

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 665**

[Docket No. 120416010-2119-01]

RIN 0648-BB84

Western Pacific Pelagic Fisheries; Revised Limits on Sea Turtle Interactions in the Hawaii Shallow-Set Longline Fishery

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to revise the annual number of allowable incidental interactions that may occur between the Hawaii-based shallow-set pelagic longline fishery and leatherback and loggerhead sea turtles. NMFS also proposes administrative housekeeping changes to the regulations relating to the shallow-set longline fishery. The proposed rule would implement terms and conditions of the current biological opinion on this fishery, and clarify the regulations.

DATES: NMFS must receive comments on the proposed rule by July 11, 2012.

ADDRESSES: You may send comments on the proposed rule, identified by NOAA-NMFS-2012-0068, to either of the following addresses:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal www.regulations.gov; or

- *Mail:* Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700.

Instructions: You must send any comments to one of the above two addresses to ensure that NMFS receives, documents, and considers the comments. Comments sent to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and NMFS will generally post them to www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily 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 name and organization

fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

A biological opinion issued under the Endangered Species Act (ESA) and a regulatory impact review issued under Executive Order 12866 (Regulatory Planning and Review) provide background information on this proposed rule. You may view these documents and other supporting documentation at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Adam Bailey, Sustainable Fisheries, NMFS PIR, 808-944-2248.

SUPPLEMENTARY INFORMATION: The Hawaii-based shallow-set pelagic longline fishery (the "shallow-set fishery") primarily targets swordfish on the high seas of the North Pacific Ocean. The fishery is governed by a limited access program, vessel and gear marking requirements, vessel length restrictions, Federal catch and effort logbooks, 100-percent observer coverage, large longline restricted areas around the Hawaiian Archipelago, vessel monitoring system, annual protected species workshops, and the use of sea turtle, seabird, and marine mammal handling and mitigation gear and techniques. NMFS may issue a maximum of 164 longline permits, and about 25-30 vessels are active in the shallow-set fishery in any given year.

The fishery interacts incidentally with protected species, primarily leatherback and North Pacific loggerhead sea turtles. Pelagic fisheries in the U.S. western Pacific are managed under the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific Region. NMFS established sea turtle conservation and management measures for the shallow-set fishery in 2004 (69 FR 17329, April 2, 2004), as recommended by the Western Pacific Fishery Management Council (Council). NMFS allowed the fishery to interact with (hook or entangle) up to 16 leatherback and 17 loggerhead sea turtles. The annual interaction limits directly reduce the impacts of the fishery on sea turtles.

NMFS has modified the annual interaction limits several times in response to new information or by court order. Most recently, in 2009, three environmental groups filed a lawsuit against NMFS (Turtle Island Restoration Network, et al., v. Department of Commerce, et al., and Hawaii Longline Association, Civil No. 09-00598 DAE (D. HI)) challenging a 2008 biological opinion that changed the interaction limit for loggerhead sea turtles. Under a consent decree approving settlement in

2011, the U.S. District Court (among other directions) ordered NMFS to issue a new biological opinion for the shallow-set fishery. The District Court also ordered NMFS, pending completion of the biological opinion, to reinstate the annual interaction limit for loggerhead turtles to the 2004 limits established under the regulations published at 69 FR 17329 (April 2, 2004). NMFS revised the limit, and the current regulations reflect the Court-ordered annual interaction limits of 16 leatherbacks and 17 loggerheads (76 FR 13297, March 11, 2011). If the fishery reaches either limit, NMFS closes the fishery for the remainder of the calendar year.

As required by the January 2011 Court order, NMFS completed an evaluation of the impacts of the continued operation of the shallow-set fishery, as governed under the current suite of management measures, on marine species protected by the ESA (humpback whales, North Pacific loggerhead sea turtle distinct population segment (DPS), leatherback sea turtles, olive ridley sea turtles, and green sea turtles), and issued a biological opinion on January 30, 2012 (2012 biological opinion). In this opinion, NMFS concluded that the proposed action is not likely to jeopardize the continued existence (survival and recovery) of these five species, and is not likely to destroy or adversely modify designated critical habitat. The 2012 biological opinion, including the incidental take statement, reasonable and prudent management measures, and terms and conditions are available for review at www.regulations.gov.

The 2012 biological opinion is an integral component to managing the shallow-set fishery because the one-year incidental take statement forms the basis for regulations that specify the annual limit on leatherback and North Pacific loggerhead sea turtle interactions with the shallow-set fishery.

Proposed Action

Based on the best available information and analyses of impacts to protected species in the 2012 biological opinion, NMFS proposes to revise the annual limit on incidental interactions that may occur between the Hawaii-based shallow-set pelagic longline fishery and leatherback and North Pacific loggerhead sea turtles to 26 and 34 interactions, respectively. If the fishery reaches either of the interaction limits in a given year, NMFS would close the fishery for the remainder of that year. The revised limits are consistent with the anticipated and authorized interactions identified in the

2012 biological opinion, and are necessary to manage the impacts of the fishery on sea turtles.

Administrative Housekeeping Changes

NMFS also proposes to make minor housekeeping changes to the shallow-set longline regulations for clarity and consistency in terminology. NMFS would revise all references to the “shallow-set component of the longline fishery” to read more simply the “shallow-set longline fishery.” The sections of Title 50 of the Code of Federal Regulations that contain the proposed change include § 665.802 paragraphs (ss) and (tt), and § 665.813 paragraphs (b)(2)(i) and (b)(2)(ii), and paragraph (i).

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Pelagics FEP, other provisions of the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

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

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this proposed rule and not repeated here.

The proposed rule would revise the annual number of incidental interactions that may occur between the Hawaii-based shallow-set pelagic longline fishery (shallow-set fishery) and leatherback and loggerhead sea turtles. The proposed rule would also make administrative housekeeping changes to the longline regulations for clarity and consistency of terminology. The intent of the proposed rule is to implement terms and conditions of the current biological opinion on this fishery, and clarify the regulations.

On January 30, 2012, NMFS issued a no-jeopardy biological opinion (2012 biological opinion) after evaluating the best available scientific and commercial information. The biological opinion's incidental take statement (ITS) anticipates that the fishery will take up to 26 leatherback and 34 North Pacific loggerhead sea turtles. These incidental

interaction limits are higher than the current allowable interaction limits established pursuant to a court order at 16 leatherback and 17 loggerhead sea turtles, and NMFS proposes to revise the applicable annual interaction limits in regulations to be consistent with the 2012 biological opinion. If the shallow-set fishery reaches either limit, NMFS would close the fishery for the remainder of the year as required by current regulations.

NMFS believes that all potential shallow-set fishery participants are considered small entities. As of March 2012, 132 vessels held Hawaii longline limited entry permits and each is considered a potential participant in the shallow-set fishery. The number of vessels participating in the shallow-set fishery each year from 2006–2011 varied from 20 to the mid-30s; these vessels may participate in the deep-set fishery each year, too. In 2011, fishermen made about 82 shallow-set trips, about 32 fewer trips than in 2010. Preliminary data for 2011, based on the date fishing gear was retrieved, show that shallow-set fishermen conducted 1,468 sets, and retained 14,476 swordfish, weighing 2,046,906 pounds. They also kept 2,480 albacore, 5,681 mahimahi, and 1,999 oilfish.

By raising the sea turtle interaction limits consistent with determinations based on the best available scientific and commercial data in the 2012 biological opinion, the shallow-set fishery would be less likely to reach the annual limit on interactions during the fishing year and more likely to be able to continue fishing using shallow-set gear throughout the year. Compared with current sea turtle interaction limits, the proposed action provides greater fishing opportunities for longline fishermen participating or potentially participating in the shallow-set fishery. There could be increased likelihood of fishing with shallow-set gear throughout the year and, thereby, increasing swordfish and other landings for those fishermen who predominately fish using shallow-set gear. The proposed action would also allow fishermen who primarily fish using deep-set gear greater flexibility to opt into the shallow-set fishery for a greater part of the year. In addition, the proposed action would reduce the uncertainty regarding the potential for an earlier closure of the shallow-set fishery, and allow more operational certainty regarding where, when, and how to fish, especially in the presence of other unforeseen operational issues such as fluctuating fuel costs.

The proposed action is not expected to have a significant economic impact

on a substantial number of small entities, either through a significant loss in landings or expenses incurred, as it potentially expands the opportunity for longline fishermen to participate in the shallow-set fishery through a greater part of the year.

Because this proposed action is not expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

National Environmental Policy Act

In 2008, as part of the process to develop Amendment 18 to the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region, Modifications for the Hawaii-based Shallow-set Longline Swordfish Fishery, the Council developed several recommendations for management measures that, consistent with Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801, *et seq.*), would enable the shallow-set fishery to achieve optimum yield in the North Pacific swordfish fishery, without jeopardizing protected species, including sea turtles. These recommendations included, among other proposed actions, revising the loggerhead turtle interaction limit to 46, and maintaining the leatherback turtle interaction limit of 16 (74 FR 65460, December 10, 2019), corrected at 75 FR 1023, January 8, 2010).

Amendment 18 included a final supplemental environmental impact statement (2009 FSEIS) that analyzed, among other proposed actions, the potential environmental impact of increasing the number of allowable incidental interactions between the shallow-set fishery and leatherback and loggerhead sea turtles. Based on that analysis, NMFS determined in a Record of Decision on June 17, 2009, that Amendment 18 provided additional opportunities for Hawaii-based shallow-set longline fishermen to fish for swordfish, while not creating adverse conservation and recovery impacts on leatherback or loggerhead sea turtles.

Since completion of the 2009 FSEIS, there is new information relevant to environmental concerns and bearing on Amendment 18 and its impacts, including (1) the classification and listing of the North Pacific loggerhead sea turtle DPS as endangered, and the no-jeopardy 2012 biological opinion, (2) a scientific paper on two population viability assessment models for leatherback and loggerhead sea turtles, (3) four interactions with green sea turtles in 2011, (4) a scientific paper on the spillover effect for sea turtles

resulting from the regulatory measures for the shallow-set fishery, and (5) a no-jeopardy biological opinion by the U.S. Fish and Wildlife Service on the impacts of the shallow-set fishery on short-tailed albatross.

In light of this new information, NMFS has evaluated whether the National Environmental Policy Act (NEPA) requires supplementation of the 2009 FSEIS. NMFS has determined that this proposed rule does not represent a substantial change to the action as previously analyzed. NMFS has further determined that there are no significant new circumstances or information relevant to environmental concerns and bearing on the implementation of revised incidental interaction limits. A supplement to the 2009 FSEIS is, therefore, not required under NEPA. You may view the Record of Environmental Consideration at www.regulations.gov (see **ADDRESSES**).

List of Subjects in 50 CFR Part 665

Administrative practice and procedure, Fisheries, Fishing, Hawaii, Longline, Sea turtles.

Dated: June 5, 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 665 is proposed to be amended as follows:

PART 665—FISHERIES IN THE WESTERN PACIFIC

1. The authority citation for 50 CFR part 665 continues to read as follows:

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

2. In § 665.802, revise paragraphs (ss) and (tt) to read as follows:

§ 665.802 Prohibitions.

* * * * *

(ss) Engage in shallow-setting from a vessel registered for use under a Hawaii longline limited access permit after the shallow-set longline fishery has been closed pursuant to § 665.813(b), in violation of § 665.813(i).

(tt) Fail to immediately retrieve longline fishing gear upon receipt of actual notice that the shallow-set longline fishery has been closed pursuant to § 665.813(b), in violation of § 665.813(i).

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3. In § 665.813, revise paragraphs (b)(1), (b)(2), (b)(2)(i), (b)(2)(ii), and paragraph (i) to read as follows:

§ 665.813 Western Pacific longline fishing restrictions.

* * * * *

(b) * * *

(1) Maximum annual limits are established on the number of physical interactions that occur each calendar year between leatherback and North Pacific loggerhead sea turtles and vessels registered for use under Hawaii longline limited access permits while shallow-setting. The annual limit for leatherback sea turtles (*Dermochelys coriacea*) is 26, and the annual limit for North Pacific loggerhead sea turtles (*Caretta caretta*) is 34.

(2) Upon determination by the Regional Administrator that, based on data from NMFS observers, the fishery has reached either of the two sea turtle interaction limits during a given calendar year:

(i) As soon as practicable, the Regional Administrator will file for publication at the Office of the Federal Register a notification that the fishery reached a sea turtle interaction limit. The notification will include an

advisement that the shallow-set longline fishery shall be closed, and that shallow-set longline fishing north of the Equator by vessels registered for use under Hawaii longline limited access permits will be prohibited beginning at a specified date until the end of the calendar year in which the sea turtle interaction limit was reached.

Coincidental with the filing of the notification, the Regional Administrator will also provide actual notice that the shallow-set longline fishery shall be closed, and that shallow-set longline fishing north of the Equator by vessels registered for use under Hawaii longline limited access permits will be prohibited beginning at a specified date, to all holders of Hawaii longline limited access permits via telephone, satellite telephone, radio, electronic mail, facsimile transmission, or post.

(ii) Beginning on the fishery closure date indicated by the Regional Administrator in the notification provided to vessel operators and permit holders and published in the **Federal Register** under paragraph (b)(2)(i) of this section, until the end of the calendar year in which the sea turtle interaction limit was reached, the Hawaii-based shallow-set longline fishery shall be closed.

* * * * *

(i) Vessels registered for use under Hawaii longline limited access permits may not be used to engage in shallow-setting north of the Equator (0° lat.) any time during which the shallow-set longline fishery is closed pursuant to paragraph (b)(2)(ii) of this section.

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[FR Doc. 2012-14136 Filed 6-8-12; 8:45 am]

BILLING CODE 3510-22-P