

and 315, specifically asking the applicants to certify that the proposed assignment or transfer complies with the unjust enrichment provisions of the Commission's competitive bidding rules. The instructions for FCC Form 316 have been revised to assist applicants with completing the new questions.

Federal Communications Commission.

**Gloria Miles,**

*Federal Register Liaison.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 100813358-0560-02]

RIN 0648-BA16

#### Fisheries of the Northeastern United States; Discard Provision for Herring Midwater Trawl Vessels Fishing in Groundfish Closed Area I

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

**ACTION:** Final rule.

**SUMMARY:** Through this action, NMFS removes a regulatory exemption for midwater trawl herring vessels, which was originally implemented by a November 2, 2009, final rule. The exemption allowed midwater trawl vessels with an All Areas and/or Areas 2 and 3 Atlantic herring limited access permit fishing in Northeast (NE) multispecies Closed Area I (CA I) to release fish that cannot be pumped from the net at the end of pumping operations, without those fish being sampled by a NMFS at-sea observer. As a result of this rule, vessels will be required to bring the fish on board the vessel and make them available to the at-sea observer for sampling. The publication of this action is part of a Court-approved joint motion to stay pending litigation.

**DATES:** Effective January 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Douglas Potts, Fishery Policy Analyst, (978) 281-9341, fax (978) 281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

On September 4, 2009, NMFS published a proposed rule (74 FR 45798) to implement changes to access

requirements for midwater trawl vessels fishing in CA I, at the request of the New England Fishery Management Council (Council), with the intended goal of collecting better information on bycatch in the midwater trawl fishery. A final rule was published on November 2, 2009 (74 FR 56562), that implemented regulations requiring 100-percent observer coverage of trips by vessels with limited access Atlantic herring All Areas and/or Areas 2 and 3 category permits fishing for herring in CA I with midwater trawl gear. The rule also prohibited these vessels from releasing fish from the codend of the net, transferring fish to another vessel that is not carrying an observer, or otherwise discarding fish at sea, unless the fish has first been brought on board the vessel and made available for sampling and inspection by the observer. The regulations implemented by the November 2, 2009, rule (74 FR 56562) provided the following exemptions to this prohibition:

- The vessel operator has determined there is a compelling safety reason; or
- A mechanical failure precludes bringing the fish aboard the vessel for inspection; or
- After pumping of fish onto the vessel has begun, the vessel operator determines that pumping becomes impossible as a result of spiny dogfish clogging the pump intake. Under this scenario, the vessel operator must take reasonable measures (such as strapping and splitting the net) to remove all fish that can be pumped from the net prior to release; or
- When there are small amounts of fish that cannot be pumped and remain in the net at the completion of pumping operations.

Additionally, under these regulations, if a codend is released in accordance with one of the first three exemptions, the vessel operator must complete and sign an affidavit to NOAA's Office of Law Enforcement (OLE) stating the vessel name and permit number; the vessel trip report (VTR) serial number; where, when, and for what reason the catch was released; the total weight of fish caught on that tow; and the weight of fish released (if less than the full tow). Completed affidavits are to be submitted to OLE at the conclusion of the trip. Following a released codend under one of the first three exemptions, the vessel may not fish in CA I for the remainder of the trip.

The exception allowing small amounts of fish that cannot be pumped from the net (sometimes called operational discards) to be released unobserved from the net while still in the water was not specifically

mentioned in the proposed rule. NMFS considered this exemption to be a logical outgrowth of the proposed rule that needed no further public comment because it addressed a foreseeable practical problem that a small amount of fish may be left in a net after pumping operations were completed.

However, following publication of the final rule three fishermen filed a lawsuit challenging the exemption allowing the release of small amounts of fish that remain after pumping (*Taylor et al. v. Locke*, 09-CV-02289-HHK). Plaintiffs alleged that this additional exemption violated the Administrative Procedure Act because it was not a "logical outgrowth" of the proposed rule and should have been subjected to public comment, and that it violated conservation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by allowing fish to be released from herring nets unobserved. Plaintiffs also claimed that the terms "small amounts of fish" and "at the completion of pumping operations" were not adequately defined.

Without admitting any violation of applicable law in publishing the original final rule, NMFS and the plaintiffs agreed to stay the litigation while NMFS repromulgated the challenged provision, to solicit public comment. On September 7, 2010, NMFS published a proposed rule (75 FR 54292), that repromulgated the challenged provision (§ 648.80(d)(7)(ii)(D)) and solicited public comment on whether to retain, delete, or amend the additional exemption in question. The proposed rule sought comment on: Retaining the exemption as it currently exists (status quo); eliminating the exemption (Alternative 1); modifying the exemption by specifying a maximum of 200 lb (90.7 kg) of fish that could be released (Alternative 2); or modifying the exemption by requiring that the codend either be brought on board or lifted out of the water, at the captain's discretion, so the observer could better estimate the amount and type of fish being released (Alternative 3). Public comments were accepted through October 7, 2010. Comments received are summarized and responded to below.

Based on public comment received, NMFS is implementing "Alternative 1," and is removing the exemption for operational discards at § 648.80(d)(7)(ii)(D). Therefore, if fish remain in the net at the conclusion of pumping operations, those fish will have to be brought on board the vessel and made available for sampling and

inspection by the observer, unless one of the other three exemptions applies. Therefore, fish that have not been pumped on board the vessel may be released if the vessel operator finds that: Pumping the catch could compromise the safety of the vessel; mechanical failure precludes bringing some or all of a catch on board the vessel; or spiny dogfish have clogged the pump and consequently prevent pumping of the rest of the catch. If a net is released for any of these three reasons, the vessel operator must complete and sign a CA I Midwater Trawl Released Codend Affidavit stating where, when, and why the net was released, as well as a good-faith estimate of both the total weight of fish caught on that tow and the weight of fish released (if the tow had been partially pumped). The completed affidavit form must be submitted to NMFS within 48 hr of the completion of the trip.

Following the release of a net for one of the three exemptions, the vessel is required to exit CA I. The vessel may continue to fish, but may not fish in CA I for the remainder of the trip.

#### Comments and Responses

A total of 5,924 comments were received during the comment period for the proposed rule from: 2 representatives of the commercial herring midwater trawl industry; 2 coalitions of herring advocacy groups; 5 representatives of recreational fishing organizations; 4 commercial groundfish organizations; 2 state elected officials (MA State Senator Robert A. O'Leary and MA State Representative Sarah K. Peake); 1 U.S. Congressman (Representative William Delahunt, MA); 6 environmental organizations; 1 community organization; 2 agriculture and fishery advocacy groups; the Atlantic States Marine Fisheries Commission (ASMFC); and 5,898 individuals. One comment was received after the close of the comment period. The vast majority of comments were form letters submitted by environmental organizations. The two representatives from the commercial herring midwater trawl industry supported the status quo. All other comments received supported Alternative 1 in the proposed rule. Alternatives 2 or 3 were not supported by any commenters and were criticized as being impractical or ineffective.

*Comment 1:* The two representatives of the commercial midwater trawl herring industry supported the status quo measure and raised concerns about each of the proposed alternatives. To illustrate their concerns, they described current procedures and how these procedures are not compatible with the

proposed alternatives. The commenters noted that, under current operations, a vessel typically brings the full net alongside the vessel, where the end of the net is hoisted aboard in order to attach the pump. The pump and net are then lowered back into the water and splitting lines and straps are used to move catch to the pump. When the pump is moving mostly water, with an occasional fish, pumping is stopped, and the pump is removed from the net, leaving the codend open and releasing any fish that are still in the net. The empty net is then brought aboard in order to reset clips and rings before being set out for the next tow. The commenters assert that it could be dangerous for a vessel to attempt to re-cinch the end of the net after pumping is concluded in order to then bring the net aboard with the remaining catch.

*Response:* NMFS acknowledges that some vessels may need to adjust their fishing practices in order to remove the fish pump from the net without releasing the remaining fish, so that the fish in the net can be brought aboard for the observer to sample. The time between publication of this rule and when it becomes effective can be used by these vessels to develop alternative methods that allow safe operation within these requirements. A vessel may continue to fish outside of CA I while new procedures are developed. NMFS believes the safety and other exemptions sufficiently address commenters' concerns regarding the practical and safety operational difficulties of bringing nets on board vessels after pumping operations while creating a disincentive to invoke the exemption without justification. For any safety problems in bringing the net on board for inspection after pumping operations are complete, the vessel operator may take advantage of the exemption allowing release of fish for vessel safety. However, the vessel would still need to abide by the requirements of this exemption, including leaving CA I for the remainder of that trip.

*Comment 2:* The two representatives of the commercial midwater trawl herring industry asserted that it is impossible for these vessels to safely bring full nets and brailers over the side or over the stern of the vessel. In contrast, several other commenters cited remarks from a member of the commercial herring midwater trawl industry at the July 15, 2010, meeting of the Council's Atlantic Herring Plan Development Team, that a midwater trawl vessel could not bring aboard a full net, but could bring aboard up to 1 ton (907.1 kg) of fish in the net. A commenter who claimed experience on

both midwater trawl and purse seine herring vessels also asserted that up to 1 ton (907.1 kg) of fish could safely be brought on board a midwater trawl vessel.

*Response:* This action does not require full nets and brailers to be brought aboard a vessel. The intent of the subject exemption was the release of very small amounts of fish, perhaps a few hundred pounds per tow, which physically could not be pumped. It was not intended to cover the release of larger amounts of fish. Three other exemptions, for safety, mechanical failure, or spiny dogfish clogging the pump allow release of larger catches that cannot be pumped aboard.

*Comment 3:* The representatives of the commercial midwater trawl herring industry stated that the proposed alternatives are unnecessary because at-sea observers are currently provided nearly every opportunity to estimate the volume, and most often the species of fish, remaining in the net before it is released. Conversely, on this subject several individuals, commercial groundfish organizations, and coalitions of herring advocacy groups opposed observer sampling protocols that rely on such "visual access" to the codend to estimate catch that is released. These commenters supported Alternative 1 as the only way to accurately account for all catch by the midwater trawl vessels operating in CA I.

*Response:* When determining the volume of fish before release, the at-sea observer must often rely on the estimations provided by the vessel operator and crew who are much more familiar with the specific gear in use. Species identification of fish remaining in the net is not typically possible. Observers may be able to identify large-bodied organisms in the net, but are unable to reliably differentiate many fish to their species. Even if fish at the surface of the net are identifiable, the contents may not be homogeneous and the observer cannot determine the full composition of the net. Therefore, released catch is typically classified as "Fish, NK" (i.e., fish, species not known). The Council's request for increased observer coverage in CA I was intended in part to provide additional information on the total catch of this fishery that could then inform future management actions. In order to provide the most complete and valuable information for this purpose, it is important to record, as completely and accurately as possible, the catch of vessels subject to this increased observer coverage. The removal of this exemption may help to address continued questions regarding

stratification of catch within a net or whether the pump housing, which is primarily designed to keep the net out of the pump, might also exclude some larger bodied species.

*Comment 4:* The ASMFC supported Alternative 1, but suggested NMFS periodically review this measure to determine if the level of data collection continues to be necessary and if the burden to the industry is justified.

*Response:* This rule may be reconsidered and even superseded by a future Council action modifying the catch monitoring program for the Atlantic herring fishery as a whole. If the Council does not choose to review and reevaluate the requirements for access to CA I, the regulations would still be subject to the normal periodic review process and could be changed to account for new information about the burden on the fishery if necessary or appropriate.

*Comment 5:* No commenter supported either Alternative 2 or Alternative 3. Representatives of the commercial herring midwater trawl industry, representatives of commercial groundfish industry, and environmental groups all criticized these proposed alternatives as being unworkable.

*Response:* As explained in the proposed rule, these alternatives were intended as examples of possible modification to the existing regulation. The limit on how much can be released in Alternative 2 would be difficult to estimate, and could put the observer in an enforcement role. Alternative 3 would require the vessel crew to re-cinch the net after pumping, which is one of the major hurdles to bringing the catch on board. In addition, raising the net out of the water does not address the question of catch composition within the net and may pose even more logistical problems than bringing the net and catch on board. Therefore, NMFS did not consider either of these as acceptable alternatives for this final rule.

*Comment 6:* Some commenters objected to the Council granting midwater trawl vessels access to CA I for various reasons, including that midwater trawl access to groundfish closed areas was authorized based on less research and analysis than was required for the establishment of the NE Multispecies CA I Hook Gear Haddock Special Access Program (SAP). These comments included opposition to all midwater trawling, requests that the 100 percent observer coverage requirements apply to all groundfish closed areas, questions on the use and enforcement of the Closed Area I Midwater Trawl Released Codend Affidavit, and

objections to the Council's requirement that in order to access CA I vessels targeting groundfish through the NE Multispecies CA I, Hook Gear Haddock Special Access Program had to meet a higher hurdle in terms of documenting bycatch than did midwater trawl vessels.

*Response:* These comments question the underlying provision of allowing midwater trawl vessels access to CA I, and other attendant requirements, which is beyond the scope of this rule, and, therefore not addressed in this final rule.

#### Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Atlantic Herring and NE Multispecies FMPs, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for 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 during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. NMFS received no comments questioning or regarding this certification.

Dated: November 24, 2010.

**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 648 is amended as follows:

#### **PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES**

■ 1. The authority citation for part 648 continues to read as follows:

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

#### **§ 648.80 [Amended]**

■ 2. In § 648.80, remove paragraph (d)(7)(ii)(D).

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#### **DEPARTMENT OF COMMERCE**

#### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 679**

[Docket No. 0910131362-0087-02]

RIN 0648-XA066

#### **Fisheries of the Exclusive Economic Zone Off Alaska; Big Skate in the Central Regulatory Area 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 retention of big skate in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary because the 2010 total allowable catch (TAC) of big skate in the Central Regulatory Area of the GOA has been reached.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), November 24, 2010, through 2400 hrs, A.l.t., December 31, 2010.

**FOR FURTHER INFORMATION CONTACT:** Josh Keaton, 907-586-7228.

**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 2010 TAC of big skate in the Central Regulatory Area of the GOA is 2,049 metric tons (mt) as established by the final 2010 and 2011 harvest specifications for groundfish of the GOA (75 FR 11749, March 12, 2010).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2010 TAC of big skate in the Central Regulatory Area of the GOA has been reached. Therefore, NMFS is requiring that big skate caught in the Central Regulatory Area of the GOA be treated as prohibited species in accordance with § 679.21(b).

#### **Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA