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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 200129-0036]

RIN 0648-BJ27

**Pacific Island Fisheries; Sea Turtle Limits in the Hawaii
Shallow-set Longline Fishery**

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to revise measures that govern interactions between the Hawaii shallow-set pelagic longline fishery and sea turtles. Based on recommendations from the Western Pacific Fishery Management Council (Council), we would lower the annual fleet interaction limit ("hard cap") for leatherback sea turtles from 26 to 16, and remove the annual fleet hard cap for North Pacific loggerhead turtles (currently 17). NMFS would also create individual trip interaction limits of two leatherback and five North Pacific loggerhead turtle interactions, with accountability measures for reaching a limit. The proposed rule would provide managers and fishermen with the

necessary tools to respond to and mitigate changes in North Pacific loggerhead and leatherback turtle interactions, to ensure a continued supply of fresh domestic swordfish to U.S. markets, consistent with the conservation needs of these sea turtles. The action also ensures that the Hawaii shallow-set longline fishery operates in compliance with the Reasonable and Prudent Measures (RPMs) and associated Terms and Conditions (T&Cs) of a biological opinion (BiOp) issued by NMFS on June 26, 2019.

DATES: NMFS must receive comments by [*INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER*].

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2019-0098, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0098>, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Send written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

Instructions: NMFS may not consider comments sent by any other method, to any other address or individual, or

received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

The Council prepared Amendment 10 to the Fishery Ecosystem Plan for the Pelagic Fisheries of the Western Pacific (FEP), including an environmental assessment (EA) and Regulatory Impact Review, which describes the potential impacts on the human environment that would result from the proposed rule. Copies of Amendment 10 and supporting documents are available at www.regulations.gov, or from the Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808-522-8220, fax 808-522-8226, www.wpcouncil.org.

FOR FURTHER INFORMATION CONTACT: Joshua Lee, NMFS PIR Sustainable Fisheries, 808-725-5177.

SUPPLEMENTARY INFORMATION: The Hawaii shallow-set pelagic longline fishery primarily targets swordfish (*Xiphias gladius*) on the high seas in the North Pacific Ocean. The Council and NMFS manage the fishery under the FEP and

implementing regulations, as authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). During fishing operations, vessels in the fishery occasionally hook or entangle protected species, including sea turtles. To address these interactions, the Council recommended, and NMFS implemented, several conservation and management measures (69 FR 17329, April 2, 2004). Shallow-set longline vessels are required to use circle hooks and mackerel-type bait to minimize interactions with sea turtles, and to carry and use specialized tools to improve the turtles' post-interaction survival.

NMFS also implemented annual limits (referred to as hard caps) on the number of interactions allowed between the fishery and two turtle species, the leatherback and North Pacific loggerhead. Historically, hard caps were based on the expected annual level of interaction with these sea turtles, and the T&C of the most recent BiOp. If the fishery reaches either hard cap, NMFS closes the fishery for the remainder of the calendar year. NMFS has modified the annual hard caps several times in response to new information or by court order (74 FR 65460, December 10, 2009; 76 FR 13297, March 11, 2011; 77 FR 60637, October 4, 2012; 83 FR 49495, October 2, 2018).

The current annual fleet hard cap for leatherback turtles is 26, equal to the incidental take statement (ITS) in a NMFS 2012 BiOp. The current annual hard cap for loggerhead sea turtles is 17, based on a stipulated settlement agreement of May 4, 2018, that set the limit equal to the ITS in a NMFS 2004 BiOp. These annual fleet hard caps prevent turtle takes above a specified limit, but do not provide rapid response to unforeseen higher interaction rates, which may indicate a potential for increased effects on sea turtle populations or a fishery closure early in the year.

On June 26, 2019, NMFS issued a BiOp on the effects of the shallow-set fishery on marine species listed under the Endangered Species Act (ESA). Based on the information in the 2019 BiOp, NMFS concluded that the continued authorization of the fishery is not likely to jeopardize the continued existence of ESA-listed species, including leatherback and North Pacific loggerhead turtles. The BiOp includes an ITS and RPMs necessary to minimize the effects of incidental take. NMFS must implement the RPMs for the fishery's take exemption in ESA section 7(o)(2) to apply. Of the six RPMs in the 2019 BiOp, RPM 1 (and associated T&C 1a and 1b) must be implemented by regulation to reduce the

incidental capture and mortality of leatherback and loggerhead sea turtles.

Fleet Limits

T&C 1a requires setting an annual fleet hard cap of 16 leatherback turtles. Accordingly, this proposed rule would revise the annual fleet hard cap from 26 to 16. The Council recommended the revision, consistent with the anticipated level of annual interactions (21), as reduced by the applicable RPM in the 2019 BiOp. If the shallow-set fleet reaches this limit, NMFS would close the fishery for the remainder of the calendar year.

The proposed rule would remove the annual fleet hard cap on North Pacific loggerhead turtle interactions. The Council determined that a fleet hard cap for this species is not necessary at this time for the conservation of the North Pacific loggerhead turtle in light of the abundance and increasing trend of the population, the proposed individual vessel trip limit, and the accountability measure pursuant to the 2019 BiOp RPM for vessels that might reach a trip limit twice in a calendar year. If the fishery exceeds the ITS in the current valid BiOp, NMFS would reinitiate Section 7 consultation, as required by the ESA.

Trip Limits

T&C 1b requires NMFS to establish limits of two leatherback and five loggerhead turtles per vessel per individual fishing trip, with additional restrictions on vessels that might reach a trip limit twice in a calendar year. If a vessel reaches either trip limit, NMFS would require the vessel to stop fishing, return to port, and refrain from shallow-set longline fishing for five days after returning to port.

If a vessel reaches a trip limit a second time during a calendar year, for the same turtle species as the first instance, it would be prohibited from engaging in shallow-set fishing for the remainder of the calendar year. As an additional accountability measure, in the subsequent calendar year, that vessel would be limited to an annual interaction limit for that species (two leatherbacks or five loggerheads). If the vessel then reaches that subsequent year's interaction limit, it would be prohibited from shallow-set fishing for the remainder of that calendar year.

In addition to the proposed rule described above, the Council and NMFS would continue to manage the fishery under existing gear and handling requirements designed to minimize effects on sea turtles. These include the required

use of 18/0 or larger circle hooks with no more than 10° offset and mackerel-type bait, adherence to regulations for safe handling and release of sea turtles, and required turtle handling and dehooking gear. NMFS would continue to monitor the Hawaii shallow-set longline fishery under statistically-reliable observer coverage. Observers report sea turtle interactions via satellite phone immediately after each observation so that NMFS can monitor the compliance with interaction limits in near real-time.

NMFS must receive any comments by the date provided in the **DATES** heading. In addition, NMFS is soliciting comments on proposed Amendment 10 to the Pelagics FEP, as stated in the Notice of Availability published on January 23, 2020 (85 FR 3889). NMFS must receive comments on the Notice of Availability by March 23, 2020. The Secretary of Commerce will consider public comments received in response to the requests for comments in the Notice of Availability and in this proposed rule in the decision to approve, partially approve, or disapprove Amendment 10.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the FEP, other provisions of the Magnuson-Stevens Act, and

other applicable laws, subject to further consideration after public comment.

Certification of Finding of No Significant Impact on Substantial Number of Small Entities

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rule would revise the annual number of incidental interactions that may occur between the Hawaii-based shallow-set pelagic longline fishery (shallow-set fishery) and leatherback and loggerhead sea turtles. It would also implement new individual trip limits on the number of turtle interactions with additional restrictions.

The Hawaii shallow-set longline fishery, under Amendment 3 to the Pelagics Fishery Management Plan (currently Fishery Ecosystem Plan (FEP)) implemented in 2004, had reduced loggerhead and leatherback sea turtle interactions by approximately 90 percent through the establishment of annual fleet-wide interaction limits ("hard caps") among other measures. These hard caps, if reached, would trigger the closure of the fishery for the remainder of the calendar year. But the hard caps, as

currently implemented, do not provide a mechanism to respond earlier in the year when higher interaction rates indicate both higher impacts to sea turtle populations as well as higher potential for shallow-set longline fishermen reaching hard caps before the end of the fishing season.

On April 20, 2018, NMFS reinitiated ESA Section 7 consultation on the fishery due to 1) the fishery's first documented interaction with a Guadalupe fur seal, which is listed as threatened under the ESA, 2) issuance of a final rule listing 11 new green sea turtle distinct population segments, 3) listings of oceanic whitetip shark and giant manta ray as threatened under the ESA, 4) the fishery's exceedance of the incidental take statement (ITS) for olive ridley sea turtles, and 5) a Ninth Circuit Court of Appeals opinion finding that NMFS 2012 BiOp no-jeopardy determination and associated ITS for the loggerhead turtle was arbitrary and capricious. The final biological opinion (BiOp) was issued on June 26, 2019. The ITS in the 2019 BiOp sets forth reasonable and prudent measures (RPMs) and associated terms and conditions (T&Cs) necessary to minimize the impacts of incidental take. RPM 1 and associated T&C 1a and 1b requires implementation of regulatory measures to reduce the incidental capture and

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

The purpose of this action is to implement Amendment 10 to the Pelagics FEP in order to modify sea turtle mitigation measures for effectively managing impacts to leatherback and loggerhead sea turtles from the shallow-set fishery. This action is needed to provide managers and fishery participants with the necessary tools to respond to and mitigate fluctuations in loggerhead and leatherback turtle interactions and to ensure a continued supply of fresh swordfish to U.S. markets, consistent with the conservation needs of these sea turtles. This action is also needed to ensure that the shallow-set fishery operates in compliance with the RPMs and T&Cs of the 2019 BiOp.

Under the proposed rule, the annual limit on the number of leatherback turtle interactions would be set to 16, while loggerhead turtles would no longer be subject to an annual fleet-wide hard cap limit - currently set at 17. Once the leatherback hard cap limit is reached, the fishery would close for the remainder of the calendar year. The proposed rule would also establish individual trip limits of five loggerhead and two leatherback turtle interactions for the Hawaii limited entry permit vessels that declare their trips as a shallow-set trip.

The individual trip limits would provide a mechanism for early response during times of higher interaction rates and are expected to help ensure year-round operations of the shallow-set fishery. Once a vessel has reached the trip limit for either the loggerhead or the leatherback turtle, that vessel cannot make additional sets and is required to return to port. The vessel would also be prohibited from engaging in shallow-set longline fishing for five days after returning to port. If a vessel reaches a trip limit a second time during a calendar year, for the same turtle species as the first instance, it would be prohibited from engaging in shallow-set fishing for the remainder of the calendar year. These vessels would also have an annual vessel limit equivalent to a single trip limit for that sea turtle species for the following calendar year.

The likelihood of a vessel reaching a trip limit is very low based on past observer data. From 2004 to 2019 period, 0.2 percent of all trips (3 trips out of 1,107 trips) had 5 or more loggerhead turtle interactions in a trip. In the same period, 0.9 percent of all trips (10 trips out of 1,107 trips) had 2 or more leatherback turtle interactions in a trip. Therefore, the fleet-wide economic cost of vessels reaching a trip limit is likely to be

negligible. The individual trip limits are expected to prevent a large number of loggerheads or leatherbacks from being taken in a single trip or by a single vessel, as vessels are likely to take actions to try to avoid sea turtle interactions when nearing the trip limit. This would in turn allow the remaining vessels to continue fishing for swordfish throughout the peak season and continue to fish throughout the year, resulting in a minor to moderate positive benefits for most vessels and minimizing the fleet-wide impacts to catch and revenue from fleet-wide hard cap closures compared to taking no action.

In terms of potential loss in individual trip revenue, an individual vessel that reaches a trip limit is expected to experience some loss in revenue, especially if a trip limit is reached early in the trip. Based on trip cost and revenue data in the 2018 SAFE Report (WPFMC 2019), the average trip cost excluding labor costs for the recent five year period (2014-2018) is \$44,764, and the average trip revenue for the same period is \$103,074, resulting in an average net revenue of \$58,310 per trip (all averages calculated with values adjusted for 2018). The average trip length is 32 days, and the average number of sets per trip is 16. The total number of fishing days can be estimated by adding one day to the number of sets per trip, resulting in

an average transit time of 15 days to and from port. Of the trip cost, fuel cost accounted for 49 percent, bait was 19 percent, fishing gear 9 percent, provisions 8 percent, light sticks 10 percent, engine oil 2 percent, ice 1 percent, and communications 2 percent (WPFMC 2018). Trip cost, revenue, and percentage reduction in revenue resulting under different scenarios of reaching trip limits were estimated by adjusting the average trip cost and revenue for the number of days fished (Table 1). These estimates allow for a rough comparison among scenarios. Based on these estimates, in a worst-case scenario in which a vessel reaches a trip limit on the first set, the vessel is estimated to have a 116 percent reduction in net revenue, resulting in a net loss of \$9,575 (excluding labor costs) for that trip. If a vessel reaches a trip limit after 5 sets, the vessel is estimated to have an 85 percent reduction in net revenue, at a net revenue of \$8,528 for that trip. A vessel that reaches a trip limit after 10 sets is estimated to have a 45 percent reduction in net revenue, at a net revenue of \$32,009 for that trip.

Table 1. Comparison of trip cost, trip revenue, net revenue, and percent reduction in net revenue for full trips and three scenarios of reaching a trip limit (at 1st,

5th and 10th set of the trip). Trip cost excludes labor costs).

Scenarios	Trip Cost	Trip Revenue	Net Revenue	Percent reduction in Net Revenue
Full Trip ¹	\$44,764	\$103,074	\$ 58,310	--
Trip limit reached in first set	\$16,017	\$6,442	\$(9,575)	116%
Trip limit reached in fifth set	\$23,683	\$32,211	\$8,528	85%
Trip limit reached in tenth set	\$32,412	\$64,421	\$32,009	45%

¹ This scenario represents approximately 16 fishing sets and 32 sea days.

The shallow-set fishery has been subject to four early closures since 2004: once in March 2006 from reaching the loggerhead limit of 17 turtles, another in November 2011 from reaching the leatherback limit of 16 turtles, another in May 2018 in compliance with a court order (*TIRN v. NMFS* (9th Cir. 2017)), and lastly in 2019 when the fishery reached the loggerhead hard cap of 17 turtles. Compared to the status quo/no action scenario, under the proposed action the fishery is likely to have a much lower likelihood of closing early in the calendar year from reaching the hard cap due to the combination of individual trip limits and the lack of a loggerhead hard cap limit.

This would provide greater fishing opportunities for longline fishermen participating or potentially participating in the shallow-set fishery. Not only would there be increased likelihood of fishing with shallow-set gear throughout the year and, thereby, increasing swordfish and other landings for those fishermen who solely fish using shallow-set gear, it also would allow fishermen who primarily fish using deep-set gear greater flexibility to opt into the shallow-set fishery for a greater part of the year. In addition, the proposed action would reduce the uncertainty regarding the potential for early closure of the shallow-set fishing, and allow more operational certainty regarding where, when, and how to fish, especially in the presence of other unforeseen operational issues such as fluctuating fuel costs.

NMFS believes that all potential shallow-set fishery participants are considered small entities. The shallow-set and deep-set longline fisheries are managed under a single limited access fishery with a maximum of 164 vessel permits with active vessel participation increasing in recent years. As of October 2019, 148 vessels are actively fishing and each of the 164 vessel permit holders is considered a potential participant in the shallow-set fishery. The number of vessels participating in the shallow-set fishery

each year from 2014-2018 varied from 20 to 11; these vessels may participate in the deep-set fishery each year, too. In 2017, 18 fishermen made about 61 shallow-set trips; in 2018, 11 fishermen made 30 shallow-set trips, before the fishery closed in May 2018 in compliance with court order (*TIRN v. NMFS (9th Cir. 2017)*).

The proposed action is not expected to have a significant economic impact on a substantial number of small entities, either through a significant loss in landings or expenses incurred, as it potentially expands the opportunity for longline fishermen to participate in the shallow-set fishery through a greater part of the year. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

Executive Order 12866

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

Executive Order 13771

This proposed rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

List of Subjects in 50 CFR Part 665

Hawaii, Leatherback sea turtle, Pelagic longline fishing, North Pacific loggerhead sea turtle.

Dated: January 29, 2020.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 665 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 § 665.802 revise paragraphs (ss) and (tt) to read as follows:

§ 665.802 Prohibitions.

* * * * *

(ss) Engage in shallow-setting from a vessel registered for use under a Hawaii longline limited access permit after the shallow-set longline fishery has been closed, or upon notice that that the vessel is restricted from fishing, in violation of §§ 665.813(b) and 665.813(i).

(tt) Fail to immediately retrieve longline fishing gear upon notice that the shallow-set longline fishery has been closed, or upon notice that that the vessel is restricted from fishing, in violation of § 665.813(b).

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3. In § 665.813 revise paragraphs (b) and (i) to read as follows:

§ 665.813 Western Pacific longline fishing restrictions.

* * * * *

(b) *Limits on sea turtle interactions in the shallow-set longline fishery.* (1) *Fleet Limits.* There are limits on the maximum number of allowable physical interactions that occur each year between leatherback sea turtles and vessels registered for use under Hawaii longline limited access permits while engaged in shallow-set fishing.

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

(ii) Upon determination by the Regional Administrator that the shallow-set fleet has reached the limit during a given calendar year, the Regional Administrator will, as soon as practicable, file for publication at the Office of the **Federal Register** a notification that the fleet reached the limit, and that shallow-set fishing north of the Equator will be prohibited beginning at a specified date until the end of the calendar year in which the limit was reached.

(2) *Trip limits.* There are limits on the maximum number of allowable physical interactions that occur during a single fishing trip between leatherback and North Pacific loggerhead sea turtles and individual vessels registered for use under Hawaii longline limited access permits while engaged in shallow-set fishing. For purposes of this section, a shallow-set fishing trip commences when a vessel departs port, and ends when the vessel returns to port, regardless of whether fish are landed. For purposes of this section, a calendar year is the year in which a vessel reaches a trip limit.

(i) The trip limit for leatherback sea turtles is 2, and the trip limit for North Pacific loggerhead sea turtles (*Caretta caretta*) is 5.

(ii) Upon determination by the Regional Administrator that a vessel has reached either sea turtle limit during a single fishing trip, the Regional Administrator will notify the permit holder and the vessel operator that the vessel has reached a trip limit, and that the vessel is required to immediately retrieve all fishing gear and stop fishing.

(iii) Upon notification, the vessel operator shall immediately retrieve all fishing gear, stop fishing, and return to port.

(iv) A vessel that reaches a trip limit for either turtle species during a calendar year shall be prohibited from engaging in shallow-set fishing during the 5 days immediately following the vessel's return to port.

(v) A vessel that reaches a trip limit a second time during a calendar year, for the same turtle species as the first instance, shall be prohibited from engaging in shallow-set fishing for the remainder of that calendar year. Additionally, in the subsequent calendar year, that vessel shall be limited to an annual interaction limit for that species, either 2 leatherback or 5 North Pacific loggerhead sea turtles. If that subsequent annual interaction limit is reached, that vessel shall be prohibited from engaging in shallow-set fishing for the remainder of that calendar year.

(vi) Upon determination by the Regional Administrator that a vessel has reached an annual interaction limit, the Regional Administrator will notify the permit holder and the vessel operator that the vessel has reached the limit, and that the vessel is required to immediately stop fishing and return to port.

(vii) Upon notification, the vessel operator shall immediately retrieve all fishing gear, stop fishing, and return to port.

* * * * *

(i) A vessel registered for use under a Hawaii longline limited access permit may not be used to engage in shallow-setting north of the Equator any time during which shallow-set fishing is prohibited pursuant to paragraphs (b) (1) or (b) (2) of this section.

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