

(<http://www.partnersinflight.org>); species or populations of waterfowl identified as high, or moderately high, continental priority in the North American Waterfowl Management Plan; listed threatened and endangered bird species in 50 CFR 17.11; and Migratory Bird Treaty Act—listed game birds below desired population sizes (<http://migratorybirds.fws.gov/reports/reports.html>).

3. Amend part 21, subpart B by adding a new § 21.15 as follows:

**§ 21.15 Authorization of take incidental to military readiness activities**

(a) Except to the extent authorization is withdrawn or suspended pursuant to paragraph (b) of this section, the Department of Defense may take migratory birds incidental to military readiness activities provided that, for those ongoing or proposed activities that are likely to result in a significant adverse effect on the sustainability of the population of a migratory bird species of concern, the Department of Defense must confer and cooperate with the Service to develop appropriate conservation measures to minimize or mitigate such significant adverse effects.

(b) Withdrawal of take authorization.

(1) If the Secretary determines, after seeking the views of the Secretary of Defense and consulting with the Secretary of State, that incidental take of migratory birds during a specific military readiness activity would not be compatible with one or more of the migratory bird treaties, the Secretary will suspend authorization of the take associated with that activity.

(2) The Secretary may propose to withdraw, and 30 days thereafter may withdraw, the authorization for any take incidental to a specific military readiness activity if the Secretary determines that a proposed military readiness activity may result in a significant adverse effect on the sustainability of the population of a migratory bird species of concern and one or more of the following circumstances exists:

(i) The Department of Defense has not implemented conservation measures that:

(A) Are directly related to protecting the migratory bird species of concern affected by the proposed military readiness activity;

(B) Would significantly reduce take of the migratory bird species of concern affected by the military readiness activity;

(C) Are economically feasible; and

(D) Do not limit the effectiveness of the military readiness activity;

(ii) The Department of Defense fails to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on the migratory bird species of concern and/or the efficacy of the conservation measures implemented by the Department of Defense; or

(iii) The Department of Defense has not provided reasonably available information that the Secretary has determined is necessary to evaluate whether withdrawal of take authorization for the specific military readiness activity is appropriate.

(3) When the Secretary proposes to withdraw authorization with respect to a specific military readiness activity, the Secretary will first provide written notice to the Secretary of Defense. Any such notice will include the basis for the Secretary's determination that withdrawal is warranted in accordance with the criteria contained in paragraph (b)(2) of this section, and will identify any conservation measures or other measures that would, if implemented by the Department of Defense, permit the Secretary to cancel the proposed withdrawal of authorization.

(4) Within 30 days of receipt of the notice specified in paragraph (b)(3) of this section, the Secretary of Defense may notify the Secretary in writing of the Department of Defense's objections, if any, to the proposed withdrawal, specifying the reasons therefore. Before acting to withdraw the take authorization for any specific military readiness activity, the Secretary will consider the objections raised by the Department of Defense. If the Secretary continues to believe that withdrawal is appropriate, he or she will provide written notice to the Secretary of Defense of the withdrawal and the rationale therefore, including a response to the Department of Defense's objections. If the Secretary of Defense continues to object to the withdrawal of authorization, the withdrawal will not become effective until the Secretary of Defense has had the opportunity to meet with the Secretary.

(5) Any take incidental to a military readiness activity subject to a proposed withdrawal of authorization will continue to be authorized by this regulation until the Secretary makes a final determination on the withdrawal.

(6) The Secretary may, at his or her discretion, cancel a suspension or withdrawal of authorization at any time. A suspension may be cancelled in the event new information is provided that the proposed activity would be compatible with the migratory bird treaties. A proposed withdrawal may be cancelled if the Department of Defense

modifies the proposed activity to alleviate significant adverse effects on the sustainability of a population of a migratory bird species of concern or the circumstances in paragraphs (b)(2)(i) through (iii) of this section no longer exist. Cancellation of suspension or withdrawal of authorization becomes effective upon delivery of written notice from the Secretary to the Department of Defense.

(7) The responsibilities of the Secretary under paragraph (b) of this section, may be fulfilled by his or her delegatee who must be an official nominated by the President and confirmed by the Senate.

Dated: December 12, 2003.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

Dated: January 8, 2004.

Concurrence of:

**Raymond DuBois,**

*Deputy Under Secretary of Defense (Installation & Environment).*

**Editorial Note:** This document was received by the Office of the Federal Register on May 17, 2004.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 040521156-4156-01; I.D. 051704E]

RIN 0648-AS10

### Fisheries of the Exclusive Economic Zone Off Alaska; Reduction to a Harvest Restriction for the Harvest Limit Area Atka Mackerel Fishery in the Aleutian Islands Subarea

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS issues a proposed rule that would remove a harvest restriction on participants in the harvest limit area (HLA) Atka mackerel fishery in the Aleutian Islands subarea. If approved, the regulatory amendments would allow participants assigned to an HLA fishery to harvest Atka mackerel outside of the HLA during the first HLA fishery in each season. This action would allow participants to harvest Atka mackerel

efficiently, would reduce competition with Steller sea lions for prey species within the HLA, and would not increase competition among participants in the groundfish fisheries. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands (FMP), and other applicable laws.

**DATES:** Comments must be received by June 17, 2004.

**ADDRESSES:** Send comments to Sue Salvesson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Lori Durall. Comments may be submitted by:

- Mail: P.O. Box 21668, Juneau, AK 99802.

- Hand Delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

- Fax: 907-586-7557.

- E-mail: [AM-HLA-0648-AS10@noaa.gov](mailto:AM-HLA-0648-AS10@noaa.gov). Include in the subject line of the e-mail the following document identifier: AM HLA Proposed Rule. E-mail comments, with or without attachments, are limited to 5 megabytes.

- Webform at the Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov). Follow the instructions at that site for submitting comments.

Copies of the Regulatory Impact Review (RIR) prepared for the proposed rule may be obtained from the mailing listed address above or from the NMFS Alaska Region website at [www.fakr.noaa.gov](http://www.fakr.noaa.gov).

**FOR FURTHER INFORMATION CONTACT:** Melanie Brown, 907-586-7228 or [melanie.brown@noaa.gov](mailto:melanie.brown@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The groundfish fisheries in the Exclusive Economic Zone of the Bering Sea and Aleutian Islands management area are managed under the FMP. The North Pacific Fishery Management Council prepared the FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801, *et seq.* Regulations implementing the FMP appear at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600.

### Background

The western distinct population segment (DPS) of Steller sea lions has been listed as endangered under the Endangered Species Act, and critical habitat has been designated for this DPS (50 CFR 226.202). In order to protect Steller sea lions from jeopardy of

extinction and their critical habitat from adverse modification from the effects of the groundfish fisheries, temporal and spatial harvest restrictions were established in regulations for the groundfish fisheries of Alaska (68 FR 204, January 2, 2003). Atka mackerel is an important prey species for Steller sea lions. Under the harvest restrictions, the harvest of Atka mackerel in the Aleutian Islands subarea is managed to control the amount of harvest over time and area. The details for managing the Atka mackerel fishery in 2004 are in the annual harvest specifications (69 FR 9242, February 27, 2004).

The regulations at 50 CFR 679.20(a)(8) establish an HLA fishery to control the removal of Atka mackerel in the HLA. The details of the HLA fishery are explained in the proposed rule for Steller sea lion protection measures (67 FR 56692, September 4, 2002). The HLA is the waters of statistical areas 542 and 543 west of 178° W longitude within 20 nm seaward of sites listed in Table 6 of 50 CFR part 679 and located west of 177°57.00' W longitude. This area includes critical habitat for Steller sea lions and additional waters around haulouts that are considered important for Steller sea lion foraging.

To reduce the amount of daily catch in the HLA by about half and to disperse the fishery over two areas, the Atka mackerel trawl fleet is divided into two groups assigned to fish in the HLA in either statistical area 542 or statistical area 543. HLA fisheries are conducted twice each season. One of the conditions of participating in the HLA fishery is a prohibition on participating in groundfish fisheries outside the HLA while the first assigned HLA fishery takes place each season. The intent of this prohibition is to ensure participants in the HLA fishery would not leave the HLA assignment unused and switch to another groundfish fishery at the same time, increasing competition with participants in other groundfish fisheries. The current regulations at § 679.7(a)(19) and § 679.20 (a)(8)(iii) prohibit fishing for all groundfish outside the HLA, including Atka mackerel, during the first assigned HLA fishery in a season. The harvest of Atka mackerel outside of the HLA would not increase competition among Atka mackerel fishery and other groundfish fisheries participants because the locations and methods of harvest vary among groundfish fisheries. Therefore, the current regulations are more restrictive than necessary to prevent competition among groundfish fisheries participants. The current regulations also provide less protection to Steller sea lions than the proposed changes

would provide because the current regulations actually require harvest of Atka mackerel inside the HLA during the first HLA fishery, potentially competing with Steller sea lions for prey.

The intent of the HLA fishery was to reduce the rate of harvest of Atka mackerel in the HLA. This proposed action would allow participants in the HLA fishery to fish for Atka mackerel outside of the HLA during the first assigned HLA fishery in a season. The prohibition on fishing for groundfish species other than Atka mackerel during the first assigned HLA fishery would not be affected by the proposed change. This action would provide the potential for additional reduction in the rate of Atka mackerel harvest in the HLA, adding protection to Steller sea lions by potentially reducing competition and interaction with the Atka mackerel fleet. The proposed rule also would provide the fishing industry with additional locations during the first HLA fisheries to efficiently harvest Atka mackerel, without competing with other groundfish fisheries.

### Classification

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This action would not have an economic impact on any small entities. The ten groundfish entities that will be directly regulated by this action and currently participate in the Atka mackerel fishery are large entities according to criteria established by the Small Business Administration. That is, gross revenues exceed \$3.5 million for each of these vessels. Although gross revenues were not estimated for some species harvested by these vessels, in each case over \$3.5 million in gross revenues were identified. As a result, an initial regulatory flexibility analysis was not required and none was prepared.

These vessels are catcher-processors fishing a diversified group of BSAI groundfish fisheries. In addition to Atka mackerel, these vessels make significant harvests of Pacific cod, yellowfin sole, rock sole, Pacific Ocean perch, and other species. The small entity threshold for catcher-processors is \$3.5 million. Alaska Region estimates of gross revenues indicate that none of these vessels grossed less than \$3.5 million dollars. Five of these vessels are

believed to fish for a single firm. These entities would be treated as a single entity for purposes of the RFA because of their affiliations.

The Regional Administrator determined that fishing activities conducted pursuant to this rule will not affect endangered and threatened species or critical habitat under the Endangered Species Act.

#### List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: May 26, 2004.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

For reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as follows:

#### **PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA**

1. The authority citation for part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*; 16 U.S.C. 1540(f); Pub. L. 105–277, Title II of Division C; Pub L. 106–31, Sec. 3027; and Pub. L. 106–554, Sec. 209.

2. In § 679.7, paragraph (a)(19) is revised to read as follows:

#### **§ 679.7 Prohibitions.**

\* \* \* \* \*

(a) \* \* \*

(19) *Atka Mackerel HLA Groundfish Prohibition.* For vessels registered for an Atka mackerel HLA directed fishery under § 679.20(a)(8)(iii), conduct directed fishing for groundfish, other than Atka mackerel, during the time period that the first Atka mackerel HLA directed fishery to which the vessel is

assigned under § 679.20(a)(8)(iii)(B) is open.

\* \* \* \* \*

3. In § 679.20, paragraph (a)(8)(iii)(F) is revised to read as follows:

#### **§ 679.20 General limitations.**

\* \* \* \* \*

(a) \* \* \*

(8) \* \* \*

(iii) \* \* \*

(F) *Groundfish directed fishery prohibition.* Vessels registering under paragraph (a)(8)(iii)(A) of this section are prohibited from participating in any groundfish directed fishery, other than Atka mackerel, during the opening of the first HLA directed fishery assigned to the vessel in a season, as specified in § 679.7(a)(19).

\* \* \* \* \*

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