

(1) Season: April 2–August 31.  
 (2) Closure: 30-day closure dates to be announced by the Alaska Regional Director or his designee, after consultation with local subsistence users and the region's Waterfowl Conservation Committee. This 30-day period will occur between June 1 and August 15 of each year. A press release announcing the actual closure dates will be forwarded to regional newspapers and radio and television stations and posted in village post offices and stores.

(c) Bristol Bay Region.

(1) Season: April 2–June 14 and July 16–August 31 (general season); April 2–July 15 for seabird egg gathering only.

(2) Closure: June 15–July 15 (general season); July 16–August 31 (seabird egg gathering).

(d) Bering Strait/Norton Sound Region.

(1) Stebbins/St. Michael Area (Point Romanof to Canal Point):

(i) Season: April 15–June 14 and July 16–August 31.

(ii) Closure: June 15–July 15.

(2) Remainder of the region:

(i) Season: April 2–June 14 and July 16–August 31 for waterfowl; April 2–July 19 and August 21–August 31 for all other birds.

(ii) Closure: June 15–July 15 for waterfowl; July 20–August 20 for all other birds.

(e) Kodiak Archipelago Region, except for the Kodiak Island roaded area, is closed to the harvesting of migratory birds and their eggs. The closed area consists of all lands and waters (including exposed tidelands) east of a line extending from Crag Point in the north to the west end of Saltery Cove in the south and all lands and water south of a line extending from Termination Point along the north side of Cascade Lake extending to Anton Larson Bay. Waters adjacent to the closed area are closed to harvest within 500 feet from the water's edge. The offshore islands are open to harvest.

(1) Season: April 2–June 20 and July 22–August 31, egg gathering: May 1–June 20.

(2) Closure: June 21–July 21.

(f) Northwest Arctic Region.

(1) Season: April 2–August 31 (in general); waterfowl egg gathering May 20–June 9; seabird egg gathering July 3–July 12; molting/non-nesting waterfowl July 1–July 31.

(2) Closure: June 10–August 14, except for the taking of seabird eggs and molting/non-nesting waterfowl as provided in paragraph (f)(1) of this section.

(g) North Slope Region.

(1) Southern Unit (Southwestern North Slope regional boundary east to

Peard Bay, everything west of the longitude line 158°30' S and south of the latitude line 70°45' E to west bank of the Ikpikpuk River, and everything south of the latitude line 69°45' E between the west bank of the Ikpikpuk River to the east bank of Sagavinirktok River):

(i) Season: April 2–June 29 and July 30–August 31 for seabirds; April 2–June 19 and July 20–August 31 for all other birds.

(ii) Closure: June 30–July 29 for seabirds; June 20–July 19 for all other birds.

(2) Northern Unit (At Peard Bay, everything east of the longitude line 158°30' S and north of the latitude line 70°45' E to west bank of the Ikpikpuk River, and everything north of the latitude line 69°45' E between the west bank of the Ikpikpuk River to the east bank of Sagavinirktok River):

(i) Season: April 6–June 6 and July 7–August 31 for king and common eiders and April 2–June 15 and July 16–August 31 for all other birds.

(ii) Closure: June 7–July 6 for king and common eiders and June 16–July 15 for all other birds.

(3) Eastern Unit (East of eastern bank of the Sagavanirktok River):

(i) Season: April 2–June 19 and July 20–August 31.

(ii) Closure: June 20–July 19.

(h) Interior Region.

(1) Season: April 2–June 14 and July 16–August 31; egg gathering May 1–June 14.

(2) Closure: June 15–July 15.

(i) Upper Copper River (Harvest Area: State of Alaska Game Management Units 11 and 13) (Eligible communities: Gulkana, Chitina, Tazlina, Copper Center, Gakona, Mentasta Lake, Chistochina and Cantwell).

(1) Season: April 15–May 26 and June 27–August 31.

(2) Closure: May 27–June 26.

(3) **Note:** The Copper River Basin communities listed in this paragraph (i) also documented traditional use harvesting birds in Unit 12, making them eligible to hunt in this unit using the seasons specified in paragraph (h)(1) of this section.

(j) Gulf of Alaska Region.

(1) Prince William Sound Area (Harvest area: Unit 6 [D]), (Eligible Chugach communities: Chenega Bay, Tatitlek).

(i) Season: April 2–May 31 and July 1–August 31.

(ii) Closure: June 1–30.

(2) Kachemak Bay Area (Harvest area: Unit 15[C] South of a line connecting the tip of Homer Spit to the mouth of Fox River) (Eligible Chugach Communities: Port Graham, Nanwalek).

(i) Season: April 2–May 31 and July 1–August 31.

(ii) Closure: June 1–30.

(k) Cook Inlet (Harvest area: portions of Unit 16[B] as specified in this paragraph (k)) (Eligible communities: Tyonek only)

(1) Season: April 2–May 31—That portion of Unit 16(B) south of the Skwentna River and west of the Yentna River and August 1–31—that portion of Unit 16(B) south of the Beluga River, Beluga Lake, and the Triumvirate Glacier.

(2) Closure: June 1–July 31.

(l) Southeast Alaska (Harvest area: National Forest lands in Icy Strait and Cross Sound, including Middle Pass Rock near the Inian Islands, Table Rock in Cross Sound, and other traditional locations on the coast of Yakobi Island. The land and waters of Glacier Bay National Park remain closed to all subsistence harvesting [50 CFR 100.3]). (Eligible communities: Hoonah only).

(1) Season: glaucous-winged gull egg gathering only: May 15–June 30.

(2) Closure: July 1–August 31.

Dated: March 25, 2004.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 0401130013–4098–02; I.D. 122403A]

RIN 0648–AR84

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

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

**ACTION:** Final rule.

**SUMMARY:** NMFS has approved a regulatory amendment under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (FMP) submitted by the Western Pacific Fishery Management Council (Council) and issues this final rule to establish a number of conservation and

management measures for the fisheries managed under the FMP. This final rule is intended to achieve certain objectives of the FMP, including achieving optimum yield for FMP-managed species while avoiding the likelihood of jeopardizing the continued existence of any species listed as endangered or threatened under the Endangered Species Act (ESA). This final rule eliminates a seasonal closure for longline fishing in an area south of the Hawaiian Islands and reopens the swordfish-directed component of the Hawaii-based longline fishery. In order to minimize adverse impacts on sea turtles, the swordfish component of the Hawaii-based longline fishery will be subject to restrictions on the types of hooks and bait that may be used, annual fleet-wide limits on fishery interactions with leatherback and loggerhead sea turtles, an annual fleet-wide limit on fishing effort, and other mitigation measures.

**DATES:** Effective April 2, 2004, except for the amendments to § 660.22 (ii), (ll), (nn), and (oo), § 660.32 (a) and (b), and § 660.33 (f) and (g), which are effective May 3, 2004.

**ADDRESSES:** Copies of the Final Supplemental Environmental Impact Statement (FSEIS) for this action, the Record of Decision (ROD) for the FSEIS, the Regulatory Impact Review (RIR) and Final Regulatory Flexibility Analysis (FRFA) for this regulatory action, and the Final Environmental Impact Statement (FEIS) that the FSEIS supplements (issued by NMFS on March 30, 2001) are available from Dr. Samuel Pooley, Acting Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700. These documents are also available on the Internet at the website of PIRO, <http://swr.nmfs.noaa.gov/pir/>. The FSEIS, FRFA, and RIR are also available at the website of the Western Pacific Fishery Management Council, <http://www.wpcouncil.org/>.

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

**SUPPLEMENTARY INFORMATION:** On January 28, 2004, NMFS published a proposed rule (69 FR 4098) in response to the urgent need to provide adequate protections for sea turtles and to the results of recent research in the Atlantic Ocean on mitigation technologies for sea turtle interactions in pelagic longline fisheries.

This final rule implements both a regulatory amendment recommended by the Western Pacific Fishery Management Council (Council) under

the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (FMP) and Court rulings made in *Hawaii Longline Association v. NMFS* (D.D.C., Civ. No. 01-0765) that vacated a June 12, 2002, rule containing protective measures for sea turtles, effective April 1, 2004, as discussed further in the proposed rule.

On January 23, 2004, the Environmental Protection Agency (EPA) published in the **Federal Register** (69 FR 3340) a notice of availability of a draft supplemental environmental impact statement (DSEIS) prepared for this action pursuant to the National Environmental Policy Act (NEPA). The public comment period for the DSEIS lasted until February 23, 2004. The abbreviated comment period, approved by the EPA, was needed to facilitate completion of the SEIS so that necessary turtle conservation measures for the Hawaii-based longline fishery could be effective by April 1, 2004, when the current turtle-related regulations will be vacated by Court Order. EPA published a notice of availability of a final supplemental environmental impact statement (FSEIS) for this action on March 19, 2004, at 69 FR 13036.

On February 23, 2004, NMFS concluded consultation and issued a biological opinion under section 7 of the Endangered Species Act on the pelagic fisheries of the western Pacific region as they would be managed under the measures implemented through this final rule. The biological opinion found that the fisheries are not likely to jeopardize the continued existence of any ESA-listed species under the jurisdiction of NMFS.

The proposed rule provides further background on the processes and analyses conducted under the NEPA and other applicable laws for this regulatory action, the ESA section 7 consultation history for the western Pacific pelagic fisheries, the history of litigation related to the western Pacific pelagic fisheries, the expected effects of this final rule, and the rationale for this final rule.

The measures contained in this final rule are summarized as follows:

#### **Management Measures Eliminated by Court Ruling**

As required by the Court rulings referred to above, this final rule eliminates: (1) the prohibition on Hawaii-based longline vessels and general longline vessels using longline gear to fish for swordfish north of the equator (as well as several restrictions intended to make this prohibition enforceable, including restrictions on gear configuration, set depth, and the

number of swordfish possessed and landed); (2) the prohibition on longline fishing by Hawaii-based vessels and general longline vessels during April and May in certain waters south of the Hawaiian Islands (between the equator and 15° N. lat., and between 145° W. long. and 180° long.); (3) the requirement that operators of general longline vessels annually complete a protected species workshop and have on board a valid protected species workshop certificate; (4) the requirement that owners and operators of general longline vessels and of other vessels using hooks to target Pacific pelagic species employ specified sea turtle handling measures (the handling measures, which vary among vessel type, include carrying and using line clippers, dip nets, and wire or bolt cutters to disengage sea turtles, and handling, resuscitating, and releasing sea turtles in specified manners); and (5) the requirement that any vessel de-registered from a Hawaii longline limited access permit after March 29, 2001, may only be re-registered to a Hawaii longline limited access permit during the month of October.

#### **New Management Measures**

To implement the regulatory amendment proposed by the Council, this final rule: (1) establishes an annual effort limit on the amount of shallow-set longline fishing effort north of the equator that may be collectively exerted by Hawaii-based longline vessels (2,120 shallow-sets per year); (2) divides and distributes this shallow-set annual effort limit each calendar year in equal portions (in the form of transferable single-set certificates valid for a single calendar year) to all holders of Hawaii longline limited access permits (according to the number of permits held) that provide written notice to NMFS no later than November 1 prior to the start of the calendar year of their interest in receiving such certificates; (3) prohibits any Hawaii-based longline vessel from making more shallow-sets north of the equator during a trip than the number of valid shallow-set certificates on board the vessel; (4) requires that operators of Hawaii-based longline vessels submit to the Regional Administrator within 72 hours of each landing of pelagic management unit species, with the logbooks, one valid shallow-set certificate for every shallow-set made north of the equator during the trip; (5) requires that Hawaii-based longline vessels, when making shallow-sets north of the equator, use only circle hooks sized 18/0 or larger with a 10-degree offset; (6) requires that Hawaii-based longline vessels, when making

shallow-sets north of the equator, use only mackerel-type bait; (7) establishes annual limits on the numbers of interactions between leatherback and loggerhead sea turtles and Hawaii-based longline vessels while engaged in shallow-setting, set at 16 and 17 for leatherback and loggerhead sea turtles, respectively (the limits are equal to the annual number of turtles expected to be captured for the respective species in the shallow-set component of the Hawaii-based fishery, as established in the biological opinion issued by NMFS pursuant to section 7 of the ESA); (8) establishes a procedure for closing the shallow-setting component of the Hawaii-based longline fishery for the remainder of the calendar year when either of the two limits is reached, after giving at least one (1) week advanced notice of such closure to all holders of Hawaii longline limited access permits (the numbers of interactions will be monitored with respect to the limits using year-to-date estimates derived from data recorded by NMFS vessel observers); (9) requires that operators of Hawaii-based longline vessels notify the Regional Administrator (as defined at 50 CFR 660.236) in advance of every trip whether the longline sets made during the trip will involve shallow-setting or deep-setting and require that Hawaii-based longline vessels make sets only of the type declared (i.e., shallow-sets or deep-sets); (10) requires that operators of Hawaii-based longline vessels carry and use NMFS-approved de-hooking devices; and (11) requires that Hawaii-based longline vessels, when making shallow-sets north of 23° N. lat., start and complete the deployment of longline gear during the nighttime (specifically, no earlier than one hour after local sunset and no later than local sunrise).

Under this final rule, holders of Hawaii longline limited access permits must, in order to receive shallow-set certificates for a given calendar year, provide written notice to NMFS of their interest in receiving such certificates no later than November 1 prior to the start of the calendar year (for the 2004 fishing year, the deadline is May 1, 2004). Although NMFS intends to deliver annual reminders of this requirement to all permit holders, the permit holders will be responsible for providing notice of their interest regardless of whether they receive a reminder from NMFS. Such notice must be provided to the Regional Administrator, NMFS, Pacific Islands Regional Office (see ADDRESSES), and it should say "attention: swordfish certificates."

The Council's proposed regulatory amendment was accompanied by

proposals to implement or continue implementing five off-site sea turtle conservation projects. These projects are aimed at protecting affected sea turtle populations on their nesting beaches and in their nearshore foraging grounds at sites in Southeast Asia, Mexico, and Japan. These projects are not part of this final rule, but they were considered and assessed by the Council in conjunction with the regulatory elements of its proposed action and were found to be important components of sea turtle conservation in the Pacific.

#### Comments and Responses

NMFS received and considered comments on the proposed rule from a number of interested parties. NMFS responds to these comments as follows:

*Comment 1:* One commenter stated that in the absence of vessel observers there is no incentive for fishermen to self-report leatherback and loggerhead takes and that the proposed measure may not protect these endangered species.

*Response:* Self-reporting of sea turtle interactions is not necessary to provide adequate protection to sea turtles or more specifically, to ensure compliance with the annual interaction limits. First, even without the precautionary annual limits on sea turtle interactions, the other measures in this final rule, including the required hook and bait types and the limit on shallow-set effort, are expected to adequately protect sea turtle species. Second, it is acknowledged that the sea turtle interaction limits will require substantial coverage by vessel observers in order to be implemented. Although these measures do not mandate any particular minimum level of observer coverage, existing regulations require all longline fishing vessels to accept a vessel observer if required by NMFS. Further, the biological opinion issued by the NMFS Office of Protected Resources on February 23, 2004, under section 7 of the ESA for the pelagic fisheries of the western Pacific region ("2004 biological opinion") includes an incidental take statement with reasonable and prudent measures and implementing terms and conditions that mandate 100-percent observer coverage in the shallow-set component of the Hawaii-based longline fishery and a minimum of 20-percent coverage in the deep-set component. NMFS intends to implement these mandates. These levels of observer coverage will provide for reliable and timely determinations of the numbers of sea turtle interactions occurring in the fishery, which will facilitate effective enforcement of the annual limits on interactions with

leatherback and loggerhead sea turtles in the shallow-set component of the fishery.

*Comment 2:* One commenter recommended that the number of shallow-sets made by a vessel be equated to the number of "set signatures" observed in NMFS's vessel monitoring system (VMS) program.

*Response:* NMFS intends to have 100-percent observer cover age in the shallow-set component of the Hawaii-based longline fishery, which will ensure compliance with the limits and restrictions related to shallow-setting, so monitoring via VMS set signatures is not necessary.

*Comment 3:* One commenter stated that deep-setting is proposed to be defined in 50 CFR 660.12 as the deployment of longline gear without light sticks, but there is no evidence that light sticks have any effect on sea turtle catches and there is therefore no reason for this measure. The commenter added that the proposed restriction stems from a previous NMFS rule that the Court ruled was arbitrary. The commenter also stated that there are light products designed specifically for tuna fishing (e.g., blinking lights) that can improve catches and that the proposed definition could therefore reduce the potential efficiency of fishing vessels while having no beneficial effect on sea turtles.

*Response:* NMFS acknowledges that certain light devices for deep-set, tuna-directed longlining may have benefits to fishing operations. However, lacking detailed information on those potential benefits, NMFS has determined the potential benefits are outweighed by the need to ensure compliance with the restrictions on shallow-setting, including the annual effort limit on shallow-set effort. Light sticks are normally used on shallow-sets to target swordfish. Although light sticks may also be used on deep-sets to target tuna, allowing them on board during deep-setting trips would provide an opportunity for vessel operators on trips without observers to reconfigure their gear at sea and illegally shallow-set to target swordfish. No Court ruled on the substance of the June 2002 turtle rule, or questioned the prohibition on light sticks; the Court invalidated the June 2002 rule on procedural grounds.

*Comment 4:* One commenter stated that deep-setting during the day to harvest swordfish while avoiding turtles was and is still a good idea. The limited tests conducted to date show poor swordfish catches because of operational problems, but the results were nonetheless encouraging. The commenter also stated that the longline

fleet should be allowed to explore this option.

*Response:* The Council and NMFS are considering research into the feasibility of deep-setting for swordfish, but until the findings of such research are available, limits on the possession and landing of swordfish by deep-setting longline vessels have been determined to be necessary to ensure compliance with the restrictions on shallow-setting.

*Comment 5:* One commenter stated that the proposed prohibition on the possession or landing of more than 10 swordfish in the tuna component of the Hawaii-based longline fishery is unwarranted and there is no evidence that swordfish are overfished in the region. The commenter also stated that the use of light on deep sets may increase catches of swordfish, so deep-setting for swordfish may be economical while successfully avoiding sea turtles.

*Response:* The commenter is correct that swordfish have not been determined to be overfished in the region. This measure is necessary to conserve sea turtles by ensuring compliance with the restrictions on shallow-setting. Without a limit on the possession and landing of swordfish by vessels engaged in deep-setting, vessel operators on trips without observers could illegally target and land unlimited quantities of swordfish and claim that they were legally caught incidentally on deep-sets. Although swordfish is sometimes caught incidentally on deep-sets, landings data show catching more than 10 swordfish on a tuna-directed trip would be a very rare event.

*Comment 6:* One commenter stated that the proposed measures to mitigate sea turtle interactions (the requirements to use circle hooks and mackerel-type bait in the shallow-set component of the Hawaii-based longline fishery) are not universally exportable solutions, because mackerel does not catch swordfish in some areas. The commenter also stated that it is important that industry not be handcuffed unnecessarily so that other options can be explored.

*Response:* One of the expected benefits of the model swordfish fishery is that valuable information will be generated regarding the effectiveness in the Pacific of circle hooks and mackerel-type bait with respect to minimizing sea turtle interactions and mortalities. Further, the results of recent research in the Atlantic indicate substantially enhanced swordfish catch rates with the hook and bait types that will be required under this final rule. NMFS and the Council will continue to explore viable options to achieve optimum yield in the

longline fisheries while minimizing adverse impacts to protected species.

*Comment 7:* One commenter stated that the potential adverse impacts on sea turtles and seabirds of reopening this fishery are serious enough to warrant continued closure of the fishery. The commenter requested that if the fishery is opened, more effective seabird avoidance measures be implemented and seabird avoidance measures be required in all areas.

*Response:* The 2004 biological opinion concludes that the western Pacific pelagic fisheries, as managed under the proposed measures, are not likely to jeopardize the continued existence of sea turtle species. This final rule does not affect the existing requirements to use seabird mitigation measures in the Hawaii-based longline fishery when fishing north of 23° N. latitude, including the use of blue-dyed bait, strategic discarding of offal, and, when deep-setting with monofilament main longline, the use of weighted branch lines and a line-setting machine or line shooter. In addition, this final rule requires that the line-setting procedure take place at night when shallow-setting north of 23° N. latitude in order to avoid interactions with seabirds. The potential implementation of additional seabird avoidance measures in the longline fisheries, including the use of side-setting, setting chutes, and streamer lines, is currently being explored by the Council and NMFS and was discussed at the Council's 122nd meeting in March 2004. The Council staff is developing alternative measures, including side setting and setting chutes, for the Council's action at its 123rd meeting in June 2004. Consideration will be given to the areas in which the measures should be implemented. NMFS has initiated consultation under section 7 of the ESA with the U.S. Fish and Wildlife Service on the short-tailed albatross with respect to this action. Although the outcome of that consultation is not yet known, it is noted that the U.S. Fish and Wildlife Service issued a biological opinion on the short-tailed albatross in November 2000 for an action that was less restrictive with respect to shallow-setting than this action, and the opinion found that the Hawaii-based longline fishery was not likely to jeopardize the continued existence of the short-tailed albatross.

*Comment 8:* One commenter stated that the current regulations requiring blue-dyed bait, line shooters, and night setting are no longer based on the best available science. The commenter also stated that the use of setting chutes, side-setting, and streamer lines has been

proven to be more effective and should be required.

*Response:* See the response to Comment 7 with respect to seabirds. The utility of the existing seabird avoidance measures will also be considered.

*Comment 9:* One commenter requested that seabird avoidance measures be required in all areas, not just those likely to be frequented by the endangered short-tailed albatross (i.e., north of 23° N lat.).

*Response:* See response to Comment 7 with respect to seabirds. Consideration will also be given to the areas in which those seabird avoidance measures should be implemented.

*Comment 10:* One commenter stated that prior to authorizing the reopening of the swordfish fishery, NMFS must insure that the fishery is not likely to jeopardize the continued existence of any endangered species or threatened species.

*Response:* The 2004 biological opinion concludes that the fishery, as managed under these measures, is not likely to jeopardize the continued existence of any of the ESA-listed species considered in the opinion.

*Comment 11:* One commenter requested that the use of straight circle hooks be made mandatory in all pelagic longline fishing, both deep and shallow.

*Response:* There is insufficient information available on the effectiveness of circle hooks in deep-set tuna-directed fisheries with respect to both sea turtle interactions and target species catches. Although some research has been done in the Atlantic on the use of circle hooks in tuna-directed longlining, it involved shallow-set rather than deep-set longlining, so the results are not directly applicable to the longline fisheries in the western Pacific, where tuna is generally targeted with deep-set gear. At this time, therefore, there is not an adequate basis for requiring that circle hooks be used in the deep-set component of the fishery, as it could constrain fishing efficiency and comprise the objective of achieving optimum yield. However, the Council and NMFS are considering potential research and fishery demonstration initiatives in the western Pacific in order to assess the potential effectiveness with deep-set longline gear of various hook and bait combinations.

*Comment 12:* One commenter requested that the fishery be closed once the limits for any species in the 2004 biological opinion's incidental take statement have been reached.

*Response:* Although such a measure would be more conservative with respect to sea turtles, NMFS has

determined that it would be unnecessarily conservative. The interaction limits for leatherback and loggerhead sea turtles will also limit, albeit indirectly, interactions with other protected species in the shallow-set component of the Hawaii-based longline fishery. Furthermore, under the ESA, when any of the incidental take limits is exceeded, NMFS will reinitiate consultation under section 7 of the ESA, at which point the need for more restrictive measures would be considered.

*Comment 13:* One commenter requested that vessel observer coverage be 100 percent for shallow-set longlining and at least 50 percent for deep-set longlining.

*Response:* The terms and conditions of the incidental take statement in the 2004 biological opinion mandate 100-percent observer coverage in the shallow-set component of the Hawaii-based longline fishery and at least 20-percent coverage in the deep-set component. NMFS intends to implement these levels of coverage. Given the relatively long history of the deep-set component and our understanding of patterns of fishing, catches, and interactions with protected species, NMFS has determined 20 percent to be a sufficient level of coverage in the deep-set component of the fishery.

*Comment 14:* One commenter stated that the comment period after the release of the 2004 biological opinion was too brief.

*Response:* The consultation process under section 7 of the ESA does not provide for a public comment period, but NMFS considered comments received during 30-day comment periods for both the proposed rule and the draft supplemental environmental impact statement for the action.

*Comment 15:* Two commenters stated that results from the NED [Northeast Distant Waters] experiments are too preliminary to form the basis for reopening the fishery.

*Response:* The use of modified hooks to reduce and mitigate sea turtle interactions has been a focus of research for several years. NMFS' Pascagoula Laboratory, in conjunction with the Blue Water Fishermen's Association, conducted research between 2001 and 2003 to evaluate fishing gear modifications and strategies to reduce and mitigate interactions between endangered and threatened sea turtle species and longline fishing gear. The area of operations was the NED statistical reporting zone in the Western Atlantic Ocean. This area is closed to pelagic longline fishing by U.S. flagged

vessels with the exception of the experimental fishery. Between 2001 and 2002, almost 700 swordfish-directed shallow-sets were made to test potential sea turtle mitigation techniques, which yielded robust and promising experimental results. While NMFS and the Council are confident that the results from the Atlantic will be reflected to a large degree in the western Pacific longline fisheries, these measures are precautionary in including the limits on interactions with leatherback and loggerhead sea turtles, in case the hook and bait measures are not as successful as anticipated.

*Comment 16:* One commenter stated that the proposed regulations are far less protective of listed species than current measures.

*Response:* NMFS acknowledges that the expected rates of interactions with sea turtles under the proposed measures are greater than those expected under the current management regime. However, the 2004 biological opinion concludes that the western Pacific pelagic fisheries as managed under these proposed measures are not likely to jeopardize the continued existence of any of the ESA-listed species considered in the opinion. Furthermore, NMFS anticipates that the mitigative hook and bait types that will be required in the shallow-set component of the Hawaii-based fishery will serve as a model that the longline fleets of other nations may adopt, possibly resulting in net positive impacts on ESA-listed sea turtle species.

*Comment 17:* One commenter stated that authorizing any pelagic longline fishing violates NMFS' obligation under the ESA to avoid jeopardizing listed species.

*Response:* The 2004 biological opinion concludes that the western Pacific pelagic fisheries as managed under these measures is not likely to jeopardize the continued existence of any of the ESA-listed species considered in the opinion.

*Comment 18:* One commenter stated that Atlantic experiments did not eliminate mortality to leatherback turtles and that any mortality is unacceptable. The commenter also stated that using purported reductions in mortality as an excuse to reopen the swordfish fishery will not benefit sea turtles.

*Response:* NMFS acknowledges that the experiments in the Atlantic did not result in the development of mitigation measures that would eliminate mortality to leatherback sea turtles in longline fisheries, and a certain number of mortalities of leatherback turtles are anticipated to occur in the western Pacific longline fisheries under these

measures. However, the best scientific and commercial information was used to predict the effects of these measures on leatherback sea turtle populations, and it was found that the number of mortalities anticipated to result from the western Pacific pelagic fisheries is small compared to other sources of mortality and the conduct of the fisheries is not likely to jeopardize the continued existence of the leatherback sea turtle. One of the measures will limit annual shallow-set longline effort at about 50 percent of the average annual effort during the 1994-1999 period. Another measure will establish annual limits on the numbers of interactions with leatherback and loggerhead sea turtles, which will ensure that the actual numbers of interactions do not exceed the expected rates, as computed in the 2004 biological opinion and established in the opinion's incidental take statement.

The measures may have indirect positive effects on leatherback sea turtles and other ESA-listed species. First, the hook and bait types that will be required when making shallow longline sets north of the equator may serve as models for the longline fleets of other nations to adopt. Since foreign fishing fleets exert the majority of longline fishing effort in the Pacific, such adoption would likely result in substantial decreases in mortalities of leatherback and other sea turtles in the Pacific. The degree to which the mitigative hook and bait types are adopted by other fleets will likely depend on how they affect the catch rates of swordfish and other target species. In the Atlantic experiments, swordfish catch rates were enhanced when using the required hook-and-bait combination, which suggests that they may well serve as attractive models for the longline fleets of other nations. Second, if reopening of the U.S. swordfish fishery results in a decrease in foreign fishing for swordfish, it is possible that fewer turtle interactions or mortalities will occur.

*Comment 19:* One commenter stated that eliminating the restrictions on swordfish fishing north of the equator and the longline restrictions in April and May violates the ESA.

*Response:* The 2004 biological opinion concludes that the western Pacific pelagic fisheries as managed under these measures are not likely to jeopardize the continued existence of any of the ESA-listed species considered in the opinion.

*Comment 20:* One commenter stated that the proposed regulations would violate the ESA and the MMPA with regard to marine mammals.

*Response:* The 2004 biological opinion found that the western Pacific pelagic fisheries, as managed under these measures, are not likely to adversely affect any ESA-listed marine mammal species. Currently, the western Pacific pelagic longline fishery is classified as a Category III fishery under the MMPA, which indicates that the fishery has a remote likelihood of or no known incidental mortality or serious injury of marine mammals. NMFS and the Council are exploring ways to reduce and mitigate fishery interactions with marine mammals.

*Comment 21:* One commenter stated that NMFS has not defined the "Zero Mortality Rate Goal" (ZMRG) for marine mammals, but the pelagic longline fishery exceeds it and that authorization of the fishery without a ZMRG violates the MMPA. The commenter further stated that the take of false killer whales is not only greater than the ZMRG, but also greater than the Potential Biological Removal (PBR) level.

*Response:* With respect to the ZMRG, it is not possible to exceed a limit not yet established. Currently, the western Pacific pelagic longline fishery is classified as a Category III fishery under the MMPA, which signifies that the fishery has a remote likelihood of incidental mortality or serious injury of marine mammals. NMFS annually reviews its categorization of all fisheries and is doing so with this fishery.

*Comment 22:* Two commenters stated that the take in the fishery of migratory birds such as albatross and fulmars violates the Migratory Bird Treaty Act (MBTA) because there is no take authorization.

*Response:* The MBTA only applies in nearshore waters, seaward to three nautical miles (nm) from the shoreline. Since the pelagic longline fishery is prohibited from fishing within 25 to 75 nm of the Hawaiian Islands (depending on time of year), the MBTA does not apply, and therefore, no take authorization is required.

*Comment 23:* One commenter stated that the proposed regulations would violate the High Seas Fishing Compliance Act (HSFCA) because the HSFCA requires NMFS to regulate fishing by U.S. vessels on the high seas so as to be consistent with international conservation and management measures established pursuant to various international agreements such as the Inter-American Convention for the Protection and Conservation of Sea Turtles. This Convention was ratified by the U.S. and it requires that each party to the Convention take measures to reduce, to the greatest extent practicable, the incidental capture,

retention, harm, or mortality of sea turtles in the course of fishing activities, through the regulation of such activities. Presuming that NMFS intends to establish HSFCA permit conditions through these regulations, the failure of the regulations to reduce sea turtle mortality by prohibiting swordfish longlining renders NMFS in violation of the HSFCA and the underlying treaties and conventions it implements.

*Response:* This final rule implements additional conservation and management measures for the protection of sea turtles in fisheries managed under the FMP. These measures are consistent with the mitigation recommendations of a formal ESA section 7 consultation that NMFS underwent during the development of this final rule. The section 7 consultation for the fishery managed under the FMP covers all fishing activities on the high seas by vessels permitted under the FMP. These vessels must also have permits under the HSFCA. As such, this consultation covered the same underlying fishing operations as are permitted under the HSFCA. The consultation covers the issuance of permits for these same vessels under both the Magnuson-Stevens Act and the HSFCA. NMFS determined that the conservation and management measures implemented through this final rule meet the U.S.'s obligations under the Inter-American Convention for the Protection and Conservation of Sea Turtles to take measures to reduce, to the greatest extent practicable, the incidental capture, retention, harm, or mortality of sea turtles in the course of fishing activities.

*Comment 24:* One commenter expressed opposition to allowing shallow-setting north of the equator because of the killing of albatrosses and other seabirds in the Hawaii-based longline fishery.

*Response:* See the response to Comment 7 with respect to seabirds.

*Comment 25:* Three commenters requested that if the shallow set fishery is reopened, effective seabird avoidance measures be required, and also noted that recent research documents the effectiveness of streamer lines, weights, and side setting.

*Response:* See the response to Comment 7 with respect to seabirds.

*Comment 26:* One commenter stated that the invalidation of the biological opinion (issued by NMFS in 2001 and 2002) was based on procedure, not science, and that NMFS should continue the shallow-set fishery closure or adopt effective seabird avoidance measures.

*Response:* It is true that the previous biological opinions were invalidated on procedural, not substantive, grounds. This final rule is not being implemented in response to the invalidation of the previous biological opinions, but rather in response to the need to establish protective measures for sea turtles given that many of the existing protective measures will be eliminated by Court Order on April 1, 2004, as well as in response to the promising findings of recent research in the Atlantic on new gear technologies available for minimizing interactions with sea turtles. In order to minimize adverse impacts on seabirds, this final rule also requires that the line-setting procedure take place at night when shallow-setting north of 23° N. lat. As indicated in the response to Comment 7, additional seabird avoidance measures were discussed at the Council's 122nd meeting in March 2004.

*Comment 27:* One commenter stated that the January 14, 2004, biological assessment and the proposed regulations are deficient under the NEPA in their treatment of seabirds.

*Response:* The January 14, 2004, biological assessment, prepared by the Council and the Hawaii Longline Association, was not intended by the drafters to fulfill the requirements of NEPA, nor is it a component of consultation with the U.S. Fish and Wildlife Service concerning seabirds. In contrast, the regulations to implement the Council's proposed management measures are subject to the requirements of NEPA. Documentation prepared by the Council and NMFS to comply with NEPA included a draft supplemental environmental impact statement (DSEIS), the notice of availability for which was published in the **Federal Register** on January 23, 2004. A final SEIS (FSEIS) accompanies this final rule. The DSEIS and FSEIS both include assessments of the expected effects of the proposed measures on seabirds, using the latest available information.

*Comment 28:* One commenter stated that the incidental catch of seabirds in shallow sets is 51 times greater than in deep sets, and that the proposed regulations fail to address this. The commenter further stated that using circle hooks and mackerel bait will not prevent seabird mortality.

*Response:* NMFS acknowledges that the hook and bait types that will be required in the shallow-set component of the Hawaii-based fishery are unlikely to eliminate the mortality of seabirds, but the relatively large size of the required hooks (18/0 or larger) may make them less likely to be swallowed by seabirds than the conventionally

used hooks, and if swallowed, the shape of the required hooks (circle, with the barb curving inward toward the shank) may make them less likely to be lodged in a bird's gullet, thus reducing the severity of interactions and possibly reducing the number of resultant mortalities. Also see response to Comment 7.

*Comment 29:* One commenter stated that the biological assessment and proposed regulations do not use up-to-date albatross data.

*Response:* The DSEIS and FSEIS for the action use the best available information at the time of the assessment, including fishery interaction data. The FSEIS also includes the most recent assessments from the U.S. Fish and Wildlife Service concerning albatross populations on the Northwestern Hawaiian Islands, which are the most likely populations to interact with the Hawaii-based longline fishery.

*Comment 30:* Two commenters requested that section 7 consultation under the ESA be initiated with the U.S. Fish and Wildlife Service before reopening the fishery.

*Response:* NMFS has reinitiated ESA section 7 consultation with the U.S. Fish and Wildlife Service with respect to the effects of the Hawaii-based longline fishery on the short-tailed albatross. See also the response to Comment 7. The terms and conditions of the current U.S. Fish and Wildlife Service biological opinion, implemented through existing regulations, still apply to the fishery.

*Comment 31:* One commenter stated that the current action is being undertaken in response to the August 31, 2003, decision of Judge Kollar-Kotelly in *HLA v. NMFS*, and because the basis for that decision was explicitly procedural, the nature of the ruling makes caution the most prudent line of action.

*Response:* As discussed in the DSEIS, the Council and NMFS were engaged in activities relating to this proposed regulatory amendment before the August 31, 2003, decision in the *HLA v. NMFS* case. The identification of new data and new fishing gear technologies that have the potential to substantially reduce incidental sea turtle interaction rates prompted the Council and NMFS to consider adjustments in the regulatory regime. The 2004 biological opinion confirms that the adjustments are not likely to jeopardize the continued existence of sea turtle species.

*Comment 32:* The agency is under no legal obligation to take the drastic action in the Proposed Rule to undo

regulations intended to prevent the longline fishery from jeopardizing the continued existence of threatened and endangered sea turtles.

*Response:* NMFS acknowledges that it is not obligated to implement this particular rule. The measures in this final rule are based on a regulatory amendment proposed by the Council, and they were chosen from among a range of alternatives in terms of achieving specific objectives, including avoiding the likelihood of jeopardizing the continued existence of endangered or threatened species. Like the regulations currently in place, NMFS has determined that this final rule is not likely to jeopardize the continued existence of endangered or threatened sea turtles.

*Comment 33:* A demonstration tuna fishery using the hook and bait combinations tested in the Atlantic should be implemented rather than the model swordfish fishery.

*Response:* There is insufficient information available at this time on the impacts of circle hooks in deep-set tuna longline fisheries, such as the fishery conducted around Hawaii, to move forward with such a suggestion.

Although some research on the efficacy of hook and bait types with respect to sea turtle interactions and catch rates of target species has been conducted on tuna sets in the Atlantic, the sets involved were shallow-sets, so the results are not applicable to the Hawaii deep-set fishery. However, the conduct of a Pacific demonstration tuna fishery using new hook and bait combinations is being considered by NMFS and research into such modifications is a discretionary recommendation of the 2004 biological opinion.

*Comment 34:* Asserting that reopening the seasonal southern area closure will likely result in increased incidental sea turtle capture in the longline fishery in that area, one commenter recommends that additional protections for sea turtles be included for the tuna fleet. Specifically, the comment suggests including at least 20-percent observer coverage during April and May in the area to the south of the Hawaiian Islands that prior to this final rule was closed to longline fishing during those months, as well as establishing a trigger mechanism for closing the area if take levels are exceeded.

*Response:* One condition of the incidental take statement in the 2004 biological opinion is that there must be a minimum of 20-percent observer coverage in the tuna component of the Hawaii-based longline fishery and 100-percent observer coverage in the

swordfish component. NMFS intends to implement this mandate. The 2004 biological opinion concluded that the proposed action is not likely to jeopardize the continued existence of any sea turtle species if the fishery is prosecuted in accordance with its recommendations. It also established separate take levels for the swordfish and tuna components of the fishery. Should the tuna component exceed its authorized take levels, NMFS will reinitiate consultation under section 7 of the ESA, at which point the need for additional measures would be considered.

*Comment 35:* One commenter preferred a mechanism that would close the fishery immediately upon reaching any hard cap identified in the 2004 biological opinion, commenting that the one week advance notice of closure of the fishery upon reaching the hard cap is unnecessary and potentially harmful to the sea turtles. The "yellow-light concept" and observer reports should provide ample advance warning of any fishery closure. Similar mechanisms should also be put into place if rate of capture or mortality per set is much higher than estimated, and that should trigger re-initiation of consultation.

*Response:* Biological opinions do not include hard caps. This final rule includes annual limits on the annual numbers of interactions with leatherback and loggerhead sea turtles in the shallow-set component of the Hawaii-based longline fishery, and although the limits are based on the findings of the biological opinion, they are not established or mandated by the biological opinion. The purpose of establishing these limits is to address the uncertainty that exists in implementing the hook and bait modifications that have proven to be effective in the Atlantic longline fishery but are, as yet, untested in the Pacific. Although the one week advance notice of closure of the fishery could result in additional sea turtles being taken, the number is expected to be very small. The delay in effectiveness offered by the advance notice provision is necessary to give permit holders and vessel operators time to cope the logistical aspects of the closure. Providing advance, "yellow-light" warnings based on vessel observer reports is an alternative approach, but the interaction limits are so small that NMFS has determined it to be impractical. Should any of the incidental take limits, including interactions or mortalities, be exceeded, NMFS will reinitiate consultation under section 7 of the ESA, at which point the need for additional measures would be considered.



*Comment 36:* One commenter recommends a similar analysis and mechanism ("yellow-light concept" and hard limit trigger) for closure of the tuna fishery and supports the use of circle hooks and squid bait in the tuna fishery.

*Response:* This final rule does not include a hard limit for the deep-set fishery because there is a higher level of confidence in the reliability of the projected take levels. The tuna component of the fishery has its own incidental take statement and if those limits are exceeded, NMFS will reinstate consultation under section 7 of the ESA. Additionally, experimentation with alternative gear, bait, and fishing tactics in the tuna component of the fishery could be undertaken within the existing management framework, and such experimentation is recommended under the 2004 biological opinion.

*Comment 37:* The commenter stated that controls on general longline permitted vessels and those operating out of American Samoa should be included in the rule and analyzed in the DSEIS.

*Response:* The potential impacts of the American Samoa-based longline fleet are discussed in section 10.5 of the DSEIS. A program to limit access in that fishery has already been adopted by the Council for recommendation to NMFS. NMFS is in the process of designing an observer program for the American Samoa-based longline fishery, which is consistent with a condition in the 2004 biological opinion's incidental take statement that such a program be established where feasible. The program would improve the information base for the fishery. The Council plans to consider further measures for the American Samoa-based longline fishery at the Council's March, 2004, meeting.

*Comment 38:* One commenter stated that the Atlantic research results do not "minimize" turtle bycatch and that more work needs to be done. The comment also stated the limit of 2,120 shallow sets per year for the action is too much, although it expressed support for additional work in the Atlantic and Azores with larger hooks and urged NMFS to promote the use of promising gear by foreign fleets.

*Response:* NMFS allows that further reductions in turtle takes and mortalities may be achieved with expanded experimentation on gear and fishing tactics and agrees that more work needs to be done. However, NMFS supports the proposed set limit. According to the 2004 biological opinion, the proposed number of sets is not likely to jeopardize the continued existence of any turtle species.

Adaptation of the Atlantic results to the Pacific is necessary because of the different oceanographic conditions and fishing practices, and will be essential in transferring new methods to foreign fleets in the Pacific. It is likely that work in both the Atlantic and Pacific will contribute to reductions of turtle takes. The 2004 biological opinion includes several conservation recommendations aimed at increasing the export of knowledge of techniques and gear to reduce turtle interactions and mortalities.

*Comment 39:* A comment states that NMFS should carefully review the bycatch of other non-target species, such as seabirds and sharks. An expressed concern is historical observer data showing seasonal variations in seabird interactions, with peaks in the April-June period.

*Response:* The Magnuson-Stevens Act requires that FMPs establish a standardized reporting methodology for assessing bycatch, reduce bycatch to the extent practicable, and reduce mortality of unavoidable bycatch to the extent practicable. (Seabirds are not "bycatch" as defined in the Magnuson-Stevens Act but seabird interactions are nonetheless monitored and managed as bycatch is.) The Magnuson-Stevens Act does not require measures to reduce bycatch that are not practicable. In accordance with the Magnuson-Stevens Act, NMFS is in the process of establishing a bycatch protocol that describes common elements of a standardized bycatch reporting methodology for fisheries under the jurisdiction of the agency. Consistent with this developing protocol, the FMP for the western Pacific pelagic fisheries includes a review of bycatch in the fisheries and evaluates the potential and practicability of alternative approaches to reduce bycatch and bycatch mortality, as required. Existing regulations for the longline fisheries provide for bycatch data, as well as seabird data, to be collected through mandatory vessel logbooks. Data on bycatch and protected species interactions are also collected through a vessel observer program in the Hawaii-based longline fishery, and a similar program is being planned for the American Samoa-based longline fishery. NMFS will develop observer coverage levels and sampling designs following the bycatch protocol.

A new ESA section 7 consultation on the short-tailed albatross is being conducted. As indicated in the response to Comment 7, this final rule does not affect the existing requirements to employ seabird mitigation measures, and NMFS and the Council are

considering additional seabird avoidance measures, some of which hold promise for virtually eliminating seabird interactions in pelagic longline fisheries. It should be noted that the April-June peak observed in seabird interactions coincided to a large extent with the April-May period of the southern area closure, which had the effect of pushing longline effort closer to the major seabird breeding colonies in the Northwestern Hawaiian Islands.

*Comment 40:* One commenter stated that the proposed regulatory amendment and its implementing regulations reflect dramatic progress toward a collaborative, science-based, integrated and lawful regulatory regime.

*Response:* Comment acknowledged.

*Comment 41:* One commenter stated that narrow definitions and design criteria for dehooking devices are likely to cramp NMFS's discretion in ways that may be detrimental to the fishery and to conservation interests.

*Response:* The design standards are based on devices and designs developed and used beneficially in research conducted in Atlantic research over the last 3 years. They are minimum design standards and in fact allow a substantial amount of flexibility in construction and design. If additional experience or research indicates the design standards should be modified, NMFS may adjust the regulations.

*Comment 42:* A number of commenters stated that they oppose renewed swordfish fishing east of 150° W. long.

*Response:* This final rule does not distinguish between waters east and west of 150° W long., as the best available scientific information does not warrant such an action. Vessels operating under Hawaii longline limited access permits will be allowed to target swordfish (make shallow longline sets) north of the equator at any longitude. Issues involving distinctions by longitude arose in the development of regulations for the West Coast-based longline fishery in the Pacific Fishery Management Council's Highly Migratory Species (HMS) Fishery Management Plan (FMP) for vessels operating primarily out of California and the biological opinion for that action. The Pacific Council reviewed the available evidence and concluded that there was insufficient evidence that turtle takes were significantly higher east 150° W long. A recent study of this issue (Carretta, 2003) concluded that, while there is some evidence that shallow sets east of 150° W long. have higher interaction rates with loggerhead and leatherback sea turtles, the difference is not statistically significant at the 95



percent level of confidence. Conversely, the interaction rate of shallow sets with olive ridley sea turtles was significantly higher west of 150° W long. Regulation of the fishery conducted under the HMS FMP is independent of this proposed action for the Western Pacific. The HMS fishery will be prohibited from making shallow-sets west of 150° W long, by the FMP and its implementing regulations and from making shallow sets east of 150° W long, by rules implemented under the ESA (for the latter, see final rule published March 11, 2004, at 69 FR 11540). The HMS FMP and its associated biological opinion assumed that any shallow-set longlining would be done using the same techniques historically used in both the Hawaii-based and the West Coast-based fisheries, specifically, J-hooks and squid bait. The action here requires the use of circle hooks and mackerel-type bait for Hawaii-based vessels making shallow sets north of the equator, hook and bait types that have been shown in the Atlantic to significantly reduce interactions with loggerhead and leatherback turtles. Waters east of 150° W long, have historically represented a relatively minor portion of the Hawaii-based longline effort, and that is expected to be the case under this final rule.

*Comment 43:* Several commenters stated that keeping the area east of 150° W long, closed to longline fishing for swordfish is the only measure that will help prevent extinction of the leatherback.

*Response:* There are a number of measures that will help reduce the risk of extinction of the leatherback including elimination or reduction of direct harvesting, nesting beach management, and egg protection. Additionally, the best available scientific information does not warrant a longitudinal separation of regulations for the Hawaii-based longline fleet. In either case, there is relatively little fishing east of 150° W long, by this fleet. Also, the 2004 biological opinion concludes that the fishery, as managed under this final rule (i.e., without longitudinal distinctions), is not likely to jeopardize the continued existence of any sea turtle species.

*Comment 44:* Several commenters stated that since the area east of 150° W long, was closed to shallow sets, the number of sea turtles killed has dropped significantly.

*Response:* It is true that shallow-set longlining generally has higher turtle interaction rates than does deep-set longlining, and prohibiting shallow-setting would likely result in fewer sea turtle interactions than an open

swordfish fishery. Nevertheless, NMFS has determined that the number of interactions that is anticipated to occur under this final rule is acceptably small. It is important to note that the Hawaii-based longline fleet exerts approximately 3 percent of all Pacific pelagic longline effort. When U.S. vessels are restricted from fishing for swordfish, it is possible that foreign fleets will fill all or part of the void in supply, and since those fleets are likely to have greater interaction and mortality rates per unit catch than the Hawaii-based fleet, the result could be more interactions Pacific-wide. This final rule includes a model swordfish fishery employing methods shown in the Atlantic (circle hooks and mackerel-type bait) to dramatically reduce turtle interactions and at the same time, increase swordfish catches. If these techniques prove as effective in the Pacific as they have been found to be in the Atlantic, foreign fleets may adopt these methods to increase their swordfish landings while also reducing their turtle interaction rates. The long-term effects of exporting these techniques may far outweigh any short-term gains resulting from closing areas to Hawaii-based vessels.

*Comment 45:* One commenter asked why the data collected to implement the Disaster Economic Assistance Program (DEAP) for the Hawaii-based longline fishery was not used as the basis for developing an allocation based on historical participation in the swordfish fishery.

*Response:* Although the data from the DEAP is available and could have been used to determine a minimum baseline for participation in the historical swordfish fishery, the Council recommended that the model swordfish fishery be open to all Hawaii-based longline permit holders. The main rationale for that recommendation is that limiting participation to permit holders with historical participation in the swordfish component of the fishery would be an unjustified removal of a previous privilege and economic option from vessels that historically targeted tuna.

*Comment 46:* One commenter stated that the limits on the numbers of loggerhead or leatherback turtle interactions would create an incentive for each permit holder to do as much shallow-setting as possible before the fishery is closed, thereby encouraging fishermen to shallow-set under what would otherwise be sub-optimal conditions in terms of economic performance and safety.

*Response:* These effects could indeed occur. Their likelihood and magnitude

are dependent on, among other factors, the probability of either of the interaction limits being reached in a given year. NMFS has determined that the probability is not excessively great and that these potential effects are likely to be relatively minor. However, like several other measures in this final rule, this measure is novel in the western Pacific pelagic fisheries and its effects are not certain. NMFS intends to continue to monitor the biological and socioeconomic aspects of the fishery such that these and other effects, both positive and negative, can be detected and measured, and if needed, appropriate management responses can be taken.

*Comment 47:* One commenter expressed support for the proposed rule and its implementing management measures. The commenter also stated that the reopening of the Hawaii-based swordfish fishery will send a positive conservation message globally.

*Response:* Comment acknowledged.

*Comment 48:* One commenter stated the agency should be doing all it can to protect what little there is left of the nation's precious natural heritage.

*Response:* The model swordfish fishery, if it is as successful in the Pacific as it has been in the Atlantic, is expected to have positive effects on international longline fishing practices with respects to effects on sea turtle populations, which might be considered to be part of the natural heritage of the U.S.

*Comment 49:* One commenter stated that leatherback turtles can withstand no additional human captures or kills and are likely to be killed at an increased rate if shallow sets are allowed.

*Response:* The 2004 biological opinion concluded that the action is not likely to jeopardize the continued existence of any turtle species. The model swordfish fishery, if it is as successful in the Pacific as it has been in the Atlantic, is expected to have positive effects on international longline fishing practices with respect to effects on leatherback and loggerhead turtle populations. Management alternatives that would eliminate or sharply curtail the model swordfish fishery would provide little incentive for foreign fishing vessels to change their fishing patterns.

*Comment 50:* One commenter stated that it is unknown whether turtles are able to survive the injury and trauma of being captured and then released.

*Response:* Post-release mortality is an area of active research and quite a bit is known. In 2001, NMFS established a policy and criteria for estimating

survival and mortality rates following interactions with longline gear. In 2004 (since publication of the DSEIS and described in new section 14.0 of the Final SEIS for this action), these criteria were reviewed and modified on the basis of new information. Six categories of interaction and three categories of release were defined to give a matrix of post-release mortality estimates for both leatherback and hard shell turtles. These percentages currently are used in estimating post-release mortalities. It is likely that these criteria will continue to be refined as new data become available.

*Comment 51:* One commenter stated that the indiscriminate use of long soak times, shallow depths, and light sticks poses a terrible threat to our oceans. It simply is too wasteful a fishing technique.

*Response:* The action includes a variety of measures to regulate and monitor the Hawaii-based domestic longline fishery. It includes a model swordfish fishery employing methods shown in the Atlantic (circle hooks and mackerel-type bait) to dramatically reduce turtle interactions and at the same time, increase swordfish catches. Swordfish-directed longlining results in bycatch of other fish species, and although no such species have been identified as being in poor condition as a result of swordfish-directed longlining, the Council and NMFS are continuing to explore strategies for reducing bycatch in longline fisheries. Discarding of light sticks is prohibited under U.S. law and international convention.

*Comment 52:* One commenter stated that harpooning would be preferable to longline fishing in terms of economics, jobs, product quality and ecosystem impact.

*Response:* Harpooning is not prohibited under the FMP. There are only certain places where the oceanographic conditions favor a concentration of swordfish at the sea surface where they can be harpooned. These conditions do not exist in the area fished by the Hawaii-based fleet, and this method is impractical for them to use.

*Comment 53:* One commenter expressed the desire that the agency stop giving commercial fishermen optimum yields, which means no fish left in our oceans for our children's world.

*Response:* National Standard 1 of the Magnuson-Stevens Act requires NMFS to manage fisheries for "optimum yield" (16 U.S.C. § 1851(a)(1)), which is the yield that provides the greatest overall benefit to the nation, with particular

reference to food production and recreational opportunities. Optimum yield is based on maximum sustainable yield (MSY) as modified by economic, social and ecological factors. MSY is a sustainable management benchmark with respect to fish stocks and OY further reduces that benchmark to account for other relevant factors, including interactions with protected species.

*Comment 54:* One commenter stated that all longlining should be eliminated because swordfish are endangered.

*Response:* Swordfish in the Pacific are not overfished or listed as endangered or threatened under the ESA, and the stock historically fished by the Hawaii-based fishery appears to be in good condition. As reviewed in section 9.1.4.6 of the DSEIS, "The stock assessment for North Pacific swordfish by Kleiber and Yokawa (2002) suggests that the population in recent years is well above 50% of the unexploited biomass, implying that swordfish are not over-exploited and relatively stable at current levels of longline fishing effort in the North Pacific."

*Comment 55:* One commenter opposed the elimination of the requirement that operators of general longline vessels take an annual protected species course.

*Response:* The removal of this requirement will occur as a result of the Court Order vacating the regulations published June 12, 2002, that provided protective measures for sea turtles. At its March 2004 meeting, the Council is expected to consider whether this requirement should be reimplemented.

*Comment 56:* A commenter expressed concern over the composition of the Council, asserting that a strong commercial fishing presence on the Council may improperly influence the biological opinions produced.

*Response:* The Western Pacific Fishery Management Council has 13 voting and 3 non-voting members. Half of the members are appointed by the U.S. Secretary of Commerce to represent fishing and related community interests in the region. The other Council members are designated state, territorial and federal officials with fishery management responsibilities. Only one of the four Hawaii members of the Council represents commercial fishing interests. Biological opinions are issued by NMFS' Office of Protected Resources, not the Council or its staff.

*Comment 57:* A commenter expressed concern that results from the Atlantic may not work in the Pacific, maybe because there is too little food and too few turtles in the Atlantic.

*Response:* In the Atlantic experiments, the observed reductions in turtle takes were quite substantial for loggerheads and leatherbacks and it is hoped that they will be similarly successful in the Pacific. Recognizing that the efficacy of the mitigative hook and bait types has yet to be tested in the Pacific, this final rule includes annual limits on interactions with leatherback and loggerhead turtles in the shallow-set component of the fishery, which will ensure that few interactions occur regardless of the success of the hook and bait requirements. Compliance with the limits will be facilitated by a high level of observer coverage in that component. NMFS intends to have 100-percent vessel observer coverage in the shallow-set component, as mandated in the 2004 biological opinion.

*Comment 58:* A commenter suggested that all quotas be cut by 50 percent this year and 10 percent each subsequent year.

*Response:* Because the North Pacific swordfish stock is not overfished and appears to be in good condition, there are no quotas on swordfish landings. This final rule will limit the annual number of shallow (swordfish-directed) sets to about one half the annual average during the 1994–1999 period and strictly limit the number of leatherback and loggerhead turtles incidentally caught to avoid jeopardizing turtle species. The limit on shallow sets will also serve to limit the catches of other species.

*Comment 59:* One commenter suggested that any fishing violator lose his vessel.

*Response:* The appropriate vehicles for establishing penalties are the enabling statute and penalty schedules issued by the NOAA Office of Law Enforcement and NOAA General Counsel.

*Comment 60:* A commenter stated they would like to see marine sanctuaries established where nobody can fish.

*Response:* Marine sanctuaries, including "no take" areas, are being established throughout the Western Pacific by local and federal agencies. The Council has established such areas through its Coral Reef Ecosystems Fishery Management Plan, and is considering implementing more such areas for other fisheries. Establishing no-take marine sanctuaries in international waters is not feasible, as the United States may not unilaterally prohibit foreign fishing on the high seas.

*Comment 61:* One commenter questioned the motivation for the action, asking whether the Council

wants to fish out the area and decimate the stocks.

*Response:* This final rule might result in an increase in the harvest of swordfish, but swordfish in the Pacific are not overfished, as described above. The Council and NMFS are charged with protecting fishery resources while maintaining opportunities for domestic fishing at sustainable levels of effort and yield and avoiding adverse impacts to protected species. Towards this end, there is a limited access program in place for the Hawaii-based longline fleet, and this final rule will implement effort limits for the shallow-set sector of this fishery. The effect of both is to limit the catch of fish.

*Comment 62:* A commenter expressed the view that even a "possibility" that greater effort per set could increase relative to the no action scenario would make any plan allowing such increase too risky or wrong.

*Response:* There are physical constraints to how many hooks can be set in a day by a shallow-setting longline vessel. Further, the limits on interactions with leatherback and loggerhead turtles will ensure that interactions are limited regardless of the degree to which effective effort per set might increase as a result of this final rule.

*Comment 63:* A commenter stated that assessing for multiple years is worrisome, as a plan could be set in stone and, meanwhile, every fish in the ocean could have disappeared.

*Response:* The fishery management plan and implementing regulations for this fishery are reviewed annually. Due to the considerable inter-annual variability in climatic and oceanographic conditions across the western Pacific, results obtained in a single year may not represent typical conditions. Valid, representative results are necessary to formulate appropriate long-term management measures, and this typically requires data from more than a single year. The status of each stock is regularly assessed and adjustments to the respective management regimes are required if a stock is found to be overfished.

*Comment 64:* A commenter stated that more time, rather than an abbreviated comment period, was needed.

*Response:* The DSEIS for this action had a 30-day comment period, approved by the Environmental Protection Agency, in order to ensure that protective measures for sea turtles are implemented by April 1, 2004, the date that existing protective measures will be eliminated by Court Order.

*Comment 65:* A business should not hold more than one permit.

*Response:* This rule does not affect the existing requirements and restrictions related to fishing vessel permits and it does not affect the number of permits that may be held by a single business. The comment is acknowledged, but NMFS does not find reason at this time to restrict the number of permits that may be held by a single business.

*Comment 66:* All the catch of all vessels should be posted on the internet so the public can see what is being done to a resource that belongs to all Americans.

*Response:* NMFS and the Council provide aggregated catch information in the form of quarterly and annual reports that are available on their websites. ([www.nmfs.hawaii.edu](http://www.nmfs.hawaii.edu) and [www.wpcouncil.org](http://www.wpcouncil.org)).

*Comment 67:* One commenter stated the limit on shallow setting certificates should be 500, not 2,120.

*Response:* NMFS considered a range of limits on shallow sets from 0 to 3,179. Several considerations factored into the choice of the number of sets for the preferred alternative, including potential effects on turtle populations, adequacy of resultant data to document the effects of the model swordfish fishery, the costs of outfitting a vessel for this type of fishing, and the potential annual returns for participants. One of the objectives of the FMP is to achieve optimum yield. The preferred alternative was selected to provide the greatest economic benefits at the least cost, including the non-market costs associated with sea turtle interactions.

*Comment 68:* Several commenters stated the rules should not just restrict American fishermen, but level the playing field and restrict foreign longline fleets from fishing as well.

*Response:* The United States government cannot manage/regulate foreign fishing effort on the high seas.

*Comment 69:* One commenter stated that sea turtles are essential to the lure and lore of the western Pacific cultures and communities.

*Response:* NMFS recognizes the importance of sea turtles to the cultures and communities of the western Pacific. One objective of this rule is to avoid jeopardizing the continued existence of sea turtles. The analyses conducted in association with the rule, including those in the 2004 biological opinion, indicate that it is not likely to jeopardize the continued existence of any sea turtle species.

*Comment 70:* One commenter expressed views that trading, selling or giving shares should not be allowed.

*Response:* Depending on the number of interested permit holders, individual

permit holders may receive so few shallow-set certificates that prohibiting transfers of these certificates could have the effect of making participation uneconomical due to the start-up costs. It would also result in unused effort, meaning the FMP objective of attaining optimum yield would not be furthered nor would the efficacy of the mitigative hook and bait types be tested and demonstrated to foreign fishing fleets.

*Comment 71:* One commenter raised concerns about blue marlin, indicating that it may be nearly fully exploited so more study is required before opening up a fishery that could further diminish the stock.

*Response:* In 1997, the Hawaii-based longline fishery was estimated to have caught 3.7 percent of the Pacific-wide catch of blue marlin (Boggs et al., 2000). That includes both deep and shallow set catches. Limitations inherent in this action would allow Hawaii-based shallow-set effort, with its greater rate of blue marlin catch as compared to the deep-set fishery, to 50 percent of the average annual effort seen during the 1994–1999 period.

*Comment 72:* A commenter suggested reducing the length of the hook leader to reduce hooking based on the fact leatherbacks are typically flipper hooked.

*Response:* Encounters by leatherbacks with longline gear are not completely random, but may to some extent be related to the turtles being attracted to the gear. Experiments in the Atlantic showed that hooks nearer to floats have a higher incidence of turtle interactions, however this has not been consistently observed for Pacific turtles. It would be premature to regulate this parameter without a better understanding of why leatherbacks are hooked.

#### Changes From the Proposed Rule

The final rule includes, in § 660.12, definitions of "circle hook" and "offset circle hook" in order to facilitate compliance with the requirement, in § 660.33(f), for Hawaii-based longline vessels to use offset circle hooks when making shallow longline sets north of the equator. For the same reason, § 660.33(f) also establishes minimum dimensions for an "offset circle hook sized 18/0 or larger," and specifies how the required 10° offset in the required circle hooks is measured.

The final rule includes, in § 660.32(a)(4), more detailed specifications of the dehookers that must be carried and used by Hawaii-based longline vessels to disengage hooked and entangled sea turtles. The dehooker specifications, expressed through minimum design and

performance standards, are based on the dehookers used in the recent research in the Atlantic on potential sea turtle mitigation measures. NMFS will provide vessel operators with further guidance on how to use the dehookers through various outreach activities, including the annual protected species

workshops that owners and operators of Hawaii-based longline vessels are required to attend. The final rule also includes slight revisions to § 660.32(b) to specify that if a sea turtle is too large or hooked or entangled in a manner as to preclude safe boarding without causing further damage/injury to the

turtle, the line clippers and dehookers must be used to cut and remove as much of the line as possible prior to releasing the turtle. In Table 1 is a list of the required equipment and sample models that meet the requirements.

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Table 1 - List of required equipment and sample models that meet the requirements

Required Item (see Note)	Sample
(i) Long-handled dehooker for ingested hooks	ARC Pole Model Deep-Hooked Dehooker (Model BP11)
(ii) Long-handled dehooker for external hooks	ARC Model LJ6P (6 ft (1.83 m)); ARC Model LJ36; or ARC Pole Model Deep-Hooked Dehooker (Model BP11); ARC 6 ft (1.83 m) Pole Big Game Dehooker (Model P610)
(iii) Long-handled device to pull an "inverted V"	ARC Model LJ6P (6 ft); Davis Telescoping Boat Hook to 96 inch (2.44 m) (Model 85002A); West Marine #F6H5 Hook and #F6-006 Handle
(iv) Tire	Any standard automobile tire free of exposed steel belts
(v) Short-handled dehooker for ingested hooks	ARC 17-inch (43.18-cm) Hand-Held Bite Block Deep-Hooked Turtle Dehooking Device (Model ST08)
(vi) Short-handled dehooker for external hooks	ARC Hand-Held Large J-Style Dehooker (Model LJ07); ARC Hand-Held Large J-Style Dehooker (Model LJ24); ARC 17-inch (43.18-cm) Hand-Held Bite Block Deep-Hooked Turtle Dehooking Device (Model ST08); Scotty's Dehooker
(vii) Long-nose or needle-nose pliers	12-inch (30.48-cm) S.S. NuMark Model #030281109871; any 12-inch (30.48-cm) stainless steel long-nose or needle-nose pliers
(viii) Wire or bolt cutters	H.K. Porter Model 1490 AC
(ix) Monofilament line cutters	Jinkai Model MC-T
(x) Mouth openers and gags (choose two):	
(A) Block of hard wood	Any block of hard wood meeting specifications
(B) Set of three canine mouth gags	Jorvet Model #4160, 4162, and 4164
(C) Set of two sturdy canine chew bones	Nylabone (a trademark owned by T.F.H. Publications, Inc.); Gumabone (a trademark owned by T.F.H. Publications, Inc.); Galileo (a trademark owned by T.F.H. Publications, Inc.)
(D) Set of two rope loops covered with hose	Any set of two rope loops covered with hose meeting specifications
(E) Hank of rope	Any size soft braided nylon rope, provided it creates a hank of rope 2 - 4 inches (5.08 cm - 10.16 cm) in thickness
(F) Set of four PVC splice couplings	A set of four Standard Schedule 40 PVC splice couplings (1-inch (2.54-cm), 1 1/4-inch 3.175-cm), 1 1/2 inch (3.81-cm), and 2-inch (5.08-cm)
(G) Large avian oral speculum	Webster Vet Supply (Model 85408); Veterinary Specialty Products (Model VSP 216-08); Jorvet (Model J-51z); Krusse (Model 273117)

Note: The designations preceding the required items refer to the applicable paragraphs in § 660.32(a)(4).

Figures 1, 2, 3, and 4 are diagrams of a sample hook removal device for a long-handled dehooker for ingested

hooks, a sample long-handled dehooker for external hooks, a sample short-handled dehooker for ingested hooks,

and a sample short-handled dehooker for external hooks, respectively.

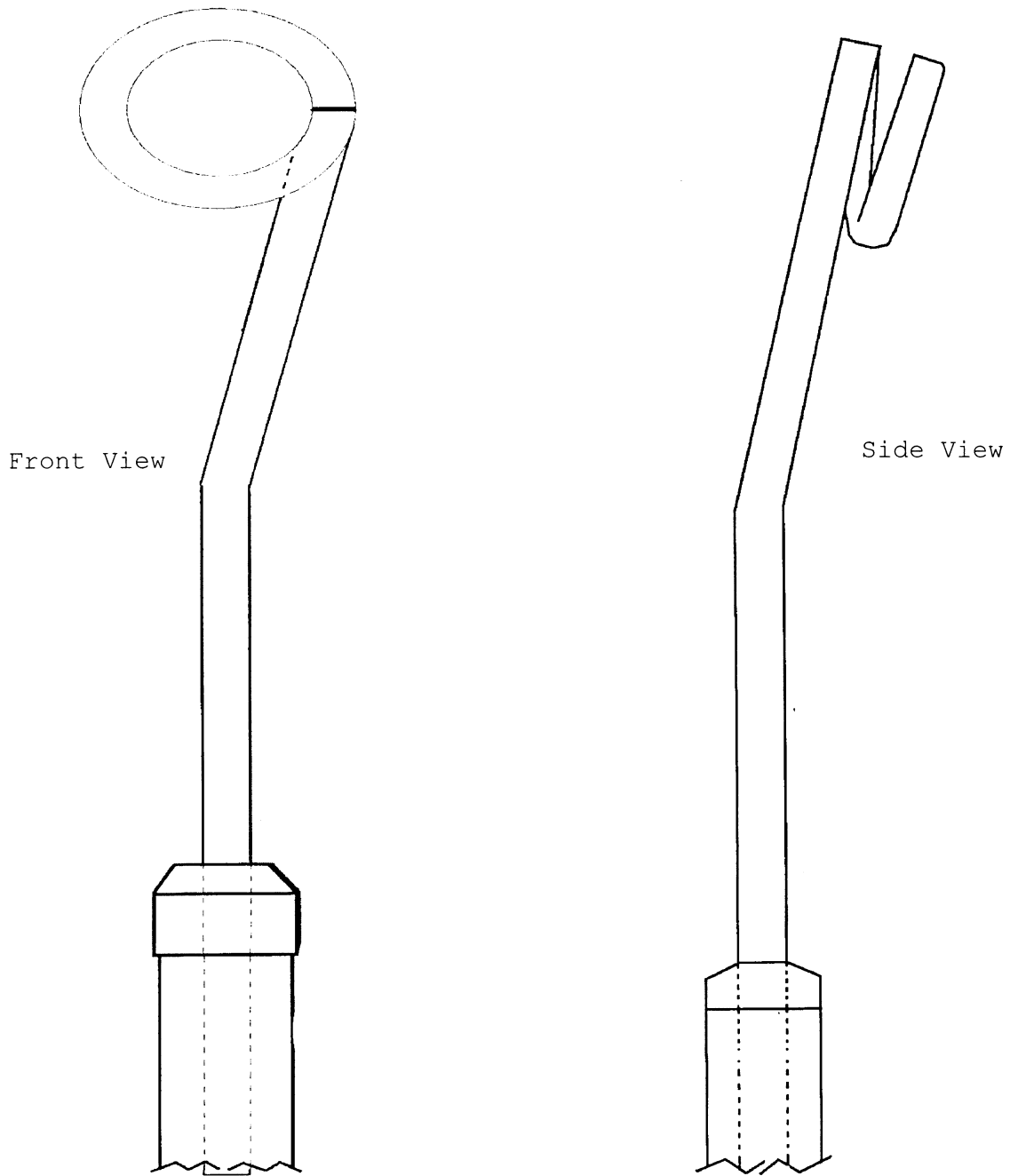


Figure 1 - Sample hook removal device for long-handled dehooker for ingested hooks. Reprinted with permission from Aquatic Release Conservation, Inc.

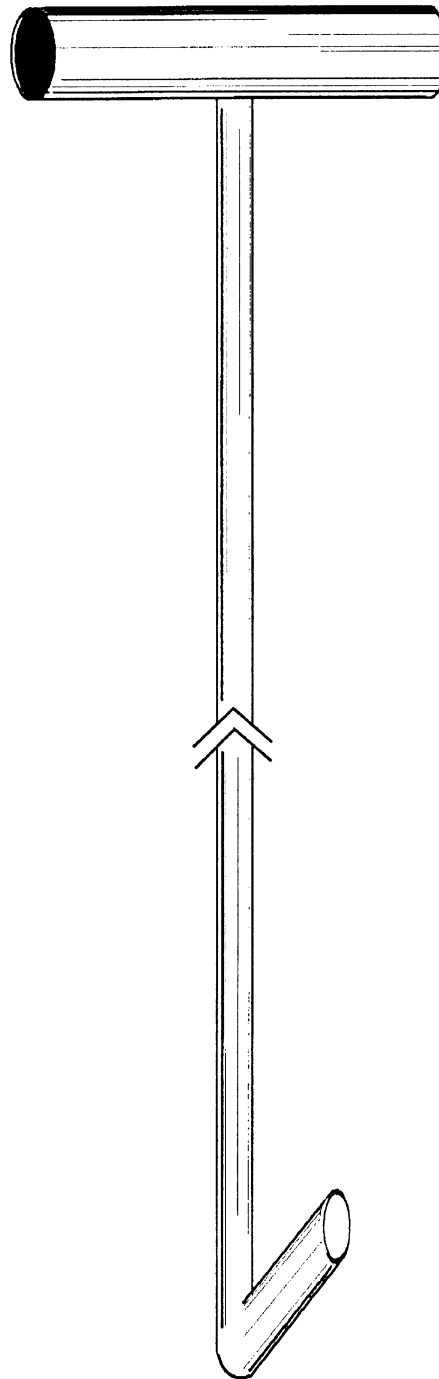


Figure 2 - Sample long-handled dehooker for external hooks



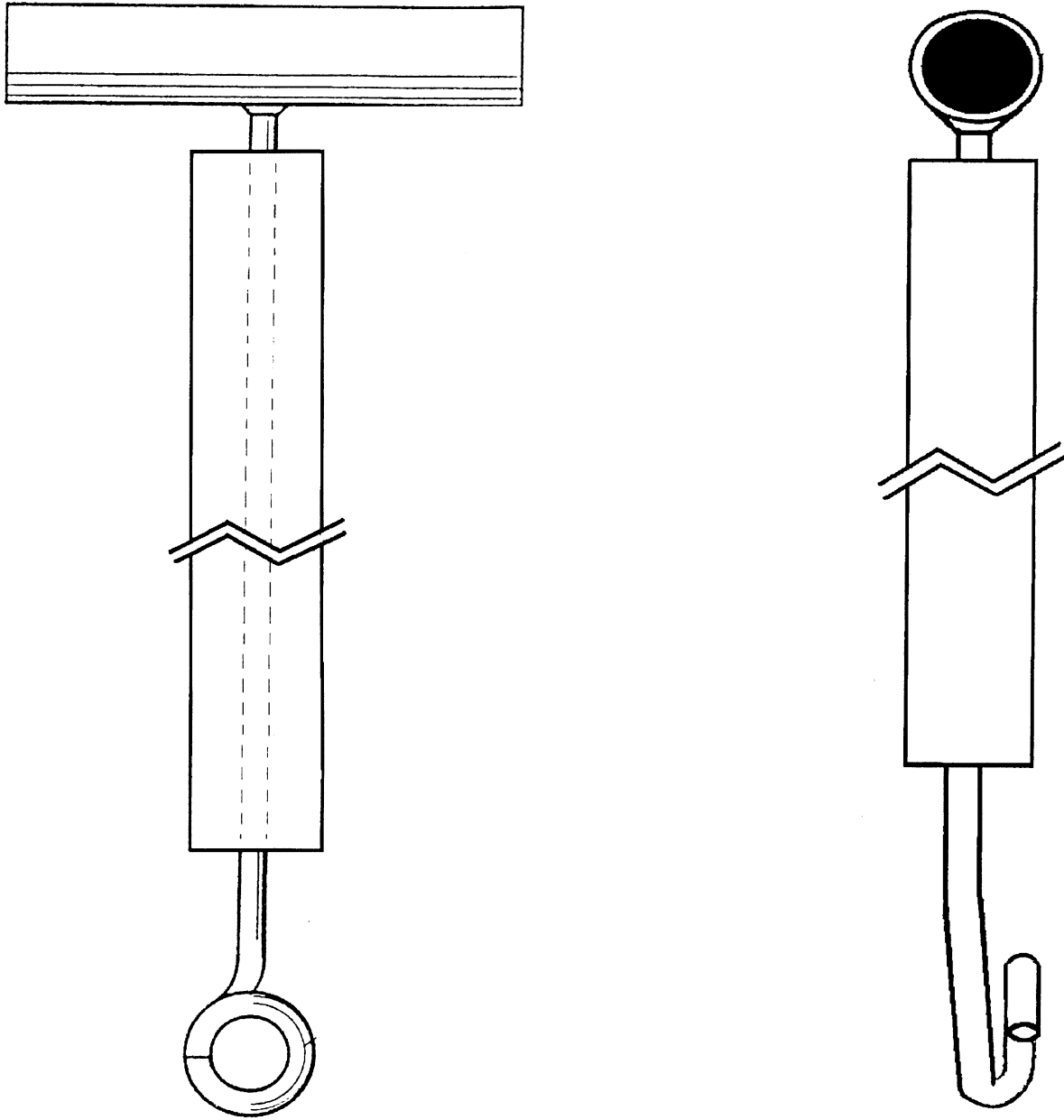


Figure 3 - Sample short-handled dehooker for ingested hooks. Reprinted with permission from Aquatic Release Conservation, Inc.

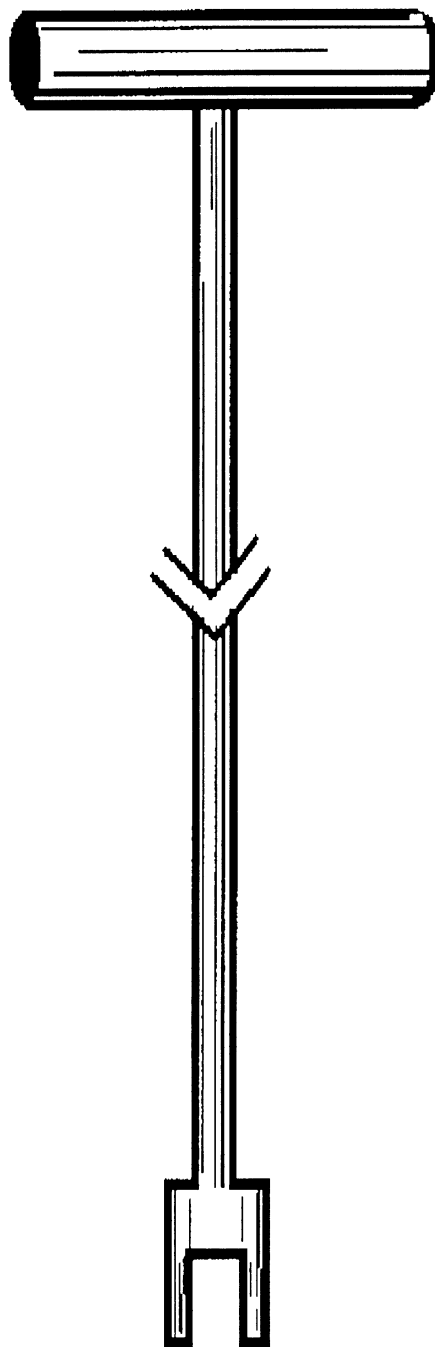


Figure 4 - Sample short-handled dehooker for external hooks

The final rule clarifies, in § 660.33(a)(2), that each holder of a Hawaii longline limited access permit that expresses interest to NMFS in receiving shallow-set certificates for the upcoming year would receive not one share of the shallow-set certificates, but one share for each permit held.

The final rule includes, in § 660.33(b)(1), annual limits on the numbers of interactions in the shallow-set component of the Hawaii-based fishery, set at 16 and 17 for leatherback and loggerhead sea turtles, respectively. The proposed rule indicated that the limits would be set equal to the annual estimated incidental takes for the respective species in the shallow-set component of the Hawaii-based longline fishery, as indicated in the latest incidental take statement issued by NMFS in association with a biological opinion pursuant to section 7 of the ESA. Because a biological opinion with an incidental take statement has since been issued (February 23, 2004), the expected annual numbers of captures in the incidental take statement of that opinion are used to establish these interaction limits. If the numbers in the incidental take statement are modified or if a new biological opinion is issued, new rule-making will be undertaken to change the interaction limits accordingly.

The final rule includes, in § 660.33(g), a definition of "mackerel-type bait," based on form and coloration, in order to facilitate compliance with the requirement in that paragraph for Hawaii-based longline vessels to use mackerel-type bait when making shallow longline sets north of the equator.

The final rule includes, in § 660.33(j), an explicit prohibition against Hawaii-based longline vessels possessing or landing more than 10 swordfish from trips for which the pre-trip notification to NMFS under § 660.23(a) indicated the trip type to be deep-setting. This restriction will facilitate compliance with the limits and restrictions related to shallow-setting (the 10-swordfish threshold is included, in both the proposed and final rules, as one of the criteria that distinguishes the definitions of "deep-setting" and "shallow-setting").

#### Classification

Under 5 U.S.C. 553(d)(3), NMFS finds good cause to waive the 30-day delay in effectiveness of certain measures in this final rule, finding such delay to be contrary to public interest because Court Orders (described above) will, on April 1, 2004, remove protections to sea turtles. The implementation of the turtle

conservation measures in this final rule are necessary to ensure that the fishery is conducted in compliance with the ESA after the removal of existing protections on April 1, 2004. If such measures are not implemented on or after April 1, 2004, then sea turtles will not be adequately protected from adverse impacts caused by interaction with longline vessels. NMFS was unable to issue this final rule sooner because of the time needed to complete the rule-making process, including the requirements under NEPA to invite and consider input from the public, and the brief time available since the Court Orders. Certain measures related to shallow-setting by Hawaii-based vessels do not need to be effective immediately because shallow-setting will not be allowable until the shallow-set certificates for 2004 are distributed, which will not occur before May 1, 2004. Accordingly, this final rule is effective upon publication in the **Federal Register**, except for the new requirements and prohibitions regarding carrying and using dehookers (§ 660.22(ii) and § 660.32(a)), the amended requirements and prohibitions regarding sea turtle handling requirements (§ 660.22(ll) and § 660.32(b)), the new requirements and prohibitions regarding the use of specific hook types (§ 660.22(nn) and § 660.33(f)), and the new requirements and prohibitions regarding the use of specific bait types (§ 660.22(oo) and § 660.33(g)), which are effective 30 days after the date of publication in the **Federal Register**.

The Council and NMFS prepared an FSEIS for this regulatory amendment. EPA published a notice of availability of the FSEIS on March 19, 2004 at 69 FR 13036. This final rule is issued after an abbreviated comment period for the FSEIS under alternative procedures approved by the Council on Environmental Quality. The FSEIS focuses on the expected effects of the action on sea turtle species that interact with the western Pacific pelagic longline fisheries. The annual numbers of sea turtle interactions and mortalities in the Hawaii-based longline fishery resulting from the proposed rule would likely be substantially lower than those under the management regime in place in 1999, prior to the imposition of restrictions on swordfish-directed fishing and the April-May area closure (the regime to which the fishery will revert on April 1, 2004, if management action is not taken before then), and higher than the expected rates under the current management regime. During the 1994–1998 period, which represents an

appropriate baseline for the no-action scenario, the estimated annual average numbers of interactions are as follows: leatherback, 112; loggerhead, 418; green, 40; and olive ridley, 146. Under this final rule, the expected numbers of annual average interactions are as follows: leatherback, 35; loggerhead, 21; green, 7; and olive ridley, 42. Under the current management regime, the expected numbers of annual average interactions are as follows: leatherback, 6; loggerhead, 19; green, 3; and olive ridley, 31. The projected annual numbers of sea turtle mortalities, which are subsets of the annual numbers of interactions, are more uncertain than the projected interactions because of the difficulty in estimating the numbers of turtles that ultimately die as a result of injuries incurred in interactions with fishing gear.

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

The Council prepared a Final Regulatory Flexibility Analysis (FRFA) that describes the economic impact this final rule is expected to have on small entities. The Initial Regulatory Flexibility Analysis (IRFA) was summarized in the proposed rule published January 28, 2004 (69 FR 4098). A description of why action is being considered, the objectives and legal basis for the action, and a description of the action, including its reporting, recordkeeping, and other compliance requirements, are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the FRFA is available from NMFS (see **ADDRESSES**). A summary of the FRFA follows:

#### Number of Affected Small Entities

This final rule applies to all holders of Hawaii longline limited access permits and all holders of western Pacific longline general permits. The number of Hawaii longline limited access permit holders is 164. Not all such permits are renewed and used every year (approximately 126 were renewed in 2003). Most holders of Hawaii longline limited access permits are based in, or operate out of, Hawaii. Longline general permits are not limited by number. Approximately 67 longline general permits were issued in 2003, about 48 of which were active. In 2003 all but two holders of longline general permits were based in, or operated out of, American Samoa. The remaining two, neither of which was active in 2003, were based in the Mariana Islands.

In a few cases multiple permits are held by a single business, so the number

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

### **Duplicating, Overlapping, and Conflicting Federal Rules**

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

### **Alternatives to the Rule**

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

The alternatives included two variations on the seasonal area longline closure, including one that would retain the current April-May closure in certain waters south of the Hawaiian Islands and one that would retain the current April-May closure with the exception of the EEZ waters around Palmyra Atoll (the preferred alternative eliminates the current April-May area closure). The alternatives were rejected because they would unnecessarily constrain the fishing activities and economic performance of holders of longline general permits and Hawaii longline limited access permits; adverse impacts to sea turtles could be adequately mitigated through other elements of the preferred alternative without having to restrict longline fishing activity by period or area.

The alternatives included five variations on the amount of shallow-setting longline effort north of the equator that would be allowed by Hawaii-based vessels. The levels of shallow-setting effort considered were zero, 1,060 sets per year, 3,179 sets per year, and unlimited, as well as one alternative that would allow only a one-time trial of 1,560 sets (the preferred alternative limits shallow-setting effort at 2,120 sets, about 50 percent of the 1994–1998 annual average level). The selection among alternatives was based on their expected impacts on sea turtles (sea turtle interactions and mortalities are expected to be strongly correlated with the amount of fishing effort) versus their expected impacts on the economic performance of the Hawaii-based longline fishery (economic benefits are expected to be strongly correlated with

the amount of fishing effort). The alternatives allowing shallow-setting at levels greater than 50 percent of the 1994–1998 annual average were rejected because they might fail to keep impacts on sea turtles below those required in the biological opinion's incidental take statement. The alternatives allowing shallow-setting at levels less than 50 percent of the 1994–1998 annual average were rejected because they would unnecessarily constrain the fishing activities and economic performance of Hawaii-based longline vessels; adverse impacts to sea turtles could be adequately mitigated through other elements of the preferred alternative without having to restrict shallow-setting to the degree proposed under the rejected alternatives.

The alternatives included five variations on how the allowable level of shallow-setting effort north of the equator would be allocated among holders of Hawaii longline limited access permits. Variations included allocating the available effort by lottery, allocating it equally among all permit holders, allocating it in proportion to the permit holders' historical shallow-setting effort, and not allocating the effort in any particular way, in which case the fishery would be closed each year once the fleet-wide limit on effort (sets) is reached (provided the limits on sea turtle interactions are not reached first) (the preferred alternative divides and distributes the effort limit equally among all interested permit holders in the form of transferable shallow-set certificates). The lottery variation was rejected because it would impose a substantial amount of uncertainty on fishermen and might be considered inequitable by some fishermen. The equal-distribution variation was rejected because it would give each permit holder too few shallow sets to be able to make it worth investing and participating in the shallow-set component of the fishery, thereby constraining the economic performance of that component. The variation of allocating effort in proportion to the permit holders' historical shallow-setting effort was rejected because it would be excessively costly to implement and because it would exclude those participants who have historically targeted tuna but who were not previously barred from participating in the swordfish component of the fishery. The fleet-wide effort limit variation was rejected because it would create an incentive for each permit holder to do as much shallow-setting as possible before the fishery is closed, thereby encouraging fishermen to

shallow-set under what would otherwise be sub-optimal conditions (in terms of both economic performance and safety).

The alternatives included two variations on the sea turtle interaction limit(s), including no sea turtle interaction limit and an interaction limit for each species for which there is an Incidental Take Statement issued under the ESA (the preferred alternative will close the shallow-set component of the fishery if either of two calendar-year interaction limits is reached, one for leatherback sea turtles and one for loggerhead sea turtles; the limits are 16 and 17, respectively, equal to the annual number of turtles expected to be captured for the respective species in the shallow-set component of the Hawaii-based fishery, as established in the prevailing biological opinion issued by NMFS pursuant to section 7 of the ESA). The no sea turtle interaction limit variation was rejected because it might fail to adequately minimize adverse impacts on sea turtles. The variation of establishing limits for all affected species was rejected because it would likely result in the shallow-set component of the fishery being closed more often than is needed to adequately mitigate adverse impacts on sea turtles.

### **Reasons for Selecting the Preferred Alternative**

The preferred alternative was selected primarily in terms of how well it would be expected to achieve the objectives of the action, particularly achieving optimum yield and promoting domestic harvest and domestic fishery values while avoiding the likelihood of jeopardizing the continued existence of any endangered or threatened species. Because the target fish stocks in the Hawaii-based longline fishery are not overfished and greater fishing effort by the U.S. fleet would generally result in greater economic returns and greater benefit to the nation, the essence of the selection was one of balancing the beneficial effects of greater fishing effort against its negative impacts to ESA-listed sea turtle species, and at the same time, selecting sea turtle and seabird mitigation measures that have the promise of minimizing adverse impacts to those species without unduly comprising fishing efficiency. Another important consideration was the fairness of the scheme used to allocate the available shallow-set effort among fishery participants. The alternative that was determined to best meet these criteria was the one that would: eliminate the April-May longline closed area, limit shallow-set longline effort in the Hawaii-based longline fishery to

2,120 sets per year, distribute that annual limit in equal portions to all interested permit holders, establish annual limits on the numbers of interactions with leatherback and loggerhead sea turtles in the shallow-set component of the fishery, require that mitigative hook and bait types be used in the shallow-set component of the fishery, require that dehookers be carried and used to disengage hooked and entangled sea turtles, and require that longline gear be deployed during the nighttime when shallow-setting north of 23° N. latitude.

#### Effects of the Rule on Small Entities

This final rule is expected to have positive overall economic impacts on the small entities to whom the proposed rule would apply, all of which are individuals and businesses that hold permits for, and participate in, the western Pacific pelagic longline fisheries. These positive impacts will stem from the relaxation of the current restrictions on longlining, including the elimination of the April-May area closure for longlining and the elimination of the prohibition on shallow-setting north of the equator, thereby providing new fishing opportunities and potential economic benefits. These benefits will likely be very slightly offset by the need to acquire and use specified de-hooking devices.

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

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

bait and to conduct the line-setting procedure during the nighttime hours when shallow-setting north of the equator.

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

#### Public Comments on Initial Regulatory Flexibility Analysis

NMFS received and considered a number of comments on the IRFA, and responds as follows:

*Comment 1:* There is a lack of transparency in the process by which the alternative allocation methods were developed and evaluated. The economic and social impact analysis in the IRFA, in combination with those in the DSEIS and Regulatory Impact Review (RIR), is sketchy and sometimes contradictory.

*Response:* The participation options were discussed, and a preliminarily preferred option selected, at the Council's 121st meeting. In trying to determine the fairest alternative, the preferences of those directly affected (the holders of Hawaii longline limited access permits) were of primary importance, as explained further in the response to Comment 5. The economic and social impact analyses in the FRFA, in combination with those in the FSEIS and the RIR, have been expanded with respect to the expected impacts of the alternatives on fishery participants. Contradictions among those analyses have reconciled, particularly with respect to the relative advantages and disadvantages of the participation options (see also responses to Comments 2 and 4).

*Comment 2:* The IRFA, in combination with the DSEIS, is unclear if the prospect of a decrease in fishing vessel safety is a likely one and therefore a valid reason for rejecting Participation Option 1 (no allocation of shallow-set effort shares open to all).

*Response:* Discussions of the impacts of the participation options have been expanded and contradictory statements in the IRFA and DSEIS have been reconciled in the FRFA and FSEIS. As indicated in the FRFA, one consideration in choosing among the participation options was that Participation Option 1 could lead to safety problems because there would be an incentive to fish quickly, before the effort limit is reached, and that incentive could lead some fishermen to

choose to fish in relatively hazardous weather or sea conditions.

*Comment 3:* The contention that Participation Option 1 may result in market gluts and shortages is not substantiated, and the information provided seems to indicate otherwise.

*Response:* Although Hawaii-caught swordfish has been a small part of the world market, interruptions or fluctuating availability of any product make the necessary establishment of market channels difficult. This is especially true for producers in relatively remote areas such as Hawaii who do not have easy access to the world market. These statements have been qualified to indicate that these results could happen, not that they necessarily would.

*Comment 4:* The DSEIS states that Participation Option 1 would be relatively easy to implement, but the IRFA states it would be difficult to monitor and administer.

*Response:* The discussions of the impacts of the participation options have been expanded and contradictory statements in the DSEIS and the IRFA have been reconciled in the FSEIS and FRFA. As indicated in the FRFA, one consideration in choosing among the participation options was that Participation Option 1 would require a system for monitoring fishing effort and a mechanism for closing the fishery once the effort limit is reached, both of which would be difficult to implement.

*Comment 5:* The DSEIS states that Participation Option 2 (allocating available shallow-set effort according to individual historical participation in the swordfish component of the fishery) may be contentious, but there is no mention that the preferred alternative, Participation Option 5 (allocate available shallow-set effort equally among all interested permit holders), may also be contentious. The potential for controversy and dissension should be examined in a balanced, objective, and comprehensive manner. Who may receive windfall gains should be carefully considered. Further, one reason Participation Option 2 was rejected is that it would exclude those who target tuna but actively participated in the development of this measure. The fact that someone who has engaged in the process of developing management measures is not rewarded does not seem to be a justifiable reason for rejecting an alternative.

*Response:* NMFS acknowledges that Participation Option 5, the preferred option, may indeed be contentious among the affected fishermen, as may the other options. As with any allocation scheme, it may not be

possible to formulate a scheme that is considered fair by all affected parties. In assessing the relative fairness of the allocation options, NMFS gave considerable weight to the views of the affected fishermen, and in seeking those views NMFS relied strongly on the expressed views of the Hawaii Longline Association (HLA), of which most permit holders are members. NMFS recognizes that not all permit holders are necessarily represented by HLA, and like any organization, the views of the organization as a whole do not necessarily reflect those of all its members. Nevertheless, NMFS has found that HLA's expressed support of Participation Option 5, together with an objective assessment of the likely effects of the allocation options and the public comments received on the DSEIS, IRFA, and proposed rule, indicate that the preferred allocation alternative is reasonably fair and is unlikely to result in excessive windfall gains to some fishermen at the expense of others. With respect to the reasons for rejecting Participation Option 2, the FRFA explains that restricting the allocation of available shallow-set effort to those with historical experience in the swordfish fishery would be an unjustified removal of a previous privilege and economic option from vessels that historically targeted tuna.

*Comment 6:* Administrative expediency and the short time line should not be used to justify rejection of Participation Option 2, especially if there are opportunities for extending the deadline or implementing an interim rule until a sound analysis of allocation alternatives can be performed.

*Response:* Administrative efficiency was one consideration but the refinement of the Council's preliminarily preferred option was also based on input from the interested parties (see response to Comment 5).

*Comment 7:* One reason given for rejecting Participation Option 2 is the inefficiencies that may result if there is no method for uninterested permit holders to transfer their effort shares to others. It is unclear why the same provision allowing the transfer of effort shares used in Participation Option 5 could not be included in Participation Option 2.

*Response:* Such a provision could have been included in Participation Option 2, but that alternative, with or without transferable certificates, was determined to be less preferred than Participation Option 5 for fairness reasons (see response to Comment 5).

*Comment 8:* The IRFA, in combination with the DSEIS and RIR, should include more explicit analysis of

the costs and benefits of the allocation approach in Participation Option 5, particularly regarding the trade-offs between allocating a stable set of privileges with a long time horizon in order to promote efficiency and stability in the fishery and maintaining administrative flexibility.

*Response:* NMFS acknowledges that additional allocation approaches are available, including approaches that would allocate more stable and durable sets of privileges. The five allocation options considered were determined by NMFS to comprise a reasonable range of alternatives in the context of the objective of this action, particularly given the urgency of establishing protective measures for sea turtles by April 1, 2004, when the current protective measures are eliminated by Court Order. Lacking new measures, sea turtles will not be adequately protected from the adverse impacts of fishery interactions. One of the new protective measures is the annual fleet-wide limit on fishing effort in the shallow-set component of the fishery, which necessitates a system for allocating the available effort. With little time available to formulate and establish such a system, approaches that allocate short-term privileges, as in this rule, are advantageous relative to systems with more durable privileges in generally being less contentious, and also less irrevocable should adjustments be necessary in the future.

*Comment 9:* There is no examination of the implications of the allocation alternatives in terms of environmental justice, particularly with respect to the historical participants in the swordfish component of the fishery being predominantly Vietnamese-American.

*Response:* As indicated in the response to Comment 5, in trying to determine the fairest alternative, the preferences of those most affected (the permit holders) were of primary importance. Further, the preferred alternative does not dispossess any current permit holder in the Hawaii-based longline fishery.

*Comment 10:* The preferred participation option may or may not be the approach that maximizes net benefits, including potential economic effects, environmental effects, public health and safety, distributive impacts, and equity. Insufficient information is disclosed for policy makers or the public to make that determination.

*Response:* As discussed in section 10.1 of the DSEIS and FSEIS, the preferred alternative was selected because it was viewed as the most equitable one (see response to Comment 5) and the one most likely to result in

the use of all allowable effort by those most able to exercise that effort.

*Comment 11:* The economic and social effects of the proposed action should be given as much attention in the analyses of the IRFA, DSEIS, and RIR as biological and physical effects.

*Response:* Efficiency in the fishery was an important factor considered in the analysis, as achieving optimum yield is part of the objective of the action. As indicated in the response to Comment 5, the relative fairness of the alternatives was also given strong consideration.

This final rule contains two collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act (PRA). These requirements have been approved by the OMB under OMB control numbers 0648-0214 and 0490. The first requires that holders of Hawaii longline limited access permits respond to annual requests from NMFS if they are interested in receiving shares of the annual limit on longline shallow-sets (in the form of shallow-set certificates). The second requires that holders of Hawaii longline limited access permits or their agents notify the Regional Administrator prior to each fishing trip whether longline shallow-sets or deep-sets will be made during the trip. The public reporting burden for the first collection-of-information requirement is estimated to average 10 minutes per response, and for the second requirement, 4 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS (see ADDRESSES) and to OMB by e-mail at David\_Rostker@omb.eop.gov or faxed to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply

with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

A formal consultation under section 7 of the Endangered Species Act was conducted for the pelagic fisheries of the western Pacific region as they would be managed under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region, as modified by this regulatory amendment. In a biological opinion dated February 23, 2004, NMFS determined that fishing activities conducted under the regulatory amendment are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS.

**List of Subjects in 50 CFR Part 660**

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

Dated: March 30, 2004.

**Rebecca Lent,**

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

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

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

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

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

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

**§ 660.12 Definitions.**

\* \* \* \* \*

*Circle hook* means a fishing hook with the point turned perpendicularly back towards the shank.

\* \* \* \* \*

*Deep-set or Deep-setting* means the deployment of, or deploying, respectively, longline gear in a manner consistent with all the following criteria: with all float lines at least 20 meters in length; with a minimum of 15 branch lines between any two floats (except basket-style longline gear which may have as few as 10 branch lines between any two floats); without the use

of light sticks; and resulting in the possession or landing of no more than 10 swordfish (*Xiphias gladius*) at any time during a given trip. As used in this definition “float line” means a line used to suspend the main longline beneath a float and “light stick” means any type of light emitting device, including any fluorescent “glow bead”, chemical, or electrically powered light that is affixed underwater to the longline gear.

\* \* \* \* \*

*Offset circle hook* means a circle hook in which the barbed end of the hook is displaced relative to the parallel plane of the eyed-end, or shank, of the hook when laid on its side.

\* \* \* \* \*

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

\* \* \* \* \*

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

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

\* \* \* \* \*

**§ 660.21 [Amended]**

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

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

**§ 660.22 Prohibitions.**

\* \* \* \* \*

(ff) Own or operate a vessel that is registered for use under a Hawaii longline limited access permit and engaged in longline fishing for Pacific pelagic management unit species and fail to be certified for completion of a NMFS protected species workshop in violation of § 660.34(a).

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

(hh) From a vessel registered for use under a Hawaii longline limited access permit, make any longline set not of the type (shallow-setting or deep-setting)

indicated in the notification to the Regional Administrator pursuant to § 660.23(a), in violation of § 660.33(h).

(ii) Fail to carry, or fail to use, a line clipper, dip net, or dehookers on a vessel registered for use under a Hawaii longline limited access permit in violation of § 660.32(a).

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

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

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

(mm) Fail to begin the deployment of longline gear at least one hour after local sunset or fail to complete the deployment of longline gear before local sunrise from a vessel registered for use under a Hawaii limited access longline permit while shallow-setting north of 23° N. lat. in violation of § 660.35(a)(10).

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

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

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

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

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

(ss) Transfer a shallow-set certificate to a person other than a holder of a



Hawaii longline limited access permit in violation of § 660.33(e).

(tt) Land or possess more than 10 swordfish on board a vessel registered for use under a Hawaii longline limited access permit on a fishing trip for which the permit holder notified NMFS under § 660.23(a) that the vessel would conduct a deep-setting trip, in violation of § 660.33(j).

\* \* \* \* \*

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

**§ 660.23 Notifications.**

(a) The permit holder for a fishing vessel subject to the requirements of this subpart, or an agent designated by the permit holder, shall provide a notice to the Regional Administrator at least 72 hours (not including weekends and Federal holidays) before the vessel leaves port on a fishing trip, any part of which occurs in the EEZ around Hawaii. The vessel operator will be presumed to be an agent designated by the permit holder unless the Regional Administrator is otherwise notified by the permit holder. The notice must be provided to the office or telephone number designated by the Regional Administrator. The notice must provide the official number of the vessel, the name of the vessel, trip type (either deep-setting or shallow-setting), the intended departure date, time, and location, the name of the operator of the vessel, and the name and telephone number of the agent designated by the permit holder to be available between 8 a.m. and 5 p.m. (Hawaii time) on weekdays for NMFS to contact to arrange observer placement.

\* \* \* \* \*

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

**§ 660.32 Sea turtle take mitigation measures.**

(a) \* \* \*

(1) Owners and operators of vessels registered for use under a Hawaii longline limited access permit must carry aboard their vessels line clippers meeting the minimum design standards as specified in paragraph (a)(2) of this section, dip nets meeting the minimum standards prescribed in paragraph (a)(3) of this section, and dehookers meeting the minimum design and performance standards prescribed in paragraph (a)(4) of this section. These items must be used to disengage any hooked or

entangled sea turtles with the least harm possible to the sea turtles, and if it is done by cutting the line, the line must be cut as close to the hook as possible. Any hooked or entangled sea turtle must be handled, resuscitated, and released in accordance with the requirements specified in paragraphs (b) through (d) of this section.

\* \* \* \* \*

(4) *Dehookers—(i) Long-handled dehooker for ingested hooks.* This item is intended to be used to remove ingested hooks from sea turtles that cannot be boated, and to engage a loose hook when a turtle is entangled but not hooked and line is being removed. One long-handled dehooker for ingested hooks is required on board. The minimum design and performance standards are as follows:

(A) *Hook removal device.* The hook removal device must be constructed of 5/16-inch (7.94 mm) 316 L stainless steel and have a dehooking end no larger than 1 7/8 inches (4.76 cm) outside diameter. The device must be capable of securely engaging and controlling the leader while shielding the barb of the hook to prevent the hook from re-engaging during removal. It must not have any unprotected terminal points (including blunt ones), as these could cause injury to the esophagus during hook removal. The device must be of a size capable of securing the range of hook sizes and styles used by the vessel.

(B) *Extended reach handle.* The hook removal device must be securely fastened to an extended reach handle or pole with a length equal to or greater than 150 percent of the vessel's freeboard or 6 ft (1.83 m), whichever is greater. It is recommended that the handle be designed so that it breaks down into sections. The handle must be sturdy and strong enough to facilitate the secure attachment of the hook removal device.

(ii) *Long-handled dehooker for external hooks.* This item is intended to be used to remove externally-hooked hooks from sea turtles that cannot be boated. The long-handled dehooker for ingested hooks described in paragraph (a)(4)(i) of this section meets this requirement. The minimum design and performance standards are as follows:

(A) *Construction.* The device must be constructed of 5/16-inch (7.94 mm) 316 L stainless steel rod. A 5-inch (12.70-cm) tube T-handle of 1-inch (2.54-cm) outside diameter is recommended, but not required. The dehooking end must be blunt with all edges rounded. The device must be of a size capable of securing the range of hook sizes and styles used by the vessel.

(B) *Handle.* The handle must have a length equal to or greater than the vessel's freeboard or 3 ft (0.91 m), whichever is greater.

(iii) *Long-handled device to pull an "inverted V".* This item is intended to be used to pull an "inverted V" in the fishing line when disentangling and dehooking entangled sea turtles. One long-handled device to pull an "inverted V" is required on board. The long-handled dehooker for external hooks described in paragraph (a)(4)(ii) of this section meets this requirement. The minimum design and performance standards are as follows:

(A) *Hook end.* It must have a hook-shaped end, like that of a standard boat hook or gaff, which must be constructed of stainless steel or aluminum.

(B) *Handle.* The handle must have a length equal to or greater than 150 percent of the vessel's freeboard or 6 ft (1.83 m), whichever is greater. The handle must be sturdy and strong enough to allow the hook end to be effectively used to engage and pull an "inverted V" in the line.

(iv) *Tire.* This item is intended to be used for supporting a turtle in an upright orientation while it is on board. One tire is required on board, but an assortment of sizes is recommended to accommodate a range of turtle sizes. The tire must be a standard passenger vehicle tire and must be free of exposed steel belts.

(v) *Short-handled dehooker for ingested hooks.* This item is intended to be used to remove ingested hooks, externally hooked hooks, and hooks in the front of the mouth of sea turtles that can be boated. One short-handled dehooker for ingested hooks is required on board. The minimum design and performance standards are as follows:

(A) *Hook removal device.* The hook removal device must be constructed of 1/4-inch (6.35-mm) 316 L stainless steel, and the design of the dehooking end must be such to allow the hook to be secured and the barb shielded without re-engaging during the hook removal process. The dehooking end must be no larger than 1 5/16 inch (3.33 cm) outside diameter. It must not have any unprotected terminal points (including blunt ones), as this could cause injury to the esophagus during hook removal. The dehooking end must be of a size appropriate to secure the range of hook sizes and styles used by the vessel.

(B) *Sliding plastic bite block.* The dehooker must have a sliding plastic bite block, which is intended to be used to protect the sea turtle's beak and facilitate hook removal if the turtle bites down on the dehooker. The bite block

must be constructed of a 3/4-inch (1.91-cm) inside diameter high impact plastic cylinder (for example, Schedule 80 PVC) that is 10 inches (25.40 cm) long. The dehooker and bite block must be configured to allow for 5 inches (12.70 cm) of slide of the bite block along the shaft of the dehooker.

(C) *Shaft and handle.* The shaft must be 16 to 24 inches (40.64 - 60.69 cm) in length, and must have a T-handle 4 to 6 inches (10.16 - 15.24 cm) in length and 3/4 to 1 1/4 inches (1.90 - 3.18 cm) in diameter.

(vi) *Short-handled dehooker for external hooks.* This item is intended to be used to remove externally hooked hooks from sea turtles that can be boated. One short-handled dehooker for external hooks is required on board. The short-handled dehooker for ingested hooks required to comply with paragraph (a)(4)(v) of this section meets this requirement. The minimum design and performance standards are as follows:

(A) *Hook removal device.* The hook removal device must be constructed of 5/16-inch (7.94-cm) 316 L stainless steel, and the design must be such that a hook can be rotated out without pulling it out at an angle. The dehooking end must be blunt, and all edges rounded. The device must be of a size appropriate to secure the range of hook sizes and styles used by the vessel.

(B) *Shaft and handle.* The shaft must be 16 to 24 inches (40.64 - 60.69 cm) in length, and must have a T-handle 4 to 6 inches (10.16 - 15.24 cm) in length and 3/4 to 1 1/4 inches (1.90 - 3.18 cm) in diameter.

(vii) *Long-nose or needle-nose pliers.* This item is intended to be used to remove deeply embedded hooks from the turtle's flesh that must be twisted in order to be removed, and also to hold in place PVC splice couplings when used as mouth openers. One pair of long-nose or needle-nose pliers is required on board. The minimum design standards are as follows: The pliers must be 8 to 14 inches (20.32 - 35.56 cm) in length. It is recommended that they be constructed of stainless steel material.

(viii) *Wire or bolt cutters.* This item is intended to be used to cut through hooks in order to remove all or part of the hook. One pair of wire or bolt cutters is required on board. The minimum design and performance standards are as follows: The wire or bolt cutters must be capable of cutting hard metals, such as stainless or carbon steel hooks, and they must be capable of cutting through the hooks used by the vessel.

(ix) *Monofilament line cutters.* This item is intended to be used to cut and remove fishing line as close to the eye of the hook as possible if the hook is swallowed or cannot be removed. One pair of monofilament line cutters is required on board. The minimum design standards are as follows: Monofilament line cutters must be 6 to 9 inches (15.24 - 22.86 cm) in length. The blades must be 1 3/4 (4.45 cm) in length and 5/8 inches (1.59 cm) wide when closed.

(x) *Mouth openers and gags.* These items are intended to be used to open the mouths of boated sea turtles, and to keep them open when removing ingested hooks in a way that allows the hook or line to be removed without causing further injury to the turtle. At least two of the seven different types of mouth openers and gags described below are required on board. The seven types and their minimum design standards are as follows.

(A) *A block of hard wood.* A block of hard wood is intended to be used to gag open a turtle's mouth by placing it in the corner of the jaw. It must be made of hard wood of a type that does not splinter (for example, maple), and it must have rounded and smoothed edges. The dimensions must be 10 to 12 inches (24.50 - 30.48 cm) by 3/4 to 1 1/4 inches (1.90 - 3.18 cm) by 3/4 to 1 1/4 inches (1.90 - 3.18 cm).

(B) *A set of three canine mouth gags.* A canine mouth gag is intended to be used to gag open a turtle's mouth while allowing hands-free operation after it is in place. A set of canine mouth gags must include one of each of the following sizes: small (5 inches) (12.7 cm), medium (6 inches) (15.2 cm), and large (7 inches) (17.8 cm). They must be constructed of stainless steel. A 1 3/4-inch (4.45 cm) long piece of vinyl tubing (3/4 inch (1.91 cm) outside diameter and 5/8 inch (1.59 cm) inside diameter) must be placed over the ends of the gags to protect the turtle's beak.

(C) *A set of two sturdy canine chew bones.* A canine chew bone is intended to be used to gag open a turtle's mouth by placing it in the corner of the jaw. They must be constructed of durable nylon, zylene resin, or thermoplastic polymer, and strong enough to withstand biting without splintering. To accommodate a variety of turtle beak sizes, a set must include one large (5 1/2 - 8 inches (13.97 - 20.32 cm) in length) and one small (3 1/2 - 4 1/2 inches (8.89 - 11.43 cm) in length) canine chew bones.

(D) *A set of two rope loops covered with hose.* A set of two rope loops covered with a piece of hose is intended to be used as a mouth opener and to keep a turtle's mouth open during hook

and/or line removal. A set consists of two 3-foot (0.91-m) lengths of poly braid rope, each covered with an 8-inch (20.32-cm) section of 1/2-inch (1.27-cm) or 3/4-inch (1.91-cm) light-duty garden hose, and each tied into a loop.

(E) *A hank of rope.* A hank of rope is intended to be used to gag open a sea turtle's mouth by placing it in the corner of the jaw. A hank of rope is made from a 6-foot (1.83-m) lanyard of braided nylon rope that is folded to create a hank, or looped bundle, of rope. The hank must be 2 to 4 inches (5.08 - 10.16 cm) in thickness.

(F) *A set of four PVC splice couplings.* PVC splice couplings are intended to be used to allow access to the back of the mouth of a turtle for hook and line removal by positioning them inside a turtle's mouth and holding them in place with long-nose or needle-nose pliers. The set must consist of the following Schedule 40 PVC splice coupling sizes: 1 inch (2.54 cm), 1 1/4 inches (3.18 cm), 1 1/2 inches (3.81 cm), and 2 inches (5.08 cm).

(G) *A large avian oral speculum.* A large avian oral speculum is intended to be used to hold a turtle's mouth open and control the head with one hand while removing a hook with the other hand. It must be 9 inches (22.86 cm) in length and constructed of 3/16-inch (4.76-mm) wire diameter surgical stainless steel (Type 304). It must be covered with 8 inches (20.32 cm) of clear vinyl tubing (5/16-inch (7.94-mm) outside diameter, 3/16-inch (4.76-mm) inside diameter).

(b) \* \* \*

(1) All incidentally hooked or entangled sea turtles must be handled in a manner to minimize injury and promote post-hooking or post-entangling survival.

\* \* \* \* \*

(3) If a sea turtle is too large or hooked or entangled in a manner as to preclude safe boarding without causing further damage/injury to the turtle, the items specified in paragraphs (a)(2) and (a)(4) of this section must be used to cut the line and remove as much line as possible prior to releasing the turtle.

\* \* \* \* \*

■ 7. Section 660.33 is revised to read as follows:

**§ 660.33 Western Pacific longline fishing restrictions.**

(a) *Annual Effort Limit on shallow-setting by Hawaii longline vessels.* (1) A maximum annual limit of 2,120 is established on the number of shallow-set certificates that will be made available each calendar year to vessels

registered for use under Hawaii longline limited access permits.

(2) The Regional Administrator will divide the 2,120-set annual effort limit each calendar year into equal shares such that each holder of a Hawaii longline limited access permit who provides notice of interest to the Regional Administrator no later than November 1 prior to the start of the calendar year, pursuant to paragraph (a)(3) of this section, receives one share for each permit held. If such division would result in shares containing a fraction of a set, the annual effort limit will be adjusted downward such that each share consists of a whole number of sets.

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

(4) No later than December 1 of each year, the Regional Administrator will send shallow-set certificates valid for the upcoming calendar year to all holders of Hawaii longline limited access permits, as of the just previous November 1, that provided notice of interest to the Regional Administrator pursuant to paragraph (a)(3) of this section. The Regional Administrator will send shallow-set certificates valid for 2004 no later than June 1, 2004, based on permit holders as of May 1, 2004.

(b) *Limits on sea turtle interactions.*

(1) Maximum annual limits are established on the numbers of physical interactions that occur each calendar year between leatherback and loggerhead sea turtles and vessels registered for use under Hawaii longline limited access permits while shallow-setting. The limits are based on the annual numbers of the two turtle species expected to be captured in the shallow-set component of the Hawaii-based fishery, as indicated in the incidental take statement of the biological opinion issued by the National Marine Fisheries Service pursuant to section 7 of the Endangered Species Act. If the numbers in the incidental take statement are modified or if a new biological opinion is issued, new rule-making will be undertaken to change the interaction limits accordingly. The limits are as follows:

(i) The annual limit for leatherback sea turtles (*Dermochelys coriacea*) is sixteen (16).

(ii) The annual limit for loggerhead sea turtles (*Caretta caretta*) is seventeen (17).

(2) Upon determination by the Regional Administrator that, based on data from NMFS observers, either of the two sea turtle interaction limits has been reached during a given calendar year:

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

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

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

attached to the original logbook form that corresponds to the shallow-set and that is submitted to the Regional Administrator within 72 hours of each landing of management unit species as required under § 660.14.

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

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

(f) Owners and operators of vessels registered for use under a Hawaii longline limited access permit must use only offset circle hooks sized 18/0 or larger, with 10° offset, when shallow-setting north of the equator (0° lat.). As used in this paragraph, an offset circle hook sized 18/0 or larger is one whose outer diameter at its widest point is no smaller than 1.97 inches (50 mm) when measured with the eye of the hook on the vertical axis (y-axis) and perpendicular to the horizontal axis (x-axis). As used in this paragraph, a 10° offset is measured from the barbed end of the hook and is relative to the parallel plane of the eyed-end, or shank, of the hook when laid on its side.

(g) Owners and operators of vessels registered for use under a Hawaii longline limited access permit must use only mackerel-type bait when shallow-setting north of the equator (0° lat.). As used in this paragraph, mackerel-type bait means a whole fusiform fish with a predominantly blue, green, or grey back and predominantly grey, silver, or white lower sides and belly.

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

(i) Vessels registered for use under Hawaii longline limited access permits may not be used to engage in shallow-setting north of the equator (0° lat.) any time during which the shallow-set component of the longline fishery is closed pursuant to paragraph (b)(3)(ii) of this section.

(j) Owners and operators of vessels registered for use under a Hawaii

longline limited access permit may land or possess no more than 10 swordfish from a fishing trip for which the permit holder notified NMFS under § 660.23(a) that the vessel would engage in a deep-setting trip.

■ 8. Section 660.34 is revised to read as follows:

**§ 660.34 Protected species workshop.**

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

(b) A protected species workshop certificate will be issued by NMFS

annually to any person who has completed the workshop.

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

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

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

**§ 660.35 Pelagic longline seabird mitigation measures.**

(a) \* \* \*

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

\* \* \* \* \*

**§ 660.36 [Removed and Reserved]**

■ 10. Section 660.36 is removed and reserved.

[FR Doc. 04-7526 Filed 3-30-04; 4:34 pm]

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