

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

[Docket No. 0612242862-7534-03; I.D. 0130061]

RIN 0648-AU93

**Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish, Crab, Salmon, and Scallop Fisheries of the Bering Sea and Aleutian Islands Management Area and Gulf of Alaska, Essential Fish Habitat Rule Correction**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to correct regulations implementing essential fish habitat (EFH) provisions for Alaska fisheries. This final rule clarifies that portions of EFH management areas in the vicinity of the Aleutian Islands are located in State of Alaska (State) waters. This rule also applies EFH vessel monitoring system (VMS) and closure requirements to federally permitted vessels operating in State waters adjacent to the Gulf of Alaska (GOA) and Aleutian Islands subarea. This action is necessary to ensure that federally permitted vessels operating in State waters comply with EFH protection measures.

**DATES:** Effective on December 10, 2007.

**ADDRESSES:** Copies of the maps of EFH and habitat areas of particular concern (HAPC) management areas, the Environmental Impact Statement for EFH Identification and Conservation (EFH EIS), the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) for HAPCs, the draft EA/RIR/IRFA for Bering Sea Habitat Conservation, and the Final Regulatory Flexibility Analysis (FRFA) for this action may be obtained from Alaska Region NMFS, P.O. Box 21668, Juneau, AK 99802, or from the Alaska Region NMFS website at <http://www.fakr.noaa.gov>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to the NMFS Alaska Region and by e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or fax to (202) 395-7285.

**FOR FURTHER INFORMATION CONTACT:**

Melanie Brown, 907-586-7228 or e-mail at [melanie.brown@noaa.gov](mailto:melanie.brown@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The groundfish, crab, scallop, and salmon fisheries in the exclusive economic zone (EEZ) off Alaska are managed under their respective fishery management plans (FMPs). The North Pacific Fishery Management Council (Council) prepared the FMPs under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801, *et seq.* Regulations implementing the FMPs appear at 50 CFR parts 679 and 680. General regulations governing U.S. fisheries also appear at 50 CFR part 600.

The final rule for the EFH protection measures (71 FR 36694, June 28, 2006) excluded State of Alaska waters under the EFH protection measures by not fully describing the areas where the EFH protection measures apply. This final rule corrects this error by fully describing waters where EFH protection measures apply.

**Background**

Background on the EFH provisions of the FMPs and regulatory amendments is in the proposed rule for this action (72 FR 33732, June 19, 2007). Several corrections to the EFH protection measures are necessary to ensure EFH protection measures in State waters apply to federally permitted vessels operating in these waters. These corrections are detailed below.

**Protection Area Definitions**

Current regulations at § 679.2 contain definitions for the Aleutian Islands Habitat Conservation Area (AIHCA) and the Aleutian Islands Coral Habitat Protection Areas (AICHPA), which are described by coordinates listed in Tables 23 and 24 to 50 CFR part 679. Each table includes coordinates for locations within State waters, as intended by the Council and described in the EFH FMP amendments. The current regulatory definitions for these management areas conflict with the FMP amendments and Tables 23 and 24 by describing the areas as part of the Aleutian Islands subarea. The Aleutian Islands subarea is limited to waters of the EEZ, which do not include State waters (§ 679.2).

To ensure that the definitions are consistent with the Council's intent, the FMP amendments, and Tables 23 and 24, § 679.2 is revised to define the AIHCA and AICHPA as located in reporting areas of the Aleutian Islands, including adjacent State waters. This revision ensures that the AIHCA and

AICHPA management measures apply to federally permitted vessels operating in the EEZ and in State waters.

**VMS Requirements**

Current regulations at § 679.28(f)(6) require all federally permitted fishing vessels to operate a VMS when operating in the Aleutian Islands subarea or when operating in the GOA with mobile bottom contact gear onboard. The Council intended that the VMS requirements would apply to all federally permitted vessels operating in State or Federal waters. Specifically, the EFH rule should have required VMS operation for all federally permitted vessels operating in Federal waters of the Aleutian Islands subarea or adjacent State waters and operating with mobile bottom contact gear onboard in the GOA or adjacent State waters. This would ensure that activities in or near the EFH management areas could be easily monitored. As described above, the AIHCA and AICHPA include areas in State waters. The EFH protection areas in the GOA are not located in State waters, but some are near State waters. Because preexisting VMS requirements implemented to monitor Steller sea lion protection areas apply to federally permitted vessels in State waters (§ 679.28), and the Council's intent was to build on existing VMS requirements, the EFH protection measures' VMS requirements also should apply in State waters.

Regulations at § 679.28(f)(6)(ii) and (iii) identify the applicable areas for VMS as the Aleutian Islands subarea and the GOA. Under § 679.2, the Aleutian Islands subarea and GOA definitions do not include State waters. This rule revises these paragraphs by requiring VMS operation in reporting areas of the Aleutian Islands subarea and the GOA, including adjacent State waters. This correction ensures that VMS operation is required for federally permitted vessels operating in Federal waters of the Aleutian Islands subarea or adjacent State waters for all gear types and in Federal waters of the GOA or adjacent State waters when mobile bottom contact gear is onboard. This correction improves monitoring of vessel activities near EFH management areas.

**Comments and Responses**

NMFS received one letter on the proposed rule (72 FR 33732, June 19, 2007) that contained two separate comments. The following summarizes and responds to these comments.

*Comment 1:* We support the actions taken by NMFS and the Council to protect ocean habitat in Alaska and

support the comprehensive use of VMS to manage ocean resources.

*Response:* Support is noted.

*Comment 2:* Monitoring of trawl activities within the EFH protection areas should extend to pollock trawling because pollock trawls are known to contact the sea floor and may negatively affect habitat in these areas. VMS should be required for all pollock trawl vessels and an annual summary of trawl activities should be produced to monitor the health of EFH protected areas and the effectiveness of the EFH protection measures.

*Response:* The EFH EIS (see **ADDRESSES**) determined that, given the location and use of pelagic trawl gear in the Aleutian Islands subarea and GOA, pelagic trawl gear is not likely to affect sea floor habitats in the EFH protection areas. The EFH protection areas within the Aleutian Islands subarea and GOA are comprised of either very deep waters or rocky substrate that is avoided by fishers using pelagic trawl gear. The EFH EIS and the draft Bering Sea Habitat Conservation EA (see **ADDRESSES**) determined that pelagic trawl gear is likely to contact soft bottom substrate that is prevalent in the Bering Sea, but any effects on EFH for FMP managed species is minimal. Thus, the EFH protection measures were designed to ensure that pelagic trawl gear fisheries will not adversely impact protected habitat areas of the Aleutian Islands and GOA in a manner that is more than minimal or temporary.

VMS monitoring is required for all federally permitted vessels fishing for pollock in the Bering Sea and Aleutian Islands management area and GOA and adjacent State waters (§ 679.7(a)(18)). NMFS currently has the ability to use VMS data to determine locations of pelagic trawling in and near EFH management areas and to provide this information to managers and scientists. No changes to the final rule from the proposed rule were made in response to this comment.

#### **Classification**

The Administrator, Alaska Region, NMFS, determined that this final rule is necessary for the conservation and management of the groundfish, scallop, crab, and salmon fisheries, and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for the purposes of Executive Order (E. O.) 12866.

This final rule contains no federalism implications as that term is defined in E. O. 13132. Even though the requirements of this rule apply to federally permitted vessels in State

waters, this rule does not supplant any State regulatory requirements.

A final regulatory flexibility analysis (FRFA) was prepared. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS' responses to those comments, and a summary of the analyses completed to support the action. A copy of the FRFA is available from NMFS (see **ADDRESSES**).

The need for and objectives of this rule are detailed in the preamble. No significant issues were raised by the public comments in response to the IRFA during the public comment periods (June 19 through July 19, 2007 (72 FR 33732, June 19, 2007), and August 2 through September 4, 2007 (72 FR 42369, August 2, 2007)). No changes were made from the proposed rule to the final rule.

The vessels that are directly regulated by the proposed action are those that are federally permitted and operate in State waters adjacent to the Aleutian Islands subarea or operate with mobile bottom contact fishing gear onboard in State waters adjacent to the GOA. Vessels were considered small, according to the Small Business Administration criteria, if they had estimated 2004 gross revenues less than or equal to \$4 million, and were not known to be affiliated with other firms whose combined receipts exceeded \$4 million.

In the Aleutian Islands reporting areas, an estimated 88 federally permitted vessels are believed to have been operated by small entities during 2004. Forty-three of these appear to have fished within State waters of the Aleutian Islands during at least one month of the year. Thus, an estimated 43 vessels would be directly regulated by this action in the State waters adjacent to the Aleutian Islands subarea. These 43 vessels grossed, on average, about \$964,000 from all fisheries, and an average of about \$114,000 from their fishing within State waters, within the Aleutian Islands reporting areas.

In the GOA, an estimated 60 federally permitted vessels using mobile bottom contact gear appear to have been operated by small entities during 2004. Twenty-seven of these appear to have fished with mobile bottom contact gear within State waters adjacent to the GOA during at least one month of the year. Thus, an estimated 27 vessels operating with mobile bottom contact onboard would be directly regulated by this action. These 27 vessels grossed, on average, about \$660,000 from all fisheries, and an average of about \$36,000 from their fishing with mobile

bottom contact gear within State waters adjacent to the GOA.

Based on these cost estimates, the calculated upper bounds for annual transmission and maintenance costs are \$10,617 per year, or \$247 per small entity. Thus, average annual costs would be 0.03 percent of total annual revenues from all sources, and 0.2 percent of revenues from fishing within State waters adjacent to the Aleutian Islands subarea. In addition, an entity may need to acquire a VMS unit to comply with this regulation. A VMS unit is estimated to cost \$2,174, although a portion of this cost is reimbursable by the Pacific States Marine Fisheries Commission (PSMFC). The analysis estimated that about \$1,600 of the initial purchase price would be reimbursable.

These cost estimates may be upper bounds for several reasons. For example, some of these vessels may already be subject to VMS regulations because of crab requirements imposed since 2004. Moreover, as noted above, vessels buying VMS to comply with this regulation are eligible for a reimbursement of a portion of the initial purchase price from the PSMFC. Some vessels may choose to avoid the VMS requirement by surrendering their federal permit during periods when they expect to operate only in State waters.

Based on these statistics, estimates of the upper bound annual transmission and maintenance costs are \$3,952 per year, or \$146 per small entity. Thus, average annual costs would be 0.02 percent of total annual gross revenues from all sources, and 0.4 percent of gross revenues from fishing within State waters adjacent to the GOA. In addition, two small entities may be required to acquire VMS units to comply with this regulation. The total cost of this is estimated to be \$4,348, or \$2,174 per vessel, although the current reimbursement program would offset some of this cost. As discussed in the RIR, there are several reasons for believing that these costs are upper bound estimates.

For purposes of the VMS requirement, a federally permitted vessel is one required to carry either a Federal fisheries permit or a Federal crab vessel permit. This action would add new reporting requirements for federally permitted vessels fishing in State waters adjacent to the Aleutian Islands subarea, or for federally permitted vessels with mobile bottom contact gear onboard while operating in State waters adjacent to the GOA. These fishing operations would be required to carry VMS units, and to report their locations every half hour while they were in fisheries

subject to the requirement. They also would be required to notify NOAA Office of Law Enforcement (OLE) that their VMS unit was active before it was used for fishing activity, and in the event of a breakdown of the unit. Estimated costs are described above.

There are no Federal rules that duplicate, overlap, or conflict with this action.

An FRFA must describe any significant alternatives to the action that accomplish the stated objectives of the action, consistent with applicable statutes, and that would minimize any significant economic impact of the final rule on small entities. This action has only the status quo and the preferred alternative. The status quo does not meet the objectives of the action because the current regulations do not apply EFH closures and VMS requirements to certain federally permitted vessels operating in State waters. As noted in Section 3.2 of the FRFA for this action (see ADDRESSES), the objectives of this action are to (1) correct erroneous language contained in current regulations to better reflect the original intent of the Council and to ensure consistency with the FMP amendments and Tables 23 and 24 to 50 CFR part 679, and (2) facilitate enforcement of EFH closure areas within State waters through the use of VMS equipment by federally permitted vessels operating in State waters adjacent to the Aleutian Islands subarea, and by federally permitted vessels operating with mobile bottom contact gear onboard in State waters adjacent to the GOA. In this way, the action provides for the protection of EFH management areas in State waters adjacent to the Aleutian Islands subarea and GOA, as was the Council's purpose in the original action.

The purpose of this action is to correct or clarify regulations to make them reflect the original "preferred alternative" chosen by the Council and the Secretary of Commerce under the previous EFH action. The method of describing the application of EFH regulations to vessels operating in State waters is limited to the current method used for the application of other fishing regulations to vessels operating in State waters. No other methods of describing the application of fishing regulations to vessels operating in State waters are known, and the same method as currently used is preferred to provide consistency in the regulations. Therefore, no other identifiable alternatives exist that would accomplish

this objective; and no other alternatives were identified, considered, and rejected.

**Small Entity Compliance Guide**

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, NMFS Alaska Region has developed a website that provides easy access to details of this final rule, including links to the final rule, maps of closure areas, and frequently asked questions regarding EFH. The relevant information available on the website is the Small Entity Compliance Guide. The website address is <http://www.fakr.noaa.gov/habitat/efh.htm>. Copies of this final rule are available upon request from the NMFS, Alaska Regional Office (see ADDRESSES).

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under Control Number 0648-0445. Public reporting burden per response are estimated to average: 6 seconds for each VMS transmission, 12 minutes for VMS check-in form, 6 hours for VMS installation, and 4 hours for VMS annual maintenance. The response times include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and by e-mail to [David\\_Rostker@omb.eop.gov](mailto: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 679**

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: November 5, 2007.

**William T. Hogarth**

*Assistant Administrator for Fisheries, National Marine Fisheries Service.*

■ For reasons set out in the preamble, NMFS amends 50 CFR part 679 as follows:

**PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA**

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

**Authority:** 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; and Pub. L. 108 199, 118 Stat. 110.

■ 2. In § 679.2, revise the definitions for "Aleutian Islands Coral Habitat Protection Areas" and "Aleutian Islands Habitat Conservation Area," to read as follows:

**§ 679.2 Definitions.**

\* \* \* \* \*

*Aleutian Islands Coral Habitat Protection Areas* means management areas established for the protection of certain coral garden areas in reporting areas of the Aleutian Islands subarea and adjacent State waters. See Table 23 to this part.

*Aleutian Islands Habitat Conservation Area* means a management area established for the protection of fish habitat in reporting areas of the Aleutian Islands subarea and adjacent State waters. See Table 24 to this part.

\* \* \* \* \*

■ 3. In § 679.28, paragraphs (f)(6)(ii) and (iii) are revised to read as follows:

**§ 679.28 Equipment and operational requirements.**

\* \* \* \* \*

(f) \* \* \*

(6) \* \* \*

(ii) You operate a vessel required to be federally permitted in reporting areas located in the Aleutian Islands subarea or operate a federally permitted vessel in adjacent State waters;

(iii) You operate a vessel required to be federally permitted with mobile bottom contact gear onboard in reporting areas located in the GOA or operate a federally permitted vessel with mobile bottom contact gear onboard in adjacent State waters; or

\* \* \* \* \*

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