

Reason for Termination

Subsequent to granting the IMS petition, the agency further investigated the installation and operational characteristics of various wheelchair lift and ramp designs. From this, it was found that: (1) wheelchair ramps do not adequately barricade the vehicle doorway to prevent occupant ejection without functional door latches, and (2) since 1998, wheelchair ramp designs have progressed such that it is no longer necessary to disable door retention components when installing wheelchair ramp and lift systems. Therefore, NHTSA is terminating the rulemaking that arose out of the August 1995, IMS petition.

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

Issued on: January 22, 2004.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 040113013-4013-01; I.D. 122403A]

RIN 0648-AR84

Fisheries Off West Coast States and in the Western Pacific; Western Pacific Pelagic Fisheries; Pelagic Longline Fishing Restrictions, Seasonal Area Closure, Limit on Swordfish Fishing Effort, Gear Restrictions, and Other Sea Turtle Take Mitigation Measures

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

ACTION: Proposed rule; request for comments.

SUMMARY: Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, NMFS issues this proposed rule that would establish a number of conservation and management measures for the pelagic fisheries of the western Pacific managed under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (FMP). This proposed rule is intended to achieve certain objectives of the FMP, particularly achieving optimum yield for FMP-managed species, promoting domestic

harvest and domestic values associated with FMP-managed species, and promoting domestic marketing of FMP-managed species in America Samoa, the Commonwealth of the Mariana Islands, Guam, and Hawaii, while avoiding the likelihood of jeopardizing the continued existence of any species listed as endangered or threatened under the Endangered Species Act (ESA). Species of particular concern include the green, hawksbill, leatherback, loggerhead, and olive ridley sea turtles, all of which have been found to interact with, and be affected by, the pelagic fisheries of the western Pacific region.

This proposed rule would eliminate the prohibition on longline fishing by vessels registered under the FMP for use under Hawaii longline limited access permits ("Hawaii-based longline vessels") and vessels registered for use under longline general permits ("general longline vessels") during April and May in certain waters south of the Hawaiian Islands; eliminate the prohibition on Hawaii-based longline vessels and general longline vessels using longline gear to target swordfish ("shallow-setting") north of the equator; establish an annual limit on the number of shallow-sets that may be conducted north of the equator by the Hawaii-based longline fleet; divide and distribute this effort limit each calendar year in equal portions to interested holders of Hawaii longline limited access permits; require the use of circle hooks sized 18/0 or larger with a 10-degree offset and mackerel-type bait by Hawaii-based longline vessels shallow-setting north of the equator; establish annual limits on the numbers of fishery interactions with leatherback and loggerhead sea turtles; require that the longline-setting procedure be performed during the nighttime when shallow-setting north of 23° N. lat.; require that operators of Hawaii-based longline vessels carry and use NMFS-approved de-hooking devices; eliminate the requirement that operators of general longline vessels annually complete a protected species workshop; eliminate the requirement that general longline vessels and other pelagic fishing vessels using hook-and-line gear employ specified sea turtle handling measures; and eliminate the requirement that certain vessels may be re-registered to Hawaii longline limited access permits only during the month of October.

DATES: Comments must be received in writing by February 27, 2004.

ADDRESSES: Written comments on this proposed rule or its Initial Regulatory Flexibility Analysis (IRFA) should be mailed to Dr. Samuel Pooley, Acting

Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700; or faxed to 808-973-2941. Written comments will not be accepted if submitted via e-mail or the Internet. Written comments regarding the burden hour estimates or any other aspects of the collection of information requirements contained in this proposed rule may be submitted by mail to NMFS (see **ADDRESSES**) and to OMB by e-mail at David_Rostker@omb.eop.gov or faxed to 202-395-7285. Copies of the Draft Supplemental Environmental Impact Statement (DSEIS), Regulatory Impact Review (RIR), and IRFA prepared for this action, as well as the Final Environmental Impact Statement (FEIS) that was prepared for the fisheries managed under the FMP and issued by NMFS on March 30, 2001, may be obtained from Dr. Samuel Pooley at the address above. Requests for such copies should indicate whether a paper copy or electronic copy on CD is preferred. Copies of the FEIS, DSEIS, IRFA, and RIR are also available on the Internet at the website of PIRO, <http://swr.nmfs.noaa.gov/pir/>. The DSEIS, IRFA, and RIR are also available at the website of the Western Pacific Fishery Management Council, <http://www.wpcouncil.org/>.

FOR FURTHER INFORMATION CONTACT: Tom Graham, Fishery Management Specialist, PIRO, at 808-973-2937.

SUPPLEMENTARY INFORMATION:

Background

On March 29, 2001, NMFS issued a biological opinion under the ESA for the pelagic fisheries of the western Pacific region. The biological opinion included a reasonable and prudent alternative designed to avoid the likelihood of jeopardizing the continued existence of green, leatherback, and loggerhead sea turtles. The requirements of the reasonable and prudent alternative were implemented on an interim basis through an Order issued on March 30, 2001, by the United States District Court for the District of Hawaii in *Center for Marine Conservation v. NMFS* and a subsequent emergency interim rule made effective June 12, 2001 (66 FR 31561), and extended on December 10, 2001 (66 FR 63630). The requirements were implemented on a permanent basis through a final rule published June 12, 2002 (67 FR 40232).

The June 12, 2002, rule prohibits: (1) swordfish-directed fishing by Hawaii-based longline vessels and general longline vessels north of the equator, (2) fishing by Hawaii-based longline vessels and general longline vessels in certain

waters south of the Hawaiian Islands (between the equator and 15° N. lat., and between 145° W. long. and 180° long.), and (3) the landing or possessing of more than 10 swordfish per fishing trip by Hawaii-based longline vessels and general longline vessels fishing north of the equator. The rule allows the re-registration of vessels to Hawaii longline limited access permits only during the month of October; requires all longline vessel operators to annually attend a protected species workshop; and requires Hawaii-based longline vessels, general longline vessels, and non-longline pelagic vessels using hook-and-line gear to use specified sea turtle handling and resuscitation measures.

On December 12, 2001, NMFS reinitiated ESA section 7 consultation on the FMP, based on the reasonable and prudent alternative in the March 29, 2001, biological opinion and new information that could improve NMFS' ability to quantify and evaluate the effects of the FMP-managed fisheries on listed sea turtle populations. At the conclusion of the consultation, on November 15, 2002, NMFS issued a new biological opinion specifying that continued authorization of pelagic fisheries in the western Pacific region under the FMP is not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat.

On August 31, 2003, the Memorandum Opinion issued in *Hawaii Longline Association v. NMFS* (D.D.C., Civ. No. 01-0765) invalidated the November 15, 2002, biological opinion and the June 12, 2002, final rule (67 FR 40232). On October 6, 2003, the Court stayed the August 31, 2003, Order and reinstated the biological opinion and regulations until April 1, 2004.

In June 2003, at its 118th meeting, the Western Pacific Fishery Management Council (Council) began considering recommendations for new measures for the FMP-managed fisheries, focusing on potential modifications to existing measures aimed at minimizing sea turtle interactions in the FMP-managed longline fisheries.

On October 17, 2003, NMFS published a notice of intent (68 FR 59771) to prepare a supplemental environmental impact statement (SEIS) in accordance with the National Environmental Policy Act of 1969 (NEPA). The SEIS would re-examine the management measures currently in place to minimize interactions between the Hawaii-based longline fishery and protected species, as well as other management issues and options raised

during the public scoping process. The notice also advised that the Court orders would eliminate existing measures designed to avoid the likelihood that FMP-managed fisheries would jeopardize the continued existence of listed species of sea turtles, and that NMFS and the Council were, therefore, considering management measures to protect sea turtles.

On December 3, 2003, NMFS published a supplemental notice of intent (68 FR 67640) regarding the SEIS. This notice furnished additional information on the need for expedited management action on proposed management measures related to the Hawaii-based longline fishery and its potential impact on ESA-listed sea turtles. The accelerated management action schedule is necessary to avoid a lapse in sea turtle conservation measures after the June 12, 2002, final rule is vacated on April 1, 2004.

The supplemental notice (68 FR 67640) also announced the Council's and NMFS' intent to apply alternative procedures approved by the Council on Environmental Quality (CEQ) to facilitate completion of the SEIS on the proposed management measures for the Hawaii-based longline fishery so that necessary turtle conservation rules could be effective by April 1, 2004. The supplemental notice advised that a subsequent phase of the SEIS would be prepared to address other management issues identified in the initial notice of intent (68 FR 59771) and during the subsequent public scoping process. The supplemental notice confirmed the initial scoping meeting schedule and effectiveness of the public input opportunity through December 15, 2003. The Council and NMFS also solicited, recorded, and considered input on issues and possible action options and alternatives received during public Council meetings and public meetings of the Council's Sea Turtle Conservation Special Advisory Committee, which was formed in September 2003.

This proposed rule was developed in response to the urgent need to provide adequate protections for sea turtles and to the promising results of recent research in the Atlantic Ocean on mitigation technologies for sea turtle interactions. The research has identified combinations of hook and bait types with potential to substantially reduce interaction rates in swordfish-directed longline fishing and the adverse impacts of such interactions. Although these combinations have not been tested in Pacific Ocean fisheries, the affected sea turtle species are the same in the Pacific and Atlantic so the positive experimental results obtained in the

Atlantic are expected to be largely replicated if the hook and bait combinations are applied in commercial fisheries in the western Pacific region. The relatively low sea turtle interaction rates expected from these hook and bait types, combined with other mitigation and safeguard measures, would allow the current restrictions on shallow-setting and deep-setting (tuna-targeting) to be eased, enhancing the ability to achieve the objectives of the FMP, particularly the objectives to achieve optimum yield for FMP-managed species, promote domestic harvest and domestic values associated with FMP-managed species, and promote domestic marketing of FMP-managed species in America Samoa, the Commonwealth of the Mariana Islands, Guam, and Hawaii.

This proposed rule would allow shallow-setting to occur at about one half the average annual level of effort during the 1994-1998 period, facilitating the generation of economic benefits in that component of the fishery. This proposed rule would also give the longline fleet year-round access to yellowfin and bigeye tuna stocks in the area currently closed to longline fishing during April and May.

At its 121st meeting, on November 25, 2003, the Council made a recommendation for management action. This proposed rule would implement both the Council's recommended action and the court ruling of August 31, 2003 (vacating the rule published June 12, 2002).

Management Measures to be Eliminated by Court Ruling

The Court ruling will on April 1, 2004, eliminate: (1) The prohibition on Hawaii-based longline vessels and general longline vessels using longline gear to fish for swordfish north of the equator (as well as several restrictions intended to make this prohibition enforceable, including restrictions on gear configuration, set depth, and the number of swordfish possessed and landed); (2) the prohibition on longline fishing by Hawaii-based vessels and general longline vessels during April and May in certain waters south of the Hawaiian Islands (between the equator and 15° N. lat., and between 145° W. long. and 180° long.); (3) the requirement that operators of general longline vessels annually complete a protected species workshop and have on board a valid protected species workshop certificate; (4) the requirement that owners and operators of general longline vessels and of other vessels using hooks to target Pacific pelagic species employ specified sea turtle handling measures (the handling

measures, which vary among vessel type, include carrying and using line clippers, dip nets, and wire or bolt cutters to disengage sea turtles, and handling, resuscitating, and releasing sea turtles in specified manners; and (5) the requirement that any vessel de-registered from a Hawaii longline limited access permit after March 29, 2001, may only be re-registered to a Hawaii longline limited access permit during the month of October.

Proposed Management Measures

The Council's proposed action would: (1) Establish an annual limit on the amount of shallow-set longline fishing effort north of the equator that may be collectively exerted by Hawaii-based longline vessels (set at 2,120 shallow-sets per year); (2) divide and distribute this shallow-set effort limit each calendar year in equal portions (in the form of transferable single-set certificates valid for a single calendar year) to all holders of Hawaii longline limited access permits that respond positively to an annual solicitation of interest from NMFS; (3) prohibit any Hawaii-based longline vessel from making more shallow-sets north of the equator during a trip than the number of valid shallow-set certificates on board the vessel; (4) require that operators of Hawaii-based longline vessels submit to the Regional Administrator within 72 hours of each landing of pelagic management unit species one valid shallow-set certificate for every shallow-set made north of the equator during the trip; (5) require that Hawaii-based longline vessels, when making shallow-sets north of the equator, use only circle hooks sized 18/0 or larger with a 10-degree offset; (6) require that Hawaii-based longline vessels, when making shallow-sets north of the equator, use only mackerel-type bait; (7) establish annual limits on the numbers of interactions between leatherback and loggerhead sea turtles and Hawaii-based longline vessels while engaged in shallow-setting (set equal to the annual estimated incidental take for the respective species in the shallow-set component of the Hawaii-based fishery, as established in the prevailing biological opinion issued by NMFS pursuant to section 7 of the ESA); (8) establish a procedure for closing the shallow-setting component of the Hawaii-based longline fishery for the remainder of the calendar year when either of the two limits is reached, after giving 1 week advanced notice of such closure to all holders of Hawaii longline limited access permits (the numbers of interactions will be monitored with respect to the limits using year-to-date

estimates derived from data recorded by NMFS vessel observers); (9) require that operators of Hawaii-based longline vessels notify the Regional Administrator (as defined at 50 CFR 660.236) in advance of every trip whether the longline sets made during the trip will involve shallow-setting or deep-setting and require that Hawaii-based longline vessels make sets only of the type declared (i.e., shallow-sets or deep-sets); (10) require that operators of Hawaii-based longline vessels carry and use NMFS-approved de-hooking devices; and (11) require that Hawaii-based longline vessels, when making shallow-sets north of 23° N. lat., start and complete the line-setting procedure during the nighttime (specifically, no earlier than one hour after local sunset and no later than local sunrise).

These proposed management measures would replace the existing restrictions on longlining north of the equator, which will be eliminated on April 1, 2004, by the Court ruling. Certain measures that will be eliminated by the Court ruling would not be reinstated under the proposed rule. Specifically, the proposed restrictions related to shallow-setting would apply only to Hawaii-based longline vessels, not general longline vessels; Hawaii-based longline vessels and general longline vessels would no longer be prohibited from longlining during April and May in certain waters south of the Hawaiian Islands; operators of general longline vessels would no longer be required to annually complete a protected species workshop; operators of general longline vessels and of other vessels using hooks to target Pacific pelagic species would no longer be required to employ specified sea turtle handling measures; and the period during which vessels de-registered from a Hawaii longline limited access permit after March 29, 2001, would be allowed to be re-registered to Hawaii longline limited access permits would no longer be limited to the month of October.

These measures that would be eliminated were intended to minimize adverse impacts on certain species of sea turtles. The Council's proposed action would not reinstate them because the Council found they are not needed to achieve the objectives of the action, provided that the measures proposed in items (1) through (10) of the above list of proposed measures are implemented. The Council found that it is unlikely that general longline vessels would engage in shallow-setting north of the equator (which would be unrestricted under the proposed rule), primarily due to their being prohibited from longlining

in the EEZ around Hawaii and from landing fish in Hawaii.

The Council's findings with respect to achieving the objectives of the action were predicated on certain off-site sea turtle conservation projects being undertaken. These projects, which are not part of this proposed rule, would be aimed at protecting affected sea turtle populations on their nesting beaches and in their nearshore foraging grounds at sites outside of the United States. The sites include a nesting beach in Papua, coastal foraging grounds in western Papua, nesting beaches in Papua New Guinea, the fishing grounds of the halibut gillnet fishery in Baja California, Mexico, and nesting beaches in Japan. The projects would be undertaken by non-governmental organizations under contract with the Council and/or NMFS. In assessing the likely impacts of its proposed action, the Council considered these projects in conjunction with the regulatory elements of the proposed action.

This proposed rule focuses on managing the Hawaii-based longline fishery with respect to listed sea turtle species. The Council intends to continue to consider management actions that might be needed for the other FMP-managed fisheries, including other longline fisheries and troll and handline fisheries.

The proposed requirement to set longline gear only during the nighttime while shallow-setting north of 23° N. lat. is intended to minimize interactions with seabirds. It would put the FMP in compliance with the terms and conditions contained in a biological opinion issued on November 28, 2000, and amended on November 18, 2002, by the U.S. Fish and Wildlife Service, which are intended to conserve endangered short-tailed albatross.

Expected Effects of Proposed Rule on Sea Turtles

The rates of sea turtle interactions and mortalities in the Hawaii-based longline fishery resulting from the proposed rule would likely be substantially lower than those under the management regime in place in 1999, prior to the imposition of restrictions on swordfish-directed fishing and the April-May area closure (the regime to which the fishery will revert on April 1, 2004, if management action is not taken before then), and higher than the expected rates under the current management regime. During the 1994–1998 period, which represents an appropriate baseline for the no-action scenario, the estimated annual average numbers of interactions were as follows: leatherback, 112; loggerhead, 418; green, 40; and olive ridley, 146. Under the

proposed rule, the expected numbers of annual average interactions are as follows: leatherback, 35; loggerhead, 21; green, 7; and olive ridley, 42. Under the current management regime, the expected numbers of annual average interactions are as follows: leatherback, 6; loggerhead, 19; green, 3; and olive ridley, 31. The projected sea turtle mortality rates, which are subsets of the interaction rates, are more uncertain than the projected interaction rates because of the difficulty in estimating the numbers of turtles that ultimately die as a result of injuries incurred in interactions with fishing gear.

The projected interaction and mortality rates under the proposed rule are uncertain in part because they are based on research findings regarding the efficacy of a hook-and-bait combination that has not been thoroughly tested in commercial fisheries in the Pacific Ocean.

The proposed hook-and-bait combination (18/0-sized circle hooks with 10-degree offset in combination with mackerel-type bait) is one of a number of gear configurations tested in experiments conducted by NMFS in the Western Atlantic Ocean during the last 3 years. The results available to date indicate substantially reduced sea turtle interaction rates compared with the J-hooks and squid bait that are conventionally used to target swordfish and that served as the experimental controls. In the experiments, the use of the proposed hook-and-bait combination resulted in an average reduction of 92 percent in interactions with loggerhead sea turtles, an average reduction of 67 percent in interactions with leatherback sea turtles, an average increase of 30 percent in swordfish catch, by weight, and an average reduction of 81 percent in bigeye tuna catch, by weight.

Under the proposed rule there is a possibility that greater effective fishing effort per set could increase relative to the no-action scenario (as could the rate of sea turtle interactions per set), since fishermen would have an incentive to fish their limited available sets to maximize harvest levels. This effect, however, as well as the uncertainty of the efficacy of the hook and bait requirements, is unlikely to pose substantial risk to affected sea turtles populations because of the imposition of the annual limits on interactions with leatherbacks and loggerheads in the shallow-set component of the Hawaii-based longline fishery. Further, the requirement that vessel operators use NMFS-approved de-hooking devices is expected to reduce the number of mortalities per interaction.

In addition to direct effects on sea turtles stemming from interactions with longline gear, the proposed rule might also have indirect effects. These include effects stemming from shifts in the production of swordfish and tuna between the U.S.-regulated fisheries and those of other countries and the effects of the Hawaii-based longline fishery serving as a model for sea turtle mitigation techniques that the fleets of other countries can adopt. Effects in both these categories are likely to be positive with respect to populations of affected sea turtles.

This proposed rule has been recommended by the Council. The impacts of this proposed rule with respect to the likelihood of jeopardizing the continued existence of affected species of sea turtles will be assessed by NMFS in the process of the ESA section 7 consultation for the FMP-managed fisheries, which is currently underway. The rule might be revised, as necessary, to comport with the reasonable and prudent alternative, if any, of the biological opinion that is issued as a result of that consultation. If such restrictions exceed the scope of this proposed rule, NMFS will initiate a second round of notice and comment.

NMFS seeks comment on the de-hooking devices that should be required to be carried and used on Hawaii-based longline vessels, including specific minimum design standards, specific required methods of use, and the possibility of requiring that several types of de-hooking devices and related equipment be carried and used, depending on the circumstances. NMFS also seeks comment on more specific definitions or minimum design standards for circle hooks and mackerel-type bait that should be required when shallow-setting north of the equator.

Classification

The Council and NMFS prepared a draft supplemental environmental impact statement (DSEIS) for this regulatory amendment. While a notice of availability has not yet been published, the DSEIS is scheduled to be filed with the Environmental Protection Agency and distributed in mid-January 2004 for an abbreviated (30-day) comment period as approved by CEQ.

This proposed rule has been determined to be significant for purposes of Executive Order 12866.

The Council prepared an IRFA that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of why action is being considered, the objectives and legal basis for the action, and a description of the action,

including its reporting, recordkeeping, and other compliance requirements, are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows:

Number of Affected Small Entities

The proposed rule would apply to all holders of Hawaii longline limited access permits and all holders of longline general permits. The number of Hawaii longline limited access permit holders is 164. Not all such permits are renewed and used every year (approximately 126 were renewed in 2003). Most holders of Hawaii longline limited access permits are based in, or operate out of, Hawaii. Longline general permits are not limited by number. Approximately 67 longline general permits were issued in 2003. In 2003 all but two holders of longline general permits were based in, or operated out of, American Samoa. The remaining two were based in the Northern Mariana Islands.

In a few cases multiple permits are held by a single business, so the number of businesses to whom the rule would apply is slightly smaller than the number of permit holders. All holders of Hawaii longline limited access permits and longline general permits are believed to be small entities (i.e., they are businesses that are independently owned and operated, not dominant in their field, and have no more than \$3.5 million in annual receipts). Therefore, the number of small entities to which the rule would apply is approximately 230.

Duplicating, Overlapping, and Conflicting Federal Rules

To the extent practicable, it has been determined that there are no Federal rules that may duplicate, overlap, or conflict with the proposed rule.

Alternatives to the Proposed Rule

A number of alternatives to the proposed rule were considered. Described below are the alternatives and why they were not chosen.

The alternatives included two variations on the seasonal area longline closure, including one that would retain the current April-May closure in certain waters south of the Hawaiian Islands and one that would retain the current April-May closure with the exception of the EEZ waters around Palmyra Atoll (the proposed rule would eliminate the current April-May area closure). The alternatives were rejected because they would unnecessarily constrain the fishing activities and economic performance of holders of longline

general permits and Hawaii longline limited access permits; adverse impacts to sea turtles could be adequately mitigated through other elements of the preferred alternative without having to restrict longline fishing activity by period or area.

The alternatives included five variations on the amount of shallow-setting longline effort north of the equator that would be allowed by Hawaii-based vessels. The levels of shallow-setting effort considered were zero, 1,060 sets per year, 3,179 sets per year, and unlimited, as well as one alternative that would allow only a one-time trial of 1,560 sets (the proposed rule would limit shallow-setting effort at 2,120 sets, about 50 percent of the 1994–1998 annual average level). The selection among alternatives was based on their expected impacts on sea turtles (sea turtle interactions and mortalities are expected to be strongly correlated with the amount of fishing effort) versus their expected impacts on the economic performance of the Hawaii-based longline fishery (economic benefits are expected to be strongly correlated with the amount of fishing effort). The alternatives allowing shallow-setting at levels greater than 50 percent of the 1994–1998 annual average were rejected because they might fail to keep impacts on sea turtles below those required in the biological opinion's incidental take statement. The alternatives allowing shallow-setting at levels less than 50 percent of the 1994–1998 annual average were rejected because they would unnecessarily constrain the fishing activities and economic performance of Hawaii-based longline vessels; adverse impacts to sea turtles could be adequately mitigated through other elements of the preferred alternative without having to restrict shallow-setting to the degree proposed under the rejected alternatives.

The alternatives included several variations on how the allowable level of shallow-setting effort north of the equator would be allocated among holders of Hawaii longline limited access permits. Variations included allocating the available effort by lottery, allocating it equally among all permit holders, allocating it in proportion to the permit holders' historical shallow-setting effort, and not allocating the effort in any particular way, in which case the fishery would be closed each year once the fleet-wide limit is reached (the proposed rule would divide and distribute the limit equally among all interested permit holders in the form of transferable shallow-set certificates). The lottery variation was rejected because it would impose a substantial

amount of uncertainty on fishermen and might be considered inequitable by some fishermen. The equal-distribution variation was rejected because it would give each permit holder too few shallow sets to be able to make it worth investing and participating in the shallow-set component of the fishery, thereby constraining the economic performance of that component. The variation of allocating effort in proportion to the permit holders' historical shallow-setting effort was rejected because it would be excessively costly to implement and because of the contention likely to be generated with respect to the documentation and determination of individuals' historical fishing effort. The fleet-wide limit variation was rejected because it would create an incentive for each permit holder to do as much shallow-setting as possible before the fishery is closed, thereby encouraging fishermen to shallow-set under what would otherwise be sub-optimal conditions (in terms of both economic performance and safety).

The alternatives included two variations on the sea turtle interaction limit(s), including no limit and a limit for every species for which there is an Incidental Take Statement issued under the ESA (the proposed rule would close the shallow-set component of the fishery if either of two calendar-year interaction limits is reached, one for leatherback sea turtles and one for loggerhead sea turtles; the limits would be set equal to the annual estimated incidental take for the respective species in the shallow-set component of the Hawaii-based fishery, as established in the prevailing biological opinion issued by NMFS pursuant to section 7 of the ESA). The no-limit variation was rejected because it might fail to adequately minimize adverse impacts on sea turtles. The variation of establishing limits for all affected species was rejected because it would likely result in the shallow-set component of the fishery being closed more often than is needed to adequately mitigate adverse impacts on sea turtles.

Effects of the Proposed Rule on Small Entities

The proposed rule is expected to have positive overall economic impacts on the small entities to whom the proposed rule would apply, all of which are individuals and businesses that hold permits for, and participate in, the western Pacific pelagic longline fisheries. These positive impacts would stem from the relaxation of the current restrictions on longlining, including the elimination of the April-May area

closure for longlining and the elimination of the prohibition on shallow-setting north of the equator, thereby providing new fishing opportunities and potential economic benefits. These benefits would be very slightly offset by the need to acquire and use NMFS-approved de-hooking devices.

Holders of Hawaii longline limited access permits that choose not to engage in shallow-setting are likely to further benefit each year by being able to sell their share of shallow-set certificates to other permit holders.

Holders of Hawaii longline limited access permits that choose to engage in shallow-setting are likely to benefit from the required hook-and-bait combination, as it has been found in experiments in the Atlantic Ocean to result in higher catch rates of swordfish relative to conventionally used hook and bait types. These permit holders would also be subject to new costs, which would partly offset the new benefits available from shallow-setting. These include the costs of acquiring an adequate number of shallow-set certificates each year and acquiring and using circle hooks sized 18/0 or larger, with 10-degree offset. There would also be very minor new costs associated with the requirement to notify NMFS each year if they are interested in receiving shallow-set certificates and with the requirement to submit shallow-set certificates to NMFS after each trip. There may also be new costs (relative to the costs associated with conventional practices) associated with the need to use only mackerel-type bait and to conduct the line-setting procedure during the nighttime hours.

Holders of longline general permits would have the opportunity to engage in unrestricted shallow-setting north of the equator, but because general longline vessels are not allowed to fish in the EEZ around Hawaii or land fish in Hawaii, it is unlikely to be a cost-effective option and thus unlikely to yield new economic benefits to fishery participants.

The proposed rule is likely to positively impact small businesses in addition to those to which the rule would apply. These include Hawaii-based businesses that supply goods and services to fishing operations, as fishing activities would expand, and seafood wholesalers and retailers, as the proposed rule is expected to lead to increased landings of swordfish and a more regular supply of tuna.

A copy of the IRFA is available from NMFS (see ADDRESSES).

This proposed rule contains two collection-of-information requirements subject to review and approval by the

Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act (PRA). These requirements have been submitted to the OMB for approval. The first would require that holders of Hawaii longline limited access permits respond to annual requests from NMFS if they are interested in receiving shares of the annual limit on longline shallow-sets (in the form of shallow-set certificates). The second would require that holders of Hawaii longline limited access permits or their agents notify the Regional Administrator prior to each fishing trip whether longline shallow-sets or deep-sets will be made during the trip. The public reporting burden for the first collection-of-information requirement is estimated to average ten minutes per response, and for the second requirement, four minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS (see ADDRESSES) and to OMB by e-mail at *David_Rostker@omb.eop.gov* or faxed 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.

In a biological opinion dated November 15, 2002, NMFS determined that fishing activities conducted under the FMP and its implementing regulations are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS or result in the destruction or adverse modification of critical habitat. Under rulings made by the U.S. District Court for the District of Columbia on August 31, 2003, and October 6, 2003 (*Hawaii Longline Association v. NMFS*), the biological opinion of November 15, 2002, will be

vacated on April 1, 2004. In response to the impending vacatur of the biological opinion and to analyze the management measures in this proposed rule, a request to reinstate formal consultation was made by the NMFS Pacific Islands Region, Office of Sustainable Fisheries, to the NMFS Office of Protected Resources on December 11, 2003.

List of Subjects in 50 CFR Part 660

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaiian Natives, Indians, Northern Mariana Islands, and Reporting and recordkeeping requirements.

Dated: January 23, 2004.

Rebecca Lent,

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

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

PART 660—FISHERIES OFF WEST COAST STATES AND IN THE WESTERN PACIFIC

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

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

2. In § 660.12, the definition of “Pelagics FMP” is revised and new definitions for “Deep-set or Deep-setting”, “Shallow-set or Shallow-setting”, and “Shallow-set certificate”, are added alphabetically to read as follows:

§ 660.12 Definitions.

* * * * *

Deep-set or Deep-setting means the deployment of, or deploying, respectively, longline gear in a manner consistent with all the following criteria: with all float lines at least 20 meters in length; with a minimum of 15 branch lines between any two floats (except basket-style longline gear which may have as few as 10 branch lines between any two floats); without the use of light sticks; and resulting in the possession or landing of no more than 10 swordfish (*Xiphias gladius*) at any time during a given trip. As used in this definition “float line” means a line used to suspend the main longline beneath a float and “light stick” means any type of light emitting device, including any fluorescent “glow bead”, chemical, or electrically powered light that is affixed underwater to the longline gear.

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Pelagics FMP means the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region.

* * * * *

Shallow-set or Shallow-setting means the deployment of, or deploying, respectively, longline gear in a manner that does not meet the definition of deep-set or deep-setting as defined in this section.

Shallow-set certificate means an original paper certificate that is issued by NMFS and valid for one shallow-set of longline gear (more than one nautical mile of deployed longline gear is a complete set) for sets that start during the period of validity indicated on the certificate.

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§ 660.21 [Removed]

3. In § 660.21, paragraphs (m) and (n) are removed.

4. In § 660.22, paragraph (hh) is added, paragraphs (ff), (gg), (jj), (kk), (ll), (mm), (nn), (oo), (pp), (qq), (rr), and (ss) are revised, and paragraph (tt) is removed and reserved, to read as follows:

§ 660.22 Prohibitions.

* * * * *

(ff) Own or operate a vessel registered for use under a Hawaii longline limited access permit and fail to attend and be certified for completion of a workshop conducted by NMFS on mitigation, handling, and release techniques for turtles and seabirds and other protected species in violation of § 660.34(a).

(gg) Operate a vessel registered for use under a Hawaii longline limited access permit without having on board a valid protected species workshop certificate issued by NMFS or a legible copy thereof in violation of § 660.34(d).

(hh) From a vessel registered for use under a Hawaii longline limited access permit, make any longline set not of the type (shallow-setting or deep-setting) indicated in the notification to the Regional Administrator pursuant to § 660.23(a), in violation of § 660.33(h).

* * * * *

(jj) Fail to carry and use a line clipper, dip net, dehooker, and wire or bolt cutters on a vessel registered for use under a Hawaii longline limited access permit in violation of § 660.32(a).

(kk) Engage in shallow-setting without a valid shallow-set certificate for each shallow-set made in violation of § 660.33(c).

(ll) Fail to attach a valid shallow-set certificate for each shallow-set to the original logbook form submitted to the Regional Administrator under § 660.14, in violation of § 660.33(c).

(mm) Fail to comply with the sea turtle handling, resuscitation, and release requirements when operating a vessel registered for use under a Hawaii longline limited access permit in violation of § 660.32(b), (c), or (d).

(nn) Engage in the line-setting process from a vessel registered for use under a Hawaii limited access longline permit while shallow-setting north of 23° N. lat. during daylight hours in violation of § 660.35(a)(10).

(oo) Engage in shallow-setting from a vessel registered for use under a Hawaii longline limited access permit north of the equator (0° lat.) with hooks other than circle hooks sized 18/0 or larger, with 10° offset, in violation of § 660.33(f).

(pp) Engage in shallow-setting from a vessel registered for use under a Hawaii longline limited access permit north of the equator (0° lat.) with bait other than mackerel-type bait in violation of § 660.33(g).

(qq) Engage in shallow-setting from a vessel registered for use under a Hawaii longline limited access permit after the shallow-set component of the longline fishery has been closed pursuant to § 660.33(b)(3)(ii), in violation of § 660.33(i).

(rr) Have on board a vessel registered for use under a Hawaii longline limited access permit, at any time during a trip for which notification to NMFS under § 660.23(a) indicated that deep-setting would be done, float lines less than 20 meters in length or light sticks, in violation of § 660.33(d).

(ss) Transfer a shallow-set certificate to a person other than a holder of a Hawaii longline limited access permit in violation of § 660.33(e).

(tt) [Reserved]

* * * * *

5. In § 660.23, paragraph (a) is revised to read as follows:

§ 660.23 Notifications.

(a) The permit holder for a fishing vessel subject to the requirements of this subpart, or an agent designated by the permit holder, shall provide a notice to the Regional Administrator at least 72 hours (not including weekends and Federal holidays) before the vessel leaves port on a fishing trip, any part of which occurs in the EEZ around Hawaii. The vessel operator will be presumed to be an agent designated by the permit holder unless the Regional Administrator is otherwise notified by the permit holder. The notice must be provided to the office or telephone number designated by the Regional Administrator. The notice must provide the official number of the vessel, the name of the vessel, trip type (either

deep-setting or shallow-setting), the intended departure date, time, and location, the name of the operator of the vessel, and the name and telephone number of the agent designated by the permit holder to be available between 8 a.m. and 5 p.m. (Hawaii time) on weekdays for NMFS to contact to arrange observer placement.

* * * * *

6. In § 660.32, paragraph (a)(1) is revised, paragraphs (a)(2) and (a)(3) are removed, paragraphs (a)(4) and (a)(5) are redesignated as paragraphs (a)(2) and (a)(3), respectively, and new paragraph (a)(4) is added, to read as follows:

§ 660.32 Sea turtle take mitigation measures.

(a) * * *

(1) Owners and operators of vessels registered for use under a Hawaii longline limited access permit must carry aboard their vessels line clippers meeting the minimum design standards as specified in paragraph (a)(2) of this section, dip nets meeting the minimum standards prescribed in paragraph (a)(3) of this section, dehookers meeting the minimum design standards prescribed in paragraph (a)(4) of this section, and wire or bolt cutters capable of cutting through the vessel's hooks. These items must be used to disengage any hooked or entangled sea turtles with the least harm possible to the sea turtles and as close to the hooks as possible in accordance with the requirements specified in paragraphs (b) through (d) of this section.

* * * * *

(4) *Dehookers.* Dehookers are devices intended to remove embedded hooks from sea turtles and other animals in a manner that minimizes injury and trauma to the animals. The minimum design standards are that the device or devices can be used to grasp or engage a hook embedded in a sea turtle or other animal on board the vessel or in the water alongside the vessel and remove the hook with little injury or trauma to the animal.

* * * * *

7. Section 660.33 is revised to read as follows:

§ 660.33 Western Pacific longline fishing restrictions.

(a) *Limit on shallow-setting by Hawaii longline vessels.*

(1) A maximum annual limit of 2,120 is established on the number of shallow-set certificates that will be made available each calendar year to vessels registered for use under Hawaii longline limited access permits.

(2) The Regional Administrator will divide the 2,120-set limit each calendar

year into equal shares such that each holder of a Hawaii longline limited access permit who provides notice of interest to the Regional Administrator no later than November 1 prior to the start of the calendar year, pursuant to paragraph (a)(3) of this section, receives a share. If such division would result in shares containing a fraction of a set, the limit will be adjusted downward such that each share consists of a whole number of sets.

(3) Any permit holder who provides notice according to this paragraph is eligible to receive shallow-set certificates. In order to be eligible to receive shallow-set certificates for a given calendar year, holders of Hawaii longline limited access permits must provide written notice to the Regional Administrator of their interest in receiving such certificates no later than November 1 prior to the start of the calendar year, except for 2004, the notification deadline for which is May 1, 2004.

(4) No later than June 1, 2004, and in every year subsequent, no later than December 1, the Regional Administrator will send shallow-set certificates valid for the upcoming calendar year to all holders of Hawaii longline limited access permits that provided notice of interest to the Regional Administrator pursuant to paragraph (a)(3) of this section.

(b) *Limits on sea turtle interactions.*

(1) Maximum annual limits are established on the numbers of physical interactions that occur each calendar year between vessels registered for use under Hawaii longline limited access permits while shallow-setting and:

- (i) Leatherback sea turtles (*Dermodochelys coriacea*); and
- (ii) Loggerhead sea turtles (*Caretta caretta*).

(2) The two sea turtle interaction limits are set equal to the Annual Estimated Incidental Takes for the respective species in the shallow-setting component of the Hawaii-based longline fishery, as indicated in the latest Incidental Take Statement issued by NMFS in association with a Biological Opinion pursuant to section 7 of the Endangered Species Act.

(3) Upon determination by the Regional Administrator that, based on data from NMFS observers, either of the two interaction limits has been reached 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 of the limit having been reached. The notification will include an advisement that the shallow-set component of the longline

fishery shall be closed and shallow-setting north of the equator by vessels registered for use under Hawaii longline limited access permits will be prohibited beginning at a specified date, not earlier than 7 days after the date of filing of the notification of the closure for public inspection at the Office of the Federal Register, until the end of the calendar year in which the limit was reached. Coincidental with the filing of the notification of the limit having been reached at the Office of the Federal Register, the Regional Administrator will also provide notice that the shallow-set component of the longline fishery shall be closed and shallow-setting north of the equator by vessels registered for use under Hawaii longline limited access permits will be prohibited beginning at a specified date, not earlier than 7 days after the date of filing of a notification of the closure for public inspection at the Office of the Federal Register, to all holders of Hawaii longline limited access permits via electronic mail, facsimile transmission, or post.

(ii) Beginning on the fishery closure date indicated in the notification published in the **Federal Register** under paragraph (b)(3)(i) of this section until the end of the calendar year in which the limit was reached, the shallow-set component of the longline fishery shall be closed.

(c) Owners and operators of vessels registered for use under a Hawaii longline limited access permit may engage in shallow-setting north of the equator (0° lat.) providing that there is on board one valid shallow-set certificate for every shallow-set that is made during the trip. For each shallow-set made north of the equator (0° lat.) vessel operators must submit one valid shallow-set certificate to the Regional Administrator. The certificate must be attached to the original logbook form that corresponds to the shallow-set and

that is submitted to the Regional Administrator within 72 hours of each landing of management unit species as required under § 660.14.

(d) Vessels registered for use under a Hawaii longline limited access permit may not have on board at any time during a trip for which notification to NMFS under § 660.23(a) indicated that deep-setting would be done any float lines less than 20 meters in length or light sticks. As used in this paragraph "float line" means a line used to suspend the main longline beneath a float and "light stick" means any type of light emitting device, including any fluorescent "glow bead", chemical, or electrically powered light that is affixed underwater to the longline gear.

(e) Shallow-set certificates may be transferred only to holders of Hawaii longline limited access permits.

(f) Owners and operators of vessels registered for use under a Hawaii longline limited access permit must use only circle hooks sized 18/0 or larger, with 10° offset, when shallow-setting north of the equator (0° lat.).

(g) Owners and operators of vessels registered for use under a Hawaii longline limited access permit must use only mackerel-type bait when shallow-setting north of the equator (0° lat.).

(h) Owners and operators of vessels registered for use under a Hawaii longline limited access permit may make sets only of the type (shallow-setting or deep-setting) indicated in the notification to NMFS pursuant to § 660.23(a).

(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 component of the longline fishery is closed pursuant to paragraph (b)(3)(ii) of this section.

8. Section 660.34 is revised to read as follows:

§ 660.34 Protected species workshop.

(a) Each year both the owner and the operator of a vessel registered for use under a Hawaii longline limited access permit must attend and be certified for completion of a workshop conducted by NMFS on mitigation, handling, and release techniques for turtles and seabirds and other protected species.

(b) A protected species workshop certificate will be issued by NMFS annually to any person who has completed the workshop.

(c) An owner of a vessel registered for use under a Hawaii longline limited access permit must maintain and have on file a valid protected species workshop certificate issued by NMFS in order to maintain or renew their vessel registration.

(d) An operator of a vessel registered for use under a Hawaii longline limited access permit and engaged in longline fishing must have on board the vessel a valid protected species workshop certificate issued by NMFS or a legible copy thereof.

9. In § 660.35, new paragraph (a)(10) is added to read as follows:

§ 660.35 Pelagic longline seabird mitigation measures.

(a) * * *

(10) When shallow-setting north of 23° N. lat., begin the line-setting process at least one hour after local sunset and complete the setting process no later than local sunrise, using only the minimum vessel lights necessary for safety.

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§ 660.36 [Removed and reserved]

10. Section 660.36 is removed and reserved.

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