

authorized by applicable requirements of [the HMR], or an exemption, approval, or registration issued under [the HMR] * * * [or]

transport a hazardous material in commerce unless * * * the hazardous material is handled and transported in accordance with applicable requirements of [the HMR], or an exemption, approval, or registration issued under [the HMR] * * *

A carrier's acceptance and transportation of hazardous materials can involve several different situations, including the following two ends of the spectrum:

1. the shipment is declared by the offeror, in one manner or another, to contain hazardous materials and complies (in whole or in part) with requirements in the HMR; or
2. whether intentionally or unintentionally, the shipment is not declared by the offeror to contain hazardous materials, and no attempt has been made to comply with the HMR (the "undeclared" or "hidden" shipment).

The Secretary of Transportation has delegated to agencies within the Department (Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, United States Coast Guard, and Research and Special Programs Administration), the authority in 49 U.S.C. 5123 to assess a civil penalty against any person who "knowingly violates" any requirement in the HMR, including the provisions in § 171.2 (a) and (b) quoted above. Section 5123(a) provides that a person "acts knowingly" when

(A) the person has actual knowledge of the facts giving rise to the violation; or
(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

Accordingly, a carrier knowingly violates the HMR when the carrier accepts or transports a hazardous material with actual or constructive knowledge that a package contains a hazardous material which has not been packaged, marked, labeled, and described on a shipping paper as required by the HMR. This means that a carrier may not ignore readily apparent facts that indicate that either (1) a shipment declared to contain a hazardous material is not properly packaged, marked, labeled, placarded, or described on a shipping paper, or (2) a shipment actually contains a hazardous material governed by the HMR despite the fact that it is not marked, labeled, placarded, or described on a shipping paper as containing a hazardous material.

The Department's October 4, 1977 interpretation concerning 49 CFR 175.30 (reproduced below) relates to the first situation in the above paragraph, *i.e.*, when an air carrier receives a shipment accompanied by a shipping paper containing a shipper's certification that hazardous materials within the shipment have been classed, packaged, marked, labeled and accurately described as required. See 49 CFR 172.204. Whenever, in the course of examining the shipping paper and performing the required visual inspection of the package, an air carrier has reason to know of discrepancies, the carrier may not simply rely on the shipper's certification.

In the case of an undeclared or hidden shipment, all relevant facts must be considered to determine whether or not a reasonable person acting in the circumstances and exercising reasonable care would realize the presence of hazardous materials. In an enforcement proceeding, this is always a question of fact, to be determined by the fact-finder. Because innumerable fact patterns may exist, it is not practicable to set forth a list of specific criteria to govern whether or not the carrier has sufficient constructive knowledge of the presence of hazardous materials within an undeclared or hidden shipment to find a knowing violation of the HMR.

Information concerning the contents of suspicious packages must be pursued to determine whether hazardous materials have been improperly offered. A carrier's employees who accept packages for transportation must be trained to recognize a "suspicious package," as part of their function—specific training as specified in 49 CFR 172.704(a)(2), because the legal standard remains the knowledge that a reasonable person acting in the circumstances and exercising reasonable care would have. Because this standard applies to all modes of transportation, a single training program and a uniform screening process can be developed for all of a company's employees involved in surface or air transportation.

At the same time, an offeror who fails to properly declare (and prepare) a shipment of hazardous materials bears the primary responsibility for a hidden shipment. Whenever hazardous materials have not been shipped in compliance with the HMR, DOT generally will attempt to identify and bring an enforcement proceeding against the person who first caused the transportation of a noncomplying shipment. The procedures applicable to DOT civil penalty enforcement cases procedures are set forth in 14 CFR 13.16 (FAA); 33 CFR part 1, subpart 1.07 (USCG); 49 CFR part 109, subpart B (FRA); 49 CFR part 107, subpart D (RSPA); and 49 CFR part 386 (FHWA).

To the extent that any carrier, regardless of the mode of transportation, is truly "innocent" in accepting an undeclared or hidden shipment of hazardous materials, it lacks the knowledge required for assessment of a civil penalty. However, when a carrier acts "knowingly," as defined in 49 U.S.C. 5123(a), it must be considered subject to civil penalties. RSPA rejects any suggestion that a carrier would be deemed to have "knowingly" accepted a hazardous material for transportation, and be subject to civil penalties under 49 U.S.C. 5123, only when the material is described as a hazardous material on a shipping paper or other commercial documentation, or the package is marked or labeled in a manner as prescribed by the HMR. That approach would improperly limit a carrier's responsibility to situations involving a "declared" shipment.

DEPARTMENT OF TRANSPORTATION
Office of the Secretary

October 4, 1977.

Subj: Air Carrier's Responsibility for Inspection of Hazardous Materials Packages.
From: Assistant General Counsel for Materials Transportation Law.
To: Director, Transportation Safety Institute, TES-15

This is in response to your request of August 25, 1977, for our opinion as to whether an air carrier has a specific regulatory obligation to inspect hazardous materials packages prior to acceptance for air transportation to insure the shipper's compliance with specific regulatory requirements of parts 173 and 178. With the question, you have supplied your analysis and conclusion that except for the physical integrity inspection provided for in § 175.30(b) there is no duty on the air carrier to inspect hazardous materials packages prior to acceptance for transportation in order to determine compliance with the requirements of parts 173 and 178. Thus, it is your opinion that the air carrier may rely on the shipper's certification accompanying the shipment.

Section 175.30 prescribes the requirements that must be met before an air carrier accepts a shipment of hazardous materials for transportation. In achieving compliance with these requirements, the air carrier must, under paragraph (a), examine the shipment against the information supplied on the shipping paper, and must, under paragraph (b), make a visual inspection for leaks and damaged packaging. Consequently, I agree with your analysis and conclusion that the regulations permit the air carrier to rely on the information supplied on the shipping paper, unless, in complying with paragraphs (a) and (b), he has reason to know that there are discrepancies.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 961107312-7021-02; I.D. 052098B]

Fisheries of the Exclusive Economic Zone Off Alaska; Bycatch Rate Standards for the Second Half of 1998

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

ACTION: Pacific halibut and red king crab bycatch rate standards; request for comments.

SUMMARY: NMFS announces Pacific halibut and red king crab bycatch rate standards for the second half of 1998. Publication of these bycatch rate standards is required under regulations

implementing the vessel incentive program. This action is necessary to implement the bycatch rate standards for vessel operators who participate in the Alaska groundfish trawl fisheries. The intent of this action is to reduce prohibited species bycatch rates and promote conservation of groundfish and other fishery resources.

DATES: Effective 1201 hours, Alaska local time (A.l.t.), July 1, 1998, through 2400 hours, A.l.t., December 31, 1998. Comments on this action must be received at the following address no later than 4:30 p.m., A.l.t., June 30, 1998.

ADDRESSES: Comments should be mailed to Susan J. Salvesson, Assistant Regional Administrator, Sustainable Fisheries Division, NMFS, P.O. Box 21668, Juneau, AK 99802-1668, Attn: Lori Gravel; or be delivered to 709 West 9th Street, Federal Building, Room 401, Juneau, AK.

FOR FURTHER INFORMATION CONTACT: Susan J. Salvesson, 907-586-7228.

SUPPLEMENTARY INFORMATION: The domestic groundfish fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands management area (BSAI) and Gulf of Alaska (GOA) are managed by NMFS according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutians Islands Area and the

Fishery Management Plan for Groundfish of the Gulf of Alaska (FMPs). The FMPs were prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson-Stevens Fishery Conservation and Management Act and are implemented by regulations governing the U.S. groundfish fisheries at 50 CFR part 679.

Regulations at § 679.21(f) implement a vessel incentive program to reduce halibut and red king crab bycatch rates in the groundfish trawl fisheries. Under the incentive program, operators of trawl vessels may not exceed Pacific halibut bycatch rate standards specified for the BSAI and GOA midwater pollock and "other trawl" fisheries and for the BSAI yellowfin sole and "bottom pollock" fisheries. Vessel operators also may not exceed red king crab bycatch standards specified for the BSAI yellowfin sole and "other trawl" fisheries in Bycatch Limitation Zone 1 (defined in § 679.2). The fisheries included under the incentive program are defined in regulations at § 679.21(f)(2).

Regulations at § 679.21(f)(3) require that halibut and red king crab bycatch rate standards for each fishery included under the incentive program be published in the **Federal Register**. The standards are in effect for specified

seasons within the 6-month periods of January 1 through June 30 and of July 1 through December 31. For purposes of calculating vessel bycatch rates under the incentive program, 1998 fishing months were specified in the **Federal Register** on December 3, 1997 (62 FR 63878).

Halibut and red king crab bycatch rate standards for the first half of 1998 also were published in the **Federal Register** (62 FR 63878, December 3, 1997). As required by § 679.21(f)(3) and (4), the Administrator of the Alaska Region, NMFS (Regional Administrator), has established the bycatch rate standards for the second half of 1998 (July 1 through December 31). These standards were endorsed by the Council at its April 1998 meeting and are set out in Table 1. The bycatch rate standards are based on the following information:

1. Previous years' average observed bycatch rates;
2. Immediately preceding season's average observed bycatch rates;
3. The bycatch allowances and associated fishery closures specified under § 679.21(d) and (e);
4. Anticipated groundfish harvests;
5. Anticipated seasonal distribution of fishing effort for groundfish; and
6. Other information and criteria deemed relevant by the Regional Administrator.

TABLE 1.—BYCATCH RATE STANDARDS BY FISHERY FOR THE SECOND HALF OF 1998 FOR PURPOSES OF THE VESSEL INCENTIVE PROGRAM IN THE BSAI AND GOA

Fishery	Bycatch rate standard
Halibut bycatch rate standards (kilograms of halibut per metric ton of groundfish catch)	
BSAI Midwater pollock	1.0
BSAI Bottom pollock	5.0
BSAI Yellowfin sole	5.0
BSAI Other trawl	30.0
GOA Midwater pollock	1.0
GOA Other trawl	40.0
Zone 1 red king crab bycatch rate standards (number of crab per metric ton of groundfish catch)	
BSAI yellowfin sole	2.5
BSAI Other trawl	2.5

Bycatch Rate Standards for Pacific Halibut

The halibut bycatch rate standards for the 1998 trawl fisheries are unchanged from those implemented in 1997. The Regional Administrator based standards for the second half of 1998 on anticipated seasonal fishing effort for groundfish species and on 1994-1998 halibut bycatch rates observed in the trawl fisheries included under the incentive program. In determining these

bycatch rate standards, the Regional Administrator considered the annual and seasonal bycatch specifications for the BSAI and GOA trawl fisheries (63 FR 12689, March 16, 1998, and 63 FR 12027, March 12, 1998, respectively). He further recognized that directed fishing for Pacific cod in the Western and Central Regulatory Areas of the GOA is closed for the remainder of the year. The GOA shallow-water and deep-water trawl fishery species complexes

will reopen on July 1 when the third seasonal apportionment of the halibut bycatch limit established for the GOA trawl fisheries becomes available. In the Bering Sea, the rockfish and rock sole/flathead sole/other flatfish fishery categories will open or reopen on July 1 when seasonal apportionments of halibut bycatch allowances specified for these fisheries become available. The BSAI yellowfin sole and Pacific cod trawl fisheries are ongoing, and no

closure has yet been projected due to crab or halibut bycatch. The Regional Administrator also considered the September 1 opening date of the 1998 Bering Sea pollock 'B' season (§ 679.23(e)(2)) and the Gulf of Alaska third season pollock fishery (§ 679.23(d)(2)).

The halibut bycatch rate standards for the BSAI yellowfin sole and "bottom pollock" trawl fisheries are each set at 5 kilograms (kg) of halibut per metric ton (mt) of groundfish. These standards approximate the average annual rates observed on trawl vessels participating in these fisheries since 1992.

The halibut bycatch rate standard for the BSAI and GOA midwater pollock fisheries (1 kg of halibut/mt of groundfish) is higher than the bycatch rates normally experienced by vessels participating in these fisheries. This standard is intended to encourage vessel operators to maintain off-bottom trawl operations and limit further bycatch of halibut in the pollock fishery when halibut bycatch restrictions at § 679.21 prohibit directed fishing for pollock by vessels using non-pelagic trawl gear.

A bycatch rate standard of 30 kg halibut/mt of groundfish is established for the BSAI "other trawl" fishery. This standard has remained unchanged since 1992. A bycatch rate standard of 40 kg of halibut/mt of groundfish is established for the GOA "other trawl" fishery, which is unchanged since 1994.

The considerations that support these bycatch rate standards for the "other trawl" fisheries are unchanged from previous years and are discussed in the **Federal Register** publications of 1995 bycatch rate standards (60 FR 2905, January 12, 1995, and 60 FR 27425, May 24, 1995).

Observer data collected from the 1997 GOA "other trawl" fishery show average third and fourth quarter halibut bycatch rates of 26 and 48 kg of halibut/mt of groundfish, respectively. The first quarter rate from 1998 was lower, at 23 kg of halibut/mt of groundfish. Observer data from the 1997 BSAI "other trawl" fishery show third and fourth quarter halibut bycatch rates of 21 and 3 kg of halibut/mt of groundfish, respectively. The first quarter rate from the 1998 BSAI "other trawl" fishery was 12 kg of halibut/mt of groundfish.

Bycatch Rate Standards for Red King Crab

The red king crab bycatch rate standard for the yellowfin sole and "other trawl" fisheries in Zone 1 of the Bering Sea subarea is 2.5 crab/mt of groundfish during the second half of 1998. This standard has remained unchanged since 1992.

Through May 2, 1998, the rock sole/flathead sole/other flatfish fishery category had taken 20 percent of its annual red king crab bycatch allowance. The Pacific cod and yellowfin sole

fisheries have taken only 41 percent and 4 percent, respectively, of their bycatch allowances. The Regional Administrator anticipates that the non-pelagic trawl gear closure of the red king crab savings area in Zone 1 will continue to result in low red king crab bycatch rates for the remainder of the year and is maintaining the 2.5 red king crab/mt of groundfish bycatch rate standard.

The Regional Administrator has determined that the bycatch rate standards set out in Table 1 are appropriately based on the information and considerations necessary for such determinations under § 679.21(f)(4). These bycatch rate standards may be revised and published in the **Federal Register** when deemed appropriate by the Regional Administrator, pending his consideration of the information set forth at § 679.21(f)(4).

Classification

This action is taken under 50 CFR 679.21(f) and is exempt from OMB review under E.O. 12866.

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

Dated: June 1, 1998.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

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