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**§ 52.2540 [Removed and Reserved]**

■ 3. Section 52.2540 is removed and reserved.

**§ 52.2541 [Removed and Reserved]**

■ 4. Section 52.2541 is removed and reserved.

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 300**

[Docket No. 090130104-91027-02]

RIN 0648-AX60

**International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009–2011 and Turtle Mitigation Requirements in Purse Seine Fisheries**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act) to implement certain decisions of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC). Those decisions require that the members of the WCPFC, including the United States, take certain measures with respect to their purse seine fisheries in the area of competence of the WCPFC, which includes most of the western and central Pacific Ocean (WCPO). The regulations include limits on the number of days that may be fished, periods during which fishing may not be done on schools in association with fish aggregating devices (FADs), areas of high seas closed to fishing, requirements to retain tuna on board up to the first point of landing or transshipment, requirements to carry observers, and requirements to handle sea turtles in a specified manner. This action is necessary for the United States to satisfy its international obligations under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the

Western and Central Pacific Ocean (Convention), to which it is a Contracting Party.

**DATES:** The rule is effective August 3, 2009, except for the amendments to §§ 300.222(aa) and 300.223(f), which are effective October 5, 2009.

**ADDRESSES:** Copies of supporting documents that were prepared for this final rule, including the regulatory impact review (RIR) and environmental assessment (EA), as well as the proposed rule, are available via the Federal e-Rulemaking portal, at <http://www.regulations.gov>. Those documents, and the small entity compliance guide prepared for this final rule, are also available from the Regional Administrator, NMFS, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700. The initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA) prepared for this rule are included in the proposed rule and this final rule, respectively.

**FOR FURTHER INFORMATION CONTACT:** Tom Graham, NMFS PIRO, 808-944-2219.

**SUPPLEMENTARY INFORMATION:****Electronic Access**

This final rule is also accessible at <http://www.gpoaccess.gov/fr>.

**Background**

On June 1, 2009, NMFS published a proposed rule in the **Federal Register** (74 FR 26160) that would revise regulations at 50 CFR part 300, subpart O, in order to implement certain decisions of the WCPFC. The proposed rule was open to public comment through June 22, 2009.

This final rule is implemented under authority of the WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*), which authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the WCPFC. The authority to promulgate regulations has been delegated to NMFS.

The objective of this final rule is to implement, with respect to U.S. purse seine vessels, two Conservation and Management Measures (CMM) adopted by the WCPFC in December 2008, at its Fifth Regular Annual Session. The first is CMM 2008-01, "Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean" The second is

CMM 2008-03, "Conservation and Management of Sea Turtles."

The proposed rule includes further background information, including information on the Convention and the WCPFC, the international obligations of the United States under the Convention, the provisions of CMM 2008-01 and CMM 2008-03 as they relate to purse seine vessels, and the basis for the proposed regulations.

**New Requirements**

This final rule establishes the following requirements:

*(1) Fishing Effort Limits*

Limits are established for 2009 through 2011 on the number of fishing days that may be spent by the U.S. purse seine fleet on the high seas and in areas under U.S. jurisdiction (including the U.S. exclusive economic zone, or EEZ) within the Convention Area. First, there is a limit of 7,764 fishing days for the entire three-year 2009–2011 period. Second, there is a limit of 6,470 fishing days for each of the two-year periods 2009–2010 and 2010–2011. Third, there is a limit of 3,882 fishing days for each of the one-year periods 2009, 2010, and 2011. Once NMFS determines during any of these time periods that, based on information collected in vessel logbooks and other sources, the limit is expected to be reached by a specific future date, NMFS will issue a notice in the **Federal Register** announcing the closure of the purse seine fishery in the Convention Area on the high seas and in areas of U.S. jurisdiction, starting on that specific future date until the end of the applicable time period. Upon closure of the fishery, it will be prohibited to use a U.S. purse seine vessel to fish in the Convention Area on the high seas or in areas under U.S. jurisdiction, effective until the end of the applicable time period. NMFS will publish the notice at least seven calendar days before the effective date of the closure to provide fishermen advance notice of the closure.

*(2) FAD Prohibition Periods*

During specified periods in each of the years 2009, 2010, and 2011 it will be prohibited to set purse seines around FADs, deploy FADs, or service FADs or their associated electronic equipment in the Convention Area. It will be prohibited during these periods to set a purse seine within one nautical mile of a FAD or to set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours or setting the purse seine in

an area into which fish were drawn by a vessel from the vicinity of a FAD. FADs are defined to include both artificial and natural floating objects that are capable of aggregating fish. In 2009, the FAD prohibition period will be August 1 through September 30. In each of 2010 and 2011, it will be July 1 through September 30.

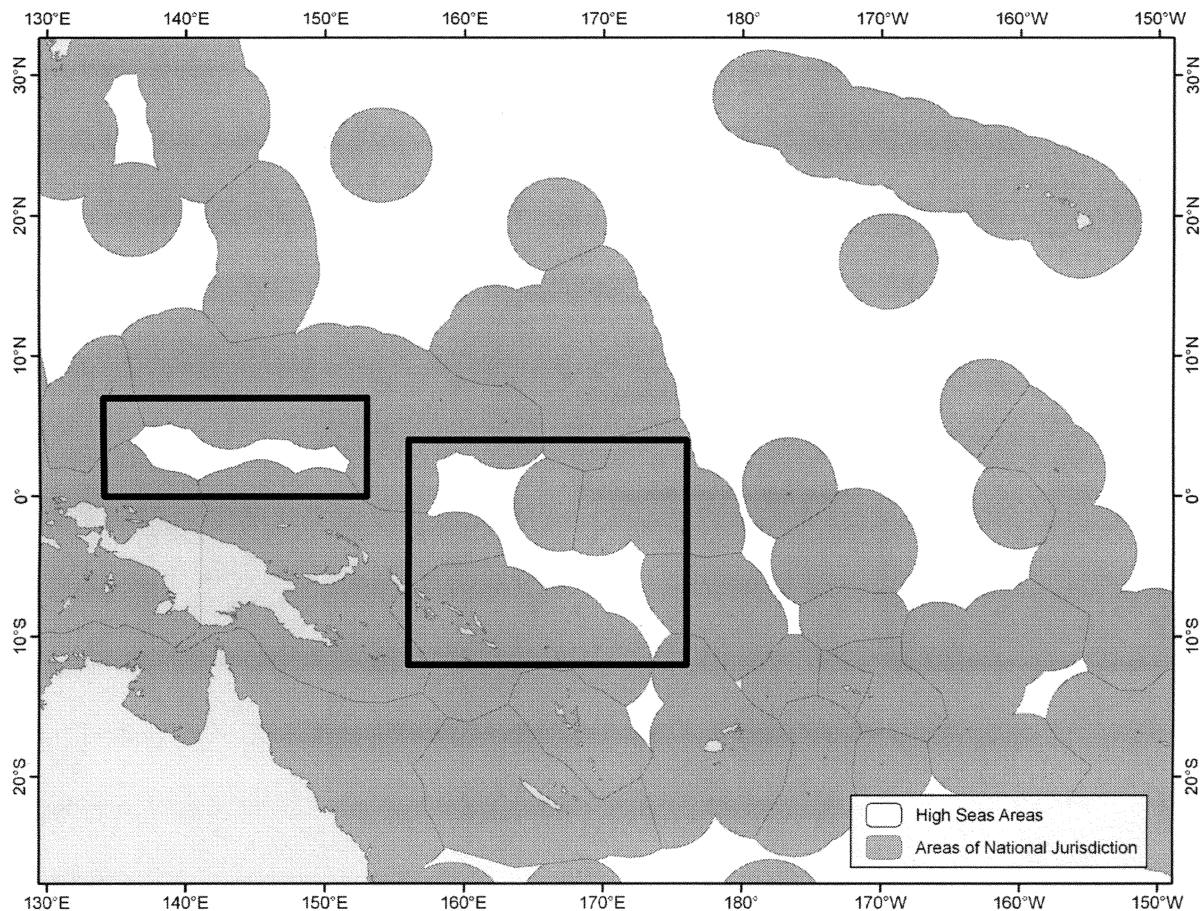
### (3) High Seas Area Closures

Two areas will be closed to fishing by U.S. purse seine vessels from January 1, 2010, through December 31, 2011. The

areas are the two areas of high seas within the Convention Area that are depicted on the map in Figure 1. In CMM 2008–01, the WCPFC has reserved the option of reversing its adoption of the closed areas at its regular annual session in December 2009. If such a decision occurs, NMFS will take appropriate action to rescind, as appropriate, the closed areas that are established in this final rule.

Figure 1. High seas closed areas. Areas of high seas are indicated in

white; areas of claimed national jurisdiction, including territorial seas, archipelagic waters, and exclusive economic zones, are indicated in dark shading. Areas that will be closed to purse seine fishing from January 1, 2010, through December 31, 2011, are all high seas areas (in white) within the two rectangles bounded by the bold black lines. The coordinates of the two rectangles are set forth in the regulation. This map displays indicative maritime boundaries only.



### (4) Catch Retention

It will be prohibited to discard any bigeye tuna (*Thunnus obesus*), yellowfin tuna (*Thunnus albacares*), or skipjack tuna (*Katsuwonus pelamis*) from a U.S. purse seine vessel at sea within the Convention Area. Exceptions are provided for fish that are unfit for human consumption for reasons other than their size, for the last set of the trip if there is insufficient well space to accommodate the entire catch, and for cases of serious malfunction of equipment that necessitate that fish be discarded. This requirement will become effective no earlier than January

1, 2010, and only upon NMFS' determination that an adequate number of WCPFC-approved observers is available for the purse seine vessels of all WCPFC members as necessary to ensure compliance by such vessels with the catch retention requirement. Once it makes that determination, NMFS will announce the effective date of the requirement in a notice published in the **Federal Register**. The requirement will then remain in effect through December 31, 2011.

### (5) Observer Coverage

U.S. purse seine vessels must carry observers deployed as part of the

WCPFC Regional Observer Programme (WCPFC ROP) or deployed by NMFS on all trips in the Convention Area from August 1 through September 30, 2009 (the FAD prohibition period). It will also be required, from January 1, 2010, through December 31, 2011, that U.S. purse seine vessels carry WCPFC-approved observers on all trips in the Convention Area. These observer requirements will not apply to trips that take place exclusively within areas under the jurisdiction of the United States, including the U.S. EEZ and U.S. territorial sea, or under the jurisdiction of any other single nation. They also will not apply in cases where NMFS has

determined that an observer is not available.

#### (6) Sea Turtle Interaction Mitigation

U.S. purse seine vessels operating in the Convention Area must carry specific equipment and specific measures must be used on such vessels to disentangle, handle, and release sea turtles that are encountered in fishing gear, including purse seines and FADs. The required equipment is a dip net or turtle hoist that meets specified minimum design standards. The required measures are: immediately releasing sea turtles that are observed enclosed in purse seines; disentangling sea turtles that are observed entangled in purse seines or FADs; stopping net roll until a sea turtle is disentangled from a purse seine; resuscitating sea turtles that appear dead or comatose; and releasing sea turtles back to the ocean in a specified manner. Unlike the other elements of the final rule, these requirements are effective indefinitely.

#### Responses to Comments

*Comment 1:* It is vital to the survival of the U.S. purse seine fleet that the United States negotiate measures in regional fisheries management organizations (RFMO) that impose a comparable burden on all participants in the fishery, and that U.S. fishermen do not bear an unfair amount of the conservation burden. Furthermore, it is critical to the survival of the U.S. purse seine fleet that domestic regulations implementing RFMO measures not be significantly more burdensome on the U.S. fleet than those imposed on the fleet's foreign competitors. Also, it is the responsibility of the U.S. government to ensure that other governments implement substantially similar rules and regulations, and the U.S. government should promptly give notice to the appropriate RFMO of any shortcomings in the regulations and enforcement by other member countries of the RFMO.

*Response:* This comment does not pertain to the proposed rule itself. NMFS, as part of U.S. delegations to the WCPFC and other RFMOs, shares the view that all participants in affected fisheries should share comparable burdens when seeking to achieve conservation and management objectives, and NMFS applies this principle in its role as part of U.S. delegations to the WCPFC and other RFMOs. As part of such U.S. delegations, NMFS routinely endeavors to determine whether all RFMO members are satisfying their obligations to implement the decisions of the RFMOs, and to alert the RFMOs, as

appropriate, about any shortcomings in such implementation.

*Comment 2:* With respect to the proposed limits on fishing days, reports advising of the number of fishing days used to date should be issued on a monthly basis in order to assist vessels in planning their operations.

*Response:* NMFS recognizes the value of providing such information to affected fishing operations and will endeavor to provide it to the extent possible. NMFS intends to make periodic estimates and/or projections of the number of fishing days used and to make them publicly available in as timely a manner as possible. Exactly what information will be provided, how often it will be updated, when it will be provided, and how it will be disseminated to the public cannot be determined at this time.

*Comment 3:* The regulations should be clarified to say that upon the proposed August 1, 2009, start date of the FAD prohibition period, a purse seine vessel would be permitted to transit to port without an observer on board, provided that no fishing takes place during such transit.

*Response:* The proposed rule is consistent with the commenter's view. Under the proposed rule, it would be prohibited to use a U.S. vessel equipped with purse seine gear to "fish" in the Convention Area without an observer on board (with certain exemptions, not relevant to this comment). Under the proposed rule, "fishing" is defined to include searching for, catching, taking, or harvesting fish, as well as a number of other specific activities, but it does not include merely transiting or being at sea.

*Comment 4:* The activities related to fishing in association with FADs that would be prohibited during the FAD prohibition periods should be qualified to include the word "intentionally"; for example, it should not be prohibited to set a purse seine on a floating object if it is not done intentionally, such as if the object was submerged and not seen when the set is made.

*Response:* NMFS does not agree. In order to ensure that fishing on schools in association with FADs does not occur, it is necessary, for enforcement and compliance purposes, to prohibit all fishing in association with FADs. Even with the presence of an observer on board the vessel, requiring a determination of the intent behind the fishing vessel's activities would undermine the rule's effectiveness and unnecessarily complicate enforcement. However, the rule is aimed at ensuring that vessels do not fish on schools associated with FADs; therefore, factors

beyond the control of the vessel will, as always, be taken into consideration in the enforcement of this regulation.

*Comment 5:* During a FAD prohibition period, the following activities should not be prohibited: (1) in situations in which there are no FADs in the area of the fishing vessel, capturing a school of tuna that has aggregated under the fishing vessel; (2) capturing fish that are in the vicinity of a floating object but not associated with the object; and (3) removing a FAD from the water and securing it on the deck, provided that no servicing of the FAD takes place.

*Response:* Regarding activity (1), the commenter's view is consistent with the intent of the proposed rule; however, NMFS will revise the final rule to clarify that the meaning of a FAD does not include the purse seine vessel itself. Having said that, it is important to note that under the proposed rule it would be prohibited during a FAD prohibition period to set a purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD. Regarding activity (2), NMFS does not agree. Although fish may indeed be found in the vicinity of a FAD but not necessarily associated with it, NMFS finds that in order to ensure that fishing on schools in association with FADs does not occur, it is necessary to also prohibit fishing on schools that are merely in the vicinity of FADs. Under the proposed rule, this would be accomplished by prohibiting setting a purse seine within one nautical mile of a FAD. Regarding activity (3), the commenter's view is consistent with the intent of the proposed rule; however, NMFS will revise the final rule to clarify that during a FAD prohibition period it will not be prohibited to remove a FAD from the water, provided that it is not returned to the water.

*Comment 6:* Regarding the areas of high seas that would be closed to purse seine fishing in 2010 and 2011, consideration should be given to using MarZone, which is a geodetic software program specifically designed and developed to implement all provisions relating to the determination of maritime boundaries as set out in relevant articles of the United Nations Law of the Sea. The enforcement agencies of WCPFC member countries, including those of the United States, and vessel operators could best meet their responsibilities with the use of an accurate system, and the same system for mapping coordinates.

*Response:* NMFS recognizes that WCPFC members and their enforcement agencies do not all use the same tools to determine where a given geographical coordinate lies on the earth's surface,

and indeed, do not all necessarily agree on the same coordinates to describe a given boundary. NMFS agrees that use by all WCPFC members of common agreed-upon geodetic tools would enhance the collective ability of WCPFC members to satisfy their enforcement responsibilities under the Convention and would reduce the potential for misunderstandings and conflicts among WCPFC members. However, this issue is outside the scope of this rule; NMFS does not recognize any way in which the proposed rule could be revised to address the comment.

*Comment 7:* The proposed fishing effort limits are inconsistent with the provisions of CMM 2008–01, paragraph 10 of which establishes 2004 levels or the average of 2001–2004 as the baseline for the limits for the high seas. The proposed rule misconstrues the meaning and intent of CMM 2008–01 by asserting that the potential effort of all 40 U.S. purse seine vessel licenses authorized under the South Pacific Tuna Treaty (SPTT) should be included in the baseline levels of fishing effort for both the high seas and the U.S. EEZ, whereas paragraph 7 of CMM 2008–01, with its proviso that “the registration of bilateral agreements or arrangements does not provide a basis for establishing effort levels on the high seas,” explicitly prohibits such an expansion. Under NMFS’ proposal, the baseline effort level (and therefore the 2009–2011 effort limit) for the high seas would be expanded from 1,066 fishing days to 2,030 fishing days, and the EEZ baseline effort and 2009–2011 effort limit would be expanded from 279 days to 558 fishing days. NMFS should not attempt to circumvent the meaning or intent of CMM 2008–01, the unmistakable intent of which is to address depletion of bigeye tuna through, among other things, the imposition of purse seine effort limits reflective of those which occurred during the baseline period. If NMFS successfully applies the proposed methodology to the U.S. purse seine fleet, it must apply the same logic to the catch limits required in longline fisheries under CMM 2008–01, a proposed rule for which has not yet been published but alternatives for which are included in the EA for this purse seine-related proposed rule.

*Response:* NMFS disagrees with the comment that the proposed fishing effort limits are inconsistent with the provisions of CMM 2008–01. Paragraph 7 of CMM 2008–01 states that the determination of levels of fishing effort established in the CMM shall include, as applicable, fishing rights organized under existing regional or bilateral fisheries partnership agreements or

arrangements, subject to the following limitations: such agreements or arrangements have been registered with the WCPFC by December 2006 in accordance with CMM 2005–01 (a precursor of CMM 2008–01); the number of licenses authorized under such arrangements does not increase; and finally, that registered “bilateral agreements or arrangements” do not provide a basis for establishing effort levels on the high seas. Accordingly, CMM 2008–01, paragraph 7, clearly provides for effort determinations to be based on existing rights (rather than historical fishing effort) under regional agreements such as the SPTT, provided that they are not used as a means to circumvent the objectives of CMM 2008–01 for bigeye tuna by increasing the number of licenses authorized under such agreements. Under the SPTT, the number of U.S. purse seine vessels that may be authorized to fish in the SPTT Area, including its areas of high seas, is strictly limited to 45, five of which are reserved for vessels engaged in joint ventures with Pacific Island Parties to the SPTT. These fishing rights of the United States under the SPTT provide the basis under CMM 2008–01 for determining effort limits. That is, the determination of the effort limits is based on the product of the number of licenses available under the SPTT and the average numbers of fishing days spent per vessel on the high seas and in the U.S. EEZ in 2004. Finally, although CMM 2008–01 expressly prohibits the use of “bilateral agreements or arrangements” to establish effort levels on the high seas, such restriction does not apply to the SPTT, which is a regional fisheries agreement among seventeen parties. Clearly, the restriction is intended to prevent parties to such bilateral arrangements from circumventing the objectives of CMM 2008–01.

A portion of this comment refers to alternatives considered for the other action analyzed in the EA, “Bigeye Tuna Catch Limits in Longline Fisheries in 2009, 2010, and 2011,” which is not a part of this rulemaking. Although resubmission of this comment during the proposed rule comment period for that proposed rule is encouraged, NMFS will consider this comment, as appropriate, in the context of the longline-related rule. Please see response to comment 14 regarding how the two actions are treated together in the EA.

*Comment 8:* The proposed approach of using multiple-year management periods appears consistent with CMM 2008–01 with respect to the fishing effort limits in the U.S. EEZ, but not

with respect to the limits on the high seas. More importantly, nowhere does CMM 2008–01 contemplate combining effort limits for the two areas that would permit the allowable effort for either area to be exceeded by transferring effort from one to the other. NMFS should determine and implement separate limits for the two areas. If the two areas are combined, NMFS must consider and present the potential impacts on stocks, marine ecosystems, other fisheries, and domestic fishing communities of up to 2,588 purse seine fishing days being annually applied within the U.S. EEZ.

*Response:* Regarding the use of multiple-year periods for the purpose of the fishing effort limits, CMM 2008–01 does not specify that the limits must be implemented on an annual basis or on any other specific time scale. With respect to limiting fishing effort on the high seas, for example, paragraph 10 of CMM 2008–01 states that “the level of purse seine fishing effort in days fished [must] not exceed 2004 levels or the average of 2001–2004.” NMFS considered several alternative time scales for the fishing effort limits, including annual limits (including the calendar-year and the SPTT licensing-year, which runs from June 15 through June 14), a three-year limit, and the combination of one-year, two-year, and three-year limits, all of which NMFS believes are entirely consistent with the relevant requirements of CMM 2008–01. Based on the findings in the EA, RIR, and IRFA, NMFS concluded that the combination of one-year, two-year, and three-year limits would be the best alternative.

CMM 2008–01 does not prohibit WCPFC members from managing areas of high seas and areas under their national jurisdiction as a single area for the purpose of the required limits on fishing effort. NMFS believes that the proposed approach is not only consistent with CMM 2008–01, but also that it is, as concluded in the RIR and IRFA, the approach that would satisfy the requirements of CMM 2008–01 while minimizing adverse economic impacts (the alternative of establishing separate limits for the two areas was also considered in the RIR, IRFA, and EA see response to comment 16).

The objective of CMM 2008–01 is to reduce fishing mortality on bigeye tuna in the WCPO. The WCPFC has consistently treated bigeye tuna in the WCPO as a single stock for management purposes, and the objectives and approach of CMM 2008–01 continue that tradition. The separation in CMM 2008–01 of the high seas-related provisions from the national zone-related provisions has nothing to do

with differing management needs or objectives in the two respective areas. Rather, the two areas are treated separately because of the management approach adopted in CMM 2008–01. Specifically, CMM 2008–01 puts the responsibility to limit fishing effort in areas under national jurisdiction on coastal States, while the responsibility to limit fishing effort in areas of high seas is put on flag States. In the case where a WCPFC member is both a coastal State and a flag State with respect to purse seine vessels, such as the United States, it makes good sense for the WCPFC member to satisfy its dual responsibilities using measures that collectively are as effective and practical as possible. NMFS has attempted to do just that in considering an alternative that would combine the two areas and another alternative that would not. Because both alternatives would accomplish the objective of reducing fishing mortality on WCPO bigeye tuna by the required amount (i.e., by U.S. purse seine vessels operating on the high seas and by purse seine vessels in areas under U.S. jurisdiction, collectively), and because the alternative of combining the two areas is expected to result in lesser adverse economic impacts, NMFS adopted the alternative that would combine the two areas, and NMFS does not find good reason to revise the proposal.

With respect to considering potential impacts on stocks, marine ecosystems, other fisheries, and domestic fishing communities, NMFS has conducted the necessary environmental and economic analyses using the best available information and a reasonable range of assumptions. After considering historical fishing practices and patterns of the U.S. purse seine fleet in the region, NMFS does not agree with the commenter that the scenario presented of 2,588 purse seine fishing days being spent in the U.S. EEZ in a single year (i.e., essentially 100 percent of allowable fishing effort) is a reasonably foreseeable result of this action. During the years 1997–2007, the proportion of total fishing effort by the U.S. WCPO purse seine fleet that occurred in the U.S. EEZ ranged from 3 to 21 percent and averaged 7 percent (see Table 3 in the EA).

*Comment 9:* Regarding the minimum distance that would be required between a purse seine set and a FAD during a FAD prohibition period, the proposed one nautical mile is inadequate in terms of effectiveness and enforceability. A buffer zone of at least 10 miles is necessary to ensure that purse seine vessels do not act as de facto FADs and draw fish away from FADs,

as well as to allow enforcement of the requirement.

*Response:* NMFS has not identified any relevant standard or precedent adopted either in the United States or in international fisheries fora. However, NMFS has considered relevant deliberations in tuna RFMOs and regional fisheries bodies, including those within the Inter-American Tropical Tuna Commission, within the Pacific Islands Forum Fisheries Agency (FFA) on behalf of its members that are Parties to the Nauru Agreement (PNA), and within the WCPFC's Third Intersessional Working Group Regional Observer Programme. Based in part on those deliberations, as well as NMFS' own assessment of what an effective distance would be, NMFS believes that a distance of one nautical mile is appropriate. NMFS believes that the distance of 10 miles proposed by the commenter is impractical, in part because of the difficulty vessel operators would have in recognizing floating objects from such a great distance. NMFS does not find good reason to make any change from the proposed rule, but it recognizes that this aspect of the rule is largely untested, and NMFS intends to closely monitor its effectiveness and enforceability.

*Comment 10:* NMFS proposes to delay implementation of CMM 2008–01's catch retention requirement until an adequate number of observers is available for all (domestic and foreign) purse seine vessels managed under the WCPFC. The United States, whose purse seine fleet is already subject to 20 percent observer coverage, should take an immediate leadership role by implementing this important conservation and management measure as required under CMM 2008–01.

*Response:* Paragraph 27 of CMM 2008–01 states that the catch retention requirement is “subject to the Commission implementing the program in paragraph 28 for 100 percent coverage on purse seine vessels by the observers from the Regional Observer Program.” The proposed “delay” in implementation referred to by the commenter is in fact not a proposal to delay implementation, but simply a proposal to implement this aspect of paragraph 27 of CMM 2008–01.

Specifically, the proposed regulations state that the catch retention requirement is contingent on a determination by NMFS that “an adequate number of WCPFC observers are available for the purse seine vessels of all Members of the Commission as necessary to ensure compliance by such vessels with the catch retention requirements established by the

Commission.” NMFS continues to find this aspect of the proposed rule to be consistent with CMM 2008–01.

*Comment 11:* The provisions in the proposed rule that would allow a purse seine vessel to be used to fish without an observer on board in cases that (1) the fishing trip is restricted entirely to areas under U.S. jurisdiction, or (2) NMFS determines an observer is not available, are inconsistent with paragraphs 13, 14, 28, and 29 of CMM 2008–01, which do not provide exemptions for such cases.

*Response:* Regarding the proposed rule's exemption for fishing trips that take place entirely in areas under U.S. jurisdiction, NMFS believes it is entirely consistent with CMM 2008–01. Paragraph 13 of CMM 2008–01 applies only to the high seas. Paragraphs 28 and 29 of CMM 2008–01 apply only to the following three cases (all within the Convention Area, between 20° N. and 20° S. lat.): (1) fishing exclusively on the high seas, (2) fishing on the high seas and in waters under the jurisdiction of one or more coastal States, and (3) fishing in waters under the jurisdiction of two or more coastal States. The case of fishing in waters under jurisdiction of a single coastal State is not included. This is consistent with the scope of the WCPFC ROP as established in Article 28.4 of the Convention, which states that WCPFC members shall ensure that their fishing vessels operating in the Convention Area are prepared to accept observers from the WCPFC ROP if required by the WCPFC, “except for vessels that operate exclusively within waters under the national jurisdiction of the flag State.” Paragraphs 12 and 14 of CMM 2008–01 speak to observer requirements for 2009 in areas under the jurisdiction of the flag State, but the requirement is only to implement measures that are “compatible” with those required under paragraph 11, which apply only to the WCPFC members that are PNA and not directly to the United States. NMFS finds the measures in the proposed rule to be compatible with those required of the PNA under paragraph 11 and, importantly, finds them consistent with the scope of the WCPFC ROP as established in Article 28.4 of the Convention.

Regarding the proposal to waive the observer requirement in cases that an observer is not available, NMFS agrees that CMM 2008–01 does not explicitly allow WCPFC members to provide exemptions for its vessels in such cases, but disagrees that it may not establish a waiver provision where, through no fault of the vessel, an observer is not available. During the 22 years that U.S.

purse seine vessels have operated in the WCPO, the fleet has maintained a 20-percent observer coverage rate using independent and impartial observers from various Pacific Island countries, deployed by the FFA Regional Observer Programme, based in Honiara, Solomon Islands. FFA observers are authorized to operate in the entire SPTT Area, which includes portions of the U.S. EEZ. Paragraphs 13, 14, 28, and 29 of CMM 2008-01 require that observers from the WCPFC ROP (or, in 2009 only, national observer programs) be deployed on purse seine vessels at levels of either 20 percent (in 2009, outside the FAD prohibition period) or 100 percent (at all other times in the years 2009-2011). The FFA Regional Observer Programme has received interim authorization under the WCPFC ROP, meaning that its observers are considered WCPFC ROP observers. At the 21st SPTT Formal Consultation, in Koror, Palau, the United States and the Pacific Island Parties to the SPTT agreed that the FFA Regional Observer Programme would continue to provide observer coverage for U.S. purse seine vessels as required under the SPTT, as well as provide the observers needed to satisfy the requirements for the United States of paragraphs 13, 14, 28, and 29 of CMM 2008-01. NMFS understands that the FFA is making preparations to move from the current 20-percent coverage rate under the SPTT to the 100-percent coverage rate required of U.S. purse seine vessels that fish any time between August 1 and September 30, 2009. NMFS anticipates that approximately 35 observers would be needed during that period, and that at least that number would be needed throughout 2010 and 2011. NMFS recognizes that accomplishing such a rapid increase may present considerable logistical and training challenges for the FFA Regional Observer Programme, and there is a possibility that the FFA would not be able to provide observers in a timely manner in all cases in which they are needed. The waiver provision included in the proposed rule is intended to address this circumstance, recognizing that fishing vessels could be prohibited from sailing due to circumstances outside their control and not of their making. The waivers would be granted on a trip-by-trip basis, and only upon a determination by the NMFS Pacific Islands Regional Administrator that an observer is not available. NMFS anticipates that such waivers would be granted rarely.

*Comment 12:* It is hoped that if an observer cannot be provided within 24 hours of a vessel's scheduled departure

date for lack of an observer, the vessel would be allowed to go fishing. Also, a fishing vessel should be compensated if its departure is delayed more than 24 hours waiting for an observer to arrive.

*Response:* U.S. purse seine vessels licensed under the SPTT are currently required to accommodate FFA-deployed observers in accordance with the South Pacific Tuna Act of 1988 and its regulations. These observers come from a variety of locations in the Pacific region. Both the FFA and NMFS do everything they can to ensure that observers are placed well before fishing vessels' estimated dates of departure. Scheduled vessel departure dates are merely estimated dates and often change for a variety of reasons unrelated to observer placement. As stated in the response to comment number 11, arrangements have been made with the FFA for observers to be deployed from the FFA Regional Observer Programme to provide the enhanced observer coverage that would be required under the proposed rule. During the 22 years that observers have been deployed on U.S. purse seine vessels under the SPTT, there have been relatively few instances in which vessels have been significantly delayed as a result of FFA observer placement. The proposed rule would allow a vessel to depart without an observer only if the NMFS Pacific Islands Regional Administrator determines that an observer is not available. This provision is intended to be applied in exceptional cases. In all circumstances, this provision would be applied at the sole discretion of the Regional Administrator. NMFS intends to work with the FFA to ensure that the successful record of the past 22 years is maintained. NMFS does not see the need to employ a time limit based on what are merely estimated dates of departure. Nor does NMFS believe that vessel owners or operators should be compensated in the event the departure of the vessel is delayed as a result of waiting for an observer, which could be caused by any number of factors outside the control of both NMFS and the FFA, such as delayed or cancelled airline flights to vessels' ports of departure.

*Comment 13:* The commenter should be provided with copies of the measures implemented by other WCPFC members to implement the WCPFC-adopted sea turtle mitigation requirements for their purse seine fleets.

*Response:* This comment does not pertain to the proposed rule itself. NMFS, as part of U.S. delegations to the WCPFC, routinely endeavors to determine whether all WCPFC members are satisfying their obligations to implement the decisions of the WCPFC,

such as by ascertaining what specific actions they have taken to implement WCPFC-adopted conservation and management measures. This applies to the WCPFC's CMM 2008-03 on sea turtles.

The following comments were specific to the EA prepared for this proposed rule.

*Comment 14:* The EA also analyzes another proposed rule, "Bigeye Tuna Catch Limits in Longline Fisheries in 2009, 2010, and 2011." However, the proposed rule for that action has not yet been published and a preferred alternative for that action has not been designated in the EA. It is unclear why the EA contains analysis of this other rule.

*Response:* As indicated in the "Note to the Reader" issued in conjunction with the draft version of the EA, the proposed rule, "Bigeye Tuna Catch Limits in Longline Fisheries in 2009, 2010, and 2011," is forthcoming. There is no requirement that a proposed rule and a draft EA be issued simultaneously. The Council on Environmental Quality's (CEQ) regulations for implementing the National Environmental Policy Act (NEPA) at 40 CFR § 1508.9 do not require the designation of a preferred alternative in an EA nor do the National Oceanic and Atmospheric Administration's Environmental Review Procedures for Implementing NEPA (NAO 216-6). As stated in Chapter 2 of the EA, for each rule, the EA compares the alternatives analyzed in depth to provide the decisionmaker and the public a clear basis for choosing among the alternatives.

As stated in Chapter 1 of the EA, "The CEQ's regulations at 40 CFR 1508.25(a)(3) state that agencies may analyze similar actions (e.g., actions that have common timing or geography) in the same NEPA document, although they are not required to do so." And further, "both rules stem from the same WCPFC decisions and share common objectives, as well as common timing and geography. Thus, in order to implement the immediately necessary provisions of the recent WCPFC decisions in an efficient manner, NMFS has prepared one EA document for the two proposed rules."

*Comment 15:* The EA should analyze an alternative that would cap purse seine fishing effort at the annual average of 2001-2004, instead of using only the 2004 fishing effort level as the baseline. Moreover, the EA expands the amount of the purse seine fishing effort limit for the high seas and U.S. EEZ by multiplying the 2004 baseline amount by 40, or the maximum number of



vessels allowed to be licensed under the SPTT. The EA should include an alternative that analyzes the fishing effort limit based on the number of vessels that was active in 2004.

*Response:* CMM 2008–01 requires that each WCPFC member take measures to ensure that the level of purse seine fishing effort is based on 2004 levels or the average of 2001–2004. The selection of the baseline period is left to the discretion of the WCPFC member. NMFS is satisfied that using the 2004 baseline period satisfies the requirements of the WCPFC decision without imposing undue or disproportionate burdens on the U.S. purse seine fishing fleet.

NMFS disagrees with the comment that NMFS should have included an alternative in the EA that would base the fishing effort limit on the number of vessels that were active in 2004. CMM 2008–01, paragraph 7, provides for WCPFC members, in determining current levels of fishing effort, to include fishing rights organized under existing regional arrangements such as the SPTT. NMFS properly considered in the EA alternatives that used the 40 non-joint venture licenses authorized under SPTT as a baseline for determining the fishing effort limits under CMM 2008–01. For an expanded discussion, see the response to comment 7.

*Comment 16:* The EA should include an alternative that sets a discrete fishing effort limit for the high seas. The extension of the PNA's Vessel Day Scheme approach to the high seas appears to be inconsistent with the provisions of the CMM 2008–01 that would be implemented in the rule.

*Response:* Alternative D in the EA includes discrete fishing effort limits for the high seas and the U.S. EEZ.

*Comment 17:* The EA should provide detailed analysis of the bigeye tuna catch limit alternative to the high seas FAD prohibition period set forth in paragraph 15 of CMM 2008–01. The EA rejected detailed consideration of this alternative because the United States did not meet the WCPFC's requirements for this alternative before the deadline of January 31, 2009. However, it appears that U.S. representatives declined to act upon this alternative and failed to provide the necessary information and commitments to the WCPFC in a timely manner. This alternative would provide a real incentive to explore methods to minimize bigeye tuna catches and achieve measurable conservation goals, whereas the use of fishing effort limits does not provide any such incentive or hard limit on bigeye tuna mortality. NMFS and U.S. representatives to the

WCPFC should seek an extension of the January 31, 2009 deadline and consider this approach in the 2010–2011 management of the domestic purse seine fishery.

*Response:* The comment is noted. The United States determined that it would not adopt the catch limit measures in paragraph 15 of CMM 2008–01 in lieu of implementing the high seas FAD closure established under paragraph 13. Accordingly, the WCPFC's deadline for proceeding under a catch limit program lapsed, and as stated in the EA, this alternative was not available for detailed consideration. Moreover, the bigeye tuna catch limit was set forth in CMM 2008–01 as an alternative to the high seas FAD prohibition period for 2009, not as an alternative to the fishing effort limit provisions.

*Comment 18:* The EA should consider a bigeye tuna catch limit for the swordfish sector of the longline fishery, which averages about 17 bigeye tuna incidentally caught per set [the commenter subsequently clarified this to mean 17 bigeye tuna per trip], which are brought to shore and sold. Such a catch limit would reduce bycatch, avoid waste, and promote optimum yields.

*Response:* This comment refers to alternatives considered for the other action analyzed in the EA, "Bigeye Tuna Catch Limits in Longline Fisheries in 2009, 2010, and 2011," which is not a part of this rulemaking. Although resubmission of this comment during the proposed rule comment period for that proposed rule is encouraged, NMFS will consider this comment, as appropriate, in the context of the longline-related rule.

*Comment 19:* The EA should include an alternative to the bigeye tuna catch limit for the longline fishery that would utilize the three-year rolling management period that has been proposed for the purse seine fishing effort limits.

*Response:* This comment refers to alternatives considered for the other action analyzed in the EA, "Bigeye Tuna Catch Limits in Longline Fisheries in 2009, 2010, and 2011," which is not a part of this rulemaking. Although resubmission of this comment during the proposed rule comment period for that proposed rule is encouraged, NMFS will consider this comment, as appropriate, in the context of the longline-related rule.

*Comment 20:* Table 4 of the EA provides combined yellowfin tuna and bigeye tuna catch data for 2007 and 2008, including by landing port, and aggregates the information for associated and unassociated fishing. Table 5 provides separate information on

yellowfin tuna and bigeye tuna catches for 2003–2008, including separate information for associated and unassociated fishing, but landing port information is not included. Detailed and fully disaggregated information should be included, discussed, and analyzed so that the differential impacts of the alternatives can be fully considered by decisionmakers and the public based on the best available information.

*Response:* The EA considered four action alternatives for the rule, as well as the No-Action or baseline alternative. Each of the action alternatives included six separate provisions, but only one of those provisions the fishing effort limit provision varied between the alternatives. Including information stating how much bigeye tuna and yellowfin tuna caught by associated or unassociated means is landed at each port would not provide additional information for the comparison of alternatives.

*Comment 21:* The information in Table 5 conflicts with other published reports regarding catches of bigeye tuna by the U.S. purse seine fleet, particularly the 2005 U.S. annual report to the WCPFC. Data in the EA for bigeye tuna catches in the purse seine fleet are incomplete, because they are only provided for the last five years. Moreover, the number for the 2008 bigeye tuna catches of the U.S. purse seine fleet included in Table 5 is inaccurate.

*Response:* NMFS acknowledges the discrepancy between the data in Table 5 of the EA and the information provided in the U.S. annual reports to the WCPFC. The annual reports contain the United States' best available information regarding the U.S. WCPO purse seine fishery's catch statistics. The data in Table 5 are from a report prepared by the Secretariat of the Pacific Community, as cited in the EA, and are based on information from vessel logsheets. As noted in the EA, the 2008 data are preliminary. Table 5 was included in the EA to provide the most recent information NMFS could obtain regarding the amounts of skipjack tuna, yellowfin tuna, and bigeye tuna caught by unassociated and associated sets, respectively. In order to account for any numerical inaccuracies, these data were aggregated and converted to percentages in Section 4.1.2.2 of the EA. This information was then used to support the qualitative analysis of the potential environmental impacts that could be caused by implementation of the FAD prohibition periods. NMFS does not believe that the inclusion of additional data beyond the past five years would

provide information pertinent to the analysis in the EA.

*Comment 22:* Table 8 of the EA conflicts with previously published information regarding catches by Hawaii-based longline vessels. Table 8 indicates that 5,779 metric tons (mt) of bigeye tuna were caught in 2007 while the U.S. report to the WCPFC indicates that 5,400 mt were caught. Also, information contained in the U.S. annual reports to the WCPFC for fishing during 2000–2008 should be included in a specific table format so that the differential impacts of the alternatives can be fully considered by decisionmakers and the public based on the best available information.

*Response:* The comment is noted. The Errata sheet for the Final EA contains a corrected version of Table 8. NMFS does not believe that the inclusion of the 2000–2008 data in the format suggested in the comment would provide information pertinent to the analysis in the EA. Moreover, the data for longline bigeye tuna catches in the U.S. annual reports to the WCPFC are not limited to the Hawaii fleet, and thus, are not comparable to the data in Table 8.

*Comment 23:* The EA fails to discuss the fact that the removal of swordfish effort limits [a separate regulatory action from this rule that would involve implementation of Amendment 18 to the Fishery Management Plan for Pelagic Fisheries in the Western Pacific Region] in the Hawaii longline fishery would result in increased direction of fishing effort toward swordfish and would likely reduce effort directed toward bigeye tuna.

*Response:* As stated in Chapter 5 of the EA, Cumulative Impacts, NMFS indicated that if and when Amendment 18 is implemented, the Hawaii longline fleet may have greater incentive to target swordfish. That, in turn, could lead to reduced fishing effort directed at bigeye tuna.

*Comment 24:* The EA fails to discuss or analyze how and to what magnitude the alternatives for purse seine fishing effort limits would reduce bigeye tuna catches from the available baseline periods.

*Response:* As discussed throughout Chapter 4, Section 4.1 of the EA, the fishing effort limits are not expected to appreciably affect the fleet's total fishing effort (relative to the no-action scenario). Moreover, the baseline for comparing the environmental effects of the alternatives in the EA is the No-Action, or baseline alternative, not the baseline periods used to derive the fishing effort limits.

*Comment 25:* The EA does not contain a comprehensive discussion of

economic or social impacts. There is no analysis of impacts on markets, communities, human nutrition, consumers, etc.

*Response:* As stated in Chapter 4 of the EA, the information regarding economic impacts in the EA is provided solely to determine whether and to what degree economic impacts are interrelated with environmental impacts. Moreover, the EA incorporates by reference the RIR and IRFA for the rule, which contain an appropriate analysis of economic impacts.

*Comment 26:* The cumulative impacts section of the EA is inadequate. A major discrepancy is the lack of discussion of the well documented transfer effects that occur when U.S. seafood production is curtailed and domestic consumption of imported seafood increases in response. If the longline fishery is closed when the bigeye tuna catch limit for that fishery is reached, the demand for bigeye tuna will be met by longline caught tuna imported from other countries, which have less stringent regulations to mitigate environmental impacts, such as interactions with seabirds and sea turtles.

*Response:* The RIR for this rule, which is incorporated by reference into the EA, examines the expected effects of this rule on consumers, including effects on quantities, quality, and prices of products available to U.S. consumers. Consumers in the United States of U.S. purse seine fishery-produced tuna are part of a large global market of tuna sourced from the fleets of many nations and produced from tuna stocks in all the world's oceans. Thus, production by the U.S. purse seine fleet in the WCPO has limited influence on the price, quantity, quality, or source of tuna products consumed in the United States. Moreover, this proposed action is expected to have relatively minor effects on production by the U.S. fleet. Therefore, NMFS believes the transfer effects mentioned in the comment are unlikely to occur.

A portion of this comment refers to the other action analyzed in the EA, "Bigeye Tuna Catch Limits in Longline Fisheries in 2009, 2010, and 2011." As indicated in the "Note to the Reader" issued in conjunction with the draft version of the EA, the proposed rule for that action had not been issued at the time the EA was made available, and the RIR for the longline-related rule consequently had not yet been made publicly available. For that reason, this comment will be addressed in the context of the longline-related rule and the RIR for that action.

*Comment 27:* The Environmental Justice section of the EA does not include sufficient analysis for a determination to be made regarding significant environmental impacts.

*Response:* The purpose of an Environmental Justice analysis is to determine whether a proposed action would have disproportionately high and adverse human health or environmental effects on minority or low-income populations. As discussed throughout the EA and summarized in Chapter 4, Section 4.6, implementation of the provisions in this rule and the longline-related rule would not lead to substantial adverse human health or environmental effects on any population minority, low income, or otherwise.

*Comment 28:* The EA is insufficient to make an informed determination regarding the significance of the likely environmental impacts of the alternatives considered. However, given that the Pacific purse seine fisheries are the biggest tuna fisheries in the world, that longline fishing is the biggest fishery in Hawaii, that many of the measures for purse seine fishing in the WCPO are being considered for the first time, and that there are increasingly loud concerns being expressed by governments and non-governmental organizations regarding overfishing of the world's marine ecosystems, it is clear that the actions being contemplated by NMFS are controversial and preparation of an Environmental Impact Statement (EIS) may better inform the public.

*Response:* NMFS disagrees that the proposed rule is controversial, but even assuming it is, controversy alone is insufficient to trigger the requirement for an EIS. NMFS received only two comment letters in response to the proposed rule. Based on the analysis in the EA, NMFS does not believe that the effects of the action on the quality of the human environment are significant, or that the proposed action or its effects are controversial.

#### Changes from the Proposed Rule

In the proposed regulations, regulatory instruction (3) said that "Subpart O, consisting of §§ 300.210 through 300.222, is added to part 300 to read as follows:" The instruction was meant to read "consisting of §§ 300.210 through 300.222..." and the corresponding instruction in this final rule is corrected accordingly.

On May 22, 2009, NMFS published in the **Federal Register** a proposed rule to implement, in part, the provisions of the Convention (74 FR 23965). The regulations in that proposed rule (called here the "WCPFC implementation



rule”) would establish a new subpart O in part 300 of title 50 of the *Code of Federal Regulations*, titled “Western and Central Pacific Fisheries for Highly Migratory Species.” The proposed rule that led to this final rule (called here the “WCPFC purse seine rule”) was published after the proposed WCPFC implementation rule, on June 1, 2009. Accordingly, the regulations in the proposed WCPFC purse seine rule were written as amendments to subpart O in part 300. However, this final rule is being published before the final WCPFC implementation rule. It is therefore necessary for subpart O of part 300 of title 50 to be created in this final rule, as well as to incorporate relevant elements of the WCPFC implementation rule into these final regulations. Specifically, the following elements of the regulations proposed in the WCPFC implementation rule are included in this final rule: § 300.210, “Purpose and scope,” is included in its entirety. From § 300.211, “Definitions,” the introductory sentence and all the terms used in the proposed WCPFC purse seine rule are included. From § 300.215, “Observers,” paragraph (c), “Accommodating observers,” which is referenced in § 300.223(e)(3) and (4) of the proposed WCPFC purse seine rule and this final rule, is included, with the exception of the sentence “All fishing vessels subject to this section must carry a WCPFC observer when directed to do so by NMFS.” From § 300.222, “Prohibitions,” the introductory sentence is included.

In § 300.211, “Definitions,” the definition of FAD has been revised to clarify that it does not include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish.

In § 300.223, “Purse seine fishing restrictions,” in order to clarify when, exactly, all the specified dates begin and end, an introductory sentence is included that states that all dates used in this section are in Universal Coordinated Time, also known as UTC.

In § 300.223, “Purse seine fishing restrictions,” paragraph (b)(2) is revised to add that during a FAD prohibition period, a purse seine may not be set in an area in which a FAD has been inspected or handled within the previous eight hours.

In § 300.223, “Purse seine fishing restrictions,” paragraph (b)(4) is revised to clarify that during a FAD prohibition period, a FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water.

## Classification

The NMFS Assistant Administrator has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

### *Administrative Procedure Act*

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date for all of this final rule except §§ 300.222(aa) and 300.223(f) (the sea turtle mitigation requirements and associated prohibitions). Compliance with the 30-day requirement would be impracticable and contrary to the public interest the FAD prohibition period and associated observer requirement would be in effect for only about half of the specified period in 2009, meaning that NMFS would be frustrated in promulgating the regulations needed to satisfy the international obligations of the United States under the Convention. Also, NMFS had limited notice of the need to implement CMM 2008–01, which was adopted in the December 2008 regular annual session of the WCPFC.

### *National Environmental Policy Act*

NMFS prepared an EA for this rule and concluded that there will be no significant impact on the human environment as a result of this rule. In the EA, NMFS compared the effects of the rule and four alternatives to the rule, including the No-Action or baseline alternative and three action alternatives. Although the alternatives would likely result in slightly different environmental impacts, all alternatives would have only minor impacts on bigeye tuna and other living marine resources in the WCPO. Overall, the expected impacts on bigeye tuna and other living marine resources from the rule or any of the action alternatives are expected to be similar and generally beneficial. The EA focuses on analyzing four alternatives for implementing the limit on the number of fishing days. NMFS initially considered two alternatives to the FAD prohibition period element of the rule that were eliminated from detailed consideration. For the other elements of the rule, NMFS was not able to identify any alternatives that were reasonable and feasible. The rule is neither the most restrictive nor the least restrictive manner in which to implement the limit on the number of fishing days. Rather, the rule seeks to establish a balance between the needs of fishery participants and the effects on the human environment.

The effects on the human environment from the rule are expected to be minor for the following reasons. First, the duration of the rule (with the exception of the sea turtle mitigation requirements) would be limited to three years, after which, unless similar or more restrictive future actions are taken, conditions would likely rebound to conditions similar to those under the No-Action or baseline alternative. Second, the rule would have relatively minor effects on the conduct or catches of the U.S. purse seine fleet, and consequently only minor effects on the total fishing mortality rates of the stocks captured by the fleet, including bigeye tuna and yellowfin tuna in the WCPO. However, other present and reasonably foreseeable future actions for the conservation and management of highly migratory species could cause similar beneficial effects, so overall, the cumulative impacts on the affected environment could be greater than if the rule were implemented in isolation. Specifically, implementation by the United States of the provisions of CMM 2008–01 applicable to longline vessels (which NMFS is undertaking via a separate rulemaking) and implementation by other WCPFC members of the provisions of CMM 2008–01 and CMM 2008–03 would enhance the beneficial impacts to bigeye tuna, yellowfin tuna, and other living marine resources. If the WCPFC adopts and its members implement similar or more restrictive measures after the three-year duration of CMM 2008–01, the beneficial impacts would be further enhanced (e.g., there could be a greater likelihood of attaining the objectives of CMM 2008–01).

The economic impacts of the rule are addressed in the EA only insofar as they are related to impacts to the biophysical environment. They are addressed more fully in the RIR, IRFA, and FRFA. A copy of the EA is available from NMFS (see ADDRESSES).

### *Executive Order 12866*

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

### *Regulatory Flexibility Act*

NMFS prepared this final regulatory flexibility analysis (FRFA) for the rule, Fishing Restrictions and Observer Requirements in Purse Seine Fisheries for 2009–2011 and Turtle Mitigation Requirements in Purse Seine Fisheries. The FRFA incorporates the IRFA prepared for the proposed rule (74 FR 26160; June 1, 2009; available from NMFS see ADDRESSES). The analysis

provided in the IRFA is not repeated here in its entirety.

The need for, reasons why action by the agency is being considered, and the objectives of the action are explained in the preambles to the proposed rule and final rule and are not repeated here. There are no disproportionate economic impacts between small and large vessels resulting from this rule. Furthermore, there are no disproportionate economic impacts from this rule based on vessel size, gear, or homeport. There are no new recordkeeping or reporting requirements associated with this rule. Other compliance requirements are described in the IRFA. This rule is issued under authority of the WCPFC Implementation Act.

#### **Description of Small Entities to Which the Rule Will Apply**

The rule will apply to owners and operators of U.S. purse seine vessels used for fishing in the Convention Area. The number of affected vessels is the number licensed under the SPTT. The current number of licensed vessels is 39, but the number could soon reach the maximum number of licenses available under the SPTT (excluding joint-venture licenses), which is 40. Based on (limited) financial information about the purse seine fleet, NMFS believes that as many as 10 of the affected vessels are owned by small entities (i.e., they are business entities with gross annual receipts of no more than \$4.0 million).

#### **Steps Taken To Minimize the Significant Economic Impact on Small Entities**

NMFS explored alternatives that would achieve the objective of this action (to satisfy the international obligations of the United States under WCPFC CMM 2008–01 and CMM 2008–03 with respect to U.S. purse seine vessels) while minimizing economic impacts on small entities. Several alternatives were identified and considered. All were limited to the way in which the fishing effort limits would be implemented. One alternative differed from the rule only in that the fishing effort limits would be allocated among individual vessels. This would likely alleviate any adverse impacts of the race-to-fish that might occur as a result of establishing the competitive fishing effort limits as in the rule. As described in the IRFA, those potential impacts include lower prices for landed product and risks to performance and safety stemming from fishing during sub-optimal times. However, as described in the IRFA, the fishing effort limits are not very constraining (i.e., the level of effort expected under no-action

is not much greater, if greater at all, than the level to which effort would be limited under this rule), so these adverse impacts are expected to be minor. For that reason, this alternative was rejected.

Another alternative differed from the rule only in that there would be a single limit of 7,764 fishing days (three times the fishing effort rate of 2,588 fishing days per year) for the entire three-year period 2009–2011. This would provide slightly more operational flexibility to affected vessels than the rule, which could bring lower compliance costs. However, the lack of any limits for a given year would bring the potential for a longer closed period (e.g., during a substantial part of 2011) than would likely occur under the rule (under which relatively brief closures might be expected in one or more of the years 2009–2011). To the extent that continuous fishing and continuity of supply are important for the fishery, several short closures might cause less adverse economic impacts than a single long closure, and for this reason, this alternative was rejected. For example, with a brief closure each year, vessel owners and operators might be able to schedule routine vessel maintenance during the closed periods and mitigate the losses of not being able to fish. This would be more difficult to do during a longer closed period. In any case, as described in the IRFA, because the majority of the fleet's traditional fishing grounds would not be subject to the limit or the closure, the potential losses caused by a closed period however short or long are likely to be relatively minor.

Another alternative would establish separate fishing effort limits for the high seas and for areas under U.S. jurisdiction and separate limits for each of the SPTT licensing years (which run from June 15 through June 14) during 2009–2011. In accordance with the baseline effort levels specified in CMM 2008–01, the limits would be 2,030 fishing days on the high seas and 558 fishing days in areas under U.S. jurisdiction. Because this alternative would provide less operational flexibility for affected purse seine vessels, the limits would be more constraining than those established under the rule, and consequently more costly. It was rejected for that reason.

The alternative of taking no action at all was rejected because it would fail to accomplish the objective of the WCPFC Implementation Act or satisfy the international obligations of the United States as a Contracting Party to the Convention.

The selected alternative would accomplish the objective of the WCPFC

Implementation Act and satisfy the international obligations of the United States with respect to implementing WCPFC CMM 2008–01 and CMM 2008–03, and do so with minimal adverse economic impacts on small entities, and for these reasons was adopted in the final rule.

#### **Comments and Responses**

*Comment 1:* The IRFA fails to consider an appropriate range of alternatives and appears to be lacking some required information and analyses. The analysis should also include an examination of the differential impacts of the alternatives on U.S.-built purse seine vessels versus foreign-built purse seine vessels.

*Response:* With respect to the range of analyses considered in the IRFA, NMFS disagrees with the comment. All the alternatives analyzed in detail in the EA were also considered in the IRFA, and NMFS finds those alternatives to comprise an appropriate range in the contexts of both NEPA and the Regulatory Flexibility Act.

With respect to differential impacts on the two types of vessels, a vessel built or rebuilt outside the United States, with limited exceptions, is not eligible for a fishery endorsement on its certificate of documentation and consequently is not authorized to be used for fishing in the U.S. EEZ. Therefore, under the no-action alternative, as well as under the proposed rule and all the action alternatives, U.S.-built vessels with fishery endorsements would have an advantage over the remainder of the U.S. purse seine fleet. The proposed rule would not alter the legal requirements with respect to eligibility for fishery endorsements, and it does not include any provisions that apply differently to U.S.-built vessels than to foreign-built vessels. Among the 39 U.S. purse seine vessels currently licensed under the SPTT and which would be directly affected by this rule, 11 have fishery endorsements and 28 do not. To give an indication of the magnitude of the advantage, in the years 1997–2007, the portion of the fleet's annual fishing effort (in days fished) that was spent in the U.S. EEZ (necessarily by vessels with fishery endorsements only) averaged seven percent (NMFS unpublished data), and through most of that period, the ratio in the number of vessels with fishery endorsements to the number without fishery endorsements was considerably higher than it is now. NMFS recognizes that two elements of the proposed rule would have the potential to enhance or diminish this advantage, as follows.

With respect to the fishing effort limits, once a limit is reached, vessels with fishery endorsements would be prohibited from fishing in a somewhat larger area (high seas plus U.S. EEZ in the Convention Area) than the area in which the vessels without fishery endorsements would be prohibited from fishing (only the high seas in the Convention Area). In absolute terms, therefore, operators of vessels with fishery endorsements could bear greater losses as a result of a limit being reached than operators of vessels without fishery endorsements. In relative terms, however, the expected impacts on the two types of vessels are the same: vessels of both types would be expected to experience approximately the same losses in terms of the proportion of revenues or profits that would be lost. Also, there would not be any differential impact at all until a limit is reached, and as described in the IRFA, the likelihood of a limit being reached in any given limit-period may not be high. Furthermore, as described in the IRFA, even if a limit is reached, the expected economic impacts, considering opportunity costs, are expected to be minor, since the most of the fleet's traditional fishing grounds—that is, foreign EEZs within the Convention Area, as well as the eastern Pacific Ocean—would remain open to fishing. In sum, the fishing effort limits would not be expected to bring substantial differential impacts according to whether a vessel is U.S.-built or foreign-built.

The high seas closed areas, in contrast to the fishing effort limits, could cause vessels without fishery endorsements to bear greater losses than vessels with fishery endorsements, since the former would be excluded from a greater proportion of their otherwise available fishing grounds than would vessels with fishery endorsements. As described in the IRFA, the economic impacts of the high seas closed areas, considering opportunity costs, are expected to be relatively minor because most of the fleet's traditional fishing grounds would remain open. Therefore, the high seas closed areas would not be expected to bring substantial differential impacts according to whether a vessel is U.S.-built or foreign-built.

None of the other elements of the proposed rule, including the FAD prohibition periods, catch retention requirements, observer coverage requirements, or turtle mitigation requirements, would be expected to have differential impacts according to whether a vessel is U.S.-built or foreign-built.

### Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide (the guide) has been prepared. The guide will be sent to all holders of purse seine licenses issued pursuant to regulations implementing the South Pacific Tuna Act of 1988. Copies of this final rule and the guide are available from NMFS (see **ADDRESSES**) and are available at: [http://www.fpir.noaa.gov/IFD/ifd\\_documents\\_data.html](http://www.fpir.noaa.gov/IFD/ifd_documents_data.html).

### List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: July 29, 2009.

**Samuel D. Rauch III,**

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

■ For the reasons set out in the preamble, 50 CFR part 300 is amended by adding subpart O, consisting of §§ 300.210 through 300.223, to read as follows:

### PART 300—INTERNATIONAL FISHERIES REGULATIONS

#### Subpart O—Western and Central Pacific Fisheries for Highly Migratory Species

Sec.

- 300.210 Purpose and scope.
- 300.211 Definitions.
- 300.212 Vessel permit endorsements. [Reserved]
- 300.213 Vessel information. [Reserved]
- 300.214 Compliance with laws of other nations. [Reserved]
- 300.215 Observers.
- 300.216 Transshipment. [Reserved]
- 300.217 Vessel identification. [Reserved]
- 300.218 Reporting and recordkeeping requirements. [Reserved]
- 300.219 Vessel monitoring system. [Reserved]
- 300.220 Confidentiality of information. [Reserved]
- 300.221 Facilitation of enforcement and inspection. [Reserved]
- 300.222 Prohibitions.
- 300.223 Purse seine fishing restrictions.

Authority: 16 U.S.C. 6901 *et seq.*

#### Subpart O—Western and Central Pacific Fisheries for Highly Migratory Species

##### § 300.210 Purpose and scope.

This subpart implements provisions of the Western and Central Pacific Fisheries Convention Implementation Act (Act) and applies to persons and vessels subject to the jurisdiction of the United States.

##### § 300.211 Definitions.

In addition to the terms defined in § 300.2 and those in the Act and in the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, with Annexes (WCPF Convention), which was adopted at Honolulu, Hawaii, on September 5, 2000, by the Multilateral High-Level Conference on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, the terms used in this subpart have the following meanings.

*Commission* means the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean established in accordance with the WCPF Convention, including its employees and contractors.

*Convention Area* means all waters of the Pacific Ocean bounded to the south and to the east by the following line: From the south coast of Australia due south along the 141st meridian of east longitude to its intersection with the 55th parallel of south latitude; thence due east along the 55th parallel of south latitude to its intersection with the 150th meridian of east longitude; thence due south along the 150th meridian of east longitude to its intersection with the 60th parallel of south latitude; thence due east along the 60th parallel of south latitude to its intersection with the 130th meridian of west longitude; thence due north along the 130th meridian of west longitude to its intersection with the 4th parallel of south latitude; thence due west along the 4th parallel of south latitude to its intersection with the 150th meridian of west longitude; thence due north along the 150th meridian of west longitude.

*Effort Limit Area for Purse Seine*, or *ELAPS*, means, within the area between 20° N. latitude and 20° S. latitude, areas within the Convention Area that either are high seas or are within the jurisdiction of the United States, including the EEZ and territorial sea.

*Fish aggregating device*, or *FAD*, means any artificial or natural floating object, whether anchored or not and

whether situated at the water surface or not, that is capable of aggregating fish, as well as any objects used for that purpose that are situated on board a vessel or otherwise out of the water. The meaning of FAD does not include a fishing vessel, provided that the fishing vessel is not used for the purpose of aggregating fish.

*Fishing* means using any vessel, vehicle, aircraft or hovercraft for any of the following activities, or attempting to do so:

(1) Searching for, catching, taking, or harvesting fish;

(2) Engaging in any other activity which can reasonably be expected to result in the locating, catching, taking, or harvesting of fish for any purpose;

(3) Placing, searching for, or recovering fish aggregating devices or associated electronic equipment such as radio beacons;

(4) Engaging in any operations at sea directly in support of, or in preparation for, any of the activities previously described in paragraphs (1) through (3) of this definition, including, but not limited to, bunkering;

(5) Engaging in transshipment, either unloading or loading fish.

*Fishing day* means, for the purpose of § 300.223, any day in which a fishing vessel of the United States equipped with purse seine gear searches for fish, deploys a FAD, services a FAD, or sets a purse seine, with the exception of setting a purse seine solely for the purpose of testing or cleaning the gear and resulting in no catch.

*Fishing trip* means a period that a fishing vessel spends at sea between port visits and during which any fishing occurs.

*Fishing vessel* means any vessel used or intended for use for the purpose of fishing, including bunkering and other support vessels, carrier vessels and other vessels that unload or load fish in a transshipment, and any other vessel directly involved in fishing.

*High seas* means the waters beyond the territorial sea or exclusive economic zone (or the equivalent) of any nation, to the extent that such territorial sea or exclusive economic zone (or the equivalent) is recognized by the United States.

*Member of the Commission* means any Contracting Party to the WCPF Convention, and, unless otherwise stated in context, any territory that has been authorized by an appropriate Contracting Party to participate in the Commission and its subsidiary bodies pursuant to Article 43 of the WCPF Convention and any fishing entity that has agreed to be bound by the regime established by the WCPF Convention

pursuant to Annex I of the WCPF Convention.

*Pacific Islands Regional Administrator* means the Regional Administrator, Pacific Islands Region, NMFS, or a designee (1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814).

*Person* means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

*Purse seine* means a floated and weighted encircling net that is closed by means of a drawstring threaded through rings attached to the bottom of the net.

*State* means each of the several States of the United States, the District of Columbia, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

*Transshipment* means the unloading of fish from one fishing vessel and its direct transfer to, and loading on, another fishing vessel, either at sea or in port.

*WCPF Convention* means the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (including any annexes, amendments, or protocols that are in force, or have come into force, for the United States) that was adopted at Honolulu, Hawaii, on September 5, 2000, by the Multilateral High-Level Conference on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

*WCPFC observer* means a person authorized by the Commission in accordance with any procedures established by the Commission to undertake vessel observer duties as part of the Commission's Regional Observer Programme, including an observer deployed as part of a NMFS-administered observer program or as part of another national or sub-regional observer program, provided that such program is authorized by the Commission to be part of the Commission's Regional Observer Programme.

**§ 300.212 Vessel permit endorsements.** [Reserved]

**§ 300.213 Vessel information.** [Reserved]

**§ 300.214 Compliance with laws of other nations.** [Reserved]

**§ 300.215 Observers.**

(a) *Applicability.* [Reserved]

(b) *Notifications.* [Reserved]

(c) *Accommodating observers.* The operator and each member of the crew of the fishing vessel shall act in accordance with this paragraph with respect to any WCPFC observer.

(1) The operator and crew shall allow and assist WCPFC observers to:

(i) Embark at a place and time determined by NMFS or otherwise agreed to by NMFS and the vessel operator;

(ii) Have access to and use of all facilities and equipment on board as necessary to conduct observer duties, including, but not limited to: full access to the bridge, the fish on board, and areas which may be used to hold, process, weigh and store fish; full access to the vessel's records, including its logs and documentation, for the purpose of inspection and copying; access to, and use of, navigational equipment, charts and radios; and access to other information relating to fishing;

(iii) Remove samples;

(iv) Disembark at a place and time determined by NMFS or otherwise agreed to by NMFS and the vessel operator; and

(v) Carry out all duties safely.

(2) The operator shall provide the WCPFC observer, while on board the vessel, with food, accommodation and medical facilities of a reasonable standard equivalent to those normally available to an officer on board the vessel, at no expense to the WCPFC observer.

(3) The operator and crew shall not assault, obstruct, resist, delay, refuse boarding to, intimidate, harass or interfere with WCPFC observers in the performance of their duties, or attempt to do any of the same.

(d) *Related observer requirements.* [Reserved]

**§ 300.216 Transshipment.** [Reserved]

**§ 300.217 Vessel identification.** [Reserved]

**§ 300.218 Reporting and recordkeeping requirements.** [Reserved]

**§ 300.219 Vessel monitoring system.** [Reserved]

**§ 300.220 Confidentiality of information.** [Reserved]

**§ 300.221 Facilitation of enforcement and inspection.** [Reserved]

**§ 300.222 Prohibitions.**

In addition to the prohibitions in § 300.4, it is unlawful for any person to:

(a) through (u) [Reserved]

(v) Use a fishing vessel equipped with purse seine gear to fish in the ELAPS while the fishery is closed under § 300.223(a).

(w) Set a purse seine around, near or in association with a FAD or deploy or service a FAD in contravention of § 300.223(b).

(x) Use a fishing vessel equipped with purse seine gear to fish in an area closed under § 300.223(c).

(y) Discard fish at sea in the ELAPS in contravention of § 300.223(d).

(z) Fail to carry an observer as required in § 300.223(e).

(aa) Fail to comply with the sea turtle mitigation gear and handling requirements of § 300.223(f).

### § 300.223 Purse seine fishing restrictions.

All dates used in this section are in Universal Coordinated Time, also known as UTC; for example: the year 2009 starts at 00:00 on January 1, 2009 UTC and ends at 24:00 on December 31, 2009 UTC; and August 1, 2009, begins at 00:00 UTC and ends at 24:00 UTC.

(a) *Fishing effort limits.* This section establishes limits on the number of fishing days that fishing vessels of the United States equipped with purse seine gear may collectively spend in the ELAPS.

(1) The limits are as follows:

(i) For each of the years 2009, 2010, and 2011, there is a limit of 3,882 fishing days.

(ii) For each of the two-year periods 2009–2010 and 2010–2011, there is a limit of 6,470 fishing days.

(iii) For the three-year period 2009–2011, there is a limit of 7,764 fishing days.

(2) NMFS will determine the number of fishing days spent in the ELAPS in each of the applicable time periods using data submitted in logbooks and other available information. After NMFS determines that the limit in any applicable time period is expected to be reached by a specific future date, and at least seven calendar days in advance of the closure date, NMFS will publish a notice in the **Federal Register** announcing that the purse seine fishery in the ELAPS will be closed starting on that specific future date and will remain closed until the end of the applicable time period.

(3) Once a fishery closure is announced pursuant to paragraph (a)(2) of this section, fishing vessels of the United States equipped with purse seine gear may not be used to fish in the ELAPS during the period specified in the **Federal Register** notice.

(b) *Use of fish aggregating devices.* From August 1 through September 30, 2009, and from July 1 through September 30 in each of 2010 and 2011, owners, operators, and crew of fishing vessels of the United States shall not do any of the following in the Convention Area:

(1) Set a purse seine around a FAD or within one nautical mile of a FAD.

(2) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD, such as by setting the purse seine in an area from which a FAD has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD.

(3) Deploy a FAD into the water.

(4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that:

(i) A FAD may be inspected and handled as needed to identify the owner of the FAD, identify and release incidentally captured animals, unfoul fishing gear, or prevent damage to property or risk to human safety; and

(ii) A FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water.

(c) *Closed areas.* (1) Effective January 1, 2010, through December 31, 2011, a fishing vessel of the United States may not be used to fish with purse seine gear on the high seas within either Area A or Area B, the respective boundaries of which are the four lines connecting, in the most direct fashion, the coordinates specified as follows:

(i) Area A: 7° N. latitude and 134° E. longitude; 7° N. latitude and 153° E. longitude; 0° latitude and 153° E. longitude; and 0° latitude and 134° E. longitude.

(ii) Area B: 4° N. latitude and 156° E. longitude; 4° N. latitude and 176° E. longitude; 12° S. latitude and 176° E. longitude; and 12° S. latitude and 156° E. longitude.

(2) NMFS may, through publication of a notice in the **Federal Register**, nullify any or all of the area closures specified in paragraph (c)(1) of this section.

(d) *Catch retention.* (1) Based on its determination as to whether an adequate number of WCPFC observers is available for the purse seine vessels of all Members of the Commission as necessary to ensure compliance by such vessels with the catch retention requirements established by the Commission, NMFS will, through publication of a notice in the **Federal Register**, announce the effective date of the provisions of paragraph (d) of this section. The effective date will be no earlier than January 1, 2010.

(2) If, after announcing the effective date of these requirements under

paragraph (1) of this section, NMFS determines that there is no longer an adequate number of WCPFC observers available for the purse seine vessels of all Members of the Commission as necessary to ensure compliance by such vessels with the catch retention requirements established by the Commission, NMFS may, through publication of a notice in the **Federal Register**, nullify any or all of the requirements specified in paragraph (d) of this section.

(3) Effective from the date announced pursuant to paragraph (d)(1) of this section through December 31, 2011, a fishing vessel of the United States equipped with purse seine gear may not discard at sea within the Convention Area any bigeye tuna (*Thunnus obesus*), yellowfin tuna (*Thunnus albacares*), or skipjack tuna (*Katsuwonus pelamis*), except in the following circumstances and with the following conditions:

(i) Fish that are unfit for human consumption, including but not limited to fish that are spoiled, pulverized, severed, or partially consumed at the time they are brought on board, may be discarded.

(ii) If at the end of a fishing trip there is insufficient well space to accommodate all the fish captured in a given purse seine set, fish captured in that set may be discarded, provided that no additional purse seine sets are made during the fishing trip.

(iii) If a serious malfunction of equipment occurs that necessitates that fish be discarded.

(e) *Observer coverage.* (1) From August 1 through September 30, 2009, a fishing vessel of the United States that is equipped with purse seine gear may not be used to fish in the Convention Area without a WCPFC observer or an observer deployed by NMFS on board. This requirement does not apply to fishing trips that meet any of the following conditions:

(i) The portion of the fishing trip within the Convention Area takes place entirely within areas under U.S. jurisdiction or entirely within areas under jurisdiction of a single nation other than the United States.

(ii) No fishing takes place during the fishing trip in the Convention Area in the area between 20° N. latitude and 20° S. latitude.

(iii) The Pacific Islands Regional Administrator has determined that an observer is not available for the fishing trip and a written copy of the Pacific Islands Regional Administrator's determination, which must include the approximate start date of the fishing trip and the port of departure, is carried on

board the fishing vessel during the entirety of the fishing trip.

(2) Effective January 1, 2010, through December 31, 2011, a fishing vessel of the United States may not be used to fish with purse seine gear in the Convention Area without a WCPFC observer on board. This requirement does not apply to fishing trips that meet any of the following conditions:

(i) The portion of the fishing trip within the Convention Area takes place entirely within areas under U.S. jurisdiction or entirely within the areas under jurisdiction of a single nation other than the United States.

(ii) No fishing takes place during the fishing trip in the Convention Area in the area between 20° N. latitude and 20° S. latitude.

(iii) The Pacific Islands Regional Administrator has determined that a WCPFC observer is not available for the fishing trip and a written copy of the Pacific Islands Regional Administrator's determination, which must include the approximate start date of the fishing trip and the port of departure, is carried on board the fishing vessel during the entirety of the fishing trip.

(3) Owners, operators, and crew of fishing vessels subject to paragraphs (e)(1) or (e)(2) of this section must accommodate WCPFC observers in accordance with the provisions of § 300.215(c).

(4) Meeting any of the conditions in paragraphs (e)(1)(i), (e)(1)(ii), (e)(1)(iii), (e)(2)(i), (e)(2)(ii), or (e)(2)(iii) of this section does not exempt a fishing vessel from having to carry and accommodate a WCPFC observer pursuant to § 300.215 or other applicable regulations.

(f) *Sea turtle take mitigation measures.* (1) Possession and use of required mitigation gear. Any owner or operator of a fishing vessel of the United States equipped with purse seine gear that is used to fish in the Convention Area must carry aboard the vessel the following gear:

(i) *Dip net.* A dip net is intended to facilitate safe handling of sea turtles and access to sea turtles for purposes of removing sea turtles from fishing gear, bringing sea turtles aboard the vessel when appropriate, and releasing sea turtles from the vessel. The minimum design standards for dip nets that meet the requirements of this section are:

(A) *An extended reach handle.* The dip net must have an extended reach handle with a minimum length of 150 percent of the freeboard height. The extended reach handle must be made of wood or other rigid material able to support a minimum of 100 lb (34.1 kg) without breaking or significant bending or distortion.

(B) *Size of dip net.* The dip net must have a net hoop of at least 31 inches (78.74 cm) inside diameter and a bag depth of at least 38 inches (96.52 cm). The bag mesh openings may be no more than 3 inches 3 inches (7.62 cm 7.62 cm) in size.

(ii) *Optional turtle hoist.* A turtle hoist is used for the same purpose as a dip net. It is not a required piece of gear, but a turtle hoist may be carried on board and used instead of the dip net to handle sea turtles as required in paragraph (f)(2) of this section. The minimum design standards for turtle hoists that are used instead of dip nets to meet the requirements of this section are:

(A) *Frame and net.* The turtle hoist must consist of one or more rigid frames to which a bag of mesh netting is securely attached. The frame or smallest of the frames must have a minimum opening (e.g., inside diameter, if circular in shape) of 31 inches (78.74 cm) and be capable of supporting a minimum of 100 lb (34.1 kg). The frame or frames may be hinged or otherwise designed so they can be folded for ease of storage, provided that they have no sharp edges and can be quickly reassembled. The bag mesh openings may be no more than 3 inches x 3 inches (7.62 cm x 7.62 cm) in size.

(B) *Lines.* Lines used to lower and raise the frame and net must be securely attached to the frame in multiple places such that the frame remains stable when lowered and raised.

(2) *Handling requirements.* Any owner or operator of a fishing vessel of the United States equipped with purse seine gear that is used to fish in the Convention Area must, if a sea turtle is observed to be enclosed or entangled in a purse seine, a FAD, or other fishing gear, comply with these handling requirements, including using the required mitigation gear specified in paragraph (f)(1) of this section as prescribed in these handling requirements. Any captured or entangled sea turtle must be handled in a manner to minimize injury and promote survival.

(i) *Sea turtles enclosed in purse seines.* If the sea turtle is observed enclosed in a purse seine but not entangled, it must be released immediately from the purse seine with the dip net or turtle hoist.

(ii) *Sea turtles entangled in purse seines.* If the sea turtle is observed entangled in a purse seine, the net roll must be stopped as soon as the sea turtle comes out of the water, and must not start again until the turtle has been disentangled and released. The sea turtle must be handled and released in

accordance with paragraphs (f)(2)(iv), (f)(2)(v), (f)(2)(vi), and (f)(2)(vii) of this section.

(iii) *Sea turtles entangled in FADs.* If the sea turtle is observed entangled in a FAD, it must be disentangled or the FAD must be cut immediately so as to remove the sea turtle. The sea turtle must be handled and released in accordance with paragraphs (f)(2)(iv), (f)(2)(v), (f)(2)(vi), and (f)(2)(vii) of this section.

(iv) *Disentangled sea turtles that cannot be brought aboard.* After disentanglement, if the sea turtle is not already on board the vessel and it is too large to be brought aboard or cannot be brought aboard without sustaining further injury, it shall be left where it is in the water, or gently moved, using the dip net or turtle hoist if necessary, to an area away from the fishing gear and away from the propeller.

(v) *Disentangled sea turtles that can be brought aboard.* After disentanglement, if the sea turtle is not too large to be brought aboard and can be brought aboard without sustaining further injury, the following actions shall be taken:

(A) Using the dip net or a turtle hoist, the sea turtle must be brought aboard immediately; and

(B) The sea turtle must be handled in accordance with the procedures in paragraphs (f)(2)(vi) and (f)(2)(vii) of this section.

(vi) *Sea turtle resuscitation.* If a sea turtle brought aboard appears dead or comatose, the following actions must be taken:

(A) The sea turtle must be placed on its belly (on the bottom shell or plastron) so that it is right side up and its hindquarters elevated at least 6 inches (15.24 cm) for a period of no less than 4 hours and no more than 24 hours. The amount of the elevation varies with the size of the sea turtle; greater elevations are needed for larger sea turtles;

(B) A reflex test must be administered at least once every 3 hours. The test is to be performed by gently touching the eye and pinching the tail of a sea turtle to determine if the sea turtle is responsive;

(C) The sea turtle must be kept shaded and damp or moist (but under no circumstances place the sea turtle into a container holding water). A water-soaked towel placed over the eyes (not covering the nostrils), carapace and flippers is the most effective method of keeping a sea turtle moist; and

(D) If the sea turtle revives and becomes active, it must be returned to the sea in the manner described in paragraph (f)(2)(vii) of this section. Sea



turtles that fail to revive within the 24-hour period must also be returned to the sea in the manner described in paragraph (f)(2)(vii) of this section, unless NMFS requests that the turtle or part thereof be kept on board and delivered to NMFS for research purposes.

(vii) *Sea turtle release.* After handling a sea turtle in accordance with the requirements of paragraphs (f)(2)(v) and (f)(2)(vi) of this section, the sea turtle must be returned to the ocean after identification unless NMFS requests the retention of a dead sea turtle for research. In releasing a sea turtle the vessel owner or operator must:

(A) Place the vessel engine in neutral gear so that the propeller is disengaged and the vessel is stopped;

(B) Using the dip net or a turtle hoist to release the sea turtle with little impact, gently release the sea turtle away from any deployed gear; and

(C) Observe that the turtle is safely away from the vessel before engaging the propeller and continuing operations.

(viii) *Other sea turtle requirements.* No sea turtle, including a dead turtle, may be consumed or sold. A sea turtle may be landed, offloaded, transshipped or kept below deck only if NMFS requests the retention of a dead sea turtle or a part thereof for research.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 09100091344-9056-02]

RIN 0648-XQ72

#### Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the West Yakutat District of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific ocean perch in the West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2009 total allowable catch (TAC) of Pacific ocean perch in the West Yakutat District of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), July 31, 2009, through 2400 hrs, A.l.t., December 31, 2009.

**FOR FURTHER INFORMATION CONTACT:** Patty Britza, 907-586-7376.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2009 TAC of Pacific ocean perch in the West Yakutat District of the GOA is 1,108 metric tons (mt) as established by the final 2009 and 2010 harvest specifications for groundfish of the GOA (74 FR 7333, February 17, 2009).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2009 TAC of Pacific ocean perch in the West Yakutat District of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,098 mt, and is setting aside the remaining 10 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting

directed fishing for Pacific ocean perch in the West Yakutat District of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

#### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific ocean perch in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 29, 2009.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: July 30, 2009.

**Kristen C. Koch,**

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

[FR Doc. E9-18582 Filed 7-30-09; 8:45 am]

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