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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 180810748-8814-01]

RIN 0648-BI43

**Pacific Island Fisheries; Hawaii Shallow-set Pelagic
Longline Fishery; Court Order**

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

ACTION: Final rule.

SUMMARY: This final rule revises from 34 to 17 the annual number of allowable incidental interactions that may occur between the Hawaii shallow-set pelagic longline fishery and North Pacific loggerhead sea turtles, in compliance with an order of the U.S. District Court, District of Hawaii.

DATES: Effective January 1, 2019.

FOR FURTHER INFORMATION CONTACT: Bob Harman, NMFS Pacific Islands Regional Office, 808-725-5170.

SUPPLEMENTARY INFORMATION: On January 30, 2012, NMFS completed a biological opinion (2012 BiOp) on the effects of the Hawaii shallow-set longline fishery on marine species listed as threatened or endangered under the

Endangered Species Act (ESA). The 2012 BiOp superseded a February 23, 2004, BiOp on the effects of Pacific Island pelagic fisheries, including shallow-set longline fishing, on ESA-listed marine species (2004 BiOp). In the 2012 BiOp, NMFS concluded that the continued operation of the Hawaii shallow-set fishery, as managed under the regulatory framework of the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific (FEP), was not likely to jeopardize the continued existence of any ESA-listed species or result in destruction or adverse modification of designated critical habitat.

The 2012 BiOp established an annual incidental take statement authorizing the fishery to interact with up to 26 leatherback sea turtles and 34 North Pacific loggerhead sea turtles. Consistent with the 2012 BiOp, NMFS revised the annual limits on allowable incidental interactions between the fishery and leatherback and North Pacific loggerhead sea turtles (77 FR 60637, October 4, 2012, codified at 50 CFR 665.813). If the fishery reaches either of the interaction limits in a given year, the regulations require NMFS to close the fishery for the remainder of the calendar year.

In the U.S. District Court, District of Hawaii, several plaintiffs challenged the NMFS final rule that revised the annual sea turtle interaction limits, among other things, and the Court ruled in favor of NMFS on all claims (see *Turtle Island Restoration Network, et al. v. U.S. Dept. of Commerce, et al.*, (U.S.D.C. 2013), Civil No. 12-00594). Plaintiffs appealed the Court's decision and, on December 27, 2017, a U.S Ninth Circuit Court of Appeals panel issued a split decision affirming the 2012 BiOp regarding leatherback sea turtles, but holding that NMFS was arbitrary and capricious in its no-jeopardy determination for North Pacific loggerhead turtles (see *Turtle Island Restoration Network, et al. v. U.S. Dept. of Commerce, et al.*, 878 F.3d 725 (9th Cir. 2017)).

All parties agreed to settle the case pursuant to the terms outlined in a May 4, 2018, Stipulated Settlement Agreement and Court Order (Court Order). As part of the agreement, the U.S. District Court, District of Hawaii, ordered NMFS to close the fishery for the remainder of the 2018 fishing year. On May 11, 2018, NMFS published a temporary rule closing the shallow-set longline fishery until December 31, 2018 (83 FR 21939).

The Court Order also required NMFS to implement a new regulation that establishes the annual interaction limit for North Pacific loggerhead sea turtle at 17, effective on January 1, 2019. The revised limit is consistent with the incidental take statement from the previous 2004 BiOp. This rule implements the Court Order by revising the annual limit for North Pacific loggerhead sea turtles from 34 to 17. In addition, as accounted for in the Court Order, NMFS is consulting on the potential effects of the fishery on sea turtles, and may issue a revised regulation in the future that adopts different interaction limits or takes a different approach to interactions after that consultation is concluded.

If the fishery reaches the interaction limit for either leatherback sea turtles or North Pacific loggerhead sea turtles, NMFS will close the fishery for the remainder of the calendar year. All other provisions applicable to the fishery remain unchanged.

Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this final rule is consistent with the Court order, the Magnuson-Stevens Fishery Conservation and

Management Act, the Endangered Species Act, and other applicable laws.

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

NMFS has good cause to waive the prior notice and comment requirement under the Administrative Procedure Act (APA, 5 U.S.C. 553(b)(B)). The Court Order, in relevant parts, vacates the portion of the 2012 Biological Opinion that relates to North Pacific loggerhead sea turtles, and requires NMFS to revise the interaction limit for those turtles to 17. Under the ESA, NMFS may not continue to authorize the shallow-set longline fishery until the consultation requirements of ESA section 7(a)(2) have been satisfied, and a new biological opinion and incidental take statement are prepared. Because NMFS has no discretion to revise and implement the loggerhead sea turtle interaction limit under the Court Order, no meaningful purpose will be served by public comment, and so providing prior notice and comment of this rule would be impracticable and contrary to public interest. The 30-day delayed effective date requirement under the APA (5 U.S.C. 553(d)) is not waived.

Additionally, the regulatory flexibility analysis requirements of the Regulatory Flexibility Act (5 U.S.C.

603-605) do not apply to this rule. Furthermore, because the changes identified in this rule are required by the Court Order and are not discretionary, the National Environmental Policy Act does not apply to this rule.

List of Subjects in 50 CFR Part 665

Administrative practice and procedure, Fisheries, Fishing, Hawaii, Sea turtles.

Dated: September 26, 2018.

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 665 is amended as follows:

PART 665 -- FISHERIES IN THE WESTERN PACIFIC

1. The authority citation for 50 CFR part 665 continues to read as follows:

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

2. In § 665.813, revise paragraph (b) (1) to read as follows:

§ 665.813 Western Pacific longline fishing restrictions.

* * * * *

(b) * * *

(1) Maximum annual limits are established on the number of physical interactions that occur each calendar year between leatherback and North Pacific loggerhead sea turtles and vessels registered for use under Hawaii longline limited access permits while shallow-set fishing. The annual limit for leatherback sea turtles (*Dermochelys coriacea*) is 26, and the annual limit for North Pacific loggerhead sea turtles (*Caretta caretta*) is 17.

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