



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 110211137-2141-02]

RIN 0648-BA87

Fisheries Off West Coast States; Highly Migratory Species Fisheries; Swordfish Retention Limits

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to modify retention limits for swordfish harvested in the U.S. West Coast-based deep-set tuna longline (DSL) fishery. The DSL fishery is managed under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). The final rule implements the Pacific Fishery Management Council's (Council) recommendation to modify HMS FMP regulations governing the possession and landing limits of swordfish captured in the DSL fishery as follows: if a vessel without an observer onboard uses any J-hooks (tuna hooks), the trip limit is 10 swordfish; if a vessel without an observer onboard uses only circle hooks, the trip limit is 25 swordfish; if the vessel carries a NMFS-approved observer during the entire fishing trip, there is no limit on swordfish retained.

DATES: This final rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Craig Heberer, Sustainable Fisheries Division, NMFS, 760-431-9440, ext. 303.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is also accessible at (<http://swr.nmfs.noaa.gov/>). An electronic copy of the current HMS FMP and accompanying appendices are available on the Pacific Fishery Management Council's website at <http://www.pcouncil.org/hms/hmsfmp.html>.

The HMS FMP was developed by the Council in response to the need to coordinate state, Federal, and international management of HMS stocks. The management unit in the FMP consists of highly migratory species (tunas, billfish, and sharks) that occur within the West Coast (California, Oregon, and Washington) Exclusive Economic Zone (EEZ) and to a limited extent on adjacent high seas waters. NMFS, on behalf of the Secretary of Commerce, partially approved the HMS FMP on February 4, 2004 (69 FR 18444). The majority of HMS FMP implementing regulations became effective on April 7, 2004. Reporting and recordkeeping provisions became effective on February 10, 2005.

Since being adopted in 2004, the HMS FMP has been amended twice. On June 7, 2007, NMFS approved Amendment 1 to the HMS FMP to incorporate recommended international measures to end overfishing of the Pacific stock of bigeye tuna, Thunnus obesus, in response to formal notification from NMFS that overfishing was occurring on this stock. On June 12, 2011, NMFS approved Amendment 2 to the HMS FMP (76 FR 56328) to ensure that it is consistent with revised guidelines to implement National Standard 1 of the MSA in order to more

effectively prevent overfishing and rebuild overfished stocks, or stocks that may become overfished.

This final rule modifies HMS FMP longline regulations at 50 CFR 660.705 and 660.712, which prohibit U.S. vessels based on the West Coast from using longline gear to make shallow sets (SSL), and which originally prohibited U.S. vessels using DSL gear from landing more than 10 swordfish (Xiphias gladius) per trip. The 10-swordfish trip limit was intended to prevent vessels ostensibly fishing with DSL gear targeting bigeye and yellowfin tuna, from switching to SSL gear targeting swordfish on the same trip. The final rule increases the trip limits on swordfish in order to make the West Coast-based DSL fishery consistent with recommendations by the Western Pacific Fishery Management Council on their Pacific Pelagics Fishery Ecosystem Plan (FEP) to similarly increase DSL fishing retention limits for the Hawaii-based DSL fishery.

The final rule retains the 10 swordfish limit for DSL vessels fishing with J-hooks (tuna hooks), because those types of hooks have higher sea turtle bycatch rates, and the trip limit acts as a deterrent to engaging in fishing practices that may result in sea turtle bycatch. The final rule changes the trip limits for vessels fishing without observers but using circle hooks, because those types of hooks are known to minimize the bycatch and mortality of sea turtles. However, for trips with a NMFS-approved observer, the final rule removes the trip limits entirely, because the observer acts as a sufficient deterrent to engaging in SSL fishing, which is prohibited.

The final rule assists vessels in the DSL fishery by reducing the unnecessary discard of swordfish (regulatory “bycatch” under the Magnuson Act) when a vessel employs DSL fishing methods known to reduce the risk of incidentally catching sea turtles. It also benefits the DSL vessels by allowing them to land a greater number of swordfish, which could result in fishermen

realizing greater profits from DSLL fishing trips, especially those with NMFS-approved observer coverage. Furthermore, by not forcing fishermen to discard as many swordfish, bycatch levels will be minimized as required by National Standard 9 of the MSA.

NMFS received four public comments on the proposed rule, two in support of the action and two critical of the action. The first critical comment asserted, without providing substantive evidence, that the fisherman regulated under these rules could be earning more than five million dollars a year and therefore should not be considered a small (business) entity for purposes of analysis under the Regulatory Flexibility Act (RFA). Based on the average observed annual catches by this vessel and the market values for that catch, it is extremely unlikely that the regulated fisherman is realizing annual revenues anywhere near five million dollars. NMFS has not changed its certification or undertaken a regulatory flexibility analysis due to this comment.

The second critical comment, submitted on behalf of the Turtle Island Restoration Network and the Center for Biological Diversity, recommended that NMFS disapprove the action altogether. The recommendation was based on the commenters' perceptions of: a lack of need for the regulation; adverse effects on federally protected sea turtles, marine mammals and bycatch species; adverse impacts to Pacific swordfish populations; and providing the foundation for opening the West Coast High Seas to a surface longline fishery (i.e., shallow-set fishery for swordfish) under the guise of regulatory consistency. The rationale for the rule is explained above, and is not related to opening a SSLL fishery. NMFS has analyzed the DSLL fishery (on the high seas outside the West Coast EEZ) under the National Environmental Policy Act (NEPA) and section 7 of the Endangered Species Act. This final rule will result in no additional adverse impacts to the marine environment, including sea turtles and marine mammals, or any aspect of the human social and economic environment that was not previously analyzed. The action is not

expected to increase either the fishing effort or manner of operations in the DSLL fishery (which is an open-access fishery). Furthermore, the North Pacific swordfish stock is currently healthy and not approaching an overfished or overfishing condition.

There are no changes to the rule text from those that NMFS originally proposed.

Classification

The Administrator of the Southwest Region, NMFS, determined that the final rule is necessary for the conservation and management of the U.S. West Coast Fisheries for Highly Migratory Species and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. A single comment was received questioning the determination that the one vessel affected by this rule is a "small entity." As explained above, in the response to comments under the Supplementary Section of this final rule, the commenter did not supply any substantive evidence to support that claim, and it is extremely unlikely that the regulated fisherman is realizing annual revenues anywhere near five million dollars. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 14, 2012.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

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

PART 660—FISHERIES OFF WEST COAST STATES

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

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

2. In § 660.705, revise paragraphs (s) and (mm) to read as follows:

§ 660.705 Prohibitions.

* * * * *

(s) If no observer is on the vessel and J-type fishing hooks are used, possess more than 10 swordfish; if no observer on the vessel and only circle-type fishing hooks are used, possess more than 25 swordfish on board a longline vessel from a fishing trip where any part of the trip included fishing west of 150° W. long. and north of the equator (0 ° lat.) in violation of § 660.712(a)(9).

* * * * *

(mm) Except when fishing under a western Pacific longline limited entry permit issued under § 660.21, possess more than 10 swordfish on board a longline vessel from a fishing trip where any part of the trip included fishing on the high seas of the Pacific Ocean west of 150 ° W. long. north of the equator in violation of § 660.720 (a)(3).

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3. In § 660.712, revise paragraphs (a)(10) and (a)(11) to read as follows:

§ 660.712 Longline fishery.

(a) * * *

(10) If no observer on board the vessel, owners and operators of longline vessels registered for use of longline gear may land or possess no more than 10 swordfish from a fishing trip when using any J-type fishing hooks, and no more than 25 swordfish from a fishing trip when using only circle hook-type fishing hooks. If a NMFS-approved observer is on board the vessel for the duration of the fishing trip, there is no limit on the amount of swordfish retained.

(11) Owners and operators of longline vessels registered for use of longline gear are subject to the provisions at 50 CFR part 223 prohibiting shallow sets to target swordfish in waters beyond the U.S. EEZ and east of 150 ° W. long.

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[FR Doc. 2012-6577 Filed 03/16/2012 at 8:45 am; Publication Date: 03/19/2012]