

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 679**

[Docket No. 040105003-4154-02; I.D. 122203F]

RIN 0648-AR41

Fisheries of the Exclusive Economic Zone Off Alaska; General Limitations

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule amending regulations establishing pollock Maximum Retainable Amounts (MRA) by adjusting the MRA enforcement period for pollock harvested in the Bering Sea and Aleutian Islands management area (BSAI) from enforcement at anytime during a fishing trip to enforcement at the time of offload. This action is necessary to reduce regulatory discards of pollock caught incidentally in the directed fisheries for non-pollock groundfish species. The intended effect of this action is to better use incidentally caught pollock in accordance with the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP).

DATES: Effective on July 14, 2004.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this regulatory action may be obtained from the Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Durall.

FOR FURTHER INFORMATION CONTACT: Jason Anderson, 907-586-7228 or jason.anderson@noaa.gov.

SUPPLEMENTARY INFORMATION:**Background**

NMFS manages the U.S. groundfish fisheries of the BSAI in the Exclusive Economic Zone under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP pursuant to the Magnuson-Stevens Act. 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.

This action is one of several adopted by the Council to decrease regulatory and economic discards and increase catch utilization in the BSAI groundfish fisheries. Amendment 49 to the FMP was implemented by a final rule January 3, 1998 (62 FR 63880), and established retention and utilization standards for pollock and Pacific cod. In June 2003, the Council adopted Amendment 79 to the FMP, which would establish a minimum groundfish retention standard (GRS) for specified vessels in the BSAI. Along with Amendment 79, the Council also adopted a revision to the MRA enforcement period for pollock harvested by non-American Fisheries Act (AFA) vessels in the BSAI. Prior to the June Council actions, the proposed GRS program and pollock MRA revision were considered as components of one action to reduce discard amounts in the BSAI. However, the Council recognized that the MRA change was simpler to implement than the GRS action and requested NMFS to expedite the pollock MRA revision.

Maximum Retainable Amounts

Regulations at 50 CFR 679.20(e) establish rules for calculating and implementing MRAs for groundfish species or species groups that are closed to directed fishing. The MRA is calculated as a percentage of the retained amount of species closed to directed fishing relative to the retained amount of basis species or species groups open for directed fishing. Table 11 to 50 CFR part 679 lists retainable percentages for BSAI groundfish species. Amounts that are caught in excess of the MRA must be discarded. Regulations limit vessels to MRAs at any time during a fishing trip. Under regulations implementing Amendment 49 to the FMP, vessels must retain all incidental catch of pollock and Pacific cod up to the MRA and discard the rest.

This action adds regulations at § 679.20(e)(3)(iii) to make the MRA for pollock caught by non-AFA eligible vessels in the BSAI management area enforceable at the time of offload. This action is intended to increase the retention of pollock by non-AFA vessels in the BSAI, while not increasing the overall amount of pollock harvested by adjusting the MRA enforcement period so that the MRA for pollock caught in the BSAI by non-AFA vessels is enforced at the time of offload rather than at any time during a fishing trip. Under these regulations, vessels will be able to choose to retain pollock in excess of the MRA as long as the amount retained at the time of offload is at the specified MRA percentage with respect to basis species or species

groups retained. By allowing vessels to manage their MRA percentage for pollock on an offload-to-offload basis, additional pollock may be retained over the course of a fishing trip. For example, if a vessel operator catches pollock early in a trip in excess of the MRA, he or she may choose to retain the pollock and move to an area with lower incidental catch rates of pollock, thereby lowering the percentage of pollock retained, with respect to other basis species, prior to the offloading of catch. As long as the amount of pollock on board the vessel is at or below the appropriate MRA at the time of offload, the vessel operator would be in compliance.

In addition to the pollock MRA enforcement period adjustment, this action clarifies MRA requirements for catcher vessels at § 679.20(e)(3)(i). Regulations at § 679.20(e) did not differentiate between catcher vessels and catcher processors. However, the definition of fishing trip is different for each vessel type and the MRA is enforced differently for each vessel type. Catcher vessels may fish within more than one statistical reporting area during the same fishing trip. This action clarifies that the lowest MRA for any of the areas where fish are harvested during a fishing trip applies for the duration of the fishing trip. These changes apply to catcher vessels fishing in the Gulf of Alaska (GOA) and the BSAI and reflect the existing enforcement protocol. MRA requirements for catcher processors at § 679.20(e)(3) remain unchanged except to change the BSAI pollock MRA accounting period from anytime during a fishing trip to the time of offload.

Increased Retention (IR)/Increased Utilization (IU)

The following changes to the IR/IU regulations apply to vessels fishing in the GOA and the BSAI:

Regulations at § 679.27(c)(2) describe retention requirements for IR/IU species. In § 679.27, paragraphs (c)(2)(i)(B), (c)(2)(ii)(B), (c)(2)(iii)(B), and (i)(2) refer to the "MRB" amount when directed fishing for an IR/IU species is prohibited. "MRB" is an acronym for maximum retainable bycatch and was changed to MRA for consistency with the definition of bycatch in the Magnuson-Stevens Act. The regulatory text in these paragraphs is amended to reflect current language and to provide consistency with other regulatory text.

Regulations at § 679.27(c)(2)(ii)(B) require vessels to retain IR/IU species up to the MRA for that species and are enforced at any time during a fishing trip. This action provides an exception in these regulations for pollock caught

by non-AFA eligible vessels in the BSAI.

Further background on the development of the regulatory amendments contained in this final rule is available in the proposed rule that was published January 29, 2004 (69 FR 4281) for a 30-day public review and comment period that ended March 1, 2004. One letter containing 3 comments was received during the comment period.

Response to Comments

Comment 1: The proposed regulation may create an unintended incentive for non-AFA vessels to increase the overall amount of pollock caught incidentally when directed fishing for other non-pollock species in the BSAI. The Council specifically addressed these concerns and noted that the non-AFA fleet should not increase their historic levels of incidental pollock catch. Further, the amount of pollock caught by non-AFA vessels should be compared against these historic levels during the annual groundfish harvest specification process.

Response: By adjusting the MRA enforcement period for pollock caught in the BSAI by non-AFA vessels from anytime during a fishing trip to enforcement at the time of offload, the Council intended to increase the retention of pollock by these vessels without increasing their overall catch of pollock. NMFS fisheries managers currently consider historic and recent incidental catch levels during the total allowable catch (TAC) specification process and will continue to provide this information to the Council annually.

Comment 2: Discussion in the proposed rule about the Incidental Catch Allowance (ICA) for pollock harvested by non-AFA vessels seems to imply that the purpose of the proposed rule would be achieved if the non-AFA fleet does not exceed the ICA for pollock. The ICA is not an appropriate reference point for determining whether pollock harvested by non-AFA vessels has exceeded historic levels because it is a conservative, precautionary estimate of incidental pollock catch in all non-target pollock fisheries, much of which is rolled back to the pollock fishery during a fishing year.

Response: The goal of this action is to reduce regulatory discards of pollock by non-AFA vessels without increasing the overall amount of pollock caught by these vessels. Members of the AFA fleet expressed concern during the Council process over non-AFA vessels exceeding historic levels of incidental pollock catch. These concerns were analyzed in

the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (see **ADDRESSES**) prepared for the proposed rule and further discussion was provided in the preamble to the proposed rule. While a discussion of the ICA is provided in the proposed rule, this discussion was not intended to suggest that the goal of this action would be achieved if the non-AFA fleet does not exceed the ICA for pollock. The ICA is not an allocation or quota to any particular group or sector of the BSAI groundfish fleet. Incidental catch estimates that form the basis of annual ICAs are conservatively large to ensure that overall harvest remains within the TAC. NMFS annually provides information about historical catch to the Council to guide the ICA specification and will continue to make this information available to the Council and interested public. The amount of pollock caught by non-AFA eligible vessels will continue to be well documented. Should pollock incidental catch rates or amounts increase in a manner that would require an increase in the ICA, the Council could initiate regulatory action to reduce incidental catch rates to levels closer to historical amounts. Any adjustment to the ICA would occur within the annual harvest specification process.

Comment 3: To the extent that pollock ICA levels are higher than necessary to support incidental catch rates by non-AFA vessels, NMFS routinely makes inseason adjustments to the ICA and reallocates any projected unused pollock to the AFA fleet. These reallocations should not be considered as historical catch of the non-AFA fleet.

Response: Reallocations of pollock from the ICA to the directed fishery have occurred every year since 1999 and range from 2,000 mt in 1999 to 12,000 mt in 2001. NMFS managers use actual historical and recent catch amounts to specify future ICA amounts. As a result, the ICA can change annually.

Changes From Proposed Rule

There are two changes from the proposed rule to the final rule:

First, regulations at § 679.20(e)(2)(i), (e)(2)(ii), and (e)(2)(iii) describe how to calculate the MRA for a specific incidental catch species. Proposed regulations at § 679.20(e)(2)(iv), (e)(2)(v) and (e)(2)(vi) describe the applicability of MRA regulations. This final action redesignates § 679.20(e)(2)(iv), (e)(2)(v) and (e)(2)(vi), as published in the proposed rule, to § 679.20(e)(3)(i), (e)(3)(ii) and (e)(3)(iii), respectively, and adds the title of "Application" for these paragraphs. This change from the

proposed rule is intended to enhance clarity of these regulations for the public. The cross-reference at § 679.27(d)(1)(iii)(B) is changed to reflect this redesignation.

Second, the text, "and not subject to § 679.20(e)(2)(vi)" at § 679.20(e)(2)(v) and "except when exceeded as provided for in § 679.20(e)(2)(vi)" at § 679.27(c)(2)(ii) is removed in the final rule. The revision to the MRA enforcement period for pollock harvested by non-AFA vessels in the BSAI applies to all vessel types. In the proposed rule, this text only was found in paragraphs which apply to catcher/processors. NMFS recognizes that this could cause confusion and has removed the text from the final action. Regulations at § 679.20(d)(1)(iii)(B) continue to clarify MRA applicability requirements for all vessels.

Classification

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

NMFS prepared a FRFA. The FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA) and a summary of the analyses completed to support the action. A copy of this analysis is available from NMFS (see **ADDRESSES**). Section 604(a) of the Regulatory Flexibility Act (RFA) identifies the elements that should be in the FRFA and are summarized below:

Need for, and Objectives of, the Rule

The need for, and objectives of, this action are described above in the preamble and are not repeated here.

Significant Issues Raised by the Public Comments

The proposed rule was published on January 29, 2004 (69 FR 4281). An IRFA was prepared for the proposed rule, and described in the classifications section of the preamble to the rule. The public comment period ended on March 1, 2004. No comments were received on the IRFA or concerning the economic impact of the rule.

Number of Small Entities to Which the Rule will Apply

The change in the enforcement period for the pollock MRA will apply to all non-AFA vessels that catch BSAI pollock as an incidental species, regardless of vessel size, gear type or target fishery. Non-AFA trawl catcher processors (head-and-gut sector) incidentally catch significant amounts of pollock in other groundfish fisheries. Other non-AFA vessels do not catch significant amounts of pollock and are therefore seldom affected by the MRA

for pollock on a haul-by-haul basis. In recent years, 23 to 24 vessels in the head-and-gut trawl catcher processor sector have fished in the BSAI. Ownership of the active vessels is concentrated in 10 companies. One of the listed companies is an independent company that acts as a manager of four vessels, each of which is an independently owned corporation with different ownership structures. Therefore, the FRFA treated these vessels as four independent companies.

Analysis of the 3-year average of estimated annual receipts of the head-and-gut trawl catcher processor sector indicated that 1 of the 13 companies operating in the sector in 2002 would be defined as a small entity with receipts of less than \$3.5 million. The company operates a single vessel that is less than 125 feet (38.1 meters).

Steps Taken to Minimize the Significant Economic Impact on Small Entities

The preferred alternative is not expected to have a significant negative impact on individual vessel gross receipts. Therefore, this final rule is not expected to have a significant negative impact on small entities. The preferred alternative changes the enforcement interval of the MRA to an offload-to-offload basis. This alternative meets the goal of the Council of reducing discards of pollock by non-AFA vessels without increasing the overall amount of pollock harvested by these vessels. The preferred alternative also provides regulatory relief to any directly regulated small entity to which the rule applies by increasing operational flexibility, improving resource utilization, and reducing the risk of an inadvertent violation of MRA and IR/IU pollock retention standards. This action is not expected to create any adverse impacts for directly regulated entities, small or large. The alternative allows non-AFA vessels to retain additional pollock caught incidentally in the BSAI management area, thereby helping to meet the Council's goals and objectives to reduce discards in the groundfish fisheries off Alaska.

Options for different enforcement periods for adjusting the MRA for pollock harvested by non-AFA vessels

in the BSAI and for increasing the MRA percentage were considered by the Council, but were eliminated from detailed analysis due to potential difficulties in enforcing these options and inconsistencies with the problem statement. The status quo is the alternative to the preferred action. The status quo would not lead to increased retention of pollock caught by non-AFA vessels in the BSAI. The status quo was rejected because it would not accomplish the objectives of the action.

Small Entity Compliance Guide

This action changes regulations at § 679.20 and § 679.27 to make the MRA for pollock caught by non-AFA eligible vessels in the BSAI management area enforceable at the time of offload. This action does not require additional compliance from small entities that is not described in the preamble. Copies of this final rule are available from NMFS (see ADDRESSES) and at the following website: <http://www.fakr.noaa.gov>.

Reporting, Recordkeeping, and Other Compliance Requirements

This regulation does not impose new recordkeeping or reporting requirements on the regulated small entities. The FRFA did not reveal any Federal rules that duplicate, overlap or conflict with the proposed action.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: June 4, 2004.

Rebecca Lent,

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

■ For the reasons set out in the preamble, 50 CFR part 679 is amended to read as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

■ 2. In § 679.20, paragraph (e)(2)(iv) is removed, paragraph (d)(1)(iii)(B) is

revised, and paragraph (e)(3) is added to read as follows:

§ 679.20 General limitations.

* * * * *

(d) * * *

(1) * * *

(iii) * * *

(B) *Retention of incidental species.*

Except as described in § 679.20(e)(3)(iii), if directed fishing for a target species, species group, or the "other species" category is prohibited, a vessel may not retain that incidental species in an amount that exceeds the maximum retainable amount, as calculated under paragraphs (e) and (f) of this section, at any time during a fishing trip.

* * * * *

(e) * * *

(3) *Application.*

(i) For catcher vessels, the maximum retainable amount for vessels fishing during a fishing trip in areas closed to directed fishing is the lowest maximum retainable amount applicable in any area, and this maximum retainable amount must be applied at any time and to all areas for the duration of the fishing trip.

(ii) For catcher/processors fishing in an area closed to directed fishing for a species or species group, the maximum retainable amount for that species or species group applies at any time for the duration of the fishing trip.

(iii) For all vessels not listed in subpart F of this section, the maximum retainable amount for pollock harvested in the BSAI is calculated at the end of each offload and is based on the basis species harvested since the previous offload. For purposes of this paragraph, offload means the removal of any fish or fish product from the vessel that harvested the fish or fish product to any other vessel or to shore.

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■ 3. In § 679.27, the table in paragraph (c)(2), and the table in (i) are revised to read as follows:

§ 679.27 Improved Retention/Improved Utilization Program.

* * * * *

(c) * * *

(2) * * *

IF YOU OWN OR OPERATE A	AND	YOU MUST RETAIN ON BOARD UNTIL LAWFUL TRANSFER
(i) Catcher vessel	(A) Directed fishing for an IR/IU species is open (B) Directed fishing for an IR/IU species is prohibited. (C) Retention of an IR/ IU species is prohibited	all fish of that species brought on board the vessel. all fish of that species brought on board the vessel up to the MRA for that species. no fish of that species.
(ii) Catcher/processor	(A) Directed fishing for an IR/IU species is open	a primary product from all fish of that species brought on board the vessel.

IF YOU OWN OR OPERATE A	AND	YOU MUST RETAIN ON BOARD UNTIL LAWFUL TRANSFER
(iii) Mothership	(B) Directed fishing for an IR/IU species is prohibited. (C) Retention of an IR/IU species is prohibited (A) Directed fishing for an IR/IU species is open (B) Directed fishing for an IR/IU species is prohibited. (C) Retention of an IR/IU species is prohibited	a primary product from all fish of that species brought on board the vessel up to the point that the round-weight equivalent of primary products on board equals the MRA for that species. no fish or product of that species. a primary product from all fish of that species brought on board the vessel a primary product from all fish of that species brought on board the vessel up to the point that the round-weight equivalent of primary products on board equals the MRA for that species. no fish or product of that species.

* * * * *

(i) * * *

IF...	then your total weight of retained or lawfully transferred products produced from your catch or receipt of that IR/IU species during a fishing trip must...
(1) directed fishing for an IR/IU species is open,	equal or exceed 15 percent of the round-weight catch or round-weight delivery of that species during the fishing trip.
(2) directed fishing for an IR/IU species is prohibited,	equal or exceed 15 percent of the round-weight catch or round-weight delivery of that species during the fishing trip or 15 percent of the MRA for that species, whichever is lower.
(3) retention of an IR/IU species is prohibited,	equal zero.

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