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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 0705141198140402]

RIN 0648AV51

MagnusonStevens Fishery Conservation and Management Reauthorization Act;  
Proposed Rule to Implement Identification and Certification Procedures to  
Address Illegal, Unreported, and Unregulated (IUU) Fishing Activities and  
Bycatch of Protected Living Marine Resources (PLMRs)

AGENCY:

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

ACTION:

Proposed rule; request for comments.

SUMMARY:

NMFS proposes to implement identification and certification procedures to  
address illegal, unreported, and unregulated (IUU) fishing activities and  
bycatch of protected living marine resources (PLMRs) pursuant to the High Seas  
Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act). The  
objective of these procedures is to promote the sustainability of transboundary  
and shared fishery stocks and to enhance the conservation and recovery of PLMRs.  
The proposed rule is intended to implement existing U.S. statutory authorities  
to address noncompliance with international fisheries management and  
conservation agreements and encourage the use of bycatch reduction methods in  
international fisheries that are comparable to methods used by U.S. fishermen.  
NMFS is seeking public comment on these procedures and on the sources and types  
of information to be considered in these procedures.

DATES:

Written comments must be received no later than 5 p.m. Eastern time on [INSERT  
DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES:

Written comments on this action, identified by RIN 0648AV51, may be submitted by  
any of the following methods:

• Electronic Submissions: Submit all electronic public comments via the  
Federal eRulemaking Portal <http://www.regulations.gov>.

• Mail: Laura Cimo, Trade and Marine Stewardship Division, Office of

International Affairs, NMFS, 1315 EastWest Highway, Silver Spring, MD 20910.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT:

Laura Cimo, Trade and Marine Stewardship Division, Office of International Affairs, NMFS, at (301) 7139090.

SUPPLEMENTARY INFORMATION:

NMFS is soliciting feedback on the proposed rule. Information and comments concerning this proposed rule may be submitted by any one of several methods (see ADDRESSES). NMFS will also seek feedback from other nations on the proposed rule at bilateral and multilateral meetings, as appropriate. Information related to the international fisheries provisions of the Moratorium Protection Act can be found on the NMFS Web site at <http://www.nmfs.noaa.gov/msa2007/>. NMFS will consider all comments and information received during the comment period in preparing a final rule.

National Environmental Policy Act (NEPA)

NMFS prepared a draft Environmental Assessment (EA) to accompany this proposed rule. The EA was developed as an integrated document that includes a Regulatory Impact Review (RIR) and an Initial Regulatory Flexibility Analysis (RFA). Copies of the draft EA/RIR/RFA analysis are available at the following address: Office of International Affairs, F/IA, National Marine Fisheries Service, 1315 EastWest Highway, Silver Spring, MD 20910. Copies are also available via the Internet at the NMFS website at <http://www.nmfs.noaa.gov/msa2007/>.

Electronic Access

This proposed rule is accessible via the Internet at the Government Printing Office website at [http://www.access.gpo.gov/su\\_docs/](http://www.access.gpo.gov/su_docs/).

Background

The MagnusonStevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA), which was signed into law in January 2007, amends the Moratorium Protection Act to require that actions be taken by the United States to strengthen international fishery management organizations and address IUU fishing and bycatch of PLMRs. Specifically, the Moratorium Protection Act requires the Secretary of Commerce to identify in a biennial report to Congress those foreign nations whose fishing vessels are engaged in IUU fishing or fishing activities or practices that result in bycatch of PLMRs. NMFS has determined that this language applies to vessels entitled to fly the flag of the nation in question. The Moratorium Protection Act also requires the establishment of procedures to certify whether nations identified in the biennial report are taking appropriate corrective actions to address IUU fishing

or bycatch of PLMRs by fishing vessels of those nations. Identified nations that are not positively certified by the Secretary of Commerce could be subject to prohibitions on the importation of certain fisheries products into the United States and other measures, including limitations on port access, under the High Seas Driftnet Fisheries Enforcement Act (Enforcement Act) (16 U.S.C. 1826a). This proposed rule sets forth procedures to implement these requirements of the Moratorium Protection Act.

#### Definitions under the Moratorium Protection Act

In this rulemaking, NMFS proposes to include several definitions at 50 CFR 300.201 for purposes of implementing the Moratorium Protection Act.

NMFS was required to publish a definition of IUU fishing for purposes of the Moratorium Protection Act. See 16 U.S.C. 1826j. This definition of IUU fishing was originally published in the Federal Register on April 12, 2007 (72 FR 18404). In the proposed rule, NMFS proposes to codify this definition at 50 CFR part 300 under subpart N for ease of reference. At this time, NMFS is not proposing to revise the definition of IUU fishing that was originally published. However, NMFS plans to consider revising this definition at a later date in order to take into account, as appropriate, outcomes of negotiations in international fora that are of relevance to IUU fishing, including the United Nations Food and Agriculture Organization (FAO) Technical Consultations to develop a global binding agreement on minimum standards for port State measures to combat IUU fishing.

NMFS is actively soliciting comments from the public on the IUU definition. Specifically, NMFS is seeking comment on whether to broaden the definition to include such activities as illegal incursions of a nation's vessels into the waters of other nations, flagrant reflagging, beneficial ownership, and lack of registration.

The definition of PLMR is defined in the Moratorium Protection Act at 16 U.S.C. 1826k. The definition of PLMR will be codified at 50 CFR 300.201 for ease of reference.

#### Biennial Report to Congress on International Compliance

Pursuant to the requirements of the Moratorium Protection Act (see 16 U.S.C. 1826h), the Secretary of Commerce, in consultation with the Secretary of State, will provide a report to Congress (by no later than January 12, 2009, and every two years thereafter) which includes:

- the state of knowledge on the status of international living marine resources shared by the United States or managed under treaties or agreements to which the United States is a party, including a list of all such fish stocks classified as overfished, overexploited, depleted, endangered, or threatened with extinction by any international or other authority charged with management or conservation of living marine resources;

- a list of nations identified pursuant to the Moratorium Protection Act whose fishing vessels are engaged, or have been engaged, in IUU fishing or bycatch of PLMRs, including the specific offending activities and any enforcement or other responsive actions taken by the nation;

- a description of efforts taken by nations on the list of identified nations to take appropriate corrective actions to address IUU fishing activities

of their flagged vessels, including by the implementation and enforcement of effective conservation and management measures, and an evaluation of the progress of those actions, including steps taken by the United States to encourage corrective action and improve international compliance;

- progress at the international level to strengthen the efforts of Regional Fishery Management Organizations (RFMOs) to end IUU fishing; and

- steps taken by the Secretary at the international level to encourage the adoption of international measures comparable to those of the United States to reduce impacts of fishing practices on PLMRs, if no international agreement to achieve such goal exists, or if the relevant international fishery or conservation organization has failed to implement effective measures to end or reduce the adverse impacts of fishing practices on such species.

The biennial report will also include information on whether nations identified in the previous report have taken corrective actions to address IUU fishing or bycatch of PLMRs by fishing vessels of that nation. Specifically, the report will include information on whether:

- the government of each nation identified in the previous biennial report as having fishing vessels engaged in IUU fishing has provided evidence documenting that it has taken appropriate enforcement or other responsive action to address the IUU or bycatch activities of its fishing vessels identified in the report;

- the relevant RFMO has adopted and the identified member state has implemented, and is enforcing, effective measures to prevent, deter and eliminate IUU fishing activity;

- the government of each nation identified in the previous biennial report as having fishing vessels engaged in bycatch of PLMRs has provided evidence documenting the adoption and enforcement of a regulatory program to end or reduce bycatch of PLMRs that is comparable to that of the United States, accounting for different conditions; and

- the government of each nation identified in the previous biennial report as having fishing vessels engaged in bycatch of PLMRs has established, and is enforcing, a management plan containing requirements that will assist in gathering species-specific data to support international stock assessments and conservation enforcement efforts for PLMRs.

#### Proposed Rulemaking

Despite actions taken by the United States, other nations, and international organizations to address IUU fishing and bycatch of PLMRs, these problems continue to threaten the sustainability of living marine resources. The regulatory measures proposed here encourage nations to cooperate with the United States towards ending IUU fishing and reducing the bycatch of PLMRs. NMFS is proposing these procedures pursuant to its rulemaking authority under the Moratorium Protection Act.

Although not mandated by the Moratorium Protection Act, NMFS is proposing to promulgate, through rulemaking, procedures for the identification of foreign nations whose fishing vessels are engaged in IUU fishing or bycatch of PLMRs, in order to provide the public an opportunity to review and comment on these procedures. Since the identification of nations under the Moratorium Protection

Act triggers the need for a certification, NMFS is proposing to promulgate identification procedures and certification procedures in a single rulemaking. The Agency believes this approach will promote transparency in the identification and certification processes. As discussed above, the Moratorium Protection Act requires that NMFS identify foreign nations whose fishing vessels are engaged in IUU fishing or bycatch of PLMRs and list these nations in a biennial report to Congress, the first of which is due in January 2009. Because identification and certification procedures will not be implemented prior to publication of the first biennial report to Congress, NMFS will make its first identifications, as appropriate, under authority provided in the Moratorium Protection Act.

The Moratorium Protection Act envisions a multilateral process to implement effective measures to end IUU fishing, and eliminate or reduce the bycatch of PLMRs by those nations that receive a negative certification. In the case of bycatch of PLMRs, NMFS will work on a bilateral and/or multilateral basis to assist nations with the adoption of regulatory regimes designed to end or reduce bycatch that are comparable in effectiveness to those measures that are required in the United States, taking into account relevant environmental and/or socioeconomic conditions that may bear on their feasibility or effectiveness.

#### Identification Procedures

As required under the Moratorium Protection Act, NMFS will identify, and list in the biennial report to Congress, those nations whose fishing vessels are engaged, or have been engaged at any point during the preceding two calendar years, in IUU fishing. NMFS will also identify nations whose fishing vessels are engaged, or have been engaged during the preceding calendar year, in fishing activities either in waters beyond any national jurisdiction that result in bycatch of a PLMR, or beyond the U.S. exclusive economic zone (EEZ) that result in bycatch of a PLMR shared by the United States.

#### Procedures to Identify Nations Engaged in IUU Fishing

When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will exercise due diligence in evaluating appropriate information and evidence that are available to the agency. This information could include data gathered by the U.S. Government as well as data offered by other nations, or international organizations (such as regional fisheries management organizations), institutions, or arrangements that could, if true, support a determination that a nation's vessels have been engaged in IUU fishing. NMFS will review and verify the pertinent information when determining, for the purposes of identification, whether a nation's fishing vessels are engaged, or have been engaged, during the previous two calendar years in IUU fishing as defined under the Moratorium Protection Act.

Once NMFS has determined that the information is credible and supports, for the purposes of identification, a finding that a nation's fishing vessels are engaged in IUU fishing, NMFS, acting through or in cooperation with the State Department, will initiate bilateral discussions with the nation to:

- seek corroboration of the alleged IUU activity or credible information that refutes such allegations;

- communicate the requirements of the Moratorium Protection Act to the nation; and

• encourage such nation to take corrective action to address the IUU fishing activity in question.

Corrective actions taken by the nation or information refuting allegations of IUU fishing activity will be considered by NMFS, along with all verified information on alleged IUU fishing activity, prior to making identifications.

In identifying nations whose fishing vessels are engaged, or have been engaged, in IUU fishing under the Moratorium Protection Act, NMFS will take into account, and list in the biennial report, whether or not the nation has implemented, and is enforcing, measures that are deemed to be comparable in effectiveness to measures implemented by the United States to address the pertinent IUU fishing activity. NMFS will also consider if an RFMO exists with a mandate to regulate the fishery in which the IUU activity in question takes place, whether or not the nation is party to or maintains cooperating status with the organization, whether or not the relevant RFMO has adopted measures that are deemed by NMFS to be effective at addressing such IUU fishing activity, and whether, if the nation is a party or cooperating nonparty, the nation has implemented, and is enforcing, such measures. If a nation is not party to the relevant RFMO in which the IUU activity occurs, NMFS will consider whether the nation has implemented, and is enforcing, measures deemed to be effective at addressing the IUU activity, including any measures that have been recommended by such RFMO.

Effective measures by nations to address IUU fishing could include measures that reflect the recommendations of international organizations to prevent, deter and eliminate IUU fishing. Such flag state measures and actions, as relevant, may include, but are not limited to, those that fall into the following categories:

• data collection and catch reporting programs, including observer programs, catch documentation programs, and trade tracking schemes;

• traderelated measures that seek to reduce or eliminate trade in fish and fish products derived from IUU fishing;

• atsea or dockside boarding and inspection schemes;

• programs documenting whether fish were caught in a manner consistent with conservation and management measures;

• IUU vessel lists identifying fishing vessels that violate and/or undermine management measures;

• port state measures to prohibit landings and transshipment of unauthorized or other IUU catch;

• catch and effort monitoring, including licensing and permitting schemes, reporting, and vessel monitoring systems (VMS);

• bycatch reduction and mitigation strategies, techniques, and equipment, if the IUU fishing activity includes a violation of bycatch reduction requirements of an international fishery management agreement to which the United States is a party;

• in the case of fishing activities having an adverse impact on vulnerable marine ecosystems (VMEs), programs or measures for the identification and protection of VMEs in waters beyond any national jurisdiction (including seamounts, hydrothermal vents, and cold water corals) from significant adverse

impacts due to fishing activities;

- efforts to improve and enhance fisheries enforcement and compliance, including through the development of effective sanctions and monitoring, control and surveillance (MCS) capacity;

- participation in voluntary international efforts to combat IUU fishing (e.g., the International Monitoring, Control, and Surveillance (MCS) network or other cooperative enforcement and compliance networks).

In evaluating whether or not a nation has implemented measures that will effectively address IUU fishing, NMFS will also examine whether adequate enforcement measures and capacity exist to help promote compliance.

#### Procedures to Identify Nations Engaged in PLMR Bycatch

When determining whether to identify a nation as having fishing vessels engaged in the bycatch of PLMRs, NMFS will evaluate appropriate information and evidence. In determining whether a nation's fishing vessels are engaged, or have been engaged in the previous calendar year, in fishing activities or practices that result in bycatch of PLMRs, in accordance with the Moratorium Protection Act, NMFS will review and verify the pertinent information and evidence. Once NMFS has determined that the information is credible and supports, for the purposes of identification, a finding that a nation's fishing vessels are engaged in bycatch of PLMRs, NMFS, acting through or in cooperation with the State Department, will initiate bilateral discussions with the nation to:

- seek corroboration of the alleged PLMR bycatch or credible information that refutes such allegations;

- communicate the requirements of the Moratorium Protection Act to the nation; and

- encourage such nation to take corrective action to address the PLMR bycatch.

In its determination whether to identify nations as having fishing vessels engaged in bycatch of PLMRs, NMFS will examine whether the nation has implemented measures that are deemed to be effective to end or reduce bycatch of the relevant PLMRs as well as any corrective actions taken by the nation or information refuting the allegations of PLMR bycatch. NMFS will also examine if an international organization for the conservation and protection of such PLMR, or an international or regional fishery organization with jurisdiction over or responsibility for bycatch of such PLMR exists; and whether the nation whose fishing vessels are engaged, or have been engaged during the preceding calendar year, in bycatch of PLMRs is party to or maintains cooperating status with the relevant international body. NMFS will consider whether the relevant international body has or has not adopted measures which have been demonstrated to end or reduce bycatch of PLMRs, and whether, if the nation is a party or cooperating nonparty, the nation has implemented, and is enforcing, such measures. If an identified nation is not party to the international body with jurisdiction over or responsibility for bycatch of the PLMRs in question, NMFS will consider whether the nation has implemented measures deemed to be effective at addressing the bycatch of such PLMRs, including any measures that have been recommended by the relevant international body. Such measures, where appropriate, may include, but are not limited to, those that fall into the

following categories:

- programs for data collection and sharing, including observer programs;
- bycatch reduction and mitigation strategies, techniques, and equipment, including gear restrictions and gear modifications; and
- improved monitoring, control, and surveillance of fishing activities.

In its evaluation whether or not a nation has implemented measures that will effectively address bycatch of PLMRs, NMFS will examine whether or not adequate enforcement measures and capacity exist to promote compliance.

When determining whether to identify nations as having fishing vessels engaged in bycatch of PLMRs, NMFS will also consider whether or not the nation has adopted, and is enforcing, measures designed to end or reduce bycatch of the PLMRs in question that are comparable in effectiveness to measures required in the United States, taking into account different conditions (oceanographic or other conditions) that could bear on the feasibility and efficacy of comparable measures. If other measures could address bycatch of the PLMRs in question that are comparable in effectiveness, then the implementation of such measures by a nation may be deemed sufficient for purposes of the Moratorium Protection Act.

#### Notification of Identification Decisions and Consultation

Pursuant to the requirements under the Moratorium Protection Act, NMFS will publish a list of nations that have been identified as having fishing vessels engaged in IUU fishing and/or bycatch of PLMRs in the biennial report to Congress. After submission of the biennial report to Congress, the Secretary of Commerce, acting through the Secretary of State, will officially notify nations that have been identified in the biennial report as having fishing vessels that are engaged in IUU fishing and/or bycatch of PLMRs. NMFS, acting through or in cooperation with the State Department, will notify such nations of the requirements of the Moratorium Protection Act and enter into consultations regarding the IUU fishing activity and/or bycatch of PLMRs.

#### Notification of and Consultations with Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

Upon identifying a nation whose vessels have been engaged in IUU fishing activities in the biennial report to Congress, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

- (1) notify nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities;
- (2) notify identified nations of the requirements under the Moratorium Protection Act and this subpart; and
- (3) notify any relevant international fishery management organization of actions taken by the United States to identify nations whose fishing vessels are engaged in IUU fishing and initiate consultations with such nations.

Within 60 days after submission of the biennial report to Congress, the



Secretary of Commerce, acting through or in cooperation with the Secretary of State, will initiate consultations with nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities for the purpose of encouraging such nations to take appropriate corrective action with respect to the IUU fishing activities described in the biennial report.

#### Notification for and Consultation with Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) initiate consultations as soon as possible with the governments of identified nations for the purposes of entering into bilateral and multilateral treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

(2) seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report that result in bycatch of PLMRs and, as necessary, initiate the amendment of any existing international treaty to which the United States is a party for the protection and conservation of the PLMRs in question to make such agreements consistent with this subpart.

#### Certification Procedures

Based on the identification, notification, and consultation processes outlined above, NMFS will certify nations that have been identified in the biennial report as having fishing vessels engaged in IUU fishing and/or bycatch of PLMRs. NMFS will notify nations prior to a formal certification determination and will provide such nations an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the IUU fishing activity and/or bycatch of PLMRs described in the biennial report to Congress.

Identified nations will receive either a positive or negative certification from the Secretary of Commerce. A positive certification indicates that a nation has taken appropriate corrective action pursuant to the Moratorium Protection Act to address the IUU fishing activity and/or bycatch of PLMRs described in the biennial report, and a negative certification indicates that a nation has failed to take appropriate corrective action. When evaluating whether appropriate corrective action has been taken by a nation to address IUU fishing and/or bycatch of PLMRs, NMFS will consider relevant criteria, including but not limited to:

• efforts towards improving data collection, catch monitoring, and reporting programs;

• record of implementation of or compliance with international measures to address IUU fishing and/or bycatch of PLMRs;

• participation in technical assistance and capacity building programs to address IUU fishing and/or reduce bycatch and enhance enforcement;

• adequacy of surveillance, enforcement, and prosecution to promote

compliance with conservation and management measures and respond to noncompliance;

- a nation's response to IUU fishing activity and/or PLMR bycatch; and

- participation in voluntary international efforts to combat IUU fishing (e.g., the International Monitoring, Control, and Surveillance (MCS) network or other cooperative enforcement and compliance networks);

- cooperation with other governments in enforcement, apprehension, and prosecution efforts related to those vessels of the identified nation that have engaged in IUU fishing and/or PLMR bycatch.

When evaluating whether appropriate corrective action has been taken by a nation, NMFS will also consider the extent to which nations have taken action to implement measures intended to address IUU fishing and/or PLMR bycatch.

The Secretary of Commerce will make the first certification determinations no later than 90 days after promulgation of a final rule establishing identification and certification procedures pursuant to the Moratorium Protection Act. Subsequent certification determinations will be published in the biennial report. Identified nations will receive notice of certification determinations.

Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with the affected nations and provide them an opportunity to take corrective action with respect to the IUU fishing activities or bycatch of PLMRs described in the biennial report to Congress.

NMFS is proposing to develop separate procedures for the certification of nations that have been identified as having fishing vessels engaged in IUU fishing and those nations that have been identified as having fishing vessels engaged in PLMR bycatch.

#### Procedures to Certify Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

To determine whether appropriate corrective action has been taken by nations to warrant a positive certification, NMFS will consider the extent to which the IUU fishing activities described in the biennial report have been effectively addressed and future IUU activity deterred. When evaluating whether the relevant identified member nation has implemented effective measures to address the IUU fishing activities described in the biennial report, NMFS will examine whether measures have been implemented, and are being effectively enforced, that are comparable in effectiveness to measures implemented by the United States. Such flag State measures may include, but are not limited to, those that fall into the following categories:

- catch and effort monitoring, including licensing and permitting schemes, reporting, and vessel monitoring systems (VMS);

- programs for data collection and sharing, including observer programs;

- catch documentation and trade tracking schemes that identify the origin and document the legality of fish from the point of harvest through the point of market/import;

- traderelated measures, such as import and export controls or prohibitions, to reduce or eliminate trade in fish and fish products derived from IUU fishing;

- programs that document fish were caught in a manner consistent with, or that does not undermine, conservation and management measures;

- port state control measures;

- atsea and dockside inspection schemes;

- bycatch reduction and mitigation strategies, techniques, and equipment, if the IUU fishing activity includes a violation of bycatch reduction requirements of an international fishery management agreement to which the United States is a party;

- systems to improve monitoring, control, and surveillance of fishing activities;

- sufficient sanctions and legal frameworks to support effective enforcement; and

- measures to protect VMEs from significant adverse impacts from fishing activities in waters beyond any national jurisdiction.

When considering whether appropriate corrective action has been taken to warrant a positive certification, NMFS, in consultation with the Secretary of State, will take into account the outcome of consultations with the identified nation, comments received from such nation, and subsequent actions taken by the relevant nation and applicable RFMO to address the IUU fishing activity described in the biennial report, including participation in applicable RFMOs and requests for assistance in building fisheries management and enforcement capacity.

Procedures to Certify Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

When determining whether nations identified as having fishing vessels engaged in bycatch of PLMRs have taken appropriate corrective action to warrant a positive certification, the Secretary of Commerce will consider whether the government of each nation identified in the biennial report as having fishing vessels engaged in bycatch of PLMRs has implemented measures to end or reduce bycatch of the relevant PLMRs that are comparable in effectiveness to those required in the United States. As relevant, NMFS will consider whether measures have been implemented and effectively enforced including, but not limited to, those that fall into the following categories:

- programs for data collection and sharing, including observer programs;

- bycatch reduction and mitigation strategies, techniques, and equipment (including training and assistance for bycatch reduction technology and equipment); and

- improved monitoring, control, and surveillance of fishing activities.

The Secretary of Commerce will examine if conditions exist that could bear on the feasibility and effectiveness of comparable measures. In some circumstances,

comparable measures may not be feasible or effective at addressing bycatch of the PLMRs in question. Under these circumstances, NMFS will assist identified nations, to the extent practicable, with the implementation of alternative measures designed to end or reduce bycatch. To qualify for a positive certification in the case of pelagic longline fisheries, the regulatory program of an identified nation includes mandatory use of circle hooks, careful handling and release equipment, and training and observer programs.

When determining if nations identified in the biennial report as having vessels engaged in the bycatch of PLMRs qualify for a positive certification, NMFS will also consider whether the government of each identified nation has established a management plan with requirements that will assist in the collection of data on bycatch of the pertinent PLMRs in support of international stock assessments and conservation efforts.

When making certification determinations, the Secretary of Commerce will, in consultation with the Secretary of State, evaluate the information discussed above, comments received from such nation, the consultations with each identified nation, and subsequent actions taken by the relevant nation to address the bycatch of PLMRs described in the biennial report, including requests for assistance in the implementation of measures comparable to those of the United States and establishment of an appropriate management plan. The Secretary of Commerce will also take into account whether the nation participates in existing certification programs, such as those authorized under Section 609 of Public Law 101162, or the affirmative finding process under the International Dolphin Conservation Program Act. Nothing in this rulemaking will modify such existing certification procedures.

#### Effect of Certification Determinations

If nations identified as having fishing vessels engaged in IUU fishing and/or PLMR bycatch receive a positive certification from the Secretary of Commerce pursuant to the Moratorium Protection Act, no actions will be taken against such nations.

If an identified nation fails to take sufficient action to address IUU fishing and/or PLMR bycatch and does not receive a positive certification from the Secretary of Commerce, the nation could face denial of port privileges, prohibitions on the import of certain fish and fish products into the United States, as well as other appropriate measures. In determining the appropriate course of action to recommend to the President, the Secretary of Commerce and other Federal agencies, as appropriate, will take into account the nature, circumstances, extent, duration, and gravity of the IUU fishing activity and/or bycatch of PLMRs for which the initial identification was made. With respect to the nation whose fishing vessels are engaged in IUU fishing and/or bycatch of PLMRs, the Secretary of Commerce will also consider the degree of culpability, any history of prior IUU fishing activities and/or bycatch of PLMRs, and other relevant matters. The Secretary of Commerce, in cooperation with the Secretary of State, may initiate further consultations with identified nations that fail to receive a positive certification prior to determining an appropriate course of action.

When recommending actions to the U.S. President to be taken against identified nations that have not received a positive certification, the Secretary of Commerce will recommend appropriate measures, including trade restrictive measures, to address the relevant IUU fishing activity and/or PLMR bycatch for which such nations were identified in the biennial report. Trade restrictive

measures will be implemented in accordance with international law, including the WTO Agreement, in a fair, transparent, and nondiscriminatory manner. To facilitate enforcement, nations that do not receive a positive certification may be required to submit documentation of admissibility along with fish or fish products not subject to the import restrictions that are offered for entry into the United States.

In implementing the certification procedures under the Moratorium Protection Act, in order to inform U.S. ports that cargo originating from a foreign port may not be permitted to enter into the United States, NMFS intends to collaborate with other Federal agencies and, as appropriate, take advantage of existing prior notification procedures, such as those required under section 343(a) of the Trade Act of 2002, or those proposed for further development under the International Trade Data System (ITDS) established under the Security and Accountability for Every (SAFE) Port Act of 2006. These efforts will be undertaken to help mitigate the effects of a negative certification determination on U.S. industry.

#### Information for Identification and Certification Determinations

Reliable and timely information is critical to making accurate and effective use of identification and certification provisions under the Moratorium Protection Act. Potential sources of information include NOAA and other U.S. government agencies; foreign, state, and local governments; international organizations, including RFMOs; nongovernmental organizations, including industry organizations; and citizens and citizen groups.

Other potential sources of information for identification and certification determinations include fishing vessel records; testimony and reports from offloading facilities, portside government officials, enforcement agents, military personnel, port inspectors, transshipment vessel workers and fish importers; government vessel registries; IUU vessel lists from RFMOs; RFMO catch documents and statistical document programs; appropriate certification programs; and governments, international organizations, or nongovernmental organizations. NMFS will consider all available information when making a determination whether or not to identify a particular nation.

In determining whether information is appropriate for use in making identification and certification determinations, NMFS will consider several criteria, including but not limited to:

- corroboration of testimony and evidence;

- whether multiple sources have been able to provide information in support of an identification;

- the methodology used to collect the information;

- specificity of the information provided; and

- susceptibility of the information to falsification and alteration; and

- credibility of the individuals or organization providing the information.

Based on the considerations outlined above, NMFS will validate information and evidence provided for use in making identification and certification determinations through methods that include, but are not limited to,

corroboration with governments, RFMOs, international organizations, nongovernmental organizations, and other available sources. If information or evidence is deemed by NMFS to be inaccurate, unfounded, or unreliable, it will not be used in support of an identification determination or in a certification determination.

#### Alternative Procedures

Section 609(d)(2) of the Moratorium Protection Act authorizes the Secretary of Commerce to establish alternative procedures for the certification of fish or fish products from a nation identified under section 609(a) of the Act in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. The alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this Act. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipmentbyshipment, shipperbyshipper, or other basis as long as specified conditions are met.

For nations that have been identified as having fishing vessels engaged in IUU fishing and have not received a certification from the Secretary of Commerce, certain fish or fish products of that nation may be eligible for alternative certification procedures. To qualify for the alternative certification procedures, NMFS must determine that the relevant vessel has not engaged in IUU fishing, or been identified by an international fishery management organization as participating in IUU fishing activities.

Section 610(c)(4) of the Moratorium Protection Act requires the Secretary of Commerce to establish alternative procedures for the certification of fish or fish products from a nation identified under section 610(a) of the Act in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. The alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this Act. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipmentbyshipment, shipperbyshipper, or other basis as long as specified conditions are met. To qualify for the alternative certification procedures, NMFS must determine that imports were harvested by practices that do not result in bycatch of a protected living marine resource, or were harvested by practices comparable to those required in the United States, accounting for different conditions that affect the feasibility and efficacy of such practices. NMFS must also determine that the vessel collects species-specific bycatch data that can be used to support international stock assessments and efforts to conserve PLMRs. If such imports were harvested by a vessel engaged in pelagic longline fishing, they can qualify for the alternative certification procedure only if the vessel is required to use circle hooks, careful handling and release equipment, and training and observer programs.

#### Advance Notice of Proposed Rulemaking and Public Participation

NMFS published an Advance Notice of Proposed Rulemaking (ANPR) on June 11, 2007 (72 FR 32052) to announce that it was developing certification procedures to address IUU fishing and bycatch of PLMRs pursuant to the Moratorium Protection Act. Public comments were solicited for a period of 45 days. In conjunction with publication of the ANPR, NMFS held three public input sessions in July 2007 in locations where it expected substantial public interest in the proposed certification procedures. These sessions were held in Silver Spring, Maryland

(July 2, 2007); Seattle, Washington (July 5, 2007); and Long Beach, California (July 5, 2007). In addition, NMFS hosted a meeting of representatives from foreign embassies (July 9, 2007) to explain the ANPR and solicit their comments. These meetings provided valuable opportunities for NMFS to explain the ANPR, respond to questions, and receive feedback from the public. A summary of the comments received on the ANPR and how these comments were addressed in the proposed rule can be found below.

#### Responses to Comments on the ANPR

In addition to the comments received on the ANPR at various meetings, NMFS received 14 sets of comments on the ANPR (by electronic mail, mail, or fax). Comments were submitted by governmental entities, individuals, and organizations. Comments received were compiled and posted at <http://www.nmfs.noaa.gov/msa2007/>. In this proposed rule notice, NMFS addresses the following issues that directly relate to the measures in the proposed rulemaking.

#### Definition of Bycatch

Comment 1: NMFS received several questions regarding the pertinent definition of bycatch for purposes of the rulemaking. Notably, the term bycatch is not defined in the Moratorium Protection Act.

Response: NMFS proposes to use a definition of bycatch for purposes of the Moratorium Protection Act based upon the definitions of bycatch in pertinent U.S. law (Magnuson-Stevens Fishery Conservation and Management Act, and Marine Mammal Protection Act); a 1998 NMFS report titled, *Managing Our Nation's Bycatch*; and a 2004 NMFS report titled, *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs*.

#### Definition of IUU Fishing

Comment 2: Several commenters suggested that the IUU definition in the ANPR was overly broad to include fishing activities that have an adverse impact on seamounts, hydrothermal vents, and cold water corals in areas beyond national jurisdiction. A suggestion was made that NMFS use the guidance on IUU fishing in the United Nations Food and Agriculture Organization's International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).

Response: The Moratorium Protection Act requires that the definition of IUU fishing include several elements, including fishing activity that has an adverse impact on seamounts, hydrothermal vents, and cold water corals beyond any national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement (see 16 U.S.C. 1826j). Accordingly, the definition provided in the ANPR and the proposed rule reflects these elements as required in the Moratorium Protection Act.

Recent efforts by the international community to address sustainable fisheries support the inclusion of fishing activities that have an adverse impact on VMEs in the definition of IUU fishing. The informal consultations on the 2006 United Nations General Assembly (UNGA) Sustainable Fisheries resolution (A/Res/61/105) reviewed domestic and international progress on protecting VMEs, such as seamounts, coldwater corals and hydrothermal vents, from destructive fishing practices and the impacts of fishing, as called for in UNGA resolution 59/25

(2004), and proposed further recommendations. Resolution 61/105 (2006) calls upon RFMOs and regional fishery management agreements to:

- Assess whether individual bottom fishing activities would have significant adverse impacts on VMEs and, if so, manage such fishing to prevent such impacts or not authorize it to proceed;

- Identify where VMEs are and determine if bottom fishing would cause significant adverse impacts to either the VMEs and long term sustainability of deep sea fish stocks through, among others, scientific research, data collection and sharing, and new and exploratory fisheries;

- Close areas to bottom fishing if VMEs are present or are likely to be, based on the best available scientific information, and not allow such fishing to proceed unless conservation and management measures are in place to prevent significant adverse impacts on VMEs;

- Cease bottom fishing if a VME is encountered and report the location so that appropriate measures can be adopted in respect of the relevant site; and

- Make the relevant measures adopted in accordance with resolution 61/105 public.

The text calls for RFMOs or regional fishery management agreements to comply with these provisions by December 31, 2008. For States participating in negotiations to establish new RFMOs or regional fishery management agreements to regulate bottom fisheries, the text calls for those States to implement interim measures, consistent with the above provisions, by December 31, 2007. Further, the text calls for flag States to adopt and implement the above measures or to cease authorizing bottom fishing in areas where there is no competent RFMO or regional fishery management agreement, or where no interim measures have been adopted in conjunction with negotiations to establish a new RFMO or regional fishery management agreement. Finally, States agreed to review actions taken in accordance with the resolution, and, if necessary, propose further recommendations at the 2009 UNGA fisheries resolution negotiations. The 2007 UNGA sustainable fisheries resolution (A/RES/62/177) reaffirmed the call for RFMOs, regional fishery management agreements, and Flag States to implement these measures.

#### Definition of PLMRs

Comment 3: One commenter stated that the definition of PLMRs in the ANPR is overly broad and that the regulations under Section 610(a) of the Moratorium Protection Act should only be applied to commercial fisheries to reflect the intent behind the certification procedures.

Response: PLMRs are defined in the Moratorium Protection Act. This definition is reflected in the proposed rule.

Section 610 of the Moratorium Protection Act seeks to encourage the United States to work with other nations to implement measures to eliminate or reduce the bycatch of PLMRs that are comparable in effectiveness to those in the United States. There is no distinction made in this statute to support the position that only commercial fishing vessels should be subject to these provisions. Thus, the proposed rule does not specify that the requirements of the Moratorium Protection Act only apply to commercial fishing vessels.



## Consistency with Plans of Action to Address IUU Fishing

Comment 4: A commenter pointed to the detailed guidance provided in the United Nations Food and Agriculture Organization's IPOAIUU, as well as the U.S. strategies, techniques, and equipment to combat IUU fishing, and suggested that these documents serve as a source of information to NMFS in its implementation of the requirements of the Moratorium Protection Act.

Response: NMFS concurs that these documents are valuable sources of information. Through this rulemaking, NMFS seeks to achieve the goals espoused in these plans.

## IUU Vessels Lists

Comment 5: NMFS received a substantial number of questions regarding how the Agency plans to treat vessels that are listed on RFMO IUU vessel lists. Specifically, NMFS was asked whether or not vessels on RFMO IUU vessel lists would be denied entry into U.S. ports under this rulemaking, and if so, whether legally harvested product aboard such vessels would be allowed into the United States.

Response: The United States is obliged to take action, consistent with its international obligations, to implement conservation and management measures that are agreed upon at RFMOs to which the United States is a party. Such measures may establish lists of vessels that have engaged in IUU fishing activities and require member states to impose sanctions on listed vessels, including the potential denial of port access and services. The Moratorium Protection Act does not, however, authorize the United States to deny entry of vessels into U.S. ports based solely on their inclusion on an RFMO IUU vessel list. The Moratorium Protection Act authorizes the United States to take action to address IUU fishing on a nation-by-nation basis, rather than on a vessel-by-vessel basis. NMFS will be implementing its obligations under RFMO conservation and management measures that establish IUU vessel lists in a separate rulemaking.

## Information Collection and Validation

Comment 6: NMFS received various suggestions regarding potential sources of information for the identification and certification of nations. Some commenters expressed concern about the existence of balanced and accurate data to be used in identifying nations whose vessels are engaged in IUU fishing or PLMR bycatch. NMFS was urged to develop criteria or quality control mechanisms to be used in the evaluation of collected information. Commenters suggested that the United States use information that has been peer-reviewed, agreed upon by a tribunal, and/or corroborated by a U.S. or foreign government source.

Response: Many of the suggestions for potential information sources were adopted as part of the proposed rule. NMFS shares the concerns raised by commenters regarding the submission of false information. Such information could erroneously suggest a nation's vessels are engaged in IUU fishing or bycatch of PLMRs. To prevent erroneous information from being used in identification and certification decisions, NMFS plans to carefully review and corroborate information received on activities of a nation's fishing vessels, in cooperation with other appropriate government officials, foreign and domestic, before using this information to make identification and certification decisions under the Moratorium Protection Act.

## Reason to Believe Standard

Comment 7: NMFS was asked to examine the reason to believe standard in identifying whether a nation's vessels are engaged in IUU fishing or bycatch of PLMRs, which was addressed by the Court of International Trade (CIT) in litigation related to the identification of Italy pursuant to the Enforcement Act.

Response: Section 609(a) and Section 610(a) of the Moratorium Protection Act establish a different standard for the identification of nations than the reason to believe standard under the Enforcement Act. Under the standard set forth in Section 609(a), nations must be identified if fishing vessels of that nation are engaged, or have been engaged at any point during the preceding 2 years, in illegal, unreported, or unregulated fishing See 16 U.S.C. 1826j. Under the standard set forth in Section 610(a), nations must be identified if fishing vessels of that nation are engaged, or have been engaged during the preceding calendar year in fishing activities or practices that result in bycatch of a protected living marine resource See 16 U.S.C. 1826k. NMFS believes that this standard is a higher threshold for identification, relative to the reason to believe standard set forth in the High Seas Driftnet Fisheries Enforcement Act, requiring evidence of IUU fishing activity and/or bycatch of PLMRs on the part of a nation's vessels for the nation to be identified.

## Requirements for Certification

Comment 8: NMFS received comments that the guidelines for certification decisions should be clear and consistent over time.

Response: In the proposed rule, NMFS sought to outline criteria for certification decisions to a greater extent than what was addressed in the ANPR. These criteria should provide guidance and promote greater transparency in the decision making process.

## Capacity Building

Comment 9: NMFS was encouraged to use incentives, such as capacity building, to assist nations in addressing IUU fishing and PLMR bycatch. However, concerns were raised that current capacity building activities are often fragmented, uncoordinated, and may be ineffective. A suggestion was made to improve the coordination of assistance for capacity building across the relevant Federal agencies to help achieve sustainable fisheries. Recommendations were made to measure capacity at the start of projects, as well as the incremental change resulting from the capacity building project, to demonstrate progress and the need for additional assistance, if necessary.

Response: In fulfillment of the objectives outlined in the Moratorium Protection Act, NMFS will address IUU fishing and PLMR bycatch through bilateral and multilateral efforts. Further, NMFS will seek to emphasize investments in capacity building projects that address the full range of scientific, legal, and operational enforcement issues involved in the adoption and enforcement of effective management regimes. To the extent possible, NMFS will make such investments in coordination with other Federal agencies and non-Federal partners to improve their effectiveness and will seek to provide measures of the success of such projects.

## Balance between Incentives and Penalties

Comment 10: Commenters suggested that NMFS take a balanced approach in its rulemaking towards working with nations to emphasize capacity building activities and imposing trade restrictions and penalties to bring nations into compliance.

Response: In its implementation of requirements outlined in the Moratorium Protection Act, NMFS will emphasize bilateral and multilateral cooperation with other nations to address IUU fishing and bycatch of PLMRs.

To the extent that international cooperation and assistance is effective in addressing these activities, NMFS will work bilaterally and multilaterally through RFMOs and other relevant international organizations. When recommending actions to the U.S. President to be taken against identified nations that have received a negative certification, the Secretary of Commerce will recommend appropriate measures, including trade restrictive measures, the relevant IUU fishing activity and/or PLMR bycatch. Furthermore, trade restrictive measures will be implemented in accordance with international law, including the World Trade Organization (WTO) Agreement, and therefore be implemented in a fair, transparent, and nondiscriminatory manner.

#### Classification

This proposed rule is published under the authority of the Moratorium Protection Act, 16 U.S.C. 1826d1826k.

Under NOAA Administrative Order (NAO 2166), the promulgation of regulations that are procedural and administrative in nature is subject to a categorical exclusion from the requirement to prepare an Environmental Assessment. However, as a component of public involvement in the development of the proposed certification procedures, NMFS has determined that an EA for this proposed action is appropriate for two reasons. First, although the proposed action does not change any underlying fishery management conventions for IUU fishing and PLMR bycatch, the EA provides the public with a context for reviewing the proposed certification action by exploring the impacts associated with IUU fishing and bycatch. Second, because future certification determinations would not require individual NEPA analysis, this EA enhances NOAA's capacity to seek public input on the proposed approach for such certifications.

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

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. NMFS is specifically seeking comments on whether it may be appropriate at the final rule stage to certify to the Small Business Administration that the rule will not have a significant economic impact on a substantial number of small entities.

A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see ADDRESSES). This proposed rule does not apply directly to any U.S. small business as the rulemaking is aimed at foreign nations whose vessels engage in fishing activities. The universe of potentially indirectly affected industries includes the following: U.S. ports and U.S. seafood harvesters, processors, wholesalers, and importers. Ports generate economic activity across many sectors including surface transportation;

maritime services; cargo handling; federal, state, and local governments; port authorities; importers and consignees; and the banking and insurance sectors. Maritime services include pilots, handlers (food and other supplies), towing, bunkering (fuel), marine surveyors, and shipyard and marine construction. Cargo handling services include longshoremen, stevedoring, terminal operators, warehouse operators, and container leasing and repair.

No U.S. industry is directly affected by the rulemaking, although indirect effects may cause short term disruptions in the flow of seafood imports potentially impacting U.S. businesses. NMFS does not anticipate that national net benefits and costs would change significantly in the long term as a result of the implementation of the proposed alternatives.

The alternatives described in section 2.2. and 2.3 of the Environmental Assessment provide options for certification procedures for IUU fishing and bycatch separately. To meet the purpose and need, NMFS will select of one alternative for IUU fishing and one alternative for bycatch.

The Alternatives for Certification for nations whose vessels are engaged, or have been engaged in, IUU fishing activities are as follows: Under Alternative I1, the No Action Alternative, NMFS would not develop any new procedures to address the certification of nations identified in the biennial report to Congress (called for in section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding two calendar years, in IUU fishing activities. Under Alternative I2, the Secretary would provide a positive certification to a nation identified in the biennial report to Congress (called for in section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding two calendar years, in IUU fishing activities, if such nation has taken corrective action against the offending vessels, or the relevant RFMO has implemented measures that are effective in ending the IUU fishing activities by vessels of the identified nation. Under Alternative I3, the Secretary would provide a positive certification to a nation identified the biennial report to Congress (called for in section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding two calendar years, in IUU fishing activities, if such nation has taken corrective action against the offending vessels, and the relevant RFMO has implemented measures that are effective in ending the IUU fishing activities by vessels of the identified nation.

The Alternatives for Certification for nations whose vessels are engaged, or have been engaged in, bycatch of PLMRs are as follows: Under Alternative B1, the No action alternative, NMFS would not develop any new procedures to address certification of nations identified in the biennial report to Congress (called for in section 610(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding calendar year in bycatch of PLMRs. Under Alternative B2, to receive a positive certification from the Secretary of Commerce, nations identified in the biennial report to Congress (called for in section 610(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding calendar year in bycatch of PLMRs must provide documentary evidence of their adoption of a regulatory program governing the conservation of the PLMR that is comparable in effectiveness with that of the United States, taking into account different conditions, and establish a management plan that will assist in species-specific data collection to support international stock assessments and conservation enforcement efforts for the PLMR. Under Alternative B3, identified nations must provide documentary evidence of the adoption of a regulatory program, by the

identified nation and the relevant international organization for the conservation and protection of the PLMRs or the international/regional fishery organization (and proof of the identified nation's participation with such organization) governing the conservation of the PLMRs, if such organization exists, that is comparable with that of the United States, taking into account different conditions, and establish a management plan that will assist in species-specific data collection to support international stock assessments and conservation efforts, including but not limited to enforcement efforts for PLMRs.

Overall IUU Alternative I3 may produce more socioeconomic benefits than IUU Alternative I2. Likewise for the bycatch alternatives, Alternative B3 may produce more benefits than Alternative B2. Due to the consultative nature of this rulemaking, it may be possible for the costs to be ameliorated by new port state controls, substituting different transportation modes, or substituting different products all together. As a result, it is difficult to know if costs will also be higher moving from the less restrictive IUU Alternative I2 or bycatch Alternative B2 to IUU Alternative I3 or bycatch Alternative B3. This proposed rule would implement Alternatives I2 and B2.

This proposed rule contains collection of information requirements for 300.205(b)(2), 300.206(c), and 300.207(c) subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This package is being developed by NMFS and will be submitted to OMB for approval.

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; 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 Office of International Affairs at the ADDRESSES above, and by email to David\_Rostker@omb.eop.gov or fax to (202) 3957285.

List of Subjects in 50 CFR Part 300  
Bycatch, Fisheries, Fishing, Fishing vessels, Foreign relations, Illegal, unreported or unregulated fishing, Protected living marine resources.

Dated: January 9, 2009.

James W. Balsiger

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 300 as follows:

PART 300 INTERNATIONAL FISHERIES REGULATIONS

Subpart N is revised to read as follows:

Subpart N Identification and Certification of Nations

<SECHD>Sec.

</SECHD>300.200

Purpose and scope.

300.201

Definitions.

300.202

Identification and certification of nations engaged in illegal, unreported, or unregulated fishing activities.

300.203

Identification and certification of nations engaged in bycatch of protected living marine resources.

300.204

Effect of certification.

300.205

Denial of port privileges and import restrictions on fish or fish products.

300.206

Alternative procedures for IUU fishing activities.

300.207

Alternative procedures for bycatch of PLMRs.

#### Subpart N Identification and Certification of Nations

Authority:

16 U.S.C. 1826d et seq.

300.200

Purpose and scope.

The purpose of this subpart is to implement the requirements in the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act) to identify and certify nations whose vessels are engaged in illegal, unreported, or unregulated fishing or whose fishing activities result in bycatch of protected living marine resources. This language applies to vessels entitled to fly the flag of the nation in question. Identified nations that do not receive a positive certification may be subject to trade restrictive measures for certain fishery products. The Moratorium Protection Act also authorizes cooperation and assistance to nations that are taking action to combat illegal, unreported, or unregulated fishing or reduce bycatch of protected living marine resources.

300.201

Definitions.

For the purposes of the Moratorium Protection Act:

Bycatch means: the discarded catch of any living marine resource and/or mortality or serious injury of such resource due to an encounter with fishing gear that does not result in the capture of that resource.

Fishing vessel means: any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for

(1) Fishing; or

(2) Any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing, bunkering or purchasing catch, or aiding or assisting one or more vessels at sea in the performance of such activity.

Illegal, unreported, or unregulated (IUU) fishing means:

(1) Fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including but not limited to catch limits or quotas, capacity restrictions, and bycatch reduction requirements;

(2) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; or,

(3) Fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures, including those in areas with no applicable international fishery management organization or agreement.

International agreement means: an agreement between two or more States, agencies of two or more States, or intergovernmental organizations which is legally binding and governed by international law.

International fishery management agreement means: any bilateral or multilateral treaty, convention, or agreement that governs direct harvest of fish and/or directly governs bycatch of fish, sea turtles, or marine mammals.

International fishery management organization means: an international organization established by any bilateral or multilateral treaty, convention, or agreement for the conservation and management of fish.

Protected living marine resources (PLMRs) means: nontarget fish, sea turtles, or marine mammals that are protected under United States law or international agreement, including the Marine Mammal Protection Act, the Endangered Species Act, the Shark Finning Prohibition Act, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna; but they do not include species, except sharks, that are managed under the Magnuson-Stevens Fishery Conservation and Management Act, the Atlantic Tunas Convention Act, or by any international fishery management organization.

300.202

Identification and certification of nations engaged in illegal, unreported, or unregulated fishing activities.

(a) Procedures to identify nations whose fishing vessels are engaged in IUU fishing. (1) NMFS will identify and list, in a biennial report to Congress, nations whose fishing vessels are engaged, or have been engaged at any point during the preceding two calendar years, in IUU fishing.

(2) When determining whether to identify a nation as having fishing vessels

engaged in IUU fishing, NMFS will take into account all relevant matters, including but not limited to the history, nature, circumstances, extent, duration, and gravity of the IUU fishing activity in question, and any measures that the nation has implemented to address the IUU fishing activity. NMFS will also take into account whether an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes place. If such an organization exists, NMFS will consider whether the nation whose fishing vessels are engaged, or have been engaged, in IUU fishing is a party to, or maintains cooperating status, with the organization. NMFS will also consider whether the relevant international fishery management organization has adopted measures that are effective at addressing the IUU fishing activity in question and, if the nation whose fishing vessels are engaged, or have been engaged, in IUU fishing is a party to, or maintains cooperating status with, the organization, and whether the nation has implemented, and is enforcing, such measures.

(b) Notification of nations identified as having fishing vessels engaged in IUU fishing. Upon identifying a nation whose vessels have been engaged in IUU fishing activities in the biennial report to Congress, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) Notify nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities;

(2) Notify identified nations of the requirements under the Moratorium Protection Act and this subpart; and

(3) Notify any relevant international fishery management organization of actions taken by the United States to identify nations whose fishing vessels are engaged in IUU fishing and initiate consultations with such nations.

(c) Consultation with nations identified as having fishing vessels engaged in IUU fishing. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will initiate consultations with nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities for the purpose of encouraging such nations to take appropriate corrective action with respect to the IUU fishing activities described in the biennial report.

(d) Procedures to certify nations identified as having fishing vessels engaged in IUU fishing. Each nation that is identified as having fishing vessels engaged in IUU fishing shall receive either a positive or a negative certification from the Secretary of Commerce. A positive certification indicates that a nation has taken appropriate corrective action to address the IUU fishing activity described in the biennial report. A negative certification indicates that a nation has not taken appropriate corrective action.

(1) The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that such nation has taken appropriate corrective action to address the activities for which such nation has been identified in the biennial report to Congress. When making such determination, the Secretary shall take into account the following:



(i) Whether the government of the nation identified pursuant to subsection (a) has provided evidence documenting that it has taken corrective action to effectively address the IUU fishing activity described in the biennial report; or

(ii) Whether the relevant international fishery management organization has adopted and, if applicable, the identified member nation has implemented and is enforcing, measures to effectively address the IUU fishing activity of the identified nation's fishing vessels described in the biennial report.

(2) The Secretary of Commerce will issue a negative certification to an identified nation if such nation fails to provide information sufficient to establish that appropriate corrective action has been taken to address the IUU fishing activities described in the biennial report.

(3) Nations will be notified prior to a formal certification determination and will be provided with an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the activities for which such nations were identified. The Secretary of Commerce shall consider any information received during the course of these consultations when making the subsequent certification determinations.

#### 300.203

Identification and certification of nations engaged in bycatch of protected living marine resources.

(a) Procedures to identify nations whose fishing vessels are engaged in PLMR bycatch. (1) NMFS will identify and list nations in the biennial report to Congress whose fishing vessels are engaged, or have been engaged during the preceding calendar year prior to publication of the biennial report to Congress, in fishing activities or practices either in waters beyond any national jurisdiction that result in bycatch of a PLMR, or in waters beyond the U.S. exclusive economic zone (EEZ) that result in bycatch of a PLMR that is shared by the United States. When determining whether to identify nations as having fishing vessels engaged in PLMR bycatch, NMFS will take into account all relevant matters including, but not limited to, the history, nature, circumstances, extent, duration, and gravity of the bycatch activity in question. NMFS will also take into account whether there is an international organization with jurisdiction over the conservation and protection of the relevant PLMRs. If such organization exists, NMFS will consider whether the organization has adopted, and is enforcing, measures to effectively end or reduce bycatch of such species; and if the nation whose fishing vessels are engaged, or have been engaged during the preceding calendar year prior to publication of the biennial report to Congress, in bycatch of PLMRs is a party to or maintains cooperating status with the relevant international organization.

(2) When determining whether to identify nations as having fishing vessels engaged in bycatch of PLMRs, NMFS will also take into account if the nation has implemented measures designed to end or reduce such bycatch that are comparable in effectiveness to U.S. regulatory requirements. In considering whether a nation has implemented measures that are comparable in effectiveness to those of the United States, NMFS will evaluate if different conditions exist that could bear on the feasibility and efficiency of such measures to end or reduce bycatch of the pertinent PLMRs.

(b) Notification of nations identified as having fishing vessels engaged in PLMR bycatch. Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) Notify nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged during the preceding calendar year, in fishing activities or practices either in waters beyond any national jurisdiction that result in bycatch of a PLMR, or in waters beyond the U.S. EEZ that result in bycatch of a PLMR shared by the United States; and

(2) Notify, as soon as possible, identified nations about the requirements under the Moratorium Protection Act and this subpart.

(c) Consultations and negotiations. Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will:

(1) Initiate consultations as soon as possible with the governments of identified nations for the purposes of entering into bilateral and multilateral treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

(2) Seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report that result in bycatch of PLMRs and, as necessary, initiate the amendment of any existing international treaty to which the United States is a party for the protection and conservation of the PLMRs in question to make such agreements consistent with this subpart.

(d) Procedures to certify nations identified as having fishing vessels engaged in PLMR bycatch. Each nation that is identified as having fishing vessels engaged in PLMR bycatch shall receive either a positive or a negative certification from the Secretary of Commerce. A positive certification indicates that a nation has taken appropriate corrective action to address the PLMR bycatch activity described in the biennial report. A negative certification indicates that a nation has not taken appropriate corrective action.

(1) The Secretary of Commerce will also issue a negative certification for the identified nation in the absence of information from such nation that sufficient action has been taken to address the bycatch activities described in the biennial report.

(2) The Secretary of Commerce shall issue a positive certification to nation identified for having vessels engaged in bycatch of a PLMR when:

(i) Such nation has provided documentary evidence of implementation, and enforcement, of a regulatory program to conserve such PLMRs that is comparable in effectiveness to regulatory measures required under U.S. law to address bycatch in the relevant fisheries, accounting for different conditions that could bear on the feasibility and efficiency of these measures, and includes, in the case of an identified nation with fishing vessels engaged in pelagic longline fishing, the mandatory use of circle hooks, careful handling and release equipment, training and observer programs; and

(ii) Such nation has established a management plan that will assist in the collection of species-specific data on PLMR bycatch to support international

stock assessments and conservation efforts for PLMRs.

(3) Nations will be notified prior to a formal certification determination and will be provided with an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the activities for which such nations were identified. The Secretary of Commerce shall consider any information received during the course of these consultations when making the subsequent certification determinations.

300.204

Effect of certification.

(a) If an identified nation does not receive a positive certification under this subpart (i.e., the nation receives a negative certification or no certification is made), the fishing vessels of such nation are, to the extent consistent with international law, subject to the denial of entry into any place in the United States and to the navigable waters of the United States. At the recommendation of the Secretary of Commerce, certain fish or fish products from fishing vessels of such nation may be subject to import prohibitions.

(b) If certain fish or fish products from the vessels of such nation are prohibited from entering the United States, within six months after the imposition of the prohibition, the Secretary of Commerce shall determine whether the prohibition is insufficient to cause that nation to effectively address the IUU fishing described in the biennial report, or that nation has retaliated against the United States as a result of that prohibition. The Secretary of Commerce shall certify to the President each affirmative determination that an import prohibition is insufficient to cause a nation to effectively address such IUU fishing activity or that a nation has taken retaliatory action against the United States. Upon receipt of any such subsequent certification, any product from the nation may be prohibited from import for such duration as the President determines appropriate and to the extent that such prohibition is consistent with obligations under international trade agreements, including the World Trade Organization Agreement.

(c) Positive certification. (1) If a nation identified in the biennial report to Congress as having fishing vessels engaged in IUU fishing activity is positively certified by the Secretary of Commerce, the nation is deemed to have taken appropriate corrective action in accordance with this subpart to address the IUU fishing activity of its fishing vessels, or the relevant international fishery management organization is deemed to have adopted measures to effectively address the IUU fishing activity of the identified nation's fishing vessels.

(2) If a nation identified in the biennial report to Congress as having fishing vessels engaged in PLMR bycatch is positively certified by the Secretary of Commerce, the nation is deemed to have taken appropriate corrective action in accordance with this subpart to address the PLMR bycatch of its fishing vessels.

(d) Negative certification or absence of certification. If a nation identified in the biennial report to Congress as having fishing vessels engaged in IUU fishing activity is not positively certified by the Secretary of Commerce, the nation is deemed not to have taken appropriate corrective action in accordance with this subpart to address the IUU fishing activity of its fishing vessels, including by failing to implement or enforce measures adopted by the relevant

international fishery management organization to effectively address the IUU fishing activity of the identified nation's fishing vessels. If a nation identified in the biennial report to Congress as having fishing vessels engaged in the PLMR bycatch is not positively certified by the Secretary of Commerce, the nation is deemed not to have adopted and implemented a regulatory program that is comparable in effectiveness to that of the United States and the nation has not established a management plan in accordance with this subpart to reduce the bycatch of PLMRs by the identified nation's fishing vessels.

(e) Duration of certification. Any nation identified in the biennial report to Congress and negatively certified will remain negatively certified until the Secretary of Commerce determines that the nation has taken appropriate corrective action to address the IUU fishing activity and/or bycatch of PLMRs of its vessels. Receipt of a positive certification determination will demonstrate that appropriate corrective action has been taken by a nation to address the relevant IUU fishing activity and/or bycatch of PLMRs.

(f) Certification determinations. Certification determinations will be published in the biennial report to Congress.

(g) Consultations. Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with the affected nations and provide them an opportunity to take corrective action with respect to the IUU fishing activities or bycatch of PLMRs described in the biennial report to Congress. The Secretary of Commerce shall take the results of such consultations into consideration when making a subsequent certification determination for such nation. A nation that has not received a positive certification shall be eligible for a positive certification when such nation has demonstrated that it has taken appropriate corrective action to address the activities for which it was identified in the biennial report to Congress.

#### 300.205

Denial of port privileges and import restrictions on fish or fish products.

(a) Scope of Applicability. (1) If a nation identified in the biennial report under 300.202(a) or 300.203(a) is not positively certified by the Secretary of Commerce, and the fishing vessels of the nation are allowed entry to any place in the United States and to the navigable waters of the United States under this subpart, those vessels will be subject to inspection and may be prohibited from landing, processing, or transshipping fish and fish products. Services, including the refueling and resupplying of such fishing vessels, may be prohibited, with the exception of services essential to the safety, health, and welfare of the crew. Fishing vessels will not be denied port access or services in cases of force majeure or distress.

(2) For nations identified in the biennial report under 300.202(a) that are not positively certified, the Secretary of Commerce shall recommend import prohibitions only with respect to fish or fish products managed under the applicable international fishery agreement. If there is no applicable international fishery agreement, the Secretary of Commerce shall not recommend import prohibitions that would apply to fish or fish products caught by vessels not engaged in IUU fishing. For nations identified under 300.203(a) that are not positively certified, the Secretary of Commerce shall not recommend import prohibitions that would apply to fish or fish products caught by vessels not

engaged in IUU fishing.

(b) Imposition of import restrictions(1) Notification. Where the Secretary of Commerce cannot make positive certifications for identified nations, and the U.S. President determines that certain fish and fish products from such nations are ineligible for entry into the United States and U.S. territories, the Secretary of Commerce, with the concurrence of the Secretary of State and in cooperation with the Secretary of Treasury, will file with the Office of the Federal Register for publication a finding to that effect. Such finding may include a requirement that fish or fish products from such nations be accompanied by documentation of admissibility.

(2) Documentation of admissibility. The finding in paragraph(b) (1) of this section may include a requirement that fish or fish products not subject to the import restrictions from such nations be accompanied by documentation of admissibility. Such documentation must be submitted to NMFS by electronic facsimile (fax), or once available, via the Internet, to a number or website designated by NMFS. The documentation of admissibility must be executed by a duly authorized official of the country named in the finding and the documentation of admissibility must be validated by a responsible official(s) designated by NMFS.

(3) Effective date of import restrictions. Effective upon the date of publication of such finding, shipments of fish or fish products found to be ineligible will be denied entry to the United States. Entry will not be denied for any such shipment that, on the date of publication, was in transit to the United States on board a vessel operating as a common carrier.

(4) Removal of import restrictions. Upon a determination by the Secretary of Commerce that an identified nation that was not certified positively has satisfactorily met the conditions in this subpart and that nation has been positively certified, the provisions of 300.205 shall no longer apply. The Secretary of Commerce, with the concurrence of the Secretary of State and in cooperation with the Secretary of Treasury, will notify such nations and will file with the Office of the Federal Register for publication notification of the removal of the import restrictions effective on the date of publication.

#### 300.206

Alternative procedures for IUU fishing activities.

(a) The alternative procedures in this section apply to the certification of fish or fish products from a nation identified under 300.202 in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. These alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this subpart. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipmentbyshipment, shipperbyshipper, or other basis as long as the following conditions are met.

(b) To qualify for the alternative certification procedures, NMFS must determine that:

(1) The vessel has not engaged in IUU fishing in violation of an international fishery management agreement to which the U.S. is a party; or

(2) The vessel is not identified by an international fishery management organization as participating in IUU fishing activities.

(c) Fish or fish products offered for entry under this section must be accompanied by a completed documentation of admissibility form, which is available from NMFS. Such documentation must be submitted to NMFS by electronic facsimile (fax), or once available, via the Internet, to a number or website designated by NMFS. The documentation of admissibility must be executed by a duly authorized official of the country named in the finding and the documentation of admissibility must be validated by a responsible official(s) designated by NMFS.

300.207

Alternative procedures for bycatch of PLMRs.

(a) The alternative procedures in this section apply to the certification of fish or fish products from a nation identified under 300.203 in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. These alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this subpart. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipmentbyshipment, shipperbyshipper, or other basis as long as the following conditions are met.

(b) To qualify for the alternative certification procedures, NMFS must determine that imports were harvested by practices that do not result in bycatch of a protected marine species, or were harvested by practices that:

(1) Are comparable to those of the United States, taking into account different conditions, and which, in the case of pelagic longline fisheries, the regulatory program of an identified nation includes mandatory use of circle hooks, careful handling and release equipment, and training and observer programs; and

(2) Include the gathering of species specific data that can be used to support international and regional stock assessments and conservation efforts for protected living marine resources.

(c) Fish or fish products offered for entry under this section must be accompanied by a completed documentation of admissibility form, which is available from NMFS. Such documentation must be submitted to NMFS by electronic facsimile (fax), or once available, via the Internet, to a number or website designated by NMFS. The documentation of admissibility must be executed by a duly authorized official of the country named in the finding and the documentation of admissibility must be validated by a responsible official(s) designated by NMFS.

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