. The extension of the comment period for an additional 15 days was intended to ensure that NMFS provided adequate time for fishery management councils, stakeholders and members of the public to comment on the proposed revisions.

Comments and Responses

A total of 18 relevant comment letters were received from regional fishery management councils, environmental organizations, industry representatives, research institutions, and other members of the public. These comments are summarized below.

Compensation Fishing

Comment 1: Several commenters had questions about how compensation fishing can be authorized, including when it requires an EFP.

Response: Compensation fishing is authorized under section 402(e) of the MSA. Historically, the primary purpose of compensation fishing has been to compensate scientific research vessel owners or operators for participating in NMFS sponsored resource surveys. More recently, compensation fishing has also been authorized to compensate vessels participating in scientific research projects conducted by non-governmental institutions where additional fish, outside of the scope of the scientific research plan, are needed to fund the research. The amount of fish

caught during scientific research activities must be limited to only that which is necessary to meet the needs of the research, i.e., the amount identified in the scientific research plan as the necessary sample size to support a robust analysis. Any additional fish needed to compensate vessels for their participation requires evaluation of the effects of this additional mortality on the affected stock(s), for example, to ensure that overfishing does not occur, consistent with National Standard (NS) 1, the NS1 Guidelines, and MSA section 303(a)(15). The following scenarios are provided to assist in determining whether or not compensation fishing requires an EFP: (1) For research projects where the additional mortality associated with the compensation fishing has already been evaluated in a Fishery Management Plan (FMP) or FMP action, which allocates a set amount of fish to a research set-aside (RSA) and includes analysis of the impacts of the action (such as the annual specifications process used for the Mid-Atlantic Council's fisheries), no further analysis is required, and the compensation fishing may not require an EFP, depending on whether exemptions from existing regulations would be requested (e.g., possession limits, seasonal closures, etc.); (2) for research projects where compensation fishing would be consistent with the regulations for the fishery, the compensation fishing would not require an EFP; and (3) for research projects where the additional mortality associated with the compensation fishing has not been evaluated, or where the proposed compensation fishing would require an exemption from a fishery regulation, such as fishing during a closed season or retaining catch in excess of allowable limits, the compensation fishing would require an EFP.

Comment 2: One commenter asked for clarification about whether a contract for compensation fishing can be used in lieu of an EFP outside of the RSA program.

Response: A contract entered into by NMFS to conduct compensation fishing does not exempt the participating vessel(s) from any fishing regulations. An EFP is always required for any fishing activity that would, or has the potential to, violate any fishing regulation (e.g., fishing during a closure or in excess of a possession limit), unless the fishing activity has been approved to be conducted in concert with a scientific research activity that was issued a scientific research permit or a letter of acknowledgment.

Comment 3: Two commenters suggested that creating a new compensation fishing permit would help to streamline the process by alleviating the lengthy EFP review process.

Response: Any permit issued by NMFS is a Federal action, and as such must comply with any and all applicable laws, including the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), and the National Environmental Policy Act (NEPA). Therefore, a separate permit for compensation fishing would require the same review process as an EFP, and would not streamline the process.

Comment 4: Two commenters suggested that NMFS should streamline issuance of an EFP for compensation fishing by issuing the EFP at the same time as the Letter of Acknowledgment (typically occurring when projects utilize multiple vessels to conduct scientific research and compensation fishing), or by combining the EFPs for the principle investigator (PI) and the vessels.

Response: The time frame involved in reviewing applications and issuing Letters of Acknowledgment and EFPs is very different, because issuing an EFP is a Federal action requiring compliance with other applicable laws, while providing a Letter of Acknowledgment does not trigger the same requirements. Issuing both at the same time would essentially delay the receipt of the Letter of Acknowledgment, thus potentially delaying the start of the scientific research. The decision to combine, or not combine, the EFPs for the PI and the vessels should be handled on a case-by-case basis by the Regional Administrator or Director. In the Mid-Atlantic RSA program, the vessels participating in a given project are often listed on one EFP, which is issued to the PI. Other programs and regions may find that a different approach works better under their particular circumstances. Vessels participating in a scientific research activity or compensation fishing should be identified in the Letter of Acknowledgment and/or EFP. It is the PI's responsibility to manage the project and to ensure that all aspects of the project are carried out in accordance with the scientific research plan and the EFP. No research or compensation fishing should occur until the PI has coordinated with the vessel and provided the vessel with a copy of the Letter of Acknowledgment and/or EFP.

Conservation Engineering

Comment 5: Many commenters raised concerns about how the two terms,

“conservation engineering” and “gear testing,” appear to limit the types of cooperative research projects that would be allowed, or not allowed, particularly in light of the very restrictive “gear testing” definition. This caused particular concern for researchers who conduct catch rate comparisons as part of their research protocols. One commenter agreed that the distinction between “conservation engineering” and the “testing of gear” needs to be clarified.

Response: The definition of “scientific research activity” states that such activity does not include “the testing of fishing gear.” As a result, people have obtained EFPs for many projects that might otherwise be considered scientific research. In the proposed rule, NMFS intended the narrow definition of “gear testing,” coupled with the new definition of “conservation engineering,” to allow more projects to be considered scientific research activities that would not require an EFP because scientific research activities are outside of the scope of the MSA. Additionally, the proposed rule referred to testing modified gear as conservation engineering instead of “gear testing.” Due to the breadth of concerns raised about the definition of gear testing, and because the term is often used synonymously with conservation engineering, NMFS removed the definition of gear testing from the final rule. Therefore, as clarification, NMFS emphasizes that according to the MSA definition of fishing, scientific research activities are not fishing. Accordingly, conservation engineering activities that also meet the definition of scientific research activity are not fishing. Alternatively, conservation engineering activities that do not meet the definition of scientific research activity, but that do meet the definition of fishing are fishing, and must be conducted under an EFP if the activity would otherwise be prohibited by regulations under part 600.

Comment 6: Three commenters suggested that the phrase “efficient harvest of target species” in the definition of “conservation engineering” should be interpreted broadly to include projects that focus on environmental efficiency, such as testing methods to reduce fuel consumption and greenhouse gas emissions.

Response: This phrase comes directly from MSA section 404(c)(2). As such its intent is clearly fisheries conservation, and not other forms of environmental conservation, which are outside the scope of the MSA and these regulations. Fishermen will take steps to reduce fuel

consumption and increase efficiency in the course of their normal business.

Comment 7: Two other commenters focused on the phrase “efficient harvest of target species” in the definition of “conservation engineering.” One suggested that the phrase should be revised so that it does not encourage increased catch efficiency, while the other suggested that conservation engineering work should focus on minimizing bycatch while maintaining or increasing target catches.

Response: “Conservation engineering” is defined in the regulations as relating to fisheries conservation and the research being conducted to minimize the unintended impacts of fishing. The phrase “efficient harvest of target species” needs to be considered in the context of “conservation engineering,” which includes “the study of fish behavior and the development and testing of new gear technologies and fishing techniques that reduce collateral effects, such as minimizing bycatch and any adverse effects on EFH.” This definition is intended to promote research that focuses on ways to harvest target species in a manner that conserves and reduces impacts on non-target species. The definition is not intended to promote research that focuses on catching more of the target species.

Comment 8: Another commenter was concerned that the phrase “minimizing bycatch and any adverse affects on EFH” in the definition of “conservation engineering” might be misconstrued as examples of “collateral effects.”

Response: To alleviate possible misunderstandings, the reference to “collateral effects” has been removed from the definition, and the language of MSA section 404(c)(2) has been used verbatim.

Comment 9: One commenter raised concern that some activities that have typically required an EFP in the past may be reclassified as scientific research and would now receive a Letter of Acknowledgment and not have to go through the Council review process associated with EFP proposals.

Response: The new definition of “conservation engineering” and the associated revision of the definition of “scientific research activity” are provided to assist the Regional Administrator or Director in determining whether an activity is, or is not, scientific research. This determination is a matter of interpretation, and the changes to these definitions are provided for clarity. If an activity that would otherwise be considered fishing is determined to be

scientific research, then it is not regulated by the MSA.

Comment 10: One commenter inquired about whether or not “conservation engineering” includes the deployment of modified fishing gear under conditions similar to commercial fishing to assess the effectiveness of the modifications and to make comparisons to gear allowed under regulations.

Response: The expectation is that some conservation engineering projects will indeed need to conduct activities such as those described above in order to scientifically verify the effectiveness of the modified gear. It is very important that the amount of fish taken during such activities be kept to the minimum necessary to achieve a scientifically robust analysis while conserving the resource, and that any mortality is accounted for consistent with NS1, the NS1 Guidelines, and MSA section 303(a)(15), as well as other MSA provisions and other applicable laws, including the ESA. Any additional fish used as compensation for conducting the research must be caught either by fishing consistent with existing regulations or through compensation fishing, which must be approved by NMFS. The definition of conservation engineering has been revised to identify the activity as the development and assessment of fishing technologies and fishing techniques designed to conserve target and non-target species. The language of MSA section 404(c)(2) is then provided as an example of conservation engineering.

Comment 11: Two commenters inquired about what is meant by “new” gear technologies in the definition of “conservation engineering.”

Response: To clarify this point, NMFS added additional language to the definition to indicate that conservation engineering may include the development and assessment of new gear technologies as well as the assessment of existing technologies applied in novel ways. An example would be assessing the ability of a bycatch reduction device (BRD), designed and proven in one fishery, to reduce bycatch in another fishery.

Comment 12: Two commenters suggested that NMFS should ensure that EFPs produce meaningful results and provide information that will advance fishery management, and that the regulations should include a list of requirements for EFPs similar to that provided for conservation engineering and scientific research activities. Another commenter suggested that we remove the requirement that these activities address a testable hypothesis, as this undercuts the validity of

resource surveys, which do not test a hypothesis but instead make scientific observations.

Response: An EFP is a permit issued for an exemption from one or more fishery regulations. There are many reasons for requesting an EFP. Not all EFPs are issued for research purposes or to obtain information for fishery management purposes. The proposed rule included a discussion of conservation engineering and the distinctions between fishing activities that require an EFP and scientific research activities that do not, where a Letter of Acknowledgment is appropriate. Not all scientific research involves testing a hypothesis. Resource surveys by their nature record observations instead of testing a hypothesis. The MSA mandates in section 318(d) that the process be regionally-based. Councils can set research priorities for the fisheries that they manage. It is appropriate to leave the decision regarding the merits of each EFP proposal to the Regional Administrator or Director, with input from the relevant Council and the public obtained during the public comment process.

Comment 13: Three commenters suggested that the discussion about mortality associated with conservation engineering was characterized with unsupported statements and generalizations, and that in some cases the mortality has already been accounted for under the relevant FMP(s).

Response: The proposed rule preamble described conservation engineering and included a description of NMFS concerns about the impacts of conservation engineering activities and the associated mortality. Conservation engineering activities may catch substantial amounts of fish. For example, when conducting catch rate comparisons between experimental and control gear, projects often conduct multiple sets of tows to compare catches. The mortality associated with conservation engineering work needs to be properly accounted for and analyzed, consistent with NS1, the NS1 Guidelines, and MSA section 303(a)(15). If the activity is scientific research, then the activity is not regulated under the MSA, but the mortality should be analyzed under the relevant FMP(s) as scientific research mortality. If the activity is fishing and the fish are landed against the appropriate quota, then the mortality has already been analyzed as part of the FMP action that set the quota (this includes RSA programs). If the activity is fishing and is being conducted under an EFP, then

the mortality should be analyzed as part of the EFP application if it has not already been analyzed elsewhere.

Scientific Research Activity

Comment 14: Several commenters raised concerns with various aspects of the definition of scientific research activity. Some comments focused on the distinction between scientific research and fishing. It was suggested in several comments that work done under an EFP is not considered to be scientific, that there is a perception that EFPs amount to a lower standard of research, and that EFPs are used as a “catch all” for projects that do not meet the specifics of the definition of scientific research.

Response: Scientific research is not regulated by the MSA, and as such it is exempt from fisheries regulations. A definition of scientific research activity is provided to clarify what activities would qualify for such an exemption. Fishing activities that do not meet the definition of scientific research activity, and are prohibited by fishery regulations, require an EFP to exempt the activity from the relevant regulations. The determination that an EFP is necessary does not denigrate the scientific nature of an activity; it simply indicates that some aspect of the activity requires an exemption.

Comment 15: Two commenters inquired about whether or not the fish caught during a research activity can be sold.

Response: Only fish that are caught during a scientific research activity that is within the scope of the scientific research plan may be sold. Under the MSA scientific research activity on board a scientific research vessel is not fishing. Therefore, the sale of fish caught and retained during a scientific research activity that is within the scope of the research plan is not fishing or commercial fishing as defined by the MSA, and the sale of such fish does not change the scientific activity to fishing. Alternatively, the retention and sale of fish exceeding the scope of the research plan is fishing and requires the appropriate permits.

Scientific Research Vessel

Comment 16: Eleven of the 18 commenters had a comment regarding the utilization of commercial fishing vessels as research platforms and many suggested that commercial fishing vessels should be specifically included in the definition of “scientific research vessel.” Many of the comments focused on the ownership or chartering of vessels and on the misconception that commercial fishing vessels can not be

utilized as scientific research vessels under the current regulations.

Response: There were no revisions to the definition of scientific research vessel in the proposed rule. Under current regulations, a commercial fishing vessel can be utilized as a scientific research vessel if: (1) The activities on board the vessel meet the definition of scientific research activity; and (2) the vessel is “owned or chartered by, and controlled by, a ... U.S. Government agency ... U.S. state or territorial agency, university ... or scientific institution.” To date, the evaluation of proposals and the types of vessels being utilized as research platforms has been handled on a case-by-case basis by the Regional Administrator or Director. In some cases, state agencies and scientific institutions conducting research on board commercial fishing vessels have been required to obtain an EFP, while in other cases universities conducting similar research have received a Letter of Acknowledgment. These types of situations have been misconstrued to mean that commercial fishing vessels can not be utilized as research platforms without obtaining an EFP, when in fact that is not the case. Often the more important qualifier is the level of accreditation and/or scientific standing of the scientific institution. NMFS recognizes the importance of having the ability to conduct scientific research on board commercial fishing vessels, both for convenience as well as for necessity of the research. Commercial fishing vessels have been, and may continue to be, utilized as scientific research platforms. The decision to recognize this activity under a Letter of Acknowledgment versus requiring that an EFP be obtained should remain under the purview of the Regional Administrator or Director, be determined on a case-by-case basis, and be based on the merits of the individual proposal and the institution(s) involved, i.e., whether the proposed activity meets the definition of scientific research activity, and whether the vessel meets the definition of scientific research vessel. Allowing the Regional Administrator or Director to make this determination meets the “regionally-based” mandate in MSA section 318(d). Language to this effect has been added to the definition of scientific research vessel that incorporates “commercial fishing vessels” and states that Letter of Acknowledgment versus EFP determinations should be made by the Regional Administrator or Director.

General Comments

Comment 17: Two commenters suggested the introduction of a new term and concept, a NMFS-approved scientific research plan. Under this concept, the scientific research plan would be the document that would be used to determine whether the proposed activity: (1) should be considered a scientific research activity and be recognized with a Letter of Acknowledgment; or (2) should not be considered a scientific research activity and therefore may require an EFP. Using this concept, if NMFS approves the scientific research plan as part of a grant proposal review or other approval process, then the proposal should be deemed a scientific research project, and no further review, approval, or permit should be required.

Response: The determination made by the Regional Administrator or Director, as to whether a project is a scientific research activity, is separate and distinct from the decisions made to fund a project. While funding approval indicates that the project has merit, it does not evaluate the project in the context of the relevant fishery regulations. To create a system to do both would require a major reworking of the existing programs and their processes, and the involvement of all the affected programs. This is beyond the scope of this rulemaking.

Comment 18: Five commenters raised concerns with the proposed exemption of projects funded by quota set-asides from the requirement to publish separate notices in the **Federal Register**, even though notice has already been published in the **Federal Register** as part of the annual specifications process for a program, such as the Mid-Atlantic RSA program. The primary concerns were that this exemption would effectively block a Council's ability to comment on these proposals, and that it may hinder the ability of other concerned parties to comment on the proposed activities.

Response: NMFS agrees that it is important to ensure that the Councils and the public have the ability to comment on all EFP proposals. Therefore, the exemption has been removed from the rule. In addition to NMFS publishing a notice in the **Federal Register** for EFP proposals, Councils may take public comments on EFP proposals at Council meetings, providing additional opportunities for public comment.

Comment 19: One commenter supported the proposed change to the regulations requiring that the Regional Administrator or Director withhold a

Letter of Acknowledgment if they determined that the proposed research activity may require a permit or consultation under ESA, MMPA, or other applicable law, while another commenter was against this approach, indicating that it restricts the Regional Administrator or Director's ability to issue a Letter of Acknowledgment and that it would likely cause delays.

Response: To address these concerns, an alternate approach has been selected that allows the Regional Administrator or Director to provide the applicant with a Letter of Acknowledgment in these cases, but requires that they include text in the Letter of Acknowledgment informing the applicant that they may require a permit or consultation under other laws.

Comment 20: One commenter suggested that these regulations should clarify which activities are commercial fishing, and which are not, for purposes of the MMPA.

Response: Throughout the final rule, clarification has been provided as to when the various activities are fishing under the MSA. It is not appropriate for these regulations to address fishing as it relates to the MMPA.

Comment 21: Three commenters raised concerns about the proposed changes affecting the amount of additional information and the level of analysis required to be submitted with an EFP application. In particular, the level of NEPA analysis was felt to be excessive, potentially requiring an environmental assessment (EA) level of analysis for projects that would likely only require a CE. One commenter supported the development of broad-based analyses under NEPA and ESA that can apply to multiple projects.

Response: The proposed changes were intended to broaden the list of items that need to be considered when reviewing an application, to include items, such as EFH, that have been added to the MSA since the original regulations were published in 1996. The proposed changes were not intended to require EA-level analysis for every proposal prior to application. The agency supports proactive, up-front discussions to alleviate problems during the application and review process. EFP applicants are encouraged to contact the applicable NMFS regional office to discuss the proposed activity prior to submitting an application. Having this initial discussion benefits both parties. The agency becomes aware of the proposed activity and can provide the applicant with information about the relevant regulations and other information pertinent to its application, such as: if the proposed activity is likely

to meet the definition of scientific research activity and be eligible to receive a Letter of Acknowledgment, or if it requires an exemption from a fishery regulation, thus requiring an EFP; and any additional information that is needed for a complete application. This initial discussion also gives the applicant the chance to find out if any other laws may apply (e.g., ESA, MMPA, NEPA, etc.) and what level of NEPA analysis might be required. The agency also supports the combination of groups of associated projects, and their associated applications, analyses, etc., such as the projects funded through the Mid-Atlantic RSA program and the Northeast Cooperative Research Partners Program. The agency has streamlined the process for reviewing applications and combining analyses for these grouped projects. For example, the NEPA analysis for the Mid-Atlantic RSA projects is included as part of the EA for the annual specifications process for the respective FMP(s), thus alleviating the need for each project to do its own analysis. The agency is also open to considering the development of broad-based (umbrella) EFPs for groups of associated projects. This approach is currently being considered for the Cooperative Research Study Fleet in the Northeast region.

Comment 22: Two additional comments also focused on environmental analyses. One recommended that environmental analyses should be completed and made available to the public before the public comment period on an EFP application. The other suggested that collective and cumulative impacts of multiple concurrent EFPs must be evaluated.

Response: The **Federal Register** notice that is published for EFP applications provides a brief description of the proposed activities, and provides contact information for the NMFS staff involved in reviewing such proposals. The public may contact NMFS staff to request a copy of the environmental analyses submitted for the proposed project. Some regions also make their NEPA analyses available through their regional website. NMFS is concerned with the cumulative impacts of multiple concurrent EFP projects. There are NEPA staff located in each NMFS regional office and at NMFS Headquarters. They monitor and track NEPA-related activities under their purview, and perform appropriate analyses, such as cumulative impact analyses, in accordance with national and regional policies and procedures.

Comment 23: Several commenters raised concerns that the proposed rule

did not meet Congress' intent in MSA section 318(d) to "promulgate regulations that create an expedited, uniform, and regionally-based process to promote issuance, where practicable, of experimental fishing permits." Some comments asserted that there was little if any streamlining of the process. Other comments focused on a need for flexibility to address issues on a regional basis, while recognizing that the proposed rule did provide remedies to some existing regional problems. Most of the comments related to MSA language raised concerns that the proposed changes would actually make the EFP process more complex and burdensome.

Response: NMFS believes that the proposed rule does meet Congressional intent. Congress did not provide a definition of "experimental fishing" in the reauthorized MSA and NMFS regulations at § 600.10 have long interpreted "experimental fishing" and "exempted fishing" as synonymous. Therefore, the mandate in section 318(d) was viewed as direction to amend the existing regulations. The existing regulations, in conjunction with the revisions made herein, allow for regional flexibility while also maintaining national consistency. The regulations allow the Regional Administrator or Director to make determinations on a case-by-case basis when this is the best solution to address region and fishery specific issues. This meets the congressional mandate to have a "uniform, and regionally-based process." Part of the concern raised about the additional complexity introduced in the proposed rule directly relates to the proposed definition of "gear testing." The removal of the definition of gear testing, and the further clarification of conservation engineering, scientific research activity, scientific research vessel, and exempted fishing, provides additional clarification to address these concerns. Some conservation engineering projects will now be considered scientific research and will qualify for a Letter of Acknowledgment, thus simplifying and streamlining the review and issuance process for these projects. The process for obtaining EFPs is complex due to the need to comply with other applicable laws (e.g., ESA, MMPA, NEPA, etc.). Where the process becomes the most efficient is in the programs, like the Mid-Atlantic RSA and Northeast Cooperative Research Study Fleet, where the analyses can be performed for all the participating projects at the same time. NMFS encourages the Councils to work with the cooperative research

community and NMFS to increase the use of these types of programs.

Comment 24: One commenter stated that the Councils were not adequately engaged in the preparation of the proposed rule.

Response: NMFS engaged the Councils as allowed under current authorities. NMFS conducted several conference calls with regional office and Council staff to discuss the draft proposed rule. NMFS also briefed the Council Chairs and Executive Directors on the proposed rule at the March 2008 Council Coordination Committee meeting.

Comment 25: One commenter was concerned that the time limit for EFPs specified in the proposed rule in § 600.745(b)(5) is limiting and unnecessary. The commenter indicated that the duration of the permit can be determined during the review of the proposal and can be handled on a case-by-case basis.

Response: The 1-year limit specified in the proposed rule is in the existing regulations, and was not revised in the proposed rule. The only proposed change to this section was the removal of the phrase "unless revoked, suspended, or modified." The relevant paragraph now reads: "Unless otherwise specified in the EFP or a superseding notice or regulation, an EFP is valid for no longer than 1 year. EFPs may be renewed following the application procedures in this section." Therefore, the Regional Administrator or Director continues to have the discretion to issue an EFP for more than 1 year.

Comment 26: One commenter stated that inclusion of terms and conditions in EFPs should not be discretionary.

Response: Section 600.745(b)(3)(v) allows the Regional Administrator or Director the discretion to attach terms and conditions to an EFP on a case-by-case basis, and does not mandate specific terms and conditions, thus allowing for a regionally-based process.

Comment 27: One commenter raised a concern that § 600.745(b)(3)(ii) could be interpreted to mean that NMFS may not have to consult with the Council(s). The commenter felt strongly that all EFP applications should be reviewed by the Council(s), and wanted to ensure that Council review will not be circumvented by the new regulations.

Response: Section 600.745(b)(3)(i) states, "The Regional Administrator or Director also will forward copies of the application to the appropriate Council(s), the USCG, and the appropriate fishery management agencies of affected states ..." This is a mandatory requirement to notify the appropriate Council(s) and other

agencies that an EFP application is under review and provides an opportunity for the Council(s) and agencies to review and provide comment on the application. Further, § 600.745(b)(3)(ii) states, “If the application is complete and warrants additional consultation, the Regional Administrator or Director may consult with the appropriate Council(s) concerning the permit application during the period in which comments have been requested.” This sentence was not revised in the proposed rule. Retaining this wording allows the Councils the flexibility to do their review during a Council meeting, and not necessarily during the comment period.

Comment 28: Two commenters raised issue with the language in § 600.745(b)(1) allowing the collection of a fee for issuance of an EFP.

Response: This language is in the existing regulations, and was not revised in the proposed rule. The language does not mandate that a fee will be charged, it simply allows a fee to be charged.

Comment 29: One commenter recommended that the proposed regulations at § 600.745(b)(1) be revised to clarify that EFPs will not be issued to authorize fishing activities that are inconsistent with the requirements of take reduction plans adopted under the MMPA. Another commenter requested that the regulations clarify when ESA consultation will be required.

Response: NMFS emphasizes that this rulemaking concerns regulations of general applicability. In the course of reviewing each EFP application, NMFS conducts the appropriate level of ESA and MMPA consultation, which require a fact-specific inquiry. Concerns about consistency with any relevant take reduction plans would be evaluated at that time.

Comment 30: One commenter raised a concern with the potential increased expense of particular terms and conditions that may be applied to EFPs under the authority of revised § 600.745(b)(3)(v). They point out that requiring observers, vessel monitoring systems, or other electronic devices as a condition of an EFP may add significant costs to a project, and that such costs should be incorporated into the grant or that compensation fishing should be authorized to help cover the additional expense.

Response: This regulation, which is only slightly modified from the existing requirements in § 600.745(b)(3)(v), was written to provide the Regional Administrator or Director with the flexibility to place specific terms and

conditions within each EFP authorization on a case-by-case basis. NMFS realizes that these additional terms and conditions may increase the cost of conducting the project. When the Regional Administrator or Director requires additional terms and conditions they have made an informed decision that they are necessary.

Comment 31: One commenter raised concerns about the modification of projects issued EFPs. They recommended that any modifications should be clearly documented, and the public should be notified of any such changes.

Response: It is currently left up to the discretion of the Regional Administrator or Director as to whether any proposed modifications will be authorized, and to what extent a modification requires review and consultation. Minor modifications, such as the replacement of one vessel by another similar vessel, are handled as routine. In such circumstances, the principal investigator submits to NMFS information about the new vessel and any additional information required in the applicable region, such as the owner's or operator's signature agreeing to the conditions of the permit. NMFS then evaluates and documents the replacement based on regional policies, which include consideration of the vessel's history of prior fisheries violations, if any, and, in some regions, issuance of a new EFP listing the new vessel. The new vessel must carry the permit on board while conducting EFP activities. Other minor modifications, such as a slight change to the start and end date of a project, are typically handled by conducting an abbreviated review and possibly a consultation process (time and area changes may require ESA, MMPA and/or Habitat consultation), while significant modifications, such as gear changes, requests to enter an adjacent closed area, or substituting a vessel that is not equivalent to the vessel it replaces, are typically handled as a new application, with full review and consultation, as needed.

Comment 32: One commenter raised multiple concerns regarding the level of involvement that NMFS should have with applicants, the amount of assistance provided in the completion of EFP applications, and whether or not resubmissions of previously denied projects should be considered.

Response: NMFS will provide some level of assistance to EFP applicants, as resources and priorities allow. It is at the agency's discretion to decide how much assistance is appropriate given the nature of the situation. These situations

are best handled on a case-by-case basis. All applications for EFPs should be considered, even those that are being resubmitted after being previously denied.

Comment 33: Three commenters raised questions regarding the new regulations added in § 600.745(e) concerning observers. The commenters inquired to whom the regulations applied, and what was meant by “other programs.”

Response: This section was added to specifically address an agency need regarding its ability to place observers on fishing vessels to collect fish and/or data. It applies specifically to the NMFS observer programs, and to NMFS observers, staff, and contractors conducting activities in accordance with approved NMFS observer program sampling protocols. The reference to “other programs” in the preamble of the proposed rule means any other NMFS program besides the NMFS observer program (e.g., the NMFS study fleet program in the Northeast). This section of the regulations is not intended to apply to any other observer programs, such as those associated with any state agency, university, research institution, or industry group. Determining whether another institution requires an EFP shall be based upon the proposed activities and the regulations pertaining to scientific research and exempted fishing.

Changes from Proposed Rule

In § 600.10, the definition of “Compensation fishing” is revised to clarify when an EFP is required.

In § 600.10, the definition of “Conservation engineering” is revised to further describe the types and nature of the activities included, that the assessment of novel uses of existing devices is acceptable, and to clarify when this activity is, and is not, fishing, i.e., when an EFP or a Letter of Acknowledgment is appropriate.

In § 600.10, the definition of “Gear testing” is removed.

In § 600.10, the definition of “Scientific research activity” is revised. The phrase “collateral fishing effects” has been changed to read “collateral effects of fishing.” In addition, the description of when gear testing may or may not be considered scientific research is removed. In the proposed rule the phrase “unless it meets the definition of conservation engineering” was added following the phrase “or the testing of fishing gear.” Since conservation engineering was also added to the list of scientific research activity topics, this phrase is redundant and has been removed.

In § 600.10, the definition of “Scientific research vessel” is revised to clarify that a commercial fishing vessel can be utilized as a scientific research vessel.

In addition, the definitions for compensation fishing, conservation engineering, and scientific research activity in § 600.10 have been streamlined by moving text into the operative regulatory sections. For example, the regulatory language that relates to foreign fishing has been deleted from the definitions and placed in § 600.512(a) for scientific research, and the regulatory language that applies to domestic fishing has been deleted from the definitions and placed in § 600.745(a) for scientific research and § 600.745(b)(1) for exempted fishing.

In §§ 600.512(a) and 600.745(a), the factors that the Regional Administrator or Director should consider when making the determination of whether an activity constitutes scientific research or fishing have been outlined.

In §§ 600.512(a) and 600.745(a), text is added to instruct the Regional Administrator or Director to include text in the Letter of Acknowledgment informing the applicant that the proposed research activity may require a permit or consultation under other applicable laws. The proposed rule had instructed the Regional Administrator or Director not to issue the LOA until these other permits had been obtained. The new approach responds to the proposal as it pertains to fishing under the MSA while informing the applicant of potential issues under other applicable laws. In the same sections, the word “cruise” is replaced with the word “activity.”

In addition, in §§ 600.512(a) and 600.745(a), language has been added to recommend that a copy of the Letter of Acknowledgment accompany any fish, or parts thereof, during any ex-vessel activities, such as transporting the fish or fish parts from the vessel to a laboratory. In §§ 600.745(b)(7) and 600.745(d)(7), language has been added to require that a copy of the EFP or exempted educational activities authorization accompany any fish, or parts thereof, during such activities.

In § 600.745(b)(3)(i), the text that was inserted to exempt research projects funded by quota set-asides from the requirement to publish a separate notice in the **Federal Register** is removed. This alleviates the concerns that were raised about the council review and public comment process for EFP proposals for these types of projects.

In the new § 600.745(b)(4), the requirement to sign the permit is retained, but the requirement to return

a copy of the signed permit is removed. This requirement did not address a current problem, nor did it meet the intent of MSA section 318(d) to expedite the process.

In § 600.745(c)(1), “and the appropriate Regional Administrator or Director” is added so that the NMFS Science Center (fisheries scientists) and the NMFS Regional Office or Office of Sustainable Fisheries (fisheries managers) may receive a copy of a report derived from the research activity.

In § 600.745(c)(2), the requirement to submit a report is revised to set 6 months as the deadline for submission.

In § 600.745(e), the phrase NMFS-approved observer protocols is revised to read “NMFS-approved sea sampling and/or observer protocols.”

The Paperwork Reduction Act public reporting burden-hour estimates have been revised based on updated estimates from the NMFS regional offices.

Classification

The NMFS Assistant Administrator has determined that this rule is consistent with the provisions of sections 318(d), 402(e), and 305(d) of the MSA, other provisions of the MSA, and other applicable law.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities.

This rule provides clarifications of current regulations and information requirements, as well as other administrative requirements regarding scientific research, exempted fishing, and exempted educational activities. The rule serves only to define terms, clarify distinctions among scientific research activity, exempted fishing, and exempted educational activities, and standardize procedures for applying for and issuing EFPs and authorizations for exempted educational activities as allowed under EFPs.

As a result, a final regulatory flexibility analysis is not required and none has been prepared.

This rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA), which has been approved by OMB under Control Number 0648–0309. The public reporting burden for this collection of information is estimated: (1) To average 113 hours per response to send NMFS a copy of a scientific research plan and to average 3 hours per response to

provide a copy of the cruise report or research publication; (2) to average 95 hours per response to complete an application for an EFP and to average 3 hours per response or authorization for an exempted educational activity; and (3) to average 47 hours per response to provide a report at the conclusion of exempted fishing and to average 2 hours per response to provide a report at the conclusion of exempted educational activities, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to the Office of Sustainable Fisheries at the **ADDRESSES** above, and email to David_Rostker@omb.eop.gov, or fax to (202) 395–7285. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to 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 600

Fisheries, Fishing.

Dated: August 19, 2009.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons stated in the preamble, NMFS amends 50 CFR part 600 as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

■ 2. In § 600.10, definitions for “Exempted educational activity”, “Exempted or experimental fishing”, “Region”, “Regional Administrator”, “Science and Research Director”, “Scientific research activity”, and “Scientific research vessel” are revised, and definitions for “Compensation fishing” and “Conservation engineering” are added, in alphabetical order, to read as follows:

§ 600.10 Definitions.

* * * * *

Compensation fishing means fishing conducted for the purpose of recovering costs associated with resource surveys and scientific studies that support the

management of a fishery, or to provide incentive for participation in such studies. Compensation fishing may include fishing during or subsequent to such surveys or studies.

* * * * *

Conservation engineering means the development and assessment of fishing technologies and fishing techniques designed to conserve target and non-target species, and may include the study of fish behavior and the development and testing of new gear technologies and fishing techniques to minimize bycatch and any adverse effects on essential fish habitat and promote efficient harvest of target species. Conservation engineering may include the assessment of existing fishing technologies applied in novel ways. An example would be assessing the ability of a bycatch reduction device (BRD), designed and proven in one fishery, to reduce bycatch in another fishery. Conservation engineering meeting the definition of scientific research activity is not fishing.

* * * * *

Exempted educational activity means an activity that would otherwise be considered fishing, conducted by an educational institution accredited by a recognized national or international accreditation body, of limited scope and duration, that is otherwise prohibited by this chapter VI, but that is authorized by the appropriate Regional Administrator or Director for educational purposes, i.e., the instruction of an individual or group, and authorized capture of only the amount of fish necessary to demonstrate the lesson.

Exempted or experimental fishing means fishing from a vessel of the United States that involves activities otherwise prohibited by this chapter VI, but that are authorized under an exempted fishing permit (EFP). The regulations in § 600.745 refer exclusively to exempted fishing. References elsewhere in this chapter to experimental fishing mean exempted fishing under this part.

* * * * *

Region means one of six NMFS Regional Offices responsible for administering the management and development of marine resources in the United States in their respective geographical areas of responsibility.

Regional Administrator means the Administrator of one of the six NMFS Regions.

* * * * *

Science and Research Director means the Director of one of the six NMFS Fisheries Science Centers described in

Table 1 of § 600.502, or a designee, also known as a Center Director.

* * * * *

Scientific research activity is, for the purposes of this part, an activity in furtherance of a scientific fishery investigation or study that would meet the definition of fishing under the Magnuson-Stevens Act, but for the exemption applicable to scientific research activity conducted from a scientific research vessel. Scientific research activity includes, but is not limited to, sampling, collecting, observing, or surveying the fish or fishery resources within the EEZ, at sea, on board scientific research vessels, to increase scientific knowledge of the fishery resources or their environment, and to test a hypothesis as part of a planned, directed investigation or study conducted according to methodologies generally accepted as appropriate for scientific research. At-sea scientific fishery investigations address one or more topics involving taxonomy, biology, physiology, behavior, disease, aging, growth, mortality, migration, recruitment, distribution, abundance, ecology, stock structure, bycatch or other collateral effects of fishing, conservation engineering, and catch estimation of fish species considered to be a component of the fishery resources within the EEZ. Scientific research activity does not include the collection and retention of fish outside the scope of the applicable research plan, or the testing of fishing gear. Data collection designed to capture and land quantities of fish for product development, market research, and/or public display are not scientific research activities. For foreign vessels, such data collection activities are considered scientific research if they are carried out in full cooperation with the United States.

* * * * *

Scientific research vessel means a vessel owned or chartered by, and controlled by, a foreign government agency, U.S. Government agency (including NOAA or institutions designated as federally funded research and development centers), U.S. state or territorial agency, university (or other educational institution accredited by a recognized national or international accreditation body), international treaty organization, or scientific institution. In order for a domestic commercial fishing vessel to meet this definition, it must be under the control of a qualifying agency or institution, and operate in accordance with a scientific research plan, for the duration of the scientific research activity. In order for a vessel that is owned or chartered and controlled by a

foreign government to meet this definition, the vessel must have scientific research as its exclusive mission during the scientific activity in question, and the vessel operations must be conducted in accordance with a scientific research plan.

* * * * *

■ 3. In § 600.512, paragraph (a) is revised to read as follows:

§ 600.512 Scientific research.

(a) *Scientific research activity.*

Persons planning to conduct scientific research activities on board a scientific research vessel in the EEZ that may be confused with fishing are encouraged to submit to the appropriate Regional Administrator or Director, 60 days or as soon as practicable prior to its start, a scientific research plan for each scientific activity. The Regional Administrator or Director will acknowledge notification of scientific research activity by issuing to the operator or master of that vessel, or to the sponsoring institution, a Letter of Acknowledgment. This Letter of Acknowledgment is separate and distinct from any permit or consultation required under the MMPA, the ESA, or any other applicable law. The Regional Administrator or Director will include text in the Letter of Acknowledgment informing the applicant that such permits may be required and should be obtained from the agency prior to embarking on the activity. If the Regional Administrator or Director, after review of a research plan, determines that it does not constitute scientific research activity but rather fishing, the Regional Administrator or Director will inform the applicant as soon as practicable and in writing. In making this determination, the Regional Administrator, Director, or designee shall consider: the merits of the individual proposal and the institution(s) involved; whether the proposed activity meets the definition of scientific research activity; and whether the vessel meets all the requirements for a scientific research vessel. Foreign vessels that qualify as scientific research vessels and which are engaged in a scientific research activity may only engage in compensation fishing during the scientific research cruise and in accordance with the applicable scientific research plan. The Regional Administrator or Director may also make recommendations to revise the research plan to ensure the activity will be considered to be a scientific research activity. The Regional Administrator or Director may designate a Science and Research Director, or the Assistant

Regional Administrator for Sustainable Fisheries, to receive scientific research plans and issue Letters of Acknowledgment. In order to facilitate identification of the activity as scientific research, persons conducting scientific research activities are advised to carry a copy of the scientific research plan and the Letter of Acknowledgment on board the scientific research vessel and to make it available for inspection upon the request of any authorized officer. It is recommended that for any scientific research activity, any fish, or parts thereof, retained pursuant to such activity be accompanied, during any ex-vessel activities, by a copy of the Letter of Acknowledgment. Activities conducted in accordance with a scientific research plan acknowledged by such a Letter of Acknowledgment are presumed to be scientific research activities. An authorized officer may overcome this presumption by showing that an activity does not fit the definition of scientific research activity or is outside the scope of the scientific research plan.

* * * *

■ 4. In § 600.745:

A. Redesignate paragraphs (b)(3)(v)(C) through (H) as paragraphs (b)(3)(v)(D) through (I), respectively.

B. Redesignate paragraphs (b)(4) through (8) as paragraphs (b)(5) through (9), respectively.

C. Redesignate paragraphs (d)(3)(ii)(B) through (F) as paragraphs (d)(3)(ii)(C) through (G), respectively.

D. Add paragraphs (b)(3)(v)(C), (b)(4), (d)(3)(ii)(B), and (e).

E. Revise paragraphs (a), (b)(1), (b)(2)(v), (b)(3)(i) introductory text, (b)(3)(i)(C), (b)(3)(ii), (b)(3)(iii) introductory text, (b)(3)(iii)(B), (b)(3)(iii)(C), (b)(3)(v) introductory text, (b)(3)(v)(F), (b)(3)(v)(G), (b)(5), (b)(7), (c), (d)(1), (d)(2)(vii), (d)(3)(ii) introductory text, (d)(3)(ii)(E), (d)(3)(iii), and (d)(7).

The revisions and additions read as follows:

§ 600.745 Scientific research activity, exempted fishing, and exempted educational activity.

(a) *Scientific research activity.* Nothing in this part is intended to inhibit or prevent any scientific research activity conducted by a scientific research vessel. Persons planning to conduct scientific research activities on board a scientific research vessel in the EEZ are encouraged to submit to the appropriate Regional Administrator or Director, 60 days or as soon as practicable prior to its start, a scientific research plan for each scientific activity. The Regional Administrator or Director will acknowledge notification of

scientific research activity by issuing to the operator or master of that vessel, or to the sponsoring institution, a Letter of Acknowledgment. This Letter of Acknowledgment is separate and distinct from any permit or consultation required by the MMPA, the ESA, or any other applicable law. The Regional Administrator or Director will include text in the Letter of Acknowledgment informing the applicant that such a permit may be required and should be obtained from the agency prior to embarking on the activity. If the Regional Administrator or Director, after review of a research plan, determines that it does not constitute scientific research but rather fishing, the Regional Administrator or Director will inform the applicant as soon as practicable and in writing. In making this determination, the Regional Administrator, Director, or designee shall consider: the merits of the individual proposal and the institution(s) involved; whether the proposed activity meets the definition of scientific research activity; and whether the vessel meets all the requirements for a scientific research vessel. The Regional Administrator or Director may also make recommendations to revise the research plan to ensure the activity will be considered to be scientific research activity or recommend the applicant request an EFP. The Regional Administrator or Director may designate a Science and Research Director, or the Assistant Regional Administrator for Sustainable Fisheries, to receive scientific research plans and issue Letters of Acknowledgment. In order to facilitate identification of the activity as scientific research, persons conducting scientific research activities are advised to carry a copy of the scientific research plan and the Letter of Acknowledgment on board the scientific research vessel and to make it available for inspection upon the request of any authorized officer. It is recommended that for any scientific research activity, any fish, or parts thereof, retained pursuant to such activity be accompanied, during any ex-vessel activities, by a copy of the Letter of Acknowledgment. Activity conducted in accordance with a scientific research plan acknowledged by such a Letter of Acknowledgment is presumed to be scientific research activity. An authorized officer may overcome this presumption by showing that an activity does not fit the definition of scientific research activity or is outside the scope of the scientific research plan.

(b) * * *

(1) *General.* A NMFS Regional Administrator or Director may authorize, for limited testing, public

display, data collection, exploratory fishing, compensation fishing, conservation engineering, health and safety surveys, environmental cleanup, and/or hazard removal purposes, the target or incidental harvest of species managed under an FMP or fishery regulations that would otherwise be prohibited. Exempted fishing may not be conducted unless authorized by an EFP issued by a Regional Administrator or Director in accordance with the criteria and procedures specified in this section. Compensation fishing must be conducted under an EFP if the activity would otherwise be prohibited by applicable regulations unless the activity is specifically authorized under an FMP or a scientific research permit. Conservation engineering that does not meet the definition of scientific research activity, but does meet the definition of fishing must be conducted under an EFP if the activity would otherwise be prohibited by applicable regulations. Data collection designed to capture and land quantities of fish for product development, market research, and/or public display must be permitted under exempted fishing procedures. An EFP exempts a vessel only from those regulations specified in the EFP. All other applicable regulations remain in effect. The Regional Administrator or Director may charge a fee to recover the administrative expenses of issuing an EFP. The amount of the fee will be calculated, at least annually, in accordance with procedures of the NOAA Handbook for determining administrative costs of each special product or service; the fee may not exceed such costs. Persons may contact the appropriate Regional Administrator or Director to determine the applicable fee.

(2) * * *

(v) The species (target and incidental) expected to be harvested under the EFP, the amount(s) of such harvest necessary to conduct the exempted fishing, the arrangements for disposition of all regulated species harvested under the EFP, and any anticipated impacts on the environment, including impacts on fisheries, marine mammals, threatened or endangered species, and EFH.

* * * *

(3) * * *

(i) The Regional Administrator or Director, as appropriate, will review each application and will make a preliminary determination whether the application contains all of the required information and constitutes an activity appropriate for further consideration. If the Regional Administrator or Director finds that any application does not

warrant further consideration, both the applicant and the affected Council(s) will be notified in writing of the reasons for the decision. If the Regional Administrator or Director determines that any application warrants further consideration, notification of receipt of the application will be published in the **Federal Register** with a brief description of the proposal. Interested persons will be given a 15- to 45-day opportunity to comment on the notice of receipt of the EFP application. In addition, comments may be requested during public testimony at a Council meeting. If the Council intends to take comments on EFP applications at a Council meeting, it must include a statement to this effect in the Council meeting notice and meeting agenda. Multiple applications for EFPs may be published in the same **Federal Register** document and may be discussed under a single Council agenda item. The notification may establish a cut-off date for receipt of additional applications to participate in the same, or a similar, exempted fishing activity. The Regional Administrator or Director will also forward copies of the application to the Council(s), the U.S. Coast Guard, and the appropriate fishery management agencies of affected states, accompanied by the following information:

* * * * *

(C) Biological information relevant to the proposal, including appropriate statements of environmental impacts, including impacts on fisheries, marine mammals, threatened or endangered species, and EFH.

(ii) If the application is complete and warrants additional consultation, the Regional Administrator or Director may consult with the appropriate Council(s) concerning the permit application during the period in which comments have been requested. The Council(s) or the Regional Administrator or Director shall notify the applicant in advance of any public meeting at which the application will be considered, and offer the applicant the opportunity to appear in support of the application.

(iii) As soon as practicable after receiving a complete application, including all required analyses and consultations (e.g., NEPA, EFH, ESA and MMPA), and having received responses from the public, the agencies identified in paragraph (b)(3)(i) of this section, and/or after the consultation, if any, described in paragraph (b)(3)(ii) of this section, the Regional Administrator or Director shall issue the EFP or notify the applicant in writing of the decision to deny the EFP and the reasons for the denial. Grounds for denial of an EFP

include, but are not limited to, the following:

* * * * *

(B) According to the best scientific information available, the harvest to be conducted under the permit would detrimentally affect the well-being of the stock of any regulated species of fish, marine mammal, threatened or endangered species, or EFH; or

(C) Issuance of the EFP would have economic allocation as its sole purpose (other than compensation fishing); or

* * * * *

(v) The Regional Administrator or Director should attach, as applicable, terms and conditions to the EFP, consistent with the purpose of the exempted fishing and as otherwise necessary for the conservation and management of the fishery resources and the marine environment, including, but not limited to:

* * * * *

(C) A citation of the regulations from which the vessel is exempted.

* * * * *

(F) Whether observers, a vessel monitoring system, or other electronic equipment must be carried on board vessels operating under the EFP, and any necessary conditions, such as predeployment notification requirements.

(G) Data reporting requirements necessary to document the activities, including catches and incidental catches, and to determine compliance with the terms and conditions of the EFP and established time frames and formats for submission of the data to NMFS.

* * * * *

(4) *Acknowledging permit conditions.* Upon receipt of an EFP, the permit holder must date and sign the permit, and retain the permit on board the vessel(s). The permit is not valid until signed by the permit holder. In signing the permit, the permit holder:

(i) Agrees to abide by all terms and conditions set forth in the permit, and all restrictions and relevant regulations; and

(ii) Acknowledges that the authority to conduct certain activities specified in the permit is conditional and subject to authorization and revocation by the Regional Administrator or Director.

(5) *Duration.* Unless otherwise specified in the EFP or a superseding notice or regulation, an EFP is valid for no longer than 1 year. EFPs may be renewed following the application procedures in this section.

* * * * *

(7) *Inspection.* Any EFP issued under this section must be carried on board

the vessel(s) for which it was issued. The EFP must be presented for inspection upon request of any authorized officer. Any fish, or parts thereof, retained pursuant to an EFP issued under this paragraph must be accompanied, during any ex-vessel activities, by a copy of the EFP.

* * * * *

(c) *Reports.* (1) NMFS requests that persons conducting scientific research activities from scientific research vessels submit a copy of any report or other publication created as a result of the activity, including the amount, composition, and disposition of their catch, to the appropriate Science and Research Director and Regional Administrator or Director.

(2) Upon completion of the activities of the EFP, or periodically as required by the terms and conditions of the EFP, persons fishing under an EFP must submit a report of their catches and any other information required, to the appropriate Regional Administrator or Director, in the manner and within the time frame specified in the EFP, but no later than 6 months after concluding the exempted fishing activity. Persons conducting EFP activities are also requested to submit a copy of any publication prepared as a result of the EFP activity.

(d) * * *

(1) *General.* A NMFS Regional Administrator or Director may authorize, for educational purposes, the target or incidental harvest of species managed under an FMP or fishery regulations that would otherwise be prohibited. The trade, barter or sale of fish taken under this authorization is prohibited. The decision of a Regional Administrator or Director to grant or deny an exempted educational activity authorization is the final action of NMFS. Exempted educational activities may not be conducted unless authorized in writing by a Regional Administrator or Director in accordance with the criteria and procedures specified in this section. Such authorization will be issued without charge.

(2) * * *

(vii) The species and amounts expected to be caught during the exempted educational activity, and any anticipated impacts on the environment, including impacts on fisheries, marine mammals, threatened or endangered species, and EFH.

* * * * *

(3) * * *

(ii) The Regional Administrator or Director should attach, as applicable, terms and conditions to the authorization, consistent with the

purpose of the exempted educational activity and as otherwise necessary for the conservation and management of the fishery resources and the marine environment, including, but not limited to:

* * * * *

(B) A citation of the regulations from which the vessel is being exempted.

* * * * *

(E) Data reporting requirements necessary to document the activities and to determine compliance with the terms and conditions of the exempted educational activity.

* * * * *

(iii) The authorization will specify the scope of the authorized activity and will include, at a minimum, the duration, vessel(s), persons, species, and gear involved in the activity, as well as any additional terms and conditions specified under paragraph (d)(3)(ii) of this section.

* * * * *

(7) *Inspection.* Any authorization issued under this paragraph (d) must be carried on board the vessel(s) for which it was issued, or be in the possession of at least one of the persons identified in the authorization, who must be present while the exempted educational activity is being conducted. The authorization must be presented for inspection upon request of any authorized officer. Activities that meet the definition of "fishing," despite an educational purpose, are fishing. An authorization may allow covered fishing activities; however, fishing activities conducted outside the scope of an authorization for exempted educational activities are illegal. Any fish, or parts thereof, retained pursuant to an authorization issued under this paragraph must be accompanied, during any ex-vessel activities, by a copy of the authorization.

(e) *Observers.* NMFS-sanctioned observers or biological technicians conducting activities within NMFS-approved sea sampling and/or observer protocols are exempt from the requirement to obtain an EFP. For purposes of this section, NMFS-sanctioned observers or biological technicians include NMFS employees, NMFS observers, observers who are employees of NMFS-contracted observer providers, and observers who are employees of NMFS-permitted observer providers.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 090324366-9371-01]

RIN 0648-XQ50

Fisheries Off West Coast States; Modifications of the West Coast Commercial and Recreational Salmon Fisheries; Inseason Actions #1, #2, and #3

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

ACTION: Modification of fishing seasons, gear restrictions, and landing and possession limits; request for comments.

SUMMARY: NOAA Fisheries announces three inseason actions in the ocean salmon fisheries. Inseason action #1 modified the commercial fishery in the area from Cape Falcon, Oregon to Humbug Mountain, Oregon, and from Humbug Mountain, Oregon to the Oregon/California Border. Inseason action #2 modified the recreational fishery in the area from Cape Falcon, Oregon to Humbug Mountain, Oregon. Inseason action #3 modified the commercial fishery in the area from U.S./Canada Border to Cape Falcon, Oregon.

DATES: Inseason actions #1 and #2 were effective on March 15, 2009, until replaced by the 2009 management measures, May 1, 2009. Inseason action #3 was effective on July 18, 2009 and remains in effect until the closing date or attainment of the subarea quotas, whichever was first, as announced in the 2009 annual management measures or through additional inseason action. Comments will be accepted through September 9, 2009.

ADDRESSES: You may submit comments, identified by 0648-XQ50, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>
- Fax: 206-526-6736, Attn: Peggy Busby
- Mail: 7600 Sand Point Way NE, Building 1, Seattle, WA, 98115

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter

may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Peggy Busby, by phone at 206-526-4323.

SUPPLEMENTARY INFORMATION: In the 2008 annual management measures for ocean salmon fisheries (73 FR 23971, May 1, 2008), NMFS announced the commercial and recreational fisheries in the area from the U.S./Canada Border to the U.S./Mexico Border.

On March 10, 2009, the Regional Administrator (RA) consulted with representatives of the Pacific Fishery Management Council (Council), Washington Department of Fish and Wildlife, Oregon Department of Fish and Wildlife, and California Department of Fish and Game. Information related to catch to date, Chinook and coho catch rates, and possible impacts to Sacramento Fall Chinook were discussed. These inseason actions were taken because these fisheries were to occur in the impact area for Sacramento Fall Chinook. Preliminary projections suggested this stock was at risk of not meeting its escapement goal in 2009 and therefore consistent with the Magnuson-Stevens Act, all fisheries that impact the stock were potentially to remain closed until the 2009 management measures became effective on May 1, 2009. By moving the opening dates of these fisheries NMFS and the Council would have more time to evaluate the impacts of these fisheries on the Sacramento River fall Chinook stock.

As a result, on March 10, 2009, the states recommended, and the RA concurred that inseason actions #1 and #2 would cancel the previously scheduled March 15, 2009, fishery opening date for the (a) commercial fishery in the area from Cape Falcon, Oregon to Humbug Mountain, Oregon, and from Humbug Mountain, Oregon to the Oregon/California Border and (b) the recreational fishery in the area from Cape Falcon, Oregon, to Humbug Mountain, Oregon. Modification in quota and/or fishing seasons is authorized by regulations at 50 CFR 660.409(b)(1)(I).

In the 2009 annual management measures for ocean salmon fisheries (74 FR 20610, May 5, 2009), NMFS announced the commercial and