

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 683****[Docket No. 80483-8147]****Western Pacific Bottomfish Fisheries****AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.**ACTION:** Final rule.

SUMMARY: NOAA issues a final rule to implement a limited access program for the bottomfish fishery in certain waters of the Northwestern Hawaiian Islands (NWHI). The program establishes a control zone called the Ho'omalulu Zone, in which a person must have a limited entry permit to fish, and a qualifying zone called the Mau Zone, in which a person could earn points to qualify for future eligibility for a limited entry permit. Persons who can demonstrate participation in, or substantial financial commitment to participate in the NWHI fishery, on or before August 7, 1985, would be eligible for initial permits to participate in the Ho'omalulu Zone fishery. A landings requirement is established to maintain eligibility for annual renewal of permits. No new permits to enter the fishery will be issued until stocks are sufficiently large to provide adequate catches. A point system is established to qualify persons for permits for future entry to the fishery. The Western Pacific Fishery Management Council (Council), with the advice of an industry and government Advisory Review Board, will make recommendations to the Regional Director, Southwest Region, NMFS, regarding future entry to the fishery. The objectives of the limited access program are to reduce the risk of overfishing, reduce the level of overcapitalization in the fishery, increase stability in the fishery, and increase profitability or net return to the fishery. The Council will undertake a full evaluation of the effectiveness of the program in 5 years. Under the rule, it is a violation of Federal law to fail to report fishery data in accordance with State reporting requirements and vessel operators must notify the U.S. Coast Guard prior to anticipated arrival in port to unload bottomfish taken in the NWHI.

EFFECTIVE DATES: September 6, 1988.

The permit requirement will go into effect January 1, 1989. Persons who wish to obtain permits by that date must file the application and supplementary information by November 30, 1988.

ADDRESS: A copy of the amendment containing the limited access program,

the environmental assessment (EA), and the regulatory impact review (RIR) may be obtained by contacting the Western Pacific Fishery Management Council, 1194 Bishop Street, Suite 1406, Honolulu, Hawaii 96813, 808-523-1368. Comments on information collection requirements should be sent to the Office of Information and Regulatory Affairs of OMB, Washington, DC 20503. Attention Desk Officer for NOAA.

FOR FURTHER INFORMATION CONTACT: Svein Fougner (Southwest Region, Terminal Island, CA), 213-514-6660; or Peter Milone (Southwest Region, Honolulu, HI), 808-955-8831.

SUPPLEMENTARY INFORMATION: The domestic fisheries for bottomfish in the U.S. exclusive economic zone (EEZ) adjacent to the State of Hawaii are managed under the Fishery Management Plan for the Bottomfish and Seamount Groundfish Fisheries of the Western Pacific Region (FMP). The FMP was developed by the Council under the Magnuson Fishery Conservation and Management Act (MFCMA) and implemented August 27, 1986 (51 FR 27413, July 31, 1986).

The notice of availability of Amendment 2 to the FMP was published on April 18, 1988 (53 FR 12712) and the proposed rule was published on May 11, 1988 (53 FR 16735). Comments were invited until June 20, 1988. One written comment was received.

The preamble to the proposed rule presented in substantial detail the features of the limited access program proposed for the NWHI and that discussion will not be repeated here.

This final rule is scheduled to go into effect January 1, 1989. Interested persons should be advised that the Regional Director, Southwest Region, NMFS, will be working with the Council and the State of Hawaii to prepare for implementation of the Ho'omalulu Zone permit requirement and other provisions of the limited access program. Persons who wish to obtain permits under this program are urged to obtain application forms from the Southwest Region and to compile and submit the necessary documentation of participation in the fishery, or of financial commitments made for participation in the fishery by November 30, 1988, in time for review and award of permits in advance of the effective date. The NMFS also will arrange the protected species seminars required for captains and relief captains and will advise applicants of the time and location of seminars when permit applications were received.

Comments and Responses

Written comments were received from one individual.

Comment: The individual objected to the proposed limited access program because he had been advised that he might not qualify for an initial permit. He indicated he had previously supported the proposal when he had been assured that he would qualify.

Response: Whether or not this person would qualify is not yet known. Under the program, the Southwest Regional Director will make a decision based on the information presented in support of an application, including documentation of participation in the fishery on or before August 7, 1985, or of a firm commitment or offer to buy a vessel for the fishery on or before August 7, 1985. It also is noted that even if the individual does not qualify for an initial permit under the criteria of the program, he may qualify for subsequent entry to the fishery under the point system for new participation when the Regional Director concludes that stock and economic conditions warrant additional entry.

Changes From the Proposed Rule in the Final Rule

A prohibition that did not appear in the proposed rule is added in the regulatory text of the final rule. The proposed rule and this final rule contain § 683.27, which requires fishermen to notify the U.S. Coast Guard at least 24 hours before making any landing of bottomfish from the Ho'omaluu Zone. This final rule adds a new paragraph (n) to § 683.6, General prohibitions, which expressly prohibits failure to comply with the requirement of § 683.27.

Classification

The Director, Southwest Region, NMFS, determined that the Amendment, as approved, is necessary for the conservation and management of the NWHI bottomfish resource and is consistent with the Magnuson Act and other applicable law.

The Council included an environmental review as part of the FMP amendment and an environmental assessment was prepared. The Assistant Administrator for Fisheries, NOAA concluded that there will be no significant impact on the human environment as a result of this rule.

Implementation of this rule is not an action that may affect any species listed as endangered or threatened under the Endangered Species Act of 1972 (Act), or the critical habitat of those species. The Council initiated informal consultations with NMFS under section 7 to the Act

and it was concluded that the action was not likely to have adverse effects on any listed species or critical habitat.

The Under Secretary, NOAA, determined that this rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291. A summary of this determination appears in the proposed rule (53 FR 16735, May 11, 1988) and is based on the regulatory impact review (RIR) which is included in the Amendment.

The General Counsel of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. A summary of this determination appears in the proposed rule.

This final rule contains collection of information requirements subject to the Paperwork Reduction Act. These collection of information requirements contained in this rule were approved by the Office of Management and Budget under Control Number 0648-0201. Public reporting burdens for these collection of information requirements are estimated to average 1 hour per response for the permit requirement and 4 minutes per response for each advanced notification of the U.S. Coast Guard before landing bottomfish. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of these collection of information requirements, including suggestions for reducing these burdens, to Charles Fullerton, Director, Southwest Region, National Marine Fisheries Service, NOAA, 300 South Ferry St., Terminal Island, CA 90731; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

The Council determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal zone management program of Hawaii. The State of Hawaii concurred with this determination.

This final rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

List of Subjects in 50 CFR Part 683

Fisheries, Reporting and recordkeeping requirements.

Dated: August 3, 1988.

James E. Douglas, Jr.,

Deputy Assistant Administrator For Fisheries, National Marine Fisheries Service

For the reasons stated in the preamble, 50 CFR Part 683 is amended as follows:

PART 683—[AMENDED]

1. The authority citation for 50 CFR Part 683 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.* unless otherwise noted.

2. In § 683.2, a new definition for *Qualifying landing* is added to read as follows:

§ 683.2 Definitions.

Qualifying landing means a landing that meets a standard required for permit eligibility under § 683.25, as follows:

(a) Initial permit eligibility. (1) A qualifying landing for initial permit eligibility under § 683.25(b) (1) and (5) is a landing that contained bottomfish from the NWHI, regardless of amount, and which was made on or before August 7, 1985; (2) A qualifying landing for 1986 and 1987 under § 683.25(b)(2) is a landing which contained at least 2,500 pounds of bottomfish from the NWHI or a landing of at least 2,500 pounds of fish from the NWHI, of which at least 50 percent by weight was bottomfish;

(b) Permit renewal—a qualifying landing for permit renewal under § 683.25(c) is a landing which contained 2,500 pounds of bottomfish from the NWHI or a landing of at least 2,500 pounds of fish from the NWHI, of which at least 50 percent by weight was bottomfish.

(c) New access eligibility points—a qualifying landing for eligibility points under § 683.25(e) is any landing of bottomfish from the NWHI, regardless of weight, if made on or before August 7, 1985; or a landing of at least 2,500 pounds of bottomfish lawfully harvested from the NWHI, or a landing of at least 2,500 pounds of fish lawfully harvested from the NWHI, of which at least 50 percent by weight was bottomfish, if made after August 7, 1985.

3. In § 683.5, paragraph (a)(2) is amended by adding (a)(2) (i) and (ii) to read as follows:

§ 683.5 Management subareas.

(a) * * *

(2) * * *

(i) *Ho'omaluu Zone* means that portion of the EEZ around the NWHI west 165°W longitude.

(ii) *Mau Zone* means that portion of the EEZ around the NWHI between 161°20' and 165° W. longitude.

4. In § 683.6, paragraph (k) is redesignated (o) and new paragraphs (k), (l), (m) and (n) are added as follows:

§ 683.6 General prohibitions.

(k) Fish for bottomfish in the Ho'omalulu Zone without a limited access permit issued under § 683.25;

(l) Serve as captain or relief captain on a vessel fishing in the Ho'omalulu Zone without first participating in a protected species seminar conducted by NMFS;

(m) Falsify or fail to make and/or file any and all reports of bottomfish landings, containing all data and in the exact manner, required by the applicable State laws and regulations, as specified in § 683.11, provided that the person is required to do so by the applicable State laws and regulations;

(n) Fail to notify the U.S. Coast Guard at least 24 hours prior to making any landing of bottomfish taken in the Ho'omalulu Zone, as required by § 683.27;

5. A new § 683.10 is added as follows:

§ 683.10 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any applicant for a permit or permit holder may appeal the granting, denial, conditioning, or suspension of their permit or a permit affecting their interests to the Assistant Administrator for Fisheries, NOAA. In order to be considered by the Assistant Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefor, and must be submitted within 30 days of the action(s) by the Regional Director. The appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Assistant Administrator will notify the permit applicant, or permit holder as appropriate, and will request such additional information and in such form as will allow action upon the appeal.

Upon receipt of sufficient information, the Assistant Administrator will decide the appeal in accordance with the criteria set forth in 50 CFR Part 683 and the amendment to the FMP, as appropriate, based upon information relative to the application on file at NMFS and the Council and any additional information, the summary record kept of any hearing and the hearing officer's recommended decision, if any, as provided in paragraph (c) of this section, and such other considerations as deemed appropriate.

The Assistant Administrator will notify all interested persons of the decision, and the reasons therefor, in writing, normally within 30 days of the receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Assistant Administrator determines that one is appropriate, the Assistant Administrator may grant an informal hearing before a hearing officer designated for that purpose after first giving notice of the time, place, and subject matter of the hearing in the Federal Register. Such a hearing shall normally be held no later than 30 days following publication of the notice in the Federal Register unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different), and, at the discretion of the hearing officer, other interested persons, may appear personally or be represented by counsel at the hearing and submit information and present arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Assistant Administrator.

(d) The Assistant Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Assistant Administrator will notify interested persons of the decision, and the reason(s) therefor, in writing, within 30 days of receipt of the hearing officer's recommended decision. The Assistant Administrator's action shall constitute final action for the agency for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Assistant Administrator for good cause, either upon his or her own motion or upon written request from the appellant or applicant stating the reason(s) therefor.

6. A new § 683.11 is added as follows:

§ 683.11 Reports.

Any person who has a Federal permit to fish for bottomfish or seamount groundfish in the NWHI, and who is required to do so by the applicable State laws and regulations, shall make and/or file any and all reports of bottomfish and seamount groundfish landings, containing all data and in the exact manner, required by the applicable State laws and regulations.

7. In § 683.21, paragraphs (a) and (f) are revised to read as follows:

§ 683.21 Permit requirements for the Northwestern Hawaiian Islands.

(a) *Permit areas.* (1) The owner of any vessel being used to fish for bottomfish in the Mau Zone must have a permit issued under this section for that vessel.

(2) The owner of any vessel fishing for bottomfish in the Ho'omalulu Zone must have a permit issued under § 683.25 for that vessel.

(3) The owner of any vessel fishing for seamount groundfish in a given fishery management area must have a permit issued under this section for that vessel.

(4) No vessel may be covered by a permit to harvest groundfish in the Ho'omalulu Zone and the Mau Zone at the same time.

(f) *Expiration.* Permits issued under this section expire on December 31 of the year covered by the permit.

§ 683.26 [Redesignated from § 683.25]

8. Section 683.25 is redesignated § 683.26 and a new § 683.25 is added to read as follows:

§ 683.25 Limited access management program.

(a) *Limited access permits. General requirements.*

(1) The owner of any vessel engaged in fishing for bottomfish in the Ho'omalulu Zone must have a permit issued under this section.

(2) Permits issued under this section shall expire on December 31 of the year covered by the permit.

(3) Each application for a permit must be submitted to the Regional Director by the vessel owner at least 30 days before the date on which the applicant wants the permit to be effective.

(4) Each applicant must be submitted on the form used to apply for a permit under § 683.21(b) and a supplementary information sheet to be provided by the Regional Director. Each application must be signed by the vessel owner and must contain, in addition to the information listed in § 683.21(b)(2), the following information:

(i) The qualification criterion that the applicant believes he or she meets for issuance of a limited access permit; and

(ii) Copies of landings receipts or other documentation, with a certification from a State or Federal agency that this information is accurate, to demonstrate participation in the NWHI bottomfish fishery; or

(iii) Notarized copies of loan documents or other documents that would demonstrate financial commitments on or before August 7.

1985, to enter the NWHI bottomfish fishery; or

(iv) Written evidence indicating that an offer was made to purchase a vessel or that a vessel was under construction, on or before August 7, 1985, and that the vessel was to be used in the NWHI bottomfish fishery.

(v) If the application is filed by a partnership or corporation, the application must identify the names of the owners and their respective percentage of ownership of the partnership or corporation.

(5) Protected species seminar. Each designated captain and relief captain must participate in a seminar conducted by NMFS to ensure familiarity with protected species laws and regulations applicable to the NWHI and the species those laws and regulations are designed to protect.

(6) Sale or transfer of permits to new owners.

(i) A vessel permit may not be sold or otherwise transferred to a new owner.

(ii) A permit or permits may be held by a partnership or corporation. If 50 percent or more of the ownership of the vessel passes to persons other than those listed in the original application, the permit will lapse and must be surrendered to the Regional Director.

(7) Transfer of permits to new vessels.

(i) An owner of a permitted vessel may, without limitation, transfer his permit to another vessel owned by him, provided that the replacement vessel does not exceed 60 feet in length and that the replacement vessel is put into service within 12 months after the owner declares to the Regional Director the intent to make the transfer of the permit.

(ii) An owner of a permitted vessel may apply to the Regional Director for approval to use the permit for a replacement vessel greater than 60 feet in length. The Regional Director may allow this change upon determining, after consultation with the Council and considering the objectives of the limited access program, that the replacement vessel has equal catching power as the original vessel, or that the replacement vessel has catching power that is comparable to the rest of the vessels holding permits for the fishery, and that the change is not inconsistent with the objectives of the program.

(iii) The Regional Director shall consider vessel length, range, hold capacity, gear limitations, and other appropriate factors in making determinations of catching power equivalency and comparability of the catching power of vessels in the fishery.

(b) *Supplementary requirements for initial permits.* An application for an initial permit under this paragraph must

be filed within 5 years of the effective date of this program. A permit for a vessel to be used for fishing for bottomfish in the Ho'omalulu Zone may be issued to:

(1) Any owner who can document that a vessel owned by him made one or more qualifying landings of bottomfish from the NWHI on or before August 7, 1985.

(2) Any owner of two or more vessels which qualify under paragraph (b)(1) of this section may obtain a permit for each of such vessels which also made at least one qualifying landing of bottomfish in 1986 and 1987.

(3) Any person who can document that on or before August 7, 1985, he or she had incurred substantial expenditures for or had received written approval of a loan to purchase or construct a vessel to be used in the NWHI bottomfish fishery.

(4) Any person who can document that on or before August 7, 1985, he or she made an offer to purchase a vessel for the NWHI bottomfish fishery or had such a vessel under construction.

(5) Any person who can document that he or she was captain of a vessel that made at least one qualifying landing of bottomfish the NWHI on or before August 7, 1985, and who becomes an owner or 50% or more interest in a vessel within 5 years of the effective date of this program.

(c) *Supplementary requirements for permit renewal.* (1) A permit will be eligible for renewal if the vessel covered by the permit makes three or more qualifying landings during the permit year.

(2) The owner of a permitted vessel that did not make three or more qualifying landings of bottomfish in a year may apply to the Regional Director for waiver of the landing requirement. If the Regional Director finds that failure to make three landings was due to circumstances beyond the owner's control, he may renew the permit. A waiver may not be granted if the failure to make three landings was due to general economic conditions or market conditions such that the vessel operations would not be profitable.

(d) *Supplementary requirements for new entry permits.* The Regional Director may issue new vessel permits under this part when the Regional Director has determined, in consultation with the Council, that bottomfish stocks in the Ho'omalulu Zone are able to support additional fishing effort. This shall be established by determining that the total estimated annual revenue to the fleet exceeds the total estimated annual fixed and variable costs to the fleet in the Ho'omalulu Zone by an

amount at least equal to the average cost of a vessel year. This determination shall be made and published annually in association with the annual report required under § 683.24 of this part.

(e) *Eligibility.* When the Regional Director has determined that new permits may be issued, they shall be issued to applicants based upon eligibility determined as follows:

(1) *Point System.* (i) Two points shall be assigned for each year in which the applicant was owner or captain of a vessel which made three or more qualifying landings of bottomfish from the NWHI.

(ii) One point shall be assigned for each year in which the applicant was owner or captain of a vessel that landed at least 6,000 pounds of bottomfish from the main Hawaiian Islands.

(iii) Points will be assigned only under paragraph (e)(1)(i) of this section or under paragraph (e)(1)(ii) of this section for any one year.

(iv) Points will be assigned for every year for which the requisite landings can be documented.

(2) An applicant must own at least a 25 percent share in the vessel that the permit would cover, and only one permit will be assigned to any vessel.

(3) New permits shall be awarded to applicants in descending order, starting with the applicant with the largest number of points. If two or more persons have an equal number of points, and there are insufficient new permits for all such applicants, the new permits shall be awarded by the Regional Director through a lottery.

(4) Notwithstanding paragraph (e)(3) of this section, a person who originally qualifies for and obtains a permit under § 683.25(a) and who voluntarily surrenders that permit to the Regional Director within the first 5 years of this program will have priority over applicants under the point scale system for a new permit under this section. If two or more persons qualify under this provision, the person surrendering a permit at the earliest date will have first priority. If two or more such person are equally qualified under the date of surrender criterion, the permit shall be awarded by the Regional Director by a lottery. A permit holder may qualify for this provision only one time.

(5) The Regional Director shall place a notice in the Federal Register and shall use other means to notify prospective applicants of the opportunity to file applications for new permits under this program.

9. A new § 683.27 is added as follows:

§ 683.27 Notification of landings.

The operator of a fishing vessel that has taken bottomfish in the Ho'omalau must contact the U.S. Coast Guard, by radio or otherwise, at the 14th District, Honolulu, Hawaii (Telex: 392401); Pacific Area, San Francisco, California (Telex: 330427); or 17th District, Juneau, Alaska (Telex: 45305), at least 24 hours before landing, and report the port and the approximate date and time at which the bottomfish will be landed.

10. A new § 683.28 is added to read as follows:

**§ 683.28 Native Hawaiian fishing rights.
[Reserved]**

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