

Pacific Island Fisheries; Closure of the 2018 Hawaii Shallow-Set Longline Fishery; Court Order

A Rule by the [National Oceanic and Atmospheric Administration](#) on 05/11/2018

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AGENCY:

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

ACTION:

Temporary rule; fishery closure.

SUMMARY:

This final rule closes the Hawaii shallow-set pelagic longline fishery in compliance with an order of the U.S. District Court for the District of Hawaii.

DATES:

Effective May 8, 2018, through December 31, 2018.

Compliance date: May 4, 2018, through December 31, 2018.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

In a January 30, 2012, NMFS completed a biological opinion (BiOp) on the effects of the Hawaii shallow-set longline fishery, pursuant to the Endangered Species Act (ESA). In the 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 BiOp established an annual incidental take statement authorizing the fishery to interact with up to 26 leatherback and 34 loggerhead sea turtles. Consistent with the BiOp, NMFS revised its regulations establishing annual limits on allowable incidental interactions between the fishery and leatherback and North Pacific loggerhead sea turtles (77 FR 60638 (/citation/77-FR-60638), October 4, 2012, codified at 50 CFR 665.813 (/select-citation/2018/05/11/50-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 of Hawaii, several plaintiffs challenged, among other things, the NMFS final rule that revised the annual sea turtle interaction limits, 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 NMFS 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. As part of the agreement, the U.S. District Court for the District of Hawaii ordered NMFS to take several actions, including closing the Hawaii shallow-set longline fishery through December 31, 2018. This rule implements the Court order to close the Hawaii shallow-set longline fishery through December 31, 2018.

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 under the Administrative Procedure Act (5 U.S.C. 553 ([\(https://api.fdsys.gov/link?collection=uscode&title=5&year=mostrecent§ion=553&type=usc&link-type=html\)](https://api.fdsys.gov/link?collection=uscode&title=5&year=mostrecent§ion=553&type=usc&link-type=html))(b)(B)) to waive prior notice and comment and 30 days delayed effectiveness for this temporary rule. The Court Order, in relevant parts, vacates that portion of the 2012 Biological Opinion that relates to North Pacific loggerheads, and requires NMFS to immediately close the Hawaii shallow-set longline fishery until the end of 2018. 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. Accordingly, providing the public with prior notice and comment rule would be contrary to the public interest because NMFS is required to immediately close the fishery to prevent further impacts to North Pacific loggerhead sea turtles while it completes the new biological opinion. In addition, providing prior notice and comment and 30 days delayed effectiveness are unnecessary because NMFS has no discretion to take other action that is inconsistent with any term of the Court Order.

In addition, the regulatory flexibility analysis requirements of the Regulatory Flexibility Act (5 U.S.C. 603 (<https://api.fdsys.gov/link?collection=uscode&title=5&year=mostrecent§ion=603&type=usc&link-type=html>)-605) do not apply to this rule. Furthermore, because the changes identified in this rule are required by the Court Order and non-discretionary, the National Environmental Policy Act does not apply to this rule.

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Authority: 16 U.S.C. 1801 (<https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent§ion=1801&type=usc&link-type=html>) *et seq.*

Dated: May 8, 2018.

Jennifer M. Wallace,

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

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