

Attachment

Analysis for Magnuson-Stevens Reauthorization Act (MSRA), Section 110 Consistency Determination

1.0 Background

Pursuant to MSRA Section 110 (Secretarial Action on State Groundfish Fishing), the Secretary of Commerce (Secretary), within 60 days of enactment of the MSRA, shall determine whether fishing in State waters “without a Federal bottomfish and seamount groundfish permit in the Hawaiian archipelago on regulated species complex is not consistent with the applicable Federal fishery management plan or State data are not sufficient to make such a determination.” If the Secretary makes a determination that fishing in State of Hawaii waters is not consistent with the Fishery Management Plan for Bottomfish and Seamount Groundfish of the Western Pacific Region (Bottomfish FMP), the Secretary shall, in consultation with the Western Pacific Fishery Management Council (Council), and after notifying the State of Hawaii, develop and implement measures to cure the inconsistency pursuant to Section 306(b) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

2.0 Approach to Making the Determination

In making the determination, NOAA Fisheries must interpret the intent of Section 110 of the MSRA which specifies, as discussed above, if the Secretary finds that fishing for regulated bottomfish species in State waters without a Federal permit is not consistent with the Bottomfish FMP, the Secretary “shall develop and implement measures to cure the inconsistency pursuant to Section 306(b) of the Magnuson-Stevens Act.” Accordingly, NOAA Fisheries believes that the determination of “not consistent” should be based, at least in part, on language found at Section 306(b) of the Magnuson-Stevens Act. Under Section 306(b)(1) of the Magnuson-Stevens Act, the Secretary is authorized to regulate a predominantly Federal fishery in State waters only when the State has taken action or omitted to take action, the results of which will substantially and adversely affect the carrying out of such fishery management plan. Using this language as guidance, NOAA fisheries concludes that fishing in State waters for regulated bottomfish species without a Federal permit is not consistent with the Bottomfish FMP, only if the State’s management activities will substantially and adversely affect the carrying out of the Bottomfish FMP.

Whatever else Congress may have intended in order for the fishing activities to be considered not consistent under section 110, NOAA fisheries concludes, at a minimum, Congress intended that such state fishing activities must substantially and adversely affect the carrying out of the Bottomfish FMP. If this conclusion is negative, then such state fishing activities cannot be determined to be not consistent, and NOAA Fisheries need go no further in seeking to discern what else Congress intended by the “not consistent” language.

NOAA fisheries has decided to address two main considerations in ascertaining whether fishing in State waters without a Federal permit will substantially and adversely affect the carrying out of the

Bottomfish FMP. The first aspect is whether the Bottomfish FMP requires a Federal permit. The second aspect is to compare the larger Federal and State bottomfish management regimes in their entirety, and exclusive of a Federal permit requirement, to ascertain whether bottomfish fishing in State waters substantially and adversely affects the carrying out of the Federal bottomfish management regime, the standards of the Magnuson-Stevens Act, and the goals and objectives of the Bottomfish FMP.

State bottomfish management measures that are more comprehensive or restrictive than Federal measures are not considered to substantially and adversely affect the carrying out of the Bottomfish FMP, and accordingly are not viewed as “not consistent” with the Bottomfish FMP, i.e., they are considered to be consistent. While such measures could be viewed as substantially and adversely affecting the carrying out of this fishery management plan to the extent that they excessively constrained harvest and prevented the fishery from obtaining target harvest levels, this is not the case at hand. Current harvest of the regulated bottomfish species is above the desired level, thus more comprehensive or restrictive State measures are consistent with the Bottomfish FMP’s objectives of sustainable harvest of optimum yield and preventing overfishing.

3.0 Determinations

In order to determine whether fishing activities in state waters substantially and adversely affects the carrying out of such fishery management plan, there must be sufficient information available to compare management programs. The necessary data to make this determination are readily available, as it only requires a comparison of existing State and Federal bottomfish management relates statutes, regulations, and other management measures, which are readily available to the public.

The first line of inquiry is whether the Bottomfish FMP and its implementing Federal regulations require a Federal permit to participate in the Hawaii bottomfish fishery. Federal regulations do require a limited entry permit to participate in the Northwestern Hawaiian Islands bottomfish fishery (see Section 6.0 below). However, **currently, there is no Federal permit requirement to participate in the main Hawaiian Islands bottomfish fishery.**

The second line of inquiry, independent of whether a Federal permit is required, is to compare the Federal and State bottomfish management regimes to determine whether bottomfish fishing in State waters substantially and adversely affects carrying out of the Bottomfish FMP. NOAA Fisheries compared the current State regulatory regime to the Federal regulatory regime currently in effect (summarized in Table 1). In particular, the analysis looks closely at whether fishing in State waters without a Federal permit substantially or adversely affects the ability of the Federal regime to carry out the Magnuson Stevens Act requirement to either prevent or end overfishing in the fishery.

Only the bottomfish fishery in the NWHI has been actively managed by means of Federal regulations promulgated under the authority of the bottomfish FMP (see Section 6.0 below). Following proclamation of the NWHI Marine National Monument by President Bush on June 12, 2006, Federal regulations (71 FR 51134, August 29, 2006) were amended to eliminate all commercial bottomfishing within the Monument in June 2011 and, in the interim, to freeze the

number of bottomfish fishing vessels permitted to fish within Monument waters to those specific vessels that were permitted on the day of the proclamation. The State of Hawaii currently prohibits bottomfishing within NWHI State waters, although State reporting requirements apply to fishermen who participate in the Federal NWHI bottomfish fishery managed under the Bottomfish FMP. Because fishing is prohibited in NWHI State waters, there is no potential to substantially or adversely affect the carrying out of the Bottomfish FMP in the NWHI.

Both historically and currently, only the State has actively regulated commercial and recreational fishing for bottomfish within the main Hawaiian Islands. **Current Federal regulations applicable to the main Hawaiian Islands contain no requirement for Federal bottomfish permits, licenses, logbooks, or other similar management measures.** This arrangement has existed for many years and was acknowledged in a resolution passed by the Council in 1998 (98th Council Meeting) which acknowledges that the State's bottomfish management regime is consistent with the Bottomfish FMP:

“The Western Pacific Fishery Management Council resolves that the State of Hawaii’s 1998 management program restricting harvests of some species of bottomfish, is fully consistent with the Council’s Fishery Management Plan for Bottomfish and Seamount Groundfish. The Council is aware that the state’s program, among other measures, prohibits fishing for bottomfish in 19 areas of the Main Hawaiian Islands, some of which overlap into, or are fully within, the Exclusive Economic Zone (EEZ). The Council acknowledges the state’s authority to enforce its bottomfish regulations with respect to state-registered vessels operating in the EEZ off the Main Hawaiian Islands. The Council recognizes its continuing responsibility under the Magnuson-Stevens Act to prevent overfishing of bottomfish and rebuild bottomfish fisheries under its jurisdiction that are overfished or approaching a condition of being overfished. To fulfill this responsibility, the Council requests the state to report annually to the Council on the status of the bottomfish stocks of the Main Hawaiian Islands.”

In the absence of a Federal permit and associated Federal regulations designed to achieve the goals and objectives of the Bottomfish FMP, fishing activities authorized by the State in the main Hawaiian Islands cannot be determined to substantially and adversely affect the carrying out of the Bottomfish FMP because there are no regulations with which it is possible to be inconsistent. **It is determined that, although more restrictive, State of Hawaii bottomfish fishing regulations do not substantially and adversely affect the carrying out of the Bottomfish FMP, and thus, are not inconsistent with this FMP.**

4.0 Proposed New Federal Management Measures to End Overfishing

In 2005, NOAA Fisheries, on behalf of the Secretary determined that overfishing was occurring on the bottomfish stock complex in the Hawaiian Archipelago, with the primary problem being excess fishing effort in the main Hawaiian Islands. Consequently, NOAA Fisheries requested the Council to take appropriate action to end overfishing (70 FR 34452, June 14, 2005). In response, the Council adopted a recommendation to prohibit fishing for seven deep-water bottomfish species in a large portion of Federal waters around Penguin Bank and Middle Bank in the main Hawaiian Islands, and to require Federal permits and catch reports. The recommended area closures were

intended to reduce fishing mortality by approximately 15 %, which was the amount indicated by a stock assessment conducted by the NOAA Fisheries Pacific Islands Fisheries Science Center (PIFSC) that considered data through 2003. However, a recent bottomfish stock assessment by PIFSC, with data through 2004, indicates that a 24 % reduction in fishing mortality on bottomfish is required to end overfishing. A new analysis indicates that the potential effectiveness of the existing State and initially recommended Federal bottomfish area closures (Penguin and Middle Banks) may be less than previously thought. As a result, the Council decided to reconsider what additional or alternative management measures might be needed to end the overfishing at its March 2007 meeting.

Because recommendations for new Federal management measures to end the overfishing have not yet been submitted to the Secretary for approval and implementation, the current Federal regulations governing the main Hawaiian Islands bottomfish fishery remain unchanged. If the Council's new recommendations are approved and implemented by the Secretary, a new evaluation of the State's bottomfish regime may be appropriate to ensure that fishing under State regulations does not substantially and adversely affect the carrying out of the Bottomfish FMP.

5.0 Status of Hawaii Bottomfish Fisheries

5.1 Northwestern Hawaiian Islands (NWHI). Over the past 20 years, participation in the NWHI fishery has averaged 15 vessels. The creation in 2006 of the NWHI National Marine Monument, however, limits participation to eight vessels (four vessels permitted to fish in the Ho'omalulu Zone and four vessels permitted to fish in the Mau Zone), and ends commercial fishing in the NWHI on June 15, 2011. NWHI bottomfish vessels tend to be larger than those fishing around the main Hawaiian Islands, as the distance to fishing grounds is greater. They average fewer trips (less than 10/yr) that are longer (several weeks), and nearly all NWHI bottomfish are sold. Data from the NWHI fishery are collected through the State of Hawaii logbook program.

5.2 Main Hawaiian Islands. About 300 commercial vessels participate in the main Hawaiian Islands bottomfish fishery, and recreational vessels are estimated at over 1,000. Fishing trips are usually a day or less. Most fishermen participate in both pelagic (e.g., trolling) and bottomfish fisheries, and except for a few full-time commercial bottomfish fishermen, most fish for bottomfish no more than 60 days a year. (The distinction between recreational and commercial fishermen is often ambiguous, making such analyses difficult.) The total ex-vessel revenue from commercial bottomfish fishing in the main Hawaiian Islands (e.g., \$1,460,000 for landings of 273,000 lb in 2003) in recent years has been about twice that from the NWHI (e.g., \$716,000 for landings of 222,000 lb in 2003). Data from the main Hawaiian Islands commercial fishery are collected through the State of Hawaii commercial fishing report program.

6.0 Current Federal and State Management Measures

6.1 Bottomfish and Seamount Groundfish FMP (Bottomfish FMP). The FMP was implemented in 1986. It prohibited certain destructive fishing techniques, including explosives, poisons, trawl nets and bottom-set gillnets; established a moratorium on the commercial harvest of seamount groundfish stocks at the Hancock Seamounts (until August 2010); and implemented a permit system for fishing for bottomfish in the EEZ around the NWHI. The plan also established a

management framework that provides for the implementation and adjustment of measures such as catch limits, size limits, area or seasonal closures, fishing effort limitations, fishing gear restrictions, access limitations, permit and/or catch reporting requirements and a rules-related notice system.

The FMP has been amended nine times since 1986 as conditions in the fisheries have changed. Amendment 1 (1987) added bottomfish fisheries in the EEZ around American Samoa and Guam to the framework procedures of the FMP for establishing limited access and set a control date for these fisheries. Amendment 2 (1988) divided the NWHI into two zones: the Ho‘omalau Zone to the northwest and the Mau Zone to the southeast. The amendment also established a limited access permit program for the Ho‘omalau Zone. Amendment 3 (1991), which was superseded by Amendment 6, defined recruitment overfishing based on spawning potential ratio. Amendment 3 also outlined the process by which overfishing is monitored and evaluated. Amendment 4 (1990) required vessel owners or operators to notify NMFS at least 72 hours before leaving port if they intend to fish in a 50 nm “protected species study zone” around the NWHI. This notification provides NMFS the opportunity to place Federal observers on board bottomfish vessels to record interactions with protected species if this action is deemed necessary.

FMP Amendment 5 (1999) established a limited access permit program for the Mau Zone and a framework for a Community Development Program. Amendment 6 (1999) identified and described essential fish habitat for managed species of bottomfish, discussed measures to minimize bycatch and bycatch mortality in the bottomfish fishery, provided criteria for identifying when overfishing has occurred in the fishery and describes fishing communities in the region. Amendment 6 initially was only partially approved, with the provisions for bycatch, overfishing and fishing communities in Hawaii disapproved. The disapproved provisions were rewritten and the revised provisions were implemented. Amendment 7 (2003) brought the FMP into conformity with the Coral Reef Ecosystem (CRE) FMP by prohibiting fishing for bottomfish management unit species (BMUS) in the CRE FMP’s no-take areas, and amending the BMUS list to exclude species now managed under the CRE FMP. Amendment 8 (2006) included EEZ waters and bottomfish fisheries around the Commonwealth of the Northern Mariana Islands (CNMI) and U.S. Pacific remote island areas (PRIAs) under the Bottomfish FMP, and established permitting and reporting requirements for fisheries in the PRIA. Amendment 9 (2006) established bottomfish closed areas around Guam for large bottomfish vessels and Federal permits and data reporting for those large vessels.

The majority of Federal regulations implemented under the authority of the Bottomfish FMP regulate fishing in the NWHI, American Samoa, Guam, CNMI and the PRIAs. Because the Council’s policy for many years was to defer management of the main Hawaiian Islands bottomfish fishery to the State of Hawaii, Federal bottomfish regulations for the main Hawaiian Islands are limited in scope, e.g., gear restrictions. The FMP currently does not require permits, catch reporting, or impose catch limits, area closures or other similar management measures for the bottomfish fishery in the main Hawaiian Islands.

6.2 State of Hawaii Bottomfish Management. The State of Hawaii’s bottomfish management regime includes mandatory commercial permits and data collection programs, gear restrictions, recreational bag limits for certain species, closed areas (Bottomfish Restricted Fishing Areas),

vessel registration and identification, and a control date for possible future limited access programs. The State defines “commercial” fishing to mean fishing that results in the sale of fish or fishing services including charter fishing operators. Since charter fishing operations in Hawaii sell the fish harvested on a trip, this definition is consistent with the “commercial fishing” definition in the Magnuson-Stevens Act. The State’s bottomfish fishery regulations may be found at Hawaii Administrative Rules, Chapter 13-94, established in 1998 (see <http://www.hawaii.gov/dlnr/dar/regs/ch94/ch94big.pdf>).

The NWHI bottomfish fishery is conducted exclusively in Federal waters and is regulated by Federal regulations under the Bottomfish FMP. The State prohibits all bottomfish fishing within its waters in the NWHI, however, Federally-permitted bottomfish fishermen fishing in the NWHI are still required to possess State commercial marine licenses and submit State catch and effort logbooks. The State logbooks fulfill the Federal reporting requirement and NOAA Fisheries obtains the data through a data sharing agreement with the State.

In the NWHI, the non-commercial (recreational) catch comprises a miniscule portion of the catch, and in the main Hawaiian Islands the recreational catch is estimated to be as much as 25-70 percent of the total bottomfish catch. Currently there is no mandatory State marine recreational fishing permit or data collection program; however, NOAA Fisheries and the State collect marine recreational fishery data in Hawaii through the voluntary Hawaii Marine Recreational Fishing Survey. Relatively few bottomfishing trips are being sampled, however, possibly because bottomfish fishing trips are relatively rare compared to other (e.g., pelagic) trip types, and because the survey sampling may not be targeting the best times of day or locations to encounter fishermen returning from bottomfish trips. Improvements to the survey are being made.

The State has a mandatory commercial fishery reporting program that has been in existence since the late 1940s and represents the longest continuous history of fishery data collection in the western Pacific. Any fisherman who takes any marine life for commercial purposes is required to obtain a commercial marine license and submit fishing reports to the State. However, the program has been hampered by limited enforcement and data processing resources. For example, delinquent reporting and staffing limitations often result in delays in the compilation and analyses of annual fishery statistics. In addition, the state data collection program is limited by irregular and inconsistent statistical grids for geographical collection and analyses of data. Pertinent to the determinations required by this document, the State statistical reporting areas frequently overlay both State and federal waters making it impossible to distinguish between landings of bottomfish taken from State versus Federal waters. The State implemented mandatory catch and effort reporting forms for commercial fishing in 2002, and will be modifying their statistical reporting areas to coincide with the 3-nm shoreward boundary of the Federal waters. Furthermore, the State recently approved changes to its bottomfish restricted fishing areas, based on improved habitat information, that are intended to enhance the conservation of bottomfish and their nursery grounds (see <http://www.hawaii.gov/dlnr/dar/bottomfish/index.htm>). The State is also developing a proposal to require annual commercial and recreational bottomfish fishing vessel registration (a change from the current one-time only requirement) and to require data reporting from registered recreational bottomfish vessel owners.

Although limitations exist in the State's data collection system, data produced from the program are considered to be the best available fisheries-dependent information. These data currently provide the bases for bottomfish stock assessments in Hawaii and for the development of both Federal and State bottomfish management measures.

Table 1. Comparison of Current Hawaiian Archipelago Federal and State Bottomfish Management Regimes

Federal	State
Regulated Species	
"Deep 7" (onaga, ehu, kalekale, opakapaka, gindai, hapuupuu, and lehi ¹), plus others	"Deep 7"
NWHI Fishing Permits	
Limited Access (max. 8 permits). No fishing allowed in NWHI Federal waters after June 15, 2011	No fishing allowed in NWHI State waters, Commercial Marine Licenses
NWHI Data Collection	
Federal requirement to submit commercial fishing information to the State	NWHI Bottomfish Trip Daily Log and Bottomfish Trip Sales Report
MHI Fishing Permits	
None	Commercial Marine License
MHI Data Collection	
None	Commercial Fishing Report, Marine Dealer Report, & Marine Recreational Fishing Survey
Area Management	
None	Bottomfish Restricted Fishing Areas
Gear Requirements	
Use or possession of trawls, bottom-set gillnets, explosives, poisons, or intoxicants are prohibited	Use or possession of nets, traps, trawls, bottomfish longlines, explosives, electro-fishing devices, chemicals, poisons or intoxicants are prohibited
Vessel Requirements	
Official number must be displayed (not specific to bottomfish), vessel size (capacity) restrictions	Mandatory vessel registration and display of "BF" designation displayed for all bottomfishing vessels (commercial and recreational) in the main Hawaiian Islands
Catch Limits	
None.	Recreational bag limit of five onaga or ehu or a mix of both, per person, per day
Limited Entry	
None proposed at this time. Established control date of June 2, 2005	None proposed at this time. Established control date of June 1, 1998

¹ *Etelis coruscans*, *E. carbunculus*, *Pristipomoides sieboldii*, *P. filamentosus*, *P. zonatus*, *Epinephelus quernus*, and *Aphareus rutilans*, respectively.