Board remains the ultimate arbiter of which litigant's comparison group it will use to assess the challenged rate(s), and the Board will consider the extent to which a party's comparison group is most similar in the aggregate to the issue traffic on a case-by-case basis. The final offer process gives both parties the opportunity to convince the Board that its comparison group is most similar to the issue traffic.

In addition, complainants should have access to multiple years of data so that they can make year-to-year comparisons of rate changes to identify potentially unreasonable carrier pricing behavior. Although the R/VC ratios of the issue traffic might well be similar to the R/VC ratios of comparable movements in the current year, they might be dramatically higher than the R/VC ratios of comparable shipments from prior years. We see no reason why a complainant should be deprived at the outset of the case of readily available Waybill Sample data needed to make that case.[19]

Finally, NSR and CSXT argue that 49 U.S.C. 10701(d)(1) compels us to use the most current data when evaluating the reasonableness of rates. They maintain that the statute ''requires at a minimum that the comparison group movements reflect the same market conditions that exist when the railroad established the challenged rate.'' NSR/CSXT Supp. at 7. Put differently, they argue that when asked to judge the reasonableness of a rate set in 2010, we cannot perform an analysis of whether the rate was comparable to rates from 2005–2008. *Id.*

This statutory argument is unpersuasive for a number of reasons. First, the statute contains no such directive. Second, when judging the reasonableness of a particular rate, we routinely look to information beyond the year when the rate was established. For example, our SAC test does not judge the reasonableness of the challenged rate by looking only at a snapshot of the current financial circumstances. Rather, the SAC test requires a 10-year analysis that is structured to reflect the variations in the business cycle. *See Major Issues In Rail Rate Cases,* EP 657 (Sub-No. 1), slip op. at 61 (STB served Oct. 30, 1996). Some of the variables it takes into account are the annual tonnage fluctuation, change in tax laws, equity investor expectations, and inflation in the prices of the assets utilized by the industry. *Coal Trading Corp.* v. *B&O R.R.,* 6 I.C.C.2d 361, 411 (1990). Third, in their example above, the Three-Benchmark approach would not compare the rate set in 2010 against the rates from 2005–2008; it would judge the reasonableness of the challenged rate by comparing the R/VC ratio (the level of contribution to joint and common cost) against the adjusted R/VC ratios of comparable traffic from 2005–2008. Finally, in a rate case, we are not asked to determine the maximum lawful rate on the day the tariff was issued, but for a multi-year prescriptive period.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Board will adopt the rule as set forth in this decision.

2. This decision is effective on the day of service.

3. This decision will be published in the **Federal Register**.

Decided: March 8, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

Jeffrey Herzig,

Clearance Clerk.

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op. at 17–18 (STB served June 30, 2008), some rail carrier commenters maintain that the Board has foreclosed such adjustments. The carriers are mistaken. While the Board did not accept the carrier's adjustment factor in that case, it rejected the proposal because the adjustment was incomplete. The carriers also argue that the proposed rule's prohibition on the use of non-public information from their files—particularly evidence of changes in costs or market conditions—hampers their ability to show that a shipper's comparison group consisting of older movements is not comparable to the issue traffic and effectively precludes them from proving changed conditions as an ''other relevant factor.'' To the contrary, however, evidence outside the four years of Waybill Sample data provided under this rule may be used to attempt to demonstrate ''other relevant factors.'' *See Simplified Standards,* slip op. at 77–78.

[19] Releasing the Waybill Sample for the four years that correspond with the most recently published RSAM (as opposed to five years or three years of data) is reasonable because (1) complainants must have access to that data anyway to verify the Board's calculation of the RSAM and $R/VC_{>180}$ benchmarks; and (2) it provides the complainant the ability to use the same four-year time period to estimate all three benchmarks used in this analysis. No party has demonstrated that the release of more Waybill Sample data is appropriate.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 110211137–2141–02]

RIN 0648–BA87

Fisheries Off West Coast States; Highly Migratory Species Fisheries; Swordfish Retention Limits

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to modify retention limits for swordfish harvested in the U.S. West Coast-based deep-set tuna longline (DSLL) fishery. The DSLL fishery is managed under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). The final rule implements the Pacific Fishery Management Council's (Council) recommendation to modify HMS FMP regulations governing the possession and landing limits of swordfish captured in the DSLL fishery as follows: if a vessel without an observer onboard uses any J-hooks (tuna hooks), the trip limit is 10 swordfish; if a vessel without an observer onboard uses only circle hooks, the trip limit is 25 swordfish; if the vessel carries a NMFS-approved observer during the entire fishing trip, there is no limit on swordfish retained.

DATES: This final rule is effective April 18, 2012.

FOR FURTHER INFORMATION CONTACT: Craig Heberer, Sustainable Fisheries Division, NMFS, 760–431–9440, ext. 303.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is also accessible at (*http://swr.nmfs.noaa.gov/*). An electronic copy of the current HMS FMP and accompanying appendices are available on the Pacific Fishery Management Council's Web site at *http://www.pcouncil.org/hms/hmsfmp.html.*

The HMS FMP was developed by the Council in response to the need to coordinate state, Federal, and international management of HMS stocks. The management unit in the FMP consists of highly migratory species (tunas, billfish, and sharks) that

occur within the West Coast (California, Oregon, and Washington) Exclusive Economic Zone (EEZ) and to a limited extent on adjacent high seas waters. NMFS, on behalf of the Secretary of Commerce, partially approved the HMS FMP on February 4, 2004 (69 FR 18444). The majority of HMS FMP implementing regulations became effective on April 7, 2004. Reporting and recordkeeping provisions became effective on February 10, 2005.

Since being adopted in 2004, the HMS FMP has been amended twice. On June 7, 2007, NMFS approved Amendment 1 to the HMS FMP to incorporate recommended international measures to end overfishing of the Pacific stock of bigeye tuna, *Thunnus obesus,* in response to formal notification from NMFS that overfishing was occurring on this stock. On June 12, 2011, NMFS approved Amendment 2 to the HMS FMP (76 FR 56328) to ensure that it is consistent with revised guidelines to implement National Standard 1 of the MSA in order to more effectively prevent overfishing and rebuild overfished stocks, or stocks that may become overfished.

This final rule modifies HMS FMP longline regulations at 50 CFR 660.705 and 660.712, which prohibit U.S. vessels based on the West Coast from using longline gear to make shallow sets (SSLL), and which originally prohibited U.S. vessels using DSLL gear from landing more than 10 swordfish (*Xiphias gladius*) per trip. The 10-swordfish trip limit was intended to prevent vessels ostensibly fishing with DSLL gear targeting bigeye and yellowfin tuna, from switching to SSLL gear targeting swordfish on the same trip. The final rule increases the trip limits on swordfish in order to make the West Coast-based DSLL fishery consistent with recommendations by the Western Pacific Fishery Management Council on their Pacific Pelagics Fishery Ecosystem Plan (FEP) to similarly increase DSLL fishing retention limits for the Hawaii-based DSLL fishery.

The final rule retains the 10 swordfish limit for DSLL vessels fishing with J-hooks (tuna hooks), because those types of hooks have higher sea turtle bycatch rates, and the trip limit acts as a deterrent to engaging in fishing practices that may result in sea turtle bycatch. The final rule changes the trip limits for vessels fishing without observers but using circle hooks, because those types of hooks are known to minimize the bycatch and mortality of sea turtles. However, for trips with a NMFS-approved observer, the final rule removes the trip limits entirely, because the observer acts a sufficient deterrent to engaging in SSLL fishing, which is prohibited.

The final rule assists vessels in the DSLL fishery by reducing the unnecessary discard of swordfish (regulatory ''bycatch'' under the Magnuson Act) when a vessel employs DSLL fishing methods known to reduce the risk of incidentally catching sea turtles. It also benefits the DSLL vessels by allowing them to land a greater number of swordfish, which could result in fishermen realizing greater profits from DSLL fishing trips, especially those with NMFS-approved observer coverage. Furthermore, by not forcing fishermen to discard as many swordfish, bycatch levels will be minimized as required by National Standard 9 of the MSA.

NMFS received four public comments on the proposed rule, two in support of the action and two critical of the action. The first critical comment asserted, without providing substantive evidence, that the fisherman regulated under these rules could be earning more than five million dollars a year and therefore should not be considered a small (business) entity for purposes of analysis under the Regulatory Flexibility Act (RFA). Based on the average observed annual catches by this vessel and the market values for that catch, it is extremely unlikely that the regulated fisherman is realizing annual revenues anywhere near five million dollars. NMFS has not changed its certification or undertaken a regulatory flexibility analysis due to this comment.

The second critical comment, submitted on behalf of the Turtle Island Restoration Network and the Center for Biological Diversity, recommended that NMFS disapprove the action altogether. The recommendation was based on the commenters' perceptions of: a lack of need for the regulation; adverse effects on federally protected sea turtles, marine mammals and bycatch species; adverse impacts to Pacific swordfish populations; and providing the foundation for opening the West Coast High Seas to a surface longline fishery (i.e., shallow-set fishery for swordfish) under the guise of regulatory consistency. The rationale for the rule is explained above, and is not related to opening a SSLL fishery. NMFS has analyzed the DSLL fishery (on the high seas outside the West Coast EEZ) under the National Environmental Policy Act (NEPA) and section 7 of the Endangered Species Act. This final rule will result in no additional adverse impacts to the marine environment, including sea turtles and marine mammals, or any aspect of the human social and economic environment that was not previously analyzed. The action is not expected to increase either the fishing effort or manner of operations in the DSLL fishery (which is an open-access fishery). Furthermore, the North Pacific swordfish stock is currently healthy and not approaching an overfished or overfishing condition.

There are no changes to the rule text from those that NMFS originally proposed.

Classification

The Administrator of the Southwest Region, NMFS, determined that the final rule is necessary for the conservation and management of the U.S. West Coast Fisheries for Highly Migratory Species and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

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 during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. A single comment was received questioning the determination that the one vessel affected by this rule is a ''small entity.'' As explained above, in the response to comments under the Supplementary Section of this final rule, the commenter did not supply any substantive evidence to support that claim, and it is extremely unlikely that the regulated fisherman is realizing annual revenues anywhere near five million dollars. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 14, 2012.

Alan D. Risenhoover,

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

For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

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

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

■ 2. In § 660.705, revise paragraphs (s) and (mm) to read as follows:

§ 660.705 Prohibitions.

* * * * *

(s) If no observer is on the vessel and J-type fishing hooks are used, possess more than 10 swordfish; if no observer on the vessel and only circle-type fishing hooks are used, possess more than 25 swordfish on board a longline vessel from a fishing trip where any part of the trip included fishing west of 150° W. long. and north of the equator (0° lat.) in violation of § 660.712(a)(9).

* * * * *

(mm) Except when fishing under a western Pacific longline limited entry permit issued under § 660.21, possess more than 10 swordfish on board a longline vessel from a fishing trip where any part of the trip included fishing on the high seas of the Pacific Ocean west of 150° W. long. north of the equator in violation of § 660.720(a)(3).

* * * * *

■ 3. In § 660.712, revise paragraphs (a)(10) and (a)(11) to read as follows:

§ 660.712 Longline fishery.

(a) * * *

(10) If no observer is on board the vessel, owners and operators of longline vessels registered for use of longline gear may land or possess no more than 10 swordfish from a fishing trip when using any J-type fishing hooks, and no more than 25 swordfish from a fishing trip when using only circle hook-type fishing hooks. If a NMFS-approved observer is on board the vessel for the duration of the fishing trip, there is no limit on the amount of swordfish retained.

(11) Owners and operators of longline vessels registered for use of longline gear are subject to the provisions at 50 CFR part 223 prohibiting shallow sets to target swordfish in waters beyond the U.S. EEZ and east of 150° W. long.

* * * * *

[FR Doc. 2012–6577 Filed 3–16–12; 8:45 am]

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