

beginning of the following fishing year, to maintain the SWG commercial quota for that following year at the level of the prior year's quota. The applicable commercial ACLs for SWG, in gutted weight, are 7.99 million lb (3.62 million kg) for 2010, and 8.04 million lb (3.65 million kg) for 2011 and subsequent fishing years.

\* \* \* \* \*

(4) \* \* \*

(i) *Commercial fishery.* If gag commercial landings exceed the applicable ACL as specified in this paragraph (a)(4)(i), the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to maintain the gag commercial quota for that following year at the level of the prior year's quota. The applicable commercial ACLs for gag, in gutted weight, are 1.71 million lb (0.78 million kg) for 2010, and 1.76 million lb (0.80 million kg) for 2011 and subsequent fishing years.

\* \* \* \* \*

(5) \* \* \*

(i) *Commercial fishery.* If red grouper commercial landings exceed the ACL, 5.87 million lb (2.66 million kg) gutted weight, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year, to maintain the red grouper commercial quota for that following year at the level of the prior year's quota.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 070718366-7372-01]

RIN 0648-AV32

#### Fisheries of the Exclusive Economic Zone off Alaska; Maximum Retainable Amounts for Non-American Fisheries Act Trawl Catcher/Processors

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

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** NMFS withdraws the proposed rule to revise accounting regulations for maximum retainable amounts of selected groundfish species caught by trawl catcher/processers that

are not eligible under the American Fisheries Act to participate in directed fishing for pollock (February 13, 2009). Thus, the current maximum retainable amounts accounting regulations remain in effect for the following species: yellowfin sole, rock sole, flathead sole, "other flatfish," arrowtooth flounder, Pacific cod, and Atka mackerel in the Bering Sea and Aleutian Islands management area and for Pacific ocean perch in the Aleutian Islands.

**FOR FURTHER INFORMATION CONTACT:** Jeff Hartman, 907-586-7442

#### SUPPLEMENTARY INFORMATION:

##### Background

NMFS manages the groundfish fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands Management Area (BSAI) under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Area (FMP), which was prepared by the North Pacific Fishery Management Council (Council) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* Regulations implementing the FMP appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

Maximum retainable amounts (MRAs) assist in limiting catch of a species within its annual total allowable catch (TAC). Once the TAC for a species is reached, retention of that species becomes prohibited and all catch of that species must be discarded. NMFS closes a species to directed fishing before the entire TAC is taken to leave sufficient amounts of the TAC available for incidental catch. The amount of the TAC remaining available for incidental catch is managed by a species-specific MRA. The MRA is the maximum round weight of a species closed to directed fishing that may be retained onboard a vessel. MRAs are calculated as a percentage of the weight of catch of each species open to directed fishing (the basis species) that is retained onboard the vessel. If the MRA for a species is 35 percent, then the round weight of the retained incidental species must be no more than 35 percent of the round weight of basis species. Directed fishing is defined in 50 CFR part 679 as "any fishing activity that results in the retention of an amount of a species or species group onboard a vessel that is greater than the MRA for that species or species group." Table 11 to 50 CFR part 679 lists each incidental catch and basis species and the MRA of each incidental

catch species as a percentage of each basis species.

Current regulations at § 679.20(e) require, with one exception for pollock, that the MRAs apply at any time during a fishing trip. This MRA accounting period is known as "instantaneous," because the MRA may not be exceeded at any point in time during the fishing trip. The exception to this requirement, implemented in 2004 to reduce regulatory discards of pollock, allows the MRA for pollock retained by non-American Fisheries Act (AFA) vessels to apply at the end of each offload rather than at any time during the trip. Regulatory discards of a species occur when regulations prohibit retention of some portion of the catch for a species that is closed to directed fishing.

The amount and rate of groundfish discards resulting from the non-AFA trawl catcher/processor (C/P) sector have been a continuing issue with the Council. These vessels have among the highest groundfish discard (and lowest retention) amounts and rates compared with other processing sectors participating in the BSAI groundfish fisheries.

At the October 2005 Council meeting, the non-AFA trawl C/P sector proposed a way to further reduce its regulatory discards. Sector representatives noted that substantial portions of groundfish discard in the BSAI are regulatory discards. They testified that increasing the MRA accounting and calculation interval from "instantaneous" to a one-time calculation at the time of offload would allow more time to accumulate species open to directed fishing to use as a basis for the MRA, i.e., for retaining catch of species closed to directed fishing. The sector predicted that additional time to accumulate basis species would reduce the amount of regulatory discards, particularly in situations when relatively high rates of incidentally caught species were taken early in a fishing trip.

The Council took the sector's proposal under consideration because of the multi-species nature of the sector's fisheries and its longstanding difficulties in reducing discards. The action was also intended to provide an opportunity for non-AFA trawl C/Ps to minimize bycatch and so would be consistent with National Standard 9 of the Magnuson Stevens Act. National Standard 9 requires that conservation and management measures minimize bycatch and, to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

Although the Council's action provided relief from the "instantaneous" accounting interval, the

Council determined that a relaxed interval would increase incentives to harvest incidental catch in Steller sea lion protection areas. To address this problem, the Council decided that a new fishing trip would begin or end any time a non-AFA trawl C/P would enter or leave a Steller sea lion protection area that was closed to directed fishing for Atka mackerel or Pacific cod. Currently, regulations provide that a new fishing trip is triggered when a vessel enters or exits an area where a different directed fishing prohibition applies, including Steller sea lion protection areas. However, when directed fishing for Pacific cod or Atka mackerel is closed both inside and outside a Steller sea lion protection area, entering or exiting the Steller sea lion protection area does not trigger the start of a new fishing trip because the directed fishing prohibitions are the same on either side of the Steller sea lion protection area. This allows vessels to retain Pacific cod or Atka mackerel caught inside a Steller sea lion protection area using target species (basis species) retained from outside the Steller sea lion protection areas. The Council's action to require that a new fishing trip start each time a vessel enters or leaves a Steller sea lion protection area, regardless of the fishery closures in effect outside the Steller sea lion protection areas, would limit the potential to top-off and target Pacific cod or Atka mackerel inside the protection areas. The new fishing trip trigger also would facilitate NMFS' monitoring MRA compliance inside the Steller sea lion protection areas (at the end of the trip for some species and at any point in time for other species). In response to the Council's 2006 action, NMFS published a proposed rule (74 FR 7209, February 13, 2009). A detailed description of the proposed changes to MRA accounting is included in the proposed rule. To provide the non-AFA trawl C/P sector additional flexibility to increase retention and decrease regulatory discards of certain groundfish species, NMFS proposed to change the MRA calculation timing from "instantaneous" to instead occur at the end of a fishing trip. Consistent with the Council motion, instantaneous MRA accounting would continue to apply inside Steller sea lion protection areas. NMFS proposed to revise the definition of a fishing trip at § 679.2 to require that a new fishing trip would start or end when a non-AFA trawl C/P entered or exited a Steller sea lion protection area that was closed to directed fishing for Pacific cod or Atka mackerel.

A key element of the proposed rule would have established how MRAs

would be applied to Atka mackerel and Pacific cod in the BSAI. The proposed rule also would have clarified that the location of Atka mackerel and Pacific cod retained catch could impact MRA accounting requirements, depending upon whether these species were retained inside or outside a designated Steller sea lion protection area. For example, if a non-AFA trawl C/P completed one fishing trip inside a Steller sea lion protection area and a second fishing trip outside a Steller sea lion protection area, two different MRA accounting intervals would have applied to retention of Atka mackerel, as long as a single haul did not occur on both sides of a Steller sea lion protection area. For a non-AFA trawl C/P in an Amendment 80 cooperative, if Atka mackerel were closed to directed fishing both inside and outside the Steller sea lion protection area, MRAs would have applied at any time (i.e., "instantaneously") during that fishing trip inside the Steller sea lion protection area, and MRAs would not apply outside the Steller sea lion protection area. For a non-AFA trawl C/P that was not in an Amendment 80 cooperative, if Atka mackerel were closed to directed fishing both inside and outside the Steller sea lion protection area, MRAs also would have applied at any time during that fishing trip inside the Steller sea lion protection area, and would have applied at the end of a fishing trip outside the Steller sea lion protection area.

Since the Council recommended this action, two significant programs (Amendment 79 and Amendment 80) have been implemented by the Secretary to improve utilization and retention of groundfish caught by the non-AFA trawl C/P sector in the BSAI. Amendment 79 (71 FR 17362, April 6, 2006) implemented the groundfish retention standard (GRS), requiring all vessels in this sector that are greater than or equal to 125 ft. (38.1 m) to comply with a minimum annual percent of total groundfish caught. The GRS rate for 2009 requires that vessels retain 75 percent of all groundfish caught. The GRS increase from the baseline of 65 percent in 2008 to the current level has been effective in increasing this sector's retained catch of groundfish. The GRS requires this sector to continue to increase the percentage of retained catch of groundfish to 85 percent by 2011.

The Amendment 80 cooperative program (72 FR 52668, September 14, 2007) extended the GRS to all vessels in the non-AFA trawl C/P sector, regardless of length, and developed a cooperative structure for the sector that is intended to encourage additional

retention and utilization of groundfish. By extending the scope of the GRS to smaller vessels in the sector and by establishing a limited access permit program (LAPP) program authorizing annual groundfish allocations to the sector, Amendment 80 was intended to encourage fishing practices that would lower groundfish discard rates. Because the direct groundfish allocations of species under Amendment 80 included five of the eight included in this MRA accounting proposed rule, many of these important species no longer are closed to directed fishing, thereby negating some of the potential impacts of this proposed action. The species allocated by Amendment 80 to this sector are yellowfin sole, flathead sole, rock sole, Atka mackerel and Pacific cod.

### Response to Comments

The proposed rule was published in the **Federal Register** for a 30-day public review and comment period. A total of five written submissions were received. Four of the comment submissions were opposed to revising MRA accounting for non-AFA trawl C/Ps in the BSAI, no comments were in favor, and one comment addressed issues not within the scope of the proposed rule. Commenters included two representatives of the non-AFA trawl C/P sector, representing all but one of the 21 vessels in that sector, and the general public.

*Comment 1:* The costs of the action to the non-AFA trawl C/P sector would exceed the benefits. The proposed regulation to trigger a new fishing trip any time a vessel enters or exits a Steller sea lion could reduce the amount of valuable incidental catch, such as Atka mackerel and Pacific cod, that may be retained from inside the Steller sea lion protection areas when compared to retention allowed under current regulations. The potential reduction in the value of retained incidental catch as a result of the new fishing trip trigger likely would exceed any increase in the value of returned incidental catch as a result of the longer MRA accounting period.

*Response:* The proposed action relied on previous industry testimony indicating this action would increase the value of groundfish catch to the non-AFA trawl C/P sector. Now, representatives for this sector assert in their comments that this is not the case because the proposed rule requires instantaneous accounting with an additional fishing trip trigger for a new logbook entry to accurately account for MRAs inside Steller sea lion protection areas. NMFS' response to Comment 6 explains that the additional fishing trip

trigger and logbook entry are provisions necessary to support the action, as they allow for accurate estimates of the amount of Atka mackerel and Pacific cod retained in Steller sea lion protection areas. NMFS has no data or information other than these public comments from members of the non-AFA trawl C/P sector to conclude that the costs of the proposed trip trigger differ from those suggested in public comment. Those who submitted public comments on this issue represent directly or indirectly all but one of the vessels in the non-AFA trawl C/P sector. Thus, NMFS believes that the concerns expressed in these comments are representative of the overall interests of the affected sector. No contrary information or comment was received from any other sector members.

*Comment 2:* The proposed measures will not improve retention of groundfish and may increase regulatory discards of some groundfish species. Instantaneous MRA accounting will reduce the amount of Atka mackerel and Pacific cod that can be retained from catch inside the Steller sea lion protection areas. If a non-AFA trawl C/P operator completed a trawl tow where the amount of Atka mackerel caught in the Steller sea lion protection area exceeded the available basis species inside the Steller sea lion protection area, the amount of Atka mackerel exceeding the MRA percent for an amount of basis species must be discarded. Under the current regulation, if the same operator preferred to retain Atka mackerel caught inside a Steller sea lion protection area, it would be possible for the operator to continue to fish outside this area, to catch sufficient amounts of basis species to stay at or under the Atka mackerel MRA.

*Response:* One of the assumptions supporting the proposed rule was that this action would provide tools for reducing regulatory discards. Consistent with the Council action, NMFS determined that the proposed rule must include a trip trigger for vessels entering or exiting Steller sea lion trip protection areas (see response to Comment 6). Comments from the non-AFA trawl C/P sector support a determination that the new trip trigger would reduce the sector's opportunity to retain groundfish vis-a-vis the MRA provisions. Thus, this action is unlikely to achieve the objectives intended by the Council and identified as the purpose and need statement for the proposed rule. NMFS does not have any data or information to confirm a different outcome than the commenter suggests, has no reason to doubt the accuracy of this public comment, and assumes that it is correct.

*Comment 3:* This regulation is unnecessary because other more effective means of reducing regulatory discards exist. For example, one tool in 50 CFR 679.27 for improving groundfish retention for non-AFA trawl C/Ps is the Groundfish Retention Standard (GRS), and a second tool is the fishing cooperative that many of these vessels joined under Amendment 80. These tools are more effective in improving the sector's retention of groundfish than the expanded MRA accounting period developed in this proposed rule.

*Response:* NMFS agrees that the GRS is likely to be a more effective tool for reducing regulatory discards in the non-AFA trawl C/P sector compared with the tools provided by this proposed rule. Since the time of Council action, the GRS and Amendment 80 allocations and cooperative formation programs have been instituted to facilitate retention and reduce discards. The GRS sets specific retention requirements for groundfish, caught both as targets and incidentally, that increase annually from 65 percent in 2009 to 85 percent by 2011. It is likely that the GRS will compel members of this sector to increase groundfish retention until the maximum GRS is reached. NMFS does not have sufficient data at this time to determine if the cooperative formed under Amendment 80 has increased groundfish retention because it has only been in operation for less than two years.

*Comment 4:* The proposed new fishing trip trigger in the proposed rule would cause additional confusion for tracking compliance with MRAs for the non-AFA trawl C/P sector. Under the proposed rule a vessel operator would need to comply with additional recordkeeping by filling out a new logsheet page each time the vessel entered or exited the Steller sea lion protection area. That operator would also need to document for NOAA Office for Law Enforcement that he has retained the necessary basis species from within a Steller sea lion protection area to match an amount of Atka mackerel or Pacific cod caught in a Steller sea lion protection area. These proposed recordkeeping provisions would require additional tracking of retained catch for non-AFA trawl C/P vessels as they fish through areas that they do not currently track, and increase the probability of unintentional MRA violations.

*Response:* NMFS is not able to confirm if the additional trip trigger for new logbook entries described in this proposed rule is more burdensome or confusing to MRA accounting for vessels in the non-AFA trawl C/P sector

compared with the current conditions that trigger the start of a fishing trip. However, the analysis for the proposed rule does state that non-AFA C/P vessel operators would be required to carry out additional recordkeeping and tracking of MRAs. Thus, it is possible that this additional recordkeeping could increase overall complexity and reporting costs of MRA accounting. For example, MRA accounting would have become more complex because the proposed rule applied multiple accounting periods by specific area and groundfish species. The additional recordkeeping was proposed as the least burdensome approach NMFS could implement to assist non-AFA trawl C/Ps in tracking MRAs, as they would only be required to fill out a new logsheet page each time a vessel entered or exited a Steller sea lion protection area. NMFS knows of no alternative recordkeeping method that would achieve the tracking requirements for the proposed action while being less burdensome.

*Comment 5:* The non-AFA trawl C/P sector was not aware of the consequences of the trip trigger at the time the Council recommended this regulatory amendment. When issues began to be raised to the Council during the development of the proposed rule, the sector should have been afforded another opportunity to testify to the Council and express its support or lack thereof on the record.

*Response:* NMFS acknowledges that at the time the Council concluded this action, it is possible that members of the non-AFA trawl C/P sector may not have fully understood the impacts of the additional trip trigger for vessels entering or exiting a Steller sea lion protection area. The SSL protection area trip trigger and logbook reporting requirement was not analyzed in the EA/RIR/IRFA used for the Council action. Further effects of the new fishing trip trigger were identified by NMFS and included in the EA/RIR/IRFA published with this proposed rule. Consequently, the action's impacts on non-AFA trawl C/P sector members may not have been well understood until publication of the proposed rule and accompanying EA/RIR/IRFA.

*Comment 6:* The additional fishing trip trigger included in the proposed rule to prevent vessels from using Steller sea lion protection areas to top off on Atka mackerel and Pacific cod was not a logical component of the original action passed by the Council and is unnecessary.

*Response:* NMFS disagrees with the commenter that the proposed new fishing trip trigger is not a logical component of the Council's final action.

To comply with the proposed rules requirement to account for MRAs for Atka mackerel or Pacific cod at any time during a fishing trip inside BSAI Steller sea lion protection areas, vessel operators would have had to keep a discrete record of retained catch of these two species and the required basis species for computing MRAs when a vessel is inside a Steller sea lion protection area. To avoid exceeding retained catch limits at any time during a fishing trip inside Steller sea lion protection areas, the proposed rule required a non-AFA trawl C/P vessel operator to record and track the discrete amounts of retained basis species, Atka mackerel and Pacific cod, for any trawl tow or series of tows inside a Steller sea lion protection area. The new fishing trip trigger would have assured that those amounts of retained catch would remain discrete in the Steller sea lion protection area by requiring a new fishing trip to begin at any time a vessel entered or exited a Steller sea lion protection area. The additional trip trigger in the proposed rule would ensure that Atka mackerel caught in Steller sea lion protection areas would continue to be identified in NMFS' catch accounting system as being caught in these areas as opposed to some adjacent location. Finally, without a new trip trigger for identifying the beginning and end point of records for retained catch, it would be difficult for a vessel operator to demonstrate this discrete record to NOAA Office for Law Enforcement.

*Comment 7:* The commenter requests that if NMFS considers any additional fishing trip triggers, they be addressed under the process associated with future reviews of Steller sea lion recovery and not this MRA accounting proposed rule.

*Response:* The Steller sea lion recovery process is separate from this action and not relevant to proposed revisions of MRA accounting. Currently, NMFS is in the process of re-consultation and preparation of an updated Biological Opinion evaluating the impacts of the Alaska groundfish fisheries on endangered and threatened species, primarily Steller sea lions. The Biological Opinion and recovery planning will address a broad range of issues relative to Steller sea lion protection and may or may not include additional consideration of revisions to the definition of a fishing trip or MRA accounting.

*Comment 8:* If NMFS proceeds with a final rule to revise MRA accounting for the non-AFA trawl C/P sector, it should revise MRA accounting from offload to offload as currently allowed for pollock rather than at the end of a fishing trip.

*Response:* NMFS is withdrawing this proposed rule, and is not considering further rulemaking to revise MRA accounting to any interval at this time. However, the proposed rule explains why the alternatives for extending MRA accounting to the time of offload could result in significant monitoring and enforcement issues.

*Comment 9:* The commenter requests information on whether the Pribilof Habitat Protection Zone plays into NMFS' planning process and asks if NMFS has studied the efficacy of the Pribilof Habitat Protection Zone.

*Response:* The Pribilof Habitat Protection Zone is closed to trawling at all times. This proposed MRA rule only applies where trawling is allowed. Therefore, this proposed rule would have had no impact on the Pribilof Habitat Protection Zone.

*Comment 10:* No fishing should be allowed in the BSAI for groundfish. This agency allows all marine mammals to starve so that commercial fishing profiteers can make a million dollars in a couple of days at sea.

*Response:* This comment is not relevant to the proposed rule being considered because modifying season length or the allowable catch for any of the species in the proposed rule is outside the scope of this action. Total allowable catch amounts for groundfish species in the BSAI are established through the annual specifications process and remain the limit on total catch. The proposed rule did not adjust these amounts and was intended to reduce regulatory discards and improve retention of groundfish species already caught. It would have had no impact on the duration of season lengths or total allowable catch.

#### **Justification for Withdrawal**

NMFS is withdrawing this proposed rule because, as pointed out in public comment, representatives of the non-AFA trawl C/P sector who originally requested this action have requested that NMFS withdraw the proposed rule. These representatives have provided information demonstrating that the proposed rule will no longer assist the sector in increasing the value of groundfish catches, and it would not provide the intended flexibility to increase retention of groundfish in the BSAI.

This action was proposed to assist in meeting objectives of National Standard 9 by providing an additional tool for reducing groundfish bycatch to the extent practicable. Comments provided by the non-AFA trawl C/P sector support a conclusion that the proposed rule may not be effective in reducing

regulatory discards because of additional costs for complying with a new trip trigger. National Standard 9 states, "Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided or minimize the mortality of such bycatch." The proposed action, therefore, is unlikely to achieve the bycatch reduction objectives of National Standard 9 if vessel operators in this sector will not make use of the additional flexibility provided for reducing regulatory discards. Members of this sector state that they will not make use of the additional MRA accounting interval because all members of the single cooperative formed under Amendment 80 have an amendment 80 allocation for most of their important groundfish species, including Atka mackerel, Pacific cod, yellowfin sole, flathead sole, rock sole. Thus, fisheries for these species are never closed for directed fishing to the majority of vessels in this sector. Arrowtooth flounder also is included in the proposed action, but this is a minor target species for the non-AFA trawl C/P sector.

If implemented as described in the proposed rule, the proposed revisions to MRA accounting also may be inconsistent with National Standard 7. National Standard 7 states, "Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." The non-AFA trawl C/P sector's comments state that the cost of the proposed action would exceed the benefits to the sector, because vessel operators would find it more difficult to retain Atka mackerel and Pacific cod inside Steller sea lion protection areas. Retaining Atka mackerel and Pacific cod inside Steller sea lion protection areas could be made more difficult because of insufficient amounts of basis species available inside Steller sea lion protection areas for matching with incidental catch of Pacific cod or Atka mackerel. That could have the effect of requiring these operators to discard these valuable species, compared with current regulations that allow these vessels to catch basis species outside Steller sea lion protection areas. Prior to these public comments, NMFS was not aware of and was not informed by this sector that the additional trip trigger would result in costs of the magnitude that could offset the value of a longer MRA accounting interval for species caught by non-AFA trawl C/Ps. Thus, the record for this action does not show how overall benefits outweigh the costs,

and it could result in significant adverse economic impacts that are inconsistent with National Standard 7.

Following the closing of the public comment period for the proposed rule and pursuant to MSA Sec. 304(b)(3), NMFS consulted with the Council at the April 2009, meeting, and informed the Council that the industry was now opposed to the MRA accounting revision. NMFS also informed that Council that it believed the appropriate action was to withdraw the rule.

In conclusion, NMFS is withdrawing this proposed rule because it is inconsistent with the intent of the Council motion taken in 2006 and 2007 for the following reasons: it is likely to be inconsistent with National Standards 7 and 9; it is unlikely to achieve the Council's objective to improve groundfish retention and reduce regulatory discards; other regulatory tools such as the GRS, Amendment 80 sector allocations, and the sector fishing cooperatives, are likely to be more

effective for improving groundfish retention; it is likely to increase costs to the non-AFA trawl C/P sector; and it is likely to impose implementation costs on NMFS without benefit to the non-AFA trawl C/P sector or to the Nation.

Dated: December 4, 2009.

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