of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: That (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

Privacy Act

Anyone is able to search the electronic form of all our comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.regulations.gov.*

List of Subjects in 49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

■ In consideration of the foregoing, FRA amends part 225 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 225—[AMENDED]

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–02, 21301, 21302, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Amend § 225.19 by revising the first sentence of paragraph (c) and revising paragraph (e) to read as follows:

§ 225.19 Primary groups of accidents/incidents.

* * * * *

(c) *Group II—Rail equipment.* Rail equipment accidents/incidents are collisions, derailments, fires, explosions, acts of God, and other events involving the operation of on-track equipment (standing or moving) that result in damages higher than the current reporting threshold (*i.e.,* $6,700 for calendar years 2002 through 2005, $7,700 for calendar year 2006, $8,200 for calendar year 2007, $8,500 for calendar year 2008, $8,900 for calendar year 2009 and $9,200 for calendar year 2010) to railroad on-track equipment, signals, tracks, track structures, or roadbed, including labor costs and the costs for acquiring new equipment and material. * * *

* * * * *

(e) The reporting threshold is $6,700 for calendar years 2002 through 2005, $7,700 for calendar year 2006, $8,200 for calendar year 2007, $8,500 for calendar year 2008, $8,900 for calendar year 2009 and $9,200 for calendar year 2010. The procedure for determining the reporting threshold for calendar years 2006 and beyond appears as paragraphs 1–8 of appendix B to part 225.

* * * * *

Issued in Washington, DC, on December 4, 2009.

Joseph C. Szabo,

Administrator.

[FR Doc. E9–29476 Filed 12–9–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 665

[Docket No. 080225267–91393–03]

RIN 0648–AW49

International Fisheries Regulations; Fisheries in the Western Pacific; Pelagic Fisheries; Hawaii-based Shallow-set Longline Fishery

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

ACTION: Final rule.

SUMMARY: This final rule removes the annual limit on the number of fishing gear deployments (sets) for the Hawaii-based pelagic shallow-set longline fishery, and increases the annual number of allowable incidental interactions that occur between the fishery and loggerhead sea turtles. The final rule optimizes yield from the fishery without jeopardizing the continued existence of sea turtles and other protected resources. This final rule also makes several administrative clarifications to the regulations.

DATES: This final rule is effective January 11, 2010.

ADDRESSES: The Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region (Pelagics FMP) and Amendment 18, including a final supplemental environmental impact statement (SEIS), are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, www.wpcouncil.org.

FOR FURTHER INFORMATION CONTACT: Adam Bailey, Sustainable Fisheries Division, NMFS PIR, 808–944–2248.

SUPPLEMENTARY INFORMATION: This final rule is also accessible at *www.gpoaccess.gov/fr.*

Pelagic fisheries in the U.S. western Pacific are managed under the Pelagics FMP, developed by the Council and approved and implemented by NMFS. The Council submitted Amendment 18 and draft regulations to NMFS for review under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Amendment 18 was approved by the Secretary of Commerce on June 17, 2009. This final rule implements the management provisions in Amendment 18, and makes several housekeeping changes to the pelagic fishing regulations that are not related to Amendment 18.

This final rule optimizes the U.S. harvest of swordfish and other fish species, without jeopardizing the continued existence and recovery of threatened and endangered sea turtles and other protected species. The final rule relieves the burden on fishermen of providing written notice each year to obtain shallow-set certificates, and reduces the administrative burden of processing and issuing certificate requests, and monitoring certificate usage. This will allow an increase in fishing effort to optimize the harvest of North Pacific swordfish and other fish species, but will not exceed maximum sustainable yields.

Under this final rule, the Hawaii longline fleet may not interact with (hook or entangle) more than 46 loggerhead sea turtles or 16 leatherback sea turtles each year. These sea turtle interaction limits do not represent the upper limit of interactions that would avoid jeopardizing the continued existence of sea turtles, but are the annual number of sea turtle interactions

anticipated to occur in the Hawaii shallow-set fishery. The interaction limits allow for growth of the fishery without appreciably reducing the likelihood of both the survival and recovery of the loggerhead and leatherback sea turtles. The final rule is not likely to cause significant adverse effects to marine mammals, migratory birds, essential fish habitat, or habitat areas of particular concern.

All other measures that are currently applicable to the fishery remain unchanged, including but not limited to, limited access, vessel and gear marking requirements, vessel length restrictions, Federal catch and effort logbooks, 100–percent observer coverage, large longline restricted areas around the Hawaiian Archipelago, vessel monitoring system (VMS), annual protected species workshops, and the use of sea turtle, seabird, and marine mammal handling and mitigation gear and techniques. The fishery will be closed for the remainder of the calendar year if either interaction limit is reached. A range of management alternatives was identified during the development of this action, as described in the summary of the SEIS in the Classification section of the proposed rule published on June 19, 2009 (74 FR 29158).

This final rule removes the annual limits on shallow-set fishing effort and the requirements of the shallow-set certificate program found at 50 CFR 665.33, the related prohibitions at 50 CFR 665.22, and the definition of a shallow-set certificate found at 50 CFR 665.12. The annual limits for sea turtle interactions are revised in 50 CFR 665.33. Also in that section, the Regional Administrator is required to publish an annual notification in the **Federal Register** of the applicable annual sea turtle interaction limits, and if an interaction limit is exceeded in any one calendar year, the annual limit for that sea turtle species would be adjusted downward the following year by the number of interactions by which the limit was exceeded.

In addition to modifications to the shallow-set effort and turtle interaction measures, this final rule makes several technical clarifications to the longline regulations that are unrelated to Amendment 18. First, this final rule clarifies the technical specifications regarding required circle hooks. In a final rule published on November 15, 2005, NMFS implemented a requirement for Hawaii-based shallow-set longline fishermen to use circle hooks of size 18/0 or larger with an offset of 10 degrees (70 FR 69282). The wording of this requirement was intended to mirror the requirement for Atlantic longline fishing, which require the use of circle hooks with an offset not to exceed 10 degrees (69 FR 40734; July 6, 2004). The November 2005 final rule for the western Pacific shallow-set fishery inadvertently omitted the phrase ''not to exceed.'' This final rule corrects that error. The result is that shallow-set longline fishermen may use hooks with a range of offsets from zero to 10 degrees.

The second technical change to longline regulations clarifies the requirement to carry line clippers, including the design specifications, on vessels registered for use under a Hawaii longline limited access permit. On March 28, 2000, NMFS published a final rule that implemented several measures designed to mitigate injuries to sea turtles by the Hawaii longline pelagic fishery, including requirements to carry and use line clippers, dip nets, and dehookers (65 FR 16347). In a subsequent final rule relating to sea turtle mitigation measures (70 FR 69282, November 15, 2005), the requirements in 50 CFR 665.32 specifically relating to line clippers were inadvertently omitted. This final rule corrects that error. The corrected regulation requires fishermen to carry on board their vessels and use line cutters meeting NMFS design specifications. The final rule also redesignates several paragraphs in 50 CFR 665.32 for organizational clarity.

In the third technical clarification, this final rule removes the text of two regulations that were previously superseded by more stringent regulations. In 50 CFR 665.22, paragraph (gg) prohibits shallow-set longline fishing from a vessel registered for use under a Hawaii longline limited access permit north of the Equator with hooks other than circle hooks. That paragraph was superseded by paragraph (jj), which prohibits such fishing from a vessel registered under any western Pacific longline permit. Similarly, paragraph (hh) prohibits shallow-set longline fishing from a vessel registered for use under a Hawaii longline limited access permit north of the Equator with bait other than mackerel-type bait. That paragraph was superseded by paragraph (kk), which prohibits such fishing from a vessel registered for use under any western Pacific longline permit. Thus, paragraphs (gg) and (hh) are removed.

A fourth technical clarification was made to the high seas fishing regulations to correct a reference to western Pacific domestic fishing regulations. In 50 CFR 300, paragraph (1)(v) incorrectly refers to Pacific longline reporting requirements at 50 CFR 660.14. This reference was corrected to refer to the requirements at 50 CFR 665.14.

Additional background information on this final rule may be found in the preamble to the proposed rule, and is not repeated here.

Comments and Responses

On June 19, 2009, NMFS published a proposed rule and request for public comment (74 FR 29158). The public comment period ended on August 3, 2009. NMFS received public comments, and responds as follows (note that references cited may be found in Amendment 18 and the final supplemental environmental impact statement (FSEIS), and are not repeated here):

Comment 1: Expansion of the Hawaii-based shallow-set longline fishery would violate the Endangered Species Act (ESA) and would contribute to the extinction of sea turtles.

Response: This rule is consistent with the ESA. The ESA requires each Federal agency to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. Federal regulations implementing the ESA (50 CFR 402; July 3, 1986) define the term ''jeopardize the continued existence of'' to mean engaging in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

NMFS is required under ESA section 7 to consult on Federal actions affecting ESA-listed marine species. On October 15, 2008, NMFS issued a Biological Opinion (2008 BiOp) to determine whether removing the annual limit on fishing effort of the Hawaii-based shallow-set longline fishery (the Federal action) is likely to jeopardize the continued existence of any ESA-listed species. The 2008 BiOp, which utilized the best available scientific information, analyzed the effects of the continued operation of the Hawaii-based shallow-set longline fishery based on an effort level of 5,550 sets annually, or over 4.6 million hooks. The opinion concluded that the action is not likely to jeopardize the continued existence of any ESA-listed species. Critical habitat has not been designated in the action area, so no critical habitat would be affected by the action. The action does not jeopardize the continued existence of any ESA-listed species, and therefore, does not violate ESA, nor would it contribute to

the extinction of any sea turtle species. The 2008 BiOp is available on the NMFS Pacific Islands Regional Office website.

Comment 2: Given declines to both leatherbacks and loggerheads in the Pacific, increasing sea turtle interaction limits is inappropriate. The fact that the existing bycatch limit of 17 loggerheads does not approach the ''upper limit'' of a jeopardy determination is not justification for pushing takes to a point that more closely approaches jeopardy to the species. NMFS has proposed to increase the turtle mortality to levels that now more closely approach jeopardy. The ESA requires NMFS to ensure that the sea turtle populations not only survive but continue to recover; therefore, NMFS should take the most risk-averse approach to managing interacting fisheries.

Response: See response to Comment 1 for ESA requirements. The ESA allows for the incidental taking of listed species under certain conditions. The 2008 BiOp concluded that removing the annual limit on fishing effort is not likely to jeopardize the continued existence or recovery of any ESA-listed species. While this action could potentially result in the incidental take of individuals of several listed species through incidental hooking or entanglement, Section 7 of the ESA allows for taking of ESA-listed species that is incidental to, and not intended as part of an action, if the action is not likely to jeopardize the species, and such taking is in compliance with an incidental take statement (ITS) in a Biological Opinion.

In the 2008 BiOp, NMFS estimated the Hawaii shallow-set longline fishery could make 2,120 to 5,550 sets annually. Based on sea turtle interaction rates observed in the fishery from 2004 to 2008, NMFS further estimated 19 leatherback and 46 loggerhead turtle interactions could occur as the fishery increases. The 2008 BiOp concluded that the estimated number of interactions with leatherback and loggerhead sea turtles is not likely to jeopardize the continued existence (including survival and recovery) of these species.

The ITS in the 2008 BiOp requires NMFS to (1) establish annual interaction limits for loggerhead and leatherback turtles such that the fishery is closed when either interaction limit is reached, (2) implement a 3–year ITS to trigger reinitiating consultation, (3) collect data on the capture, injury, and mortality of sea turtles and life-history information, (4) require that sea turtles captured alive be released from fishing gear in a manner that minimizes injury, (5) require comatose or lethargic sea turtles to be retained on board, handled, resuscitated, and released according to established procedures, and (6) require sea turtles that are dead when brought aboard a vessel, or that do not resuscitate, be disposed of at sea unless NMFS requests retention of the carcass for sea turtle research.

The ITS established the annual interaction limit for loggerhead turtles at 46. Out of an abundance of caution due to concerns about the likely decline of the Western Pacific leatherback population, the annual interaction limit for leatherback sea turtles was retained at the current level of 16. These annual interaction limits are not intended to represent the upper limit of interactions that would avoid jeopardizing the continued existence of sea turtles, but instead are the annual number of sea turtle interactions anticipated to occur in this fishery. Although the annual sea turtle interaction limits are 46 and 16, for loggerhead and leatherback turtles, respectively, the predicted mortalities (based on 100 percent observer data) at the interaction limits would be three adult female loggerhead and two adult female leatherback sea turtles, the effects of which would be indistinguishable from natural mortality. It is important to note that continued comprehensive observer coverage allows for immediate observations and response (i.e., fishery closure) to turtle interactions exceeding established limits. Proven sea turtle mitigation measures, such as large circle hooks and mackerel-type bait, as well as other regulatory measures, will remain in effect. Also see responses to Comments 46 and 61 regarding the 2008 BiOp analyses and no jeopardy determination.

Comment 3: Managers should be developing measures to further reduce loggerhead sea turtle take in U.S. fisheries, not increase them.

Response: NMFS and the Council, working with the Hawaii longline fleet, continue to make significant progress in reducing sea turtle take in the Hawaii-based shallow-set longline fishery. Development and implementation of sea turtle mitigation measures in 2004, such as requiring the use of circle hooks and mackerel-type bait has reduced sea turtle interaction rates by approximately 90 percent for loggerheads and 83 percent for leatherbacks compared to 1994–2002 when the fishery operated without these requirements.

NMFS continues to support the development and research of improved bycatch mitigation measures and new technologies such as TurtleWatch, a mapping product which provides up-to-date information about the thermal habitat of loggerhead sea turtles in the Pacific that fishermen can use to deploy their fishing gear in areas where loggerheads are less likely to occur, and ultimately decrease the number of fishery interactions.

Comment 4: The post-hooking mortality rates of 20.5 percent for loggerheads and 22.9 percent for leatherbacks may be seriously underestimated for the Hawaii-based shallow set fishery, as turtles released with substantial amounts of gear attached are more likely to perish from line ingestion, strangulation, or as a result of amputation. Observers reported that nearly half the leatherbacks encountered were externally hooked and released with the hook and substantial amounts of line still attached.

Response: The post-hooking mortality rates used in the effects analysis, as described in Section 3.3.1.7.1 of the FSEIS, were derived from a NMFS workshop (Ryder et al. 2006) that developed criteria for assigning post-hooking mortality values based upon identified variables, including hook placement, degree of entanglement, and physical condition. Recent NMFS research using satellite tags on loggerhead turtles suggests that the loggerhead post-release mortality rate may be approximately half of those used in the effects analysis of the FSEIS, and may only be about 9.5 percent of all interactions. Given this study's wide confidence intervals, which overlapped the post-hooking mortality values used in the effects analysis of the FSEIS, NMFS relied on a conservative and established approach for applying its guidance on sea turtle post-hooking mortality rates in developing the FSEIS. Therefore, the mortality rates do not appear to be seriously underestimated.

NOAA is committed to investigating potential violations of ESA provisions related to sea turtles and will take appropriate enforcement action where warranted by the facts. NMFS continues to have confidence in the accuracy of observer data, and assigns turtle post-hooking mortality values in accordance with the observers' accounts using published criteria in Ryder et al. (2006). Fishermen are instructed annually at required protected species workshops to remove as much fishing gear as possible from any incidentally caught sea turtle, marine mammal, or seabird to reduce the likelihood of further injury or mortality.

Comment 5: NMFS should motivate fishermen to keep their interactions low by maintaining the current cap. The motivational value of a low cap was

demonstrated in 2007 when fishermen first ignored the TurtleWatch product, but then used it effectively as the fleet approached the cap. In their review of the effectiveness of circle hooks in the Hawaii-based swordfish shallow set fishery, Gilman et al. (2007) suggest that turtles aggregate at foraging grounds (and are often caught in clusters) and recommend measures to avoid real-time turtle hot spots to further reduce turtle interactions. Tripling the cap will undermine efforts to keep interactions low and remove the motivation to fishermen to safeguard these species.

Response: Limiting the annual interaction limit for loggerhead turtles to 46 does not undermine efforts to minimize sea turtle interactions in this fishery, nor does it remove the motivation of fishermen to safeguard these species. It is expected that fishermen will continue to keep interactions with protected species to a minimum to continue fishing sustainably and prevent a fishery closure, which is economically harmful to fishery participants and disrupts markets that rely on Hawaii swordfish. Annual interaction limits are based on 2004–08 interaction rates, and estimated post-hooking mortality rates of loggerheads and leatherbacks in the Hawaii shallow-set longline fishery. Additionally, the leatherback sea turtle interaction limit will remain at 16, and could potentially be a greater limiting factor than loggerheads.

Consistent with the 2008 BiOp, NMFS has recommended the continuation of the TurtleWatch program. Additional descriptive information on this program and other NMFS sea turtle programs and research is in Section 4.4.2.1.2 of the FSEIS. There is no evidence that fishermen used TurtleWatch to avoid sea turtle interactions in 2007.

Proven turtle mitigation measures and hard caps contained in the preferred alternative provide protection to sea turtles. NMFS continues to study sea turtles, including research on their preferred habitats and fishery interactions, and will continue to research effective management options.

Comment 6: The final rule would increase the annual discard mortality by 133 percent.

Response: As described in the FSEIS, fish bycatch in the Hawaii-based shallow-set longline fishery is estimated to be limited to 6–7 percent of the annual catch. Since no other significant changes are occurring in the fishery, there is no indication that removing the annual set limit would increase the mortality rates of any bycatch species. No increased mortality of protected species should occur as proven mitigation gear and techniques will continue to be required in the fishery.

Comment 7: Increasing the Hawaii shallow-set longline fishery would increase fishing pressure on swordfish, and thus, would violate the Magnuson-Stevens Act as the act requires fisheries managers to end overfishing and safeguard swordfish at present quotas.

Response: North Pacific swordfish are managed under the Western Pacific Pelagics FMP and there are no quotas or catch limits for swordfish. The most recent applicable stock assessments for North Pacific swordfish indicate that this stock is not overfished or subject to overfishing, and is not approaching either condition. Kleiber and Yokawa (2004) provided the stock assessment for North Pacific swordfish, and estimated the MSY at 22,284 mt. Results of this assessment suggest that the population in recent years is well above 50 percent of the unexploited biomass, implying that swordfish are healthy and not over-exploited, and are relatively stable at the current levels of fishing effort. Current domestic and foreign harvests of this stock amount to approximately 14,500 mt, roughly 65 percent of the MSY. Wang et al. (2007) found that the spawning stock biomass of swordfish in the North Pacific is currently at a fairly high fraction of its initial level and that the spawning stock biomass-per-recruit under current exploitation rates is higher than that corresponding to the maximum sustainable yield. Wang et al. (2007) also note that recent stock assessments of swordfish in the North Pacific indicate that this stock is not over-exploited and that it has been relatively stable at current levels of exploitation. The Hawaii-based shallow-set longline fishery's projected harvest of approximately 4,808 mt if 5,500 sets are utilized will not overfish or contribute to overfishing of swordfish. Furthermore, a 2009 International Scientific Committee swordfish stock assessment concluded that western and central Pacific Ocean (WCPO) and eastern Pacific Ocean (EPO) stocks of swordfish are healthy and well above the level required to sustain recent catches.

Comment 8: Many target and non-target species harvested by the Hawaii-based longline fishery, including bigeye and yellowfin tuna, are either overfished or approaching an overfished condition, or lack sufficient data to determine whether their populations are healthy and sustainable. Allowing the fishery to expand would violate Federal laws and international agreements, which require fishery managers to end overfishing immediately and rebuild overfished populations.

Response: No fish stock targeted or incidentally caught by the Hawaii shallow-set fishery is overfished, or approaching that condition. The Hawaii fleet targets North Pacific swordfish which have not been found by NMFS or any international management organizations to be overfished or subject to overfishing, or approaching either condition. For information about the maximum sustainable yield for North Pacific swordfish, see response to Comment 7.

Pacific-wide bigeye tuna was determined in 2004 by NMFS to be subject to overfishing, but not overfished (69 FR 78397, December 30, 2004). In that determination, NMFS recognized that Pacific bigeye tuna occur in the waters of multiple nations and on the high seas, and is fished by the fleets of other nations in addition to those of the U.S.A. Multilateral action is essential to ensure that overfishing of bigeye tuna in the Pacific Ocean ends, although U.S. fisheries comprise a very small portion of Pacific-wide bigeye tuna harvests (less than 3 percent in 2004). In 2007, NMFS approved the Council's recommendation to develop, support and implement recommendations made by international regional fishery management organizations (RFMO, such as the Western and Central Pacific Fisheries Commission (WCPFC) and the Inter-American Tropical Tuna Commission (IATTC)) to address overfishing of bigeye tuna.

Furthermore, the final rule will likely increase participation in the shallow-set fleet that targets swordfish, thereby shifting effort away from bigeye and yellowfin tuna that are targeted by the deep-set fleet. (The Hawaii longline fisheries are limited to 164 vessels, combined.) Pursuant to the Western and Central Pacific Fisheries Convention Implementation Act, NMFS and the Council have been working with the WCPFC to address the bigeye tuna overfishing issue on an international scale. The WCPFC adopted Conservation and Management Measure (CMM) 2008–01 designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors. NMFS implemented a final rule (74 FR 38544, August 4, 2009) and has proposed rulemaking (74 FR 32521, July 8, 2009) to implement CMM–2008–01 for 2009 to reduce the bigeye tuna fishing mortality rate in the WCPO. The highest expected annual fishing mortality of bigeye tuna by the Hawaii shallow-set fishery using 5,500 sets is 0.29 percent of estimated

maximum sustainable yield for bigeye tuna in the WCPO.

WCPO yellowfin is no longer considered to be subject to overfishing, based on recent stock assessments. In 2004, U.S. fisheries were estimated to be responsible for less than four percent of all WCPO yellowfin harvests, with the majority of these made by tuna purse seine vessels. A recent IATTC resolution (C–09–01) is applicable in 2009–11 for all large U.S. longline vessels (over 24 meters length overall), that fish for yellowfin, bigeye and skipjack tunas in the EPO. In reference to the U.S.A., they shall ensure that their total annual longline catches of bigeye tuna not exceed 500 metric tons. NMFS has implemented (74 FR 38544, August 4, 2009) the CMM for 2009 to prevent increases in the yellowfin tuna mortality rate in the WCPO. For yellowfin tuna, the highest expected annual fishing mortality from 5,500 sets is approximately 0.004 percent of WCPO yellowfin MSY. Neither bigeye nor yellowfin tuna estimates of potential fishing mortality from 5,500 sets include percentages of MSY estimates from the EPO. That is, the estimates of catch compared to the MSY are calculated from fishing within the WCPO only (150° W or further west). The fishery does occasionally operate east of the 150° W longitude, separating the two RFMO jurisdictions (WCPFC and IATTC). The fishery would likely catch a small unknown percentage of their annual catch of bigeye and yellowfin tuna from the EPO, thereby reducing the already low percentages of MSY from the WCPO.

Comment 9: The removal of the shallow-set fishery effort limit, increased pressure on overfished and data-poor fish species, and increased take of protected species are wholly unjustified.

Response: See the responses to Comments 1, 2, 7, and 8 for justification of the sustainable increase of Hawaii-based shallow-set longline swordfish fishery.

Comment 10: Since the annual set limit has never been reached, there currently are unused set limit allocations available to any fishermen who wish to use them. As such, there is no immediate need to open the swordfish fishery, much less propose an unlimited effort, and try to encourage fishermen to switch between target fisheries. If the tuna fishermen wish to move into the swordfish fishery now, they can.

Response: Hawaii longline permit holders who need shallow-set certificates for the next calendar year must notify the Pacific Islands Regional Office (PIRO) of their interest by November 1 of the fishing year. Each permit holder meeting the November 1 deadline receives one share for each Hawaii longline permit they hold. The 2,120 certificates are divided by the total number of shares and rounded down to the nearest whole number. The resulting number is the number of certificates issued to each share.

Shallow-set certificates are freely transferable to another Hawaii longline permit holder; however, certificates are typically sold by fishermen that do not participate in the shallow-set fishery, thus adding another layer of complexity for shallow-set fishermen to obtain an economically feasible number of certificates. While the current annual set limit of 2,120 has not been reached since the program's inception in 2004, this limit does not promote, on a continuing basis, optimal yield from the swordfish fishery in accordance with the Magnuson-Stevens Act's National Standard 1. Accordingly, the continuation of the set certificate program may be expected to unnecessarily limit fishing effort.

In addition, the set certificate program is an unnecessary administrative burden and cost to taxpayers. The final rule will enable the fishery to achieve optimum yield, while at the same time reducing costs and avoiding jeopardy to ESA-listed species. Current fishing effort limits and associated set certificates have been used to indirectly control turtle interactions. The use of interaction limits for turtles, in conjunction with other existing regulatory measures, have proven to be effective in reducing interactions. NMFS will continue to monitor the fishery with 100 percent observer coverage and is confident that this will provide complete fishery information.

Comment 11: Proposing to close a fishery based solely on endangered species interactions, with no limit on sets or effort (in other words, without having anything to do with the fish stock), is no way to manage a fishery.

Response: This fishery is being managed with many other measures, in addition to limits on sea turtle interactions. Moreover, closing a regulated fishery, like the Hawaii-based shallow-set longline fishery, based on threatened and endangered species interactions is prudent and reasonable given the intent of Amendment 18 and the final rule to achieve optimal yield from the fishery. The shallow-set longline fishery will continue to be monitored and assessed for its impact on pelagic management unit species.

The Magnuson-Stevens Act broadly gives the Councils and NMFS the authority to undertake appropriate measures to control bycatch. National Standard 9 requires that the Councils and NMFS develop conservation and management measures which ''shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.'' Under the Magnuson-Stevens Act, turtles are included in the definition of bycatch. In addition, in the recent Magnuson-Stevens Act reauthorization, Congress added an extensive provision creating a Bycatch Reducton Engineering Program which specifically authorized Councils and NMFS to take action to ''incorporate bycatch into quotas, including the establishment of collective or individual bycatch quotas.'' As a result, a number of fisheries are constrained through bycatch caps. The Magnuson-Stevens Act action establishing a bycatch cap often involves setting a limit on the specific number of animals from a prohibited species that may incidentally be caught (although not retained) before fishing operations must cease. Therefore, it is a permissible action under the Magnuson-Stevens Act to establish a limit on the number of turtles (or any other species) that can be caught as bycatch in a fishery.

Sustainable harvests of North Pacific swordfish are possible up to an MSY of about 22,284 mt. The current annual swordfish catch by the Hawaii-based shallow-set fishery ranges from 850 to 1,637 mt, (1,861,391 to 3,602,339 lb) and the amount of effort to catch 7,784 mt of additional swordfish would be about 9,925 total sets per year if the Hawaii longline fishery were to fish the North Pacific swordfish stock up to the level of the MSY. The sea turtle interactions limits are set to protect those stocks from being jeopardized. The fishery would close if either of these interaction limits were reached.

Comment 12: The impact analysis of the proposed action seems to down-play risks to a variety of species including false killer whales, humpback whales, and sea turtles. The current mortality limits were set in face of an acknowledged lack of information on sea turtle stock structure, population estimates and bycatch in non-US fisheries.

Response: In the 2008 BiOp, NMFS determined that the level of incidental take anticipated from the final rule is not likely to jeopardize the humpback whale, loggerhead turtle, leatherback turtle, green turtle, olive ridley turtle, or hawksbill turtle. While the final rule is not expected to jeopardize leatherback turtles, NMFS is concerned about the decline of the Western Pacific

leatherback population. The lack of information on this population means that it could be worse off than it appears. For these reasons, a cautionary approach is warranted, and NMFS did not propose increasing the annual interaction limit for leatherback turtles. That limit remains at the current limit of 16, rather than the expected incidental take of 19 leatherbacks.

Comment 13: NMFS should adopt a precautionary approach and support the ''no action'' alternative.

Response: Amendment 18 was approved by the Secretary of Commerce on June 17, 2009. The actions approved in the Amendment remove fishing effort limits, and increase the annual loggerhead sea turtle interaction limit to 46 interactions (the current limit of 16 interactions with leatherback sea turtles remains unchanged), and discontinue the set certificate program.

Interaction limits for the shallow-set longline fishery were established using the best available science, which included data from 100 percent observer coverage since 2004. Fishery interaction and estimated mortality rates were used to determine the annual limits on the fishery. Where information was not as readily available, a more conservative approach was utilized. For instance, the 2008 BiOp noted this in relation to the proposed increase in the leatherback sea turtle interaction limit. While the proposed increase to 19 annual interactions did not reach a jeopardy threshold, due to a lack of information and the population status of Western Pacific leatherbacks at known nesting beaches, a more conservative measure is implemented to restrict the allowable annual interactions to 16 due to a lack of information and the population status of Western Pacific leatherbacks.

Comment 14: Increasing the loggerhead sea turtle interaction limit from 17 to 46 would violate the requirement of the Magnuson-Stevens Act to minimize bycatch to the extent practicable.

Response: National Standard 9 requires conservation and management measures, to the extent practicable, to minimize bycatch and to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. The use of circle hooks and mackerel-type bait in Hawaii's shallow-set longline fishery has reduced sea turtle interaction rates by approximately 90 percent for loggerheads and 83 percent for leatherbacks compared to 1994–2002, when the fishery was operating without these requirements (Gilman et al. 2007). Gilman et al. (2007) also showed that the incidents of serious injury, e.g., the number of deeply-hooked sea turtles have been greatly reduced. Additionally, handling and release requirements are used to reduce sea turtle mortality. These requirements will not change as a result of this final rule. Bycatch of ESA-listed humpback whales, loggerhead sea turtles, leatherback sea turtles, olive ridley sea turtles, green sea turtles, and hawksbill sea turtles is not likely to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or their distribution.

Comment 15: NMFS should maintain 100 percent observer coverage of the shallow-set longline fleet and continue to improve the real-time reporting of marine mammal and sea turtle interactions to ensure that interaction limits are not exceeded.

Response: Existing management measures will be maintained, including 100 percent observer coverage and real-time reporting of sea turtle interactions. Each observer is issued a satellite telephone, and may also use the vessel's marine radio to ensure timely reporting of all sea turtle interactions. NMFS has established electronic logbook reporting mechanisms to enable timely reporting for the Hawaii pelagic longline fleet. The PIRO Observer Program is actively preparing for the potential shallow-set fishery expansion, and subsequent requirement of additional observer coverage.

Comment 16: Expansion of the Hawaii shallow-set longline fishery would violate the Marine Mammal Protection Act (MMPA), because NMFS has not proposed or issued a decision and related authorizations for incidental take of humpback whales.

Response: A marine mammal species that is listed as threatened or endangered under the ESA is, by definition, also considered strategic under the MMPA. The ESA allows taking of threatened and endangered marine mammals only if authorized by section 101(a)(5) of the MMPA. That is, the incidental taking of ESA-listed marine mammals must first be authorized under section 101(a)(5)(E) of the MMPA before it can be authorized by the ESA. Because incidental take of humpback whales has not been authorized under the MMPA for the action, the 2008 BiOp could not authorize incidental take of this species. However, NMFS has initiated the humpback whale MMPA 101(a)(5)(E) authorization process for the Hawaii-based longline shallow-set fishery.

Using annual interaction rates, the 2008 BiOp predicted this action would result in up to three interactions between humpback whales and the shallow-set fishery each year. Based on mortality estimates used in the 2008 BiOp, Chapter 4 of the FSEIS was revised to include an estimated 25 percent post-interaction mortality rate, resulting in up to one humpback whale mortality every year. As discussed in the 2008 BiOp, NMFS does not expect this to jeopardize the continued existence or recovery of the North Pacific humpback whale population. NMFS is in the final determination process on whether or not U.S. Federal fisheries have a negligible impact on the North Pacific Stock of humpback whales. This stock is currently estimated at 18,000 animals and available information indicates that it is increasing by at least 6.8 percent per year as result of international and Federal protections.

Comment 17: There is no exclusion in the ESA for beneficial conservation measures that offset fisheries incidental take, which is contrary to the ESA and the Administrative Procedure Act, and a misguided disincentive for fisheries to engage in beneficial conservation activities.

Response: While the Council's conservation projects are not a part of the current Federal action, in evaluating the status of species affected by an action under ESA Section 7 consultation, NMFS considers the beneficial impacts of conservation activities that may improve species status. Such measures must be reasonably likely to occur to make a quantitative or qualitative assessment. NMFS also considers conservation measures that are part of a proposed action in its effects analyses in Section 7 consultations. The Federal fishery action and the Council's conservation measures are two different actions with regard to ESA Section 7. For example, the issuance of Federal fishing permits for Hawaii-based longline fishing is a distinct action, separate from granting funds to support turtle conservation measures in Japan, Mexico, and Indonesia. The action areas for the conservation measures and for longline fishing are geographically separate.

Comment 18: NMFS implemented a reasonable and prudent measure (RPM) that causes more than a minor change in the proposed action (i.e., that reduces authorized leatherback sea turtle takes from 19 to 16 annually).

Response: The ESA Section 7 regulations define reasonable and prudent measures as those actions necessary or appropriate to minimize the impacts of incidental take resulting from a no-jeopardy action (402.02), and stipulate that a reasonable and prudent

measure cannot alter the basic design, location, scope, duration, or timing of the action and involve only minor changes (402.14). Because of the apparently declining population of Western Pacific leatherback turtles, NMFS exercised its discretion to minimize incidental take of this species associated with the action. The reduction in the proposed leatherback take from 19 to 16 annually does not alter the basic design, location, scope, duration, or timing of the action.

Comment 19: Would the associated take permits and authorizations under the MMPA and ESA change with implementation of this rule?

Response: MMPA take authorizations will not change as a result of the final rule, and no new permits or authorizations will be required. The Marine Mammal Authorization Program (MMAP) participation is part of the Hawaii longline limited entry permit issuance, and qualifies for commercial take exemption. The action was analyzed for potential impact to ESA-listed species. The 2008 BiOp issued on the action determined there would be no jeopardy to the survival and recovery of any ESA-listed species.

Comment 20: Existing gear and bait technologies employed in the Hawaii shallow-set longline fishery, which have been proven successful in Atlantic experiments, have not yet been proven enough in this fishery to warrant a dramatic increase in potential endangered species takes and unlimited effort that this proposal entails.

Response: The Hawaii-based shallow-set longline fishery began in late 2004 to test the effectiveness in the Pacific of a combination of circle hooks and mackerel-type bait, which successfully reduced interactions with leatherback and loggerhead sea turtles in the Atlantic. This resulted in a data set of 4,638 shallow sets (with 100 percent observer coverage).

To test the gear combination's effectiveness, fishing effort in the model Hawaii fishery was limited to 2,120 sets, roughly 50 percent of the 1994–99 annual average number of sets. As an additional safeguard, an annual limit was implemented on the number of unintended interactions with sea turtles that could occur in the shallow-set fishery. The limit was calculated by multiplying the number of sets, 2,120, by sea turtle interaction rates in the Atlantic experiments. The fishery would be closed for the remainder of the calendar year if either interaction limit was reached. Since the fishery reopened in 2004, sea turtle interactions in the Hawaii shallow-set longline fishery have been successfully reduced by a combined 89 percent compared to 1994–2002 when the fishery was operating without these requirements. Furthermore, since 2004, all sea turtles that have interacted with the Hawaii-based shallow-set fishery have been released alive.

The best available scientific information indicates that the action, with continuation of existing and effective sea turtle and seabird mitigation measures, and 100 percent observer coverage, will not jeopardize the continued existence and recovery of any protected species populations, or result in overfishing or overfished conditions of any target or non-target stocks. Section 4.0 of the FSEIS includes a description of the analytical methodology used in the analysis. The data used in the analysis are sufficient to present the potential impacts of the alternatives considered. Interaction rates are significantly lower than in the past; however, no single mitigation measure is completely effective. Annual interaction limits provide an additional level of confidence that fishery interactions do not exceed authorized levels.

Comment 21: Should the longline fishery seriously injure or kill a humpback from the Central North Pacific stock of humpback whales, the potential biological removal (PBR) for the SE Alaska portion of the stock will likely be equaled. This is not discussed in the 2008 BiOp, but it should have been.

Response: Discussion of PBR calculations were outside the scope of the effects analysis of the 2008 BiOp because PBR is a construct of the MMPA, not the ESA. Mortality estimates are published in the annual Stock Assessment Report (SAR). The draft 2009 SAR was available for public comment (74 FR 30527, June 26, 2009). In this rule, NMFS cannot assume how additional takes in the Hawaii-based shallow-set longline fishery will affect the PBR levels. The effects analyses in the FSEIS and the 2008 BiOp did quantify the potential number of interactions with humpback whales at the projected maximum number of sets.

Comment 22: There are likely to be adverse impacts from the preferred alternative to either the insular or pelagic stocks of false killer whales, and those impacts appear to be inappropriately minimized. The lack of observed interactions, on which NMFS' conclusion regarding impacts is based, is in part an artifact of low observer coverage and very limited effort; and that effort is now proposed to be dramatically increased. Given the very low PBR levels for these stocks, and the fact that the insular stock appears to be declining and the PBR for the pelagic stock is being exceeded, NMFS' conclusion is incorrect that there is likely to be little impact to these stocks from a dramatic increase in sets and hooks.

Response: The FSEIS impacts analysis included false killer whales using shallow-set fishery data obtained from 100 percent observer coverage. There have been four observed interactions since 1994 and only two observed interactions since the inception of 100 percent observer coverage when the shallow-set fishery was re-opened in 2004. The pelagic false killer whale stock is a strategic stock because of its interaction with the deep-set longline fishery, which is not the subject of this final rule. Also see response to Comment 49 for shallow-set fishery-related marine mammal interactions.

The shallow-set fishery rarely interacts with false killer whales. Based on sighting locations and genetic analysis of tissue samples, the NMFS 2008 SAR applies an insular false killer whale stock boundary corresponding to the 25–75 nm longline prohibited area around the main Hawaiian Islands to recognize the insular false killer whale population as a separate stock for management. Based on the best available scientific information and as described in the SAR, interactions between the Hawaii-based longline fleet (both the shallow-set and deep-set fisheries) and the Hawaii insular population of false killer whales is unlikely in the longline fishing prohibited area around the main Hawaiian Islands.

Comment 23: A major consideration in the future of the North Pacific loggerhead is the reduction in numbers of juvenile foraging populations in Baja California, Mexico, with far fewer animals smaller than 50 cm than have been reported in the past. Continuing declines in juvenile foraging populations in Mexico may be manifesting themselves in the nesting beach data and the population could be declining at a much more rapid rate than the analyses here represent. Cumulative impacts should be considered when determining acceptable interaction levels.

Response: The final rule will not jeopardize the continued existence or recovery of loggerhead populations; authorized interactions with loggerhead (46) and the expected resultant adult female mortalities (up to three per year) cannot be distinguished from the effects of natural mortality. Declines of juvenile loggerheads in Mexico are not exhibited in the Japanese nesting beach data.

Incomplete North Pacific loggerhead nesting beach data from 2008 included in the FSEIS indicate a 55 percent increase in loggerhead nesting as compared to 2007. This information is in Table 19 of the FSEIS. Figure 18 shows the trend in loggerhead nesting, and was added to FSEIS Section 3.3.1.2.1. Nesting trends through 2008, presented by Dr. Yoshimasa Matsuzawa at the Symposium for North Pacific Loggerhead Turtle Conservation in Japan, convened in Kagoshima, Japan, December 7, 2008, indicated a total of 10,847 nests. This is considerably higher than the 7,700 nests that the 2008 BiOp assumed before the nesting season was finished and all data compiled. Publications on the numbers of juvenile age class foraging populations in Mexico are not currently available. The current loggerhead sea turtle population is likely in a better condition than depicted by the analyses.

The Council's ongoing sea turtle conservation projects are important to loggerhead conservation and survival. The 2008 BiOp included the following conservation recommendations for loggerhead sea turtles: (1) continuation of ongoing studies on the ecological, habitat use, and genetics of loggerhead turtles in nearshore waters around Baja California, Mexico, (2) gear mitigation studies for fisheries operating in these waters; (3) implementation of a trans-Pacific international agreement that would include relevant Pacific Rim nations in the conservation and management of sea turtle populations - specifically a Japan-U.S.A.-Mexico agreement for North Pacific loggerhead turtles, and (4) regional partnerships to implement long-term sea turtle conservation and recovery programs for critical nesting, foraging and migratory habitats.

The 2008 BiOp, which was peer-reviewed, examined the preferred alternative under Section 7 of the ESA and relying on the best information available, concluded that the action limiting annual interactions to 46 loggerheads and maintaining the current interaction limit of 16 leatherbacks would not jeopardize the continued existence and recovery of those sea turtle populations. Furthermore, transferred effects from the action will likely benefit global sea turtle populations by reducing domestic consumption of fish harvested from foreign fisheries that do not employ proven turtle mitigation measures.

Comment 24: The final rule would put leatherback turtles at greater risk of capture, because of the vulnerability to declining nesting populations of Western Pacific leatherbacks, as 75 percent of these turtles are concentrated in a few sites in Papua, Indonesia.

Response: Estimates derived from Dutton et al. (2007) suggest that during 1999–2006, two-thirds of the nesting occurred in Papua, Indonesia, most of the remainder occurred in Papua New Guinea and the Solomon Islands, and a small fraction (about 1 percent) occurred in Vanuatu.

The final rule removes the annual limit on fishing effort, thus allowing for optimum yield to be achieved in this fishery. NMFS estimates up to 5,550 sets to be made by the Hawaii shallow-set longline fishery annually. Based on sea turtle interaction rates observed in this fishery in 2004–08, NMFS estimates 5,550 sets would result in 19 leatherback interactions. However, due to concerns about the decline of the Western Pacific leatherback population, NMFS retained the annual interaction limit for leatherback sea turtles at 16. This interaction limit is identical to the limit imposed on the fishery during 2004–08 and, therefore, the risk to leatherback turtles is not increased.

Comment 25: Pacific leatherback populations have declined more than 90 percent in the last several decades, and this rule would further threaten them.

Response: The nesting beach trend is in decline at the only western Pacific nesting beach (Jamursba-Medi, Papua, Indonesia) where long-term leatherback nesting has been monitored. Other leatherback nesting beaches in the western Pacific may also be in decline, but there are no long-term nesting beach data to make a determination. As noted in Section 4.4.2.1.5 of the FSEIS, though greater numbers of nesting female leatherbacks have been discovered in the western Pacific, trend information is not available for these newly described nesting sites, thus no statements can be made describing the anticipated outlook (i.e., status) for these populations for which there are no trend data.

The number of nesting female leatherbacks in the southwestern Pacific appears to be greater than previously stated in Spotila (1996) or NMFS (2004). However, the continuation of proven regulatory measures and associated conservation efforts is necessary. The final rule does not further threaten the Western Pacific leatherback, because there will be no change in the number of authorized interactions with leatherbacks (16) and the expected resultant adult female mortalities (up to two per year) cannot be distinguished from the effects of natural mortality. The 2008 BiOp indicated that this final rule will not jeopardize the continued existence or recovery of leatherback populations.

Comment 26: Existing management of the shallow-set fishery is not likely to offer enough protection to sea turtle, marine mammal, and seabird species, and all of the proposed alternatives in the final rule are unacceptable, including the ''no action'' alternatives.

Response: Sea turtle mitigation measures implemented in the fishery in 2004, such as the required use of circle hooks and mackerel-type bait, successfully reduced sea turtle interaction rates by approximately 90 percent for loggerheads and 83 percent for leatherbacks compared to the 1994–2002 when the fishery operated without these measures. The severity of the interactions has also been greatly reduced as indicated by the number of turtles that have been deeply vs. lightly hooked (Table 3, p. 14, FSEIS, Gilman and Kobayashi 2007). Prior to the use of circle hooks and mackerel-type bait, 51 percent of sea turtle interactions in the fishery from 1994–2002 were believed to have involved deeply hooked turtles. From May 2004 to March 2007, fewer than 12 percent of the hooked sea turtles were classified as deeply-hooked.

Shallow-set fishery interactions with marine mammals are rare and apparently random events. Accordingly, potential marine mammal protective measures for the Hawaii shallow-set fishery are limited, based on limited data. Data are collected on all marine mammal interactions and depredation events and analyzed for trends or patterns that could enlighten areas where mitigation efforts would be successful. In April 2009, NMFS began the process to develop a Take Reduction Plan (TRP) and assemble a Take Reduction Team (TRT). Implementation of the full TRT is subject to the availability of funding. Once a TRT is officially designated, the MMPA requires a draft TRP to be completed within six months. The scope of the TRP has not yet been established.

Seabird mitigation requirements implemented in the fishery in 2001, such as the use of line shooters, weighted lines, side setting, night setting, and blue-dyed bait yielded a 96 percent reduction in the combined black-footed and Laysan albatross shallow-set interaction rate compared to 1994–98. The current seabird deterrent and mitigation measures remain in effect and are not affected by this final rule.

Comment 27: Fishery managers and participants should not consider the sea turtle serious injury and mortality take limits to be an acceptable level of taking, or a quota, when recovery of these turtle stocks would be best

achieved by reducing the number of takes to the lowest possible level.

Response: The loggerhead and leatherback sea turtle annual interaction limits are not regarded as a serious injury or mortality limit. A loggerhead or leatherback turtle hooked or entangled to any degree or manner counts against the annual limit. The 2008 BiOp determined that the effects of the action are likely to be indistinguishable from the effects of natural mortality. NMFS will continue to promote the recovery of loggerhead and leatherback sea turtles and will continue to require the use of proven regulatory measures for turtles, such as large circle hooks, mackerel-type bait, handling and resuscitation techniques, and annual protected species workshops. Additionally, NMFS continues to support the Council's sea turtle nesting beach projects to protect Western Pacific leatherback turtles in Wermon Beach, Indonesia, and Huon Coast, Papua New Guinea, as well as projects in Japan to protect nesting loggerheads and projects in Mexico to protect foraging loggerheads. For instance, based on the most recent nesting data available, the Wermon Beach project annually produces approximately 40,000 leatherback hatchlings, and the Huon Coast project produces approximately 12,000 leatherback hatchlings each year, most of which would not survive without the conservation projects.

Comment 28: Sea turtle populations in the Pacific are seriously reduced as the result of excessive, unregulated fisheries in international waters, so strict protections should continue, because U.S. protections diminish the threats to sea turtles while they are in domestic waters.

Response: NMFS is actively engaged in efforts to combat illegal, unreported and unregulated (IUU) fishing through participation in international conventions such as WCPFC and IATTC. NMFS will continue to protect sea turtles, wherever U.S. fishing vessels operate, including within the EEZ and on the high seas, and diminish threats by imposing strict interaction limits, proven fishing methods and gear to reduce the number and severity of potential bycatch interactions, as well as required annual protected species workshops to educate fishermen.

Comment 29: It is arbitrary and inconsistent with the ESA for NMFS to factor speculative and unproven ''market transfer effects'' of domestic fishing regulations into its jeopardy analysis.

Response: NMFS is required to use the best available scientific information in formulating its biological opinions. As described in the 2008 BiOp, the market transfer effect with regard to the Hawaii longline fishery was described in the NMFS 2001 EIS and in two peer-reviewed papers. These papers suggest that a beneficial market transfer effect with regard to turtles could occur with an increase in the U.S. fishery because of the more stringent measures in place to reduce interactions with protected resources, in comparison to less heavily regulated foreign fisheries. This information could not be omitted in a biological opinion on the proposed expansion of the fishery.

While the best available scientific information suggests that an increase in the U.S. fishery could result in a beneficial transfer effect, the information is inadequate to quantify any such effect. The potential for the beneficial transfer effect was described in the 2008 BiOp; however, it was not quantified or included in the Susceptibility to Quasi-Extinction (SQE) model used to quantify the effects of the action on the North Pacific loggerhead population. That is, the SQE model in the 2008 BiOp assumed zero market transfer effect. Thus, the analysis remained very conservative.

Comment 30: The listing of ''stressors'' to the affected populations on page 49 of the 2008 BiOp, and discussed in greater depth later, is woefully lacking and focuses largely on impacts of entanglement (interactions) by the shallow-set longline fishery.

Response: ''Effects of the action'' on page 49 of the 2008 BiOp refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline. The environmental baseline section described all past and present human impacts within the action area, and included fisheries interactions, climate change, and marine debris. The ''Effects of the Action'' section focuses on interactions with the shallow-set fishery, because that is the largest impact. The ''Effects of the Action'' are considered within the context of the ''Status of Listed Species'' and ''Environmental Baseline'' sections of the opinion to determine if the action can be expected to have direct or indirect effects on threatened and endangered species that appreciably reduce their likelihood of surviving and recovering in the wild by reducing their reproduction, numbers, or distribution (50 CFR 402.02), otherwise known as the jeopardy determination. ''Indirect effects'' are those that are likely to occur later in time (50 CFR 402.02).

Comment 31: In Hawaii, the Western Pacific Fishery Management Council is well known for allowing overfishing of Hawaii's fisheries for short-sighted profits resulting in many local fisheries near and even total collapse and a scarcity of local fish in Hawaii's own markets. The Council is under Federal investigation, and must not be allowed to establish any new catch limits, fisheries, or guidelines under their existing administration, and they also present an imminent danger to the sustainability of Hawaii's fisheries.

Response: Under the Magnuson-Stevens Act, the Council has management purview for U.S. fisheries in Federal waters around American Samoa, the Northern Mariana Islands, Guam, Hawaii, and the Pacific Remote Island Areas. The primary responsibility of the Council is to develop and recommend specific management measures in the form of fishery management plans, subject to the approval and implementation by the Secretary of Commerce via delegation to NMFS. Recent amendments to the Magnuson-Stevens Act in 2006 mandate the Council to develop annual catch limits and accountability measures to prevent and end overfishing for each of its managed stocks among other measures.

According to a NMFS 2008 Report to Congress on the status of U.S. fisheries, the Council has prepared and NMFS has approved five fishery management plans which contain 45 stocks or complexes. Of these 45 stocks and stock complexes, one stock, bigeye tuna, is subject to overfishing, one stock complex, Hancock seamount groundfish, is overfished, and no other stocks or stock complexes are approaching an overfished condition. Both bigeye tuna and seamount groundfish are fished by international fishing fleets, so ending overfishing of bigeye tuna stocks and rebuilding of the overfished seamount groundfish stock complex cannot be achieved by U.S. action alone.

In June 2009, the Government Accountability Office of the United States (GAO) completed an internal review of Council operations to determine the validity of allegations of wrongdoing raised by several Hawaii-based conservation advocacy organizations. The GAO's full report of the review is available at www.gao.gov. None of the allegation addressed the competency of the Council to fulfil its statutory responsibilities under the Magnuson-Stevens Act.

Comment 32: NMFS should focus its resources on correcting existing legal

deficiencies in the management of this fishery, obtaining better data on the target and non-target species affected by the fishery, and providing effective protection to threatened and endangered species so that they may recover to the point where ESA protection is no longer necessary.

Response: NMFS is currently unaware of any legal deficiencies in the management of the shallow-set fishery that would require correction. NMFS is mandated to implement the ESA with the goal of recovering all applicable ESA-listed species to the point that protections under the ESA are no longer necessary. In addition, 100 percent observer coverage of the shallow-set fishery will continue, as well as proven sea turtle and seabird mitigation measures, and will not be modified by the final rule.

Comment 33: The level of effort that this rule change would allow has not been tested and asserts that it is unreasonable, bordering on reckless, to allow a fishery which has never reached the 2,120 effort limit to have an unlimited number of sets in an untested arena.

Response: From 1994–99, the average shallow set effort of the Hawaii longline fleet was about 4,240 sets, with a high around 5,500. The shallow-set fishery was severely constrained in 2001 by emergency regulations due to interactions with sea turtles. The fishery re-opened in 2004 as a ''model'' fishery with a 2,120 annual set limit (half of the historical effort) to assess the effectiveness of sea turtle mitigation measures including large circle hooks and mackerel type bait.

The 2008 BiOp considered whether removing the annual limit on fishing effort, thus, allowing an increase of the Hawaii shallow-set longline fishery (the final rule), would likely jeopardize the continued existence of any ESA-listed species. The 2008 BiOp analyzed the effects of the continued operation of the Hawaii shallow-set longline fishery based at an effort level of 5,550 sets annually, or over 4.6 million hooks which, the historical high effort from 1994–99. Analysis of data sufficiently concluded that the final rule, including the continuation of existing and proven sea turtle and seabird mitigation measures and 100 percent observer coverage, will not jeopardize the continued existence and recovery of any protected species populations or result in overfishing or overfished conditions of any target or non-target stocks.

Comment 34: An increase in fishing effort should not be associated with an increase in the allowable sea turtle interaction limits, because if the management measures work, then it would not be necessary. It is contrary for NMFS to say that they have reduced bycatch, and in particular loggerhead sea turtle interactions by some 90 percent, and then proposes to nearly triple the loggerhead turtle interaction cap. The proposal testifies to the opposite.

Response: To test the effectiveness of the gear combination, fishing effort in the model Hawaii fishery was limited to 2,120 sets, roughly half of the 1994–99 annual average number of sets. As an additional safeguard, an annual limit was implemented on the number of unintended interactions with sea turtles that could occur in the shallow-set fishery. The limit was calculated by multiplying the number of sets, 2,120, by sea turtle interaction rates in the Atlantic experiments. The fishery would be closed for the remainder of the calendar year if either interaction limit was reached. Since reopening of the fishery in 2004, sea turtle interactions in the Hawaii shallow-set longline fishery have been successfully reduced by a combined 89 percent compared to 1994–2002, when the fishery was operating without sea turtle mitigation requirements and the reasonable and prudent measures of the 2004 BiOp. Interaction rates are significantly lower than in the past; however, no single mitigation or measure is completely effective. Interaction limits provide an additional level of confidence that fishery interactions do not exceed authorized levels under current sea turtle mitigation requirements and reasonable and prudent measures. The final rule follows a layered approach to ensure protection of sea turtles.

The 2008 BiOp based the number of anticipated interactions upon the high end of potential fishing effort of 5,550 sets annually. Using sea turtle interaction rates obtained from 100 percent observer data onboard shallow-set vessels since 2004, 46 loggerheads and 19 leatherbacks annual interactions were projected to occur at this fishing effort level. Due to data gaps and assumed poor nesting beach trends of leatherbacks in the non-Jamursba-Medi component of the Western Pacific population, the 2008 BiOp authorized number of annual leatherback interactions remained at 16 rather than the projected 19. The potential expansion of fishing effort corresponds with the increase in the annual number of expected loggerhead sea turtle interactions of 46. The annual sea turtle interaction limits do not represent the upper limit of interactions that would avoid jeopardizing the continued existence of loggerhead and leatherback sea turtles, but instead are the annual number of sea turtle interactions anticipated to occur in the shallow-set fishery. The realized annual interactions may be lower than 46 and 16 per year.

Consistent with applicable laws, the final rule intends to increase opportunities for the shallow-set fishery to sustainably harvest swordfish and other fish species, without jeopardizing the continued existence of sea turtles and other protected resources. The final rule will increase the current limit on incidental interactions that occur annually between loggerhead sea turtles and shallow-set longline fishing.

Comment 35: Scientists are opposing developers to preserve La Playa Grande, a leatherback nesting site in Costa Rica. Adding the expansion of Hawaii shallow-set swordfish fishery and increasing the number of turtles that could be caught will finish off the Pacific leatherback.

Response: The annual leatherback sea turtle interaction limit will not change as a result of the final rule. Leatherback turtles are found on the western and eastern coasts of the Pacific Ocean, with nesting aggregations in Mexico and Costa Rica (eastern Pacific), and Malaysia, Indonesia, Australia, Vanuatu, the Solomon Islands, Papua New Guinea, Thailand, and Fiji (western Pacific). La Playa Grande is an important nesting colony for the Eastern Pacific population of leatherback sea turtles. Based on genetic sampling from 18 leatherback interactions (from 1995–2007) with the Hawaii shallow-set longline fishery, all of the leatherback turtles that interacted with that fishery originated from western Pacific nesting beaches (none from La Playa Grande).

Comment 36: What are the scientific facts and current data concerning the status of loggerhead turtles, and the impact that this rule change may have upon them? This should be made a part of a proposed rule change so that the public can make informed comments on the issue presented to them.

Response: All relevant scientific data and information to the final rule are presented in Amendment 18 and the FSEIS, which were made available to the public as described in the **ADDRESSES** section of the proposed rule (74 FR 29158, June 19, 2009).

Comment 37: Tourism is a major interest for the economic well-being of the State of Hawaii; allowing this activity only benefits a small minority.

Response: The Hawaii longline fishery provides fish to U.S. and foreign seafood consumers, who will benefit from increased supplies of fish. This final rule is likely to have a wide beneficial effect to Hawaii's economy,

and could help increase the economic vitality and adaptive capacity of Hawaii's coastal community. It is projected in the rule that the revival of the fishery could result in the doubling of the amount of ex-vessel revenue, direct and indirect sales, personal and corporate income, and state and local taxes that are currently generated as a result of the Hawaii shallow-set fishery. In addition, the total number of jobs could more than double.

Comment 38: Under the preferred alternative, the allowable incidental take of loggerhead turtles would increase from 17 loggerheads to 49 loggerheads, and it would maintain the current limit of 16 leatherback sea turtles, a limit that has been exceeded by the fishery in the past.

Response: The annual number of loggerhead sea turtles interactions under the final rule would be limited to 46, not 49. The annual limit on leatherback sea turtle interactions would continue to be limited to 16. The leatherback limit has not been exceeded in the past. In fact, since the leatherback sea turtle interaction limit has been in place, there have been eight or fewer leatherback interactions per year. Also, under the 3–year ITS, if the number of interactions exceed the interaction limit in any given year, the fishery will close, and the annual interaction limit will be reduced by that amount the following year.

Comment 39: Although the required use of circle hooks and changes in bait have reduced sea turtle interaction rates by 90 percent for loggerheads and 83 percent for leatherbacks, the Hawaii shallow-set longline fishery was closed in 2006 for exceeding take limits.

Response: When the fishery was closed in 2006, the number of loggerhead sea turtles that interacted with the Hawaii shallow-set fishery was 17 and did not exceed the annual interaction limit. The fishery did not close as a result of reaching the interaction limit for leatherback sea turtles.

Comment 40: Under the rule, the number of sets will be allowed to increase to historic levels of over 5,500 sets per year.

Response: The final rule would remove the shallow-set fishery effort limit, and the fishery could potentially increase to historical levels. The 2008 BiOp defined and analyzed the effects of a continued operation of the Hawaii shallow-set longline fishery at an effort level of 5,550 sets annually. While exceeding 5,550 sets in one year would not necessarily close the shallow-set fishery, as noted in the Re-initiation Notice section of the 2008 BiOp, re-initiation of formal consultation is required if the agency action is subsequently modified in a manner that may affect listed species or critical habitat to an extent in a way not considered in this opinion, e.g., if more than 5,550 sets are made during one calendar year. NMFS will continue to monitor the fishery with 100 percent observer coverage, which provides comprehensive fishery information.

Comment 41: It is premature to propose increasing the fishery until NMFS addresses whether Pacific loggerheads will be listed as a distinct population segment and uplisted from threatened to endangered under the ESA. This petition should be resolved before expansion is considered for the Hawaii shallow-set fishery.

Response: On July 16, 2007, NMFS and USFWS received a petition requesting that loggerhead turtles in the North Pacific be reclassified as a distinct population segment (DPS) with endangered status and that critical habitat be designated. NMFS and USFWS committed to assess the loggerhead listing status on a global basis. In February 2008, NMFS and USFWS convened a biological review team (BRT). In August 2009, the BRT published a global Loggerhead Turtle Status Review, which concluded that the loggerhead species is composed of nine Distinct Population Segments (DPS), including a North Pacific DPS and a South Pacific DPS. The North Pacific loggerhead DPS is the only one affected by the action. The Status Review concluded that the North Pacific loggerhead DPS is at risk of extinction.

Re-initiation of formal consultation under the ESA is required on this action if (1) the amount or extent of taking specified in the ITS in the 2008 BiOp is exceeded, (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in the 2008 BiOp, (3) the action is subsequently modified in a manner that may affect listed species or critical habitat to an extent in a way not considered in the 2008 BiOp, or (4) a new species is listed or critical habitat designated that may be affected by the action. The 2009 loggerhead status review does not satisfy any of the requirements for re-initiating consultation at this time. The 2009 status review does not raise new information that would change conclusions in the 2008 BiOp. In fact, the status review did not consider all the information analyzed in the 2008 BiOp, such as nesting beach abundance. These data suggest that abundance of the loggerhead nesting populations increased over 2007 information, and appear to be continuing to increase. NMFS intends to re-initiate consultation on the effects of all of the region's pelagic fisheries on loggerhead sea turtles, if and when there is a change in this species' status under the ESA.

Comment 42: A 2000 report that estimates between 2,600–6,000 loggerhead juveniles and adults were killed by longlining, although NMFS notes that because density may be greater in the action area, the estimates may be skewed upwards. This poorly-justified assumption resulted in the agency lowering this mortality estimate to less than 1,000, minimizing the impact considered.

Response: The comment refers to the environmental baseline section of the 2008 BiOp, summarizing the past and present human impacts within the action area of the final rule. Only two sources of information were available for the 2008 BiOp regarding the number of turtles killed by longlining in the Pacific. Lewison et al. (2004) estimated that 2,600 - 6,000 loggerhead juveniles and adults were killed by pelagic longlining in 2000, and Beverly & Chapman (2007) estimated that the actual mortalities were 20 percent of the Lewison et al. (2004) estimates, or 520 - 1,200, giving a range of 520 - 6,000 loggerhead juveniles and adults killed annually. The environmental baseline for the 2008 BiOp is limited to the action area, which is less than 10 percent of the area that is longline fished in the Pacific. Thus, based on area alone, the total number would be less than 10 percent of 520 - 6,000 loggerhead juveniles and adults killed annually (i.e., less than 52 - 600). However, since loggerheads may be denser in the action area than elsewhere in the Pacific, and longline fishing effort has increased since 2000, 10 percent of 520 - 6,000 (i.e., 50 - 600, when applying appropriate rounding) was considered to be the best estimate of the total number of loggerhead juveniles and adults killed annually by longlining within the action area.

Comment 43: The Draft EIS and Final EIS both read in places as if the take of turtles is part of the activity being authorized, rather than an environmental impact of the fishing activity under consideration. This approach is completely inconsistent with the ESA and must be rejected, as it was during the 2004 rulemaking.

Response: Establishment of annual sea turtle interaction limits are not part of the Federal action, which, among other measures, is the removal of the fishing effort limit currently in place. Annual sea turtle interaction limits were

established through the ITS contained in the 2008 BiOp.

Comment 44: NMFS should not endorse a fishery management plan amendment that is predicated almost entirely on increasing authorized levels of bycatch resulting in injury and mortality to ESA-protected species.

Response: The purpose of Amendment 18 is to provide increased opportunities for the shallow-set fishery to sustainably harvest swordfish, and other fish species, while continuing to avoid jeopardizing the continued existence and recovery of threatened and endangered sea turtles as well as other protected species. When a Federal agency's action ''may affect'' an ESA-listed species that agency is required to conduct ESA Section 7 consultation. NMFS conducted Section 7 consultation to ensure that removal of the effort (set) limit for this fishery, and any resulting increase in fishing effort, is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat of such species. The 2008 BiOp is the result of this consultation. Subsequently, NMFS approved the FMP amendment to allow the expansion of the swordfish fishery by removing the effort limit and set certificate program, and set an annual interaction limit that is predicated on increasing the loggerhead sea turtle interaction limits to a level of expected interactions that corresponds to the potential increase in fishing sets (5,500). The 2008 BiOp analyzed the effects of continuing the shallow-set fishery at 5,550 sets per year, not based on sea turtle interactions. Amendment 18 and the FSEIS analyzed the effects of optimizing the yield of swordfish, and other fish species, while avoiding jeopardy to ESA-listed species, and minimizing bycatch and associated bycatch mortality. See the response to Comment 60 for how the sea turtle interaction limits were calculated.

The Magnuson-Stevens Act broadly gives the Council and NMFS the authority to undertake appropriate measures to control bycatch. ''Bycatch'' is defined as ''fish which are harvested in a fishery, but which are not sold or kept for personal use.'' ''Fish'' in turn, is defined to mean ''finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds.'' Therefore, turtles are regarded as fish and are bycatch since they can neither be sold, nor kept for personal use. National Standard 9 requires that the Council and NMFS minimize bycatch and bycatch mortality. Therefore, it is a permissible action under the Magnuson-Stevens Act to establish an annual sea turtle (or any other species) interaction limit in a fishery. Limiting the impacts of the Hawaii-based shallow-set longline fishery on loggerhead and leatherback sea turtles is the purpose of setting the interaction limits.

Comment 45: Money should be invested into finding alternate ways to sustainably raise fish for human consumption.

Response: NOAA is at the forefront in making the U.S.A. self-sufficient in the production of seafood. The core of this initiative is strengthening our commercial and recreational marine fisheries supported by sustainable domestic marine aquaculture for finfish and shellfish. The President's 2010 budget request to Congress includes $6.1 million for NOAA's Aquaculture Program at NMFS, and $1.6 million for the National Marine Aquaculture Initiative at the NOAA Office of Oceanic and Atmospheric Research. This request includes a $2 million increase for the NOAA Aquaculture Program. The funding increase would support a wide range of commercial marine aquaculture and marine stock enhancement research, including developing various aquaculture feeds and exploring ways to reduce environmental impacts of commercial aquaculture. NOAA is developing a comprehensive national policy for marine aquaculture which includes the protection of ocean resources and marine ecosystems. Such a policy will enable greater investments for alternative ways to increase seafood supply for U.S. consumers.

Comment 46: NMFS failed to account for the fishery's effect on recovery of the Pacific leatherbacks and North Pacific loggerheads, or its effects in the context of changing conditions by relying on the susceptibility to quasi-extinction analysis (SQE), the assumptions are too speculative to support the increase in authorized annual interactions from 17 to 46. As such, there is substantial uncertainty in deriving sea turtle population estimates, and major impacts on the results are possible with changes in any of the assumptions.

Response: The effects of the action and the jeopardy analysis are two sequential components of the 2008 BiOp. The effects of the action refer only to the direct, indirect, interrelated, and interdependent effects of the action on the listed species that will be added to the environmental baseline. The jeopardy analysis considers the effects of the action within the context of the status of the listed species and the environmental baseline, along with the cumulative effects, to determine if the action is likely to reduce the survival and recovery of the listed species.

The ''effects of the action'' component of the 2008 BiOp, which was peer-reviewed, uses the best available scientific information to estimate turtle mortality resulting from the action. These estimates are based on numerous assumptions, all of which are made very conservatively to produce an estimate that is very likely to be higher than the actual mortality from the action, and very unlikely to be lower than the actual mortality from the action. These estimates then provide the inputs for the susceptibility to quasi-extinction analysis (SQE) model, which is used to quantify the effect of the mortality on affected populations in terms of extinction risk. By very conservatively estimating the inputs into the SQE model, the output of the model very likely overestimates the impact of the action.

The jeopardy analysis component of the 2008 BiOp relates the effects of the action to the status of the listed species, the environmental baseline, and the cumulative effects to determine the effect of the action on survival and recovery of affected species. Nesting of the North Pacific loggerhead population has increased several-fold in the last 10 years. Mortality from all longline fishing combined within the action area for the action is estimated at 50 - 600 juvenile and adult loggerheads annually, and some additional but unquantifiable mortality is likely also occurring due to climate change, ship traffic, and marine debris within the action area (the environmental baseline). Increases in loggerhead mortality may occur due to future worsening climate change and increasing fishing, ship traffic, and marine debris within the action area (the cumulative effects). The action is expected to have a maximum mortality of 10 juvenile and adult loggerheads annually. Within the context of the status of the species and the environmental baseline, and considered together with the cumulative effects, the action is not expected to reduce the likelihood of survival or recovery (no jeopardy) of the North Pacific loggerhead population.

Comment 47: NMFS has failed to take action on designating critical habitat for Pacific leatherbacks.

Response: Critical habitat was designated in 1998 for leatherback turtles in coastal waters adjacent to Sandy Point, St. Croix, U.S. Virgin Islands. In 2007, NMFS received a petition to revise the critical habitat designation. NMFS published a 90–day finding on the petition in December 2007, and continues to compile and

evaluate biological information upon which to base a response to the petition.

Comment 48: The ESA Section 10(a) conservation plan should be re-visited and the applicant should demonstrate that they will minimize impacts and show that this action will not reduce the survival and recovery of the turtles in the wild.

Response: The final rule is a Federal action involving the commercial fisheries that fall under ESA Section 7. A Section 10(a) conservation plan is not applicable to the final rule. The 2008 BiOp analyzed the continued operation of the shallow-set fishery at 5,550 sets annually and concluded there is no jeopardy to the continued existence for all ESA-listed species in the action area, including sea turtles.

Comment 49: The action violates the MMPA, since the Hawaii pelagic longline fishery is known to injure and kill humpback and false killer whales, other marine mammals.

Response: The shallow-set fishery interacts with marine mammals, incidental to fishing operations; however, this does not violate the MMPA. The Marine Mammal Authorization Program (MMAP) allows commercial fishermen to lawfully ''incidentally take'' marine mammals in a commercial fishery. Participation in the MMAP is part of the issuance of Hawaii longline limited access permits. Managers officially began considering the deep- and shallow-set components as distinct fisheries in 2008, with the 2009 List of Fisheries final rule (73 FR 73032, December 1, 2008), based on the deep-set regulatory definition. The shallow-set fishery is classified as a Category II fishery, defined as a fishery that has occasional serious interactions with marine mammals greater than 1 percent and less than 50 percent of the PBR level. The level of interactions with other non-strategic marine mammal stocks and the shallow-set longline fishery are not significant, or above known PBR levels.

Humpback whales move through the action area to Hawaii only in the winter months, and there is a lack of a uniform occurrence of the species across spatial distribution of the longline fishery. The Hawaii-based longline fishery generally occurs at locations where humpback whales are uncommon. Thus, interactions between the Hawaii-based longline fishery and humpback whales are rare and unpredictable events when viewed in relation to the amount of fishing effort that has occurred in the Hawaii-based longline fishery (0.00037 interactions per set). There has never been an observed mortality with this species due to the fishery, and since 2001, there have been only five observed interactions between humpback whales and the Hawaii-based longline fleet. Of the interactions that have occurred, most have been with deep-set longline gear. During this same time period, the Central North Pacific (CNP) stock of humpback whales has increased in size to 18,000 individuals, and is growing at an annual rate of 4.9 to 6.8 percent, an increase of several hundred animals annually. There have been two observed interactions in the shallow-set longline fishery, in 2006 and 2008. In each instance, efforts were taken to disentangle the whale, and all whales were either released or able to break free from the gear without noticeable impairment to the animals' ability to swim or feed. Based upon the rarity of interactions and the large and growing North Pacific humpback whale population, the BiOp concluded that the action will not jeopardize the North Pacific humpback population. NMFS continues to research techniques and gear modifications to mitigate interactions with marine mammals.

Comment 50: NMFS should undertake the following activities prior to any proposed increases in fishing effort to obtain the necessary information on stock status: (1) conduct the research needed to clarify the stock structure of the marine mammal species that may be taken in the Hawaii shallow-set longline fishery, (2) complete the surveys needed to provide up-to-date, reliable estimates of stock abundance, and (3) revise the potential biological removal level of each stock. The Hawaii shallow-set longline fishery is a Category II fishery under the MMPA and interacts with bottlenose dolphins, Bryde's whales, humpback whales, Risso's dolphins, pygmy sperm whiles, and sperm whales. With the exception of central North Pacific humpback whales, the stock structure for these marine mammals is poorly known. In addition, the abundance of most of these stocks and their total fisheries-related mortality are also poorly known.

Response: Although this comment does not directly pertain to the final rule, NMFS provides a brief response. The best available science, including 100 percent fishery observer coverage, was used to develop Amendment 18 and the 2008 Biological Opinion. Under the 1994 amendments to the MMPA, NMFS is required to publish SAR for all stocks of marine mammals within U.S. waters, to review new information every year for strategic stocks and every three years for non-strategic stocks, and to update the stock assessment reports when significant new information becomes available. The final rule will not affect the research needed for a SAR, including field surveys or revisions to the potential biological removal levels of each marine mammal stock. Comments regarding the stock structure research or abundance levels to the SAR should be submitted during the SAR comment period. Comprehensive shallow-set fishery observer coverage will continue to monitor any fishery interactions with marine mammals. The final rule is not likely to cause significantly adverse effects on marine mammal stocks.

Comment 51: NMFS should fund suitable observer coverage for all western Pacific fisheries at levels needed to obtain reasonably accurate and precise estimates of marine mammal takes. The NMFS report ''Revisions to Guidelines for Assessing Marine Mammal Stocks (GAMMS II)'' recommends a coefficient of variation of 0.30 to ensure adequate precision. Assessing the accuracy of abundance estimates will be more difficult, but at the least it will require studies of each stock's distribution and movements to plan suitable abundance surveys.

Response: NMFS observers continue to monitor every shallow-set longline trip and collects scientific information on the causes and types of interactions that occur, so this comment is not directly applicable to the final rule. Any research for marine mammals and their stock's distribution and abundance would be more appropriately addressed in the SAR. However, NMFS considers every opportunity for research and data collection, especially with regard to appropriate levels of observer coverage. Any decisions to expand population assessments are ultimately subject to funding availability.

Comment 52: NMFS should evaluate all observed and documented fisheries-related injuries to humpback whales to determine whether they were serious, and consider them as such in the absence of definitive information. At the current reduced level of fishing effort, observers have documented two interactions between the shallow-set fishery and humpback whales since 2004, one in 2006 and another in 2008. Both were recorded merely as injuries, with no indication as to whether they were or were not serious. Such information is important for characterizing the fate of the animals and making informed determinations regarding the total effect of fishery interactions on humpback whales. That is, incidental takes of humpback whales in this fishery would appear to have few population-level consequences, but must be combined with those from other fisheries to provide a comprehensive

understanding of fishery effects on these whales. Taking a conservative or precautionary approach in the face of incomplete data is essential to ensure that the whale populations involved are given adequate protection and in provide an incentive for collecting better information in the future.

Response: This final rule has no impact on the determinations of humpback whale interactions with the Hawaii-based shallow-set longline fishery. Nonetheless, the current NMFS system for reviewing marine mammal injury records for the Central North Pacific stock of humpback whales is conducted through the Alaska Fisheries Science Center and the Alaska Scientific Review Group (SRG). The Alaska SRG is an advisory body which provides injury determination recommendations to NMFS. NMFS then makes the final determination whether the injury is considered serious or not serious.

Comment 53: NMFS should convene a TRT to address false killer whale bycatch in the Hawaii deep-set longline fishery in the Pacific Islands area, but also include the Hawaii shallow-set longline fishery and the stocks taken in that fishery under the purview of the team. The Hawaii shallow-set longline fishery takes individuals from a number of other stocks (e.g., Risso's dolphins, bottlenose dolphins, and central North Pacific humpback whale), which is one indicator of the need for take reduction efforts.

Response: This comment addresses false killer whale bycatch in the Hawaii-based longline fisheries, and this final rule does not include any provisions, authorizations, or mandates for a TRT. When applicable, Section 118(f)(1) of the MMPA requires NMFS to ''develop and implement a Take Reduction Plan designed to assist in the recovery or prevent the depletion of each strategic stock which interacts with a fishery listed under subsection (c)(1)(A)(i) or (ii).'' The definition of ''strategic stock'' includes marine mammal stocks for which the level of direct human-caused mortality exceeds the PBR. The Hawaii pelagic stock of false killer whales is the only known strategic stock from the Pacific Islands Region that interacts with the Hawaii-based deep-set longline fishery, which is not the subject of this final rule. In April 2009, NMFS began the process to develop a Take Reduction Plan (TRP) and assemble a TRT. Once a TRT is officially designated, the MMPA requires a draft TRP to be completed within six months. The scope of the TRP has not yet been established.

Comment 54: A well-run TRT is the best mechanism to bring relevant stakeholders together to discuss and evaluate marine mammal bycatch in commercial fisheries.

Response: See response to Comment 53. When applicable, MMPA Section 118(f)(6)(C) specifies the composition of a TRT, including members with expertise with the conservation of marine mammal species and fishing practices. NMFS will adhere to these mandates and create a TRT with an equitable balance among all stakeholders.

Comment 55: NMFS has neither convened a TRT to address false killer whale injury and mortality pursuant to the MMPA, nor completed the steps necessary to properly authorize the take of humpback whales under the MMPA and ESA before increasing the fishery.

Response: See responses to Comments 49 and 53 regarding false killer whales. The final rule does not include any provisions, authorizations or mandates for a TRT. Similarly, this final rule does not impact or authorize the take of humpback whales under the MMPA or the ESA. For further information regarding humpback whale impacts, see responses to Comments 16 and 49.

Comment 56: The action would violate the Convention on International Trade in Endangered Species (CITES).

Response: CITES is an international treaty designed to control and regulate international trade in certain animal and plant species that are now or potentially may be threatened with extinction. This rule does not permit trade in any CITES-listed species, so does not violate the treaty.

Comment 57: The expansion of the Hawaii-based longline fishery would violate the Migratory Bird Treaty Act (MBTA), and further take of seabird species is not scientifically supportable.

Response: The MBTA applies only within the United States and nearshore waters, i.e., from the shoreline seaward to three nautical miles offshore (70 FR 75075, December 19, 2005). The Hawaii-based pelagic longline fleet is prohibited from operating in those waters covered by the MBTA. In addition, the MBTA contains no provision for the incidental take of migratory birds during commercial fishing activities, and the U.S. Fish and Wildlife Service (USFWS) does not issue permits under the MBTA for incidental takes of migratory birds during otherwise lawful activities. NMFS does not believe that the MBTA was intended to disallow otherwise lawful activity merely because it has the potential to interact with migratory birds. In the absence of a permitting process to address potential conflicts between commercial fishing activities and migratory birds, NMFS will continue to promote mitigation strategies and best management practices, including workshops and the use of side-setting, to reduce and eliminate potential interactions with migratory birds. For more information see Section 6.7 of the FSEIS.

Comment 58: NMFS has not analyzed seabird interaction reduction measures, as suggested by the Department of the Interior, and the proposed regulations do not seek to minimize seabird bycatch by requiring the use of proven techniques like side-setting.

Response: All existing seabird deterrent and mitigation measures remain in effect and are not affected by this final rule. After completing the public review and comment processes afforded by the Magnuson-Stevens Act and NEPA, and after consulting with USFWS regarding the potential for incidental take of short-tailed albatross, the Council and NMFS have developed and implemented specific seabird conservation measures. Existing seabird measures have dramatically reduced the incidental take of seabirds in the shallow-set fishery to levels that are not expected to have significant adverse short- or long-term, or cumulative effects on albatrosses. Shallow-set vessels are required to set their gear at night, use thawed and blue-dyed bait, and other proven seabird interaction mitigation measures, if they choose not to employ side-setting. Shallow-set vessels have reduced the number of interactions with albatrosses, the primary component of seabird bycatch, by 96 percent. Also see response to Comment 26 for continuing seabird protections.

In September 2008, NMFS conducted an informal consultation with the USFWS on the effects of an increased shallow-set longline fishery to short-tailed albatross. USFWS concurred with NMFS that this action would not likely adversely affect the short-tailed albatross during the first year of the fishery's operation under this final rule. NMFS is working with USFWS on a BiOp on the continuation of both pelagic longline fisheries and its effects on ESA-listed seabirds and expects completion in the near future.

Comment 59: The action increases the ITS to allow more sea turtle interactions regardless of whether an increase in effort actually materializes.

Response: Amendment 18 analyzed the effects of optimizing the yield of swordfish and other fish species, while avoiding jeopardy and minimizing bycatch. By removing the effort set limit and set certificate program, which currently constrains the fishery and creates an administrative burden, NMFS

expects that the final rule will allow the fishery to increase to historical levels, allowing optimal harvest of the North Pacific swordfish stock and other fish species.

The 2008 BiOp analyzed the effects of continuing the shallow-set fishery at 5,550 sets per year, not based on sea turtle interactions. The ITS was calculated based on predicted interaction rates from observer data obtained since 2004. An incidental take is defined as a take that results from, but is not the purpose of, conducting an otherwise lawful activity (50 CFR 402.02). Although the annual sea turtle interaction limits are 46 and 16, of which the predicted mortalities (based on 100 percent observer data) could be 3 adult female loggerhead and 2 adult female leatherback sea turtles, these effects are indistinguishable from natural mortality.

Comment 60: It is not clear how the 2004 BiOp estimate of 16 leatherback takes per year with an effort cap of 2,120 sets could be essentially the same level of leatherback takes as the 2008 BiOp without an effort cap.

Response: The current annual sea turtle interaction limits set by the 2004 BiOp were not based on interaction rates in Hawaii. The limit was calculated by multiplying the number of sets, 2,120, by sea turtle interaction rates derived from Atlantic experiments using circle hooks and mackerel bait in U.S. longline fisheries, to determine the annual number of sea turtle interactions anticipated to occur in the Hawaii-based shallow-set fishery. The fishery would be closed for the remainder of the calendar year if either interaction limit was reached. The current interaction limits for loggerhead and leatherback sea turtles (2004 BiOp) do not represent the upper limit of interactions that would avoid jeopardizing the continued existence of sea turtles.

The 2008 BiOp analyzed the effects of 5,550 longline sets in the action area. Using interaction rates obtained from 100 percent observer data since 2004 in the Hawaii-based shallow-set fishery, the BiOp estimated the number of interactions that would occur and came up with 46 loggerheads and 19 leatherbacks. However, due to concerns about leatherback population conditions and uncertainty about numbers of nesting females at various locations in the western Pacific, the 2008 BiOp conservatively recommended restricting the annual leatherback interactions to the current level of 16, which is reflected in the final rule.

Comment 61: The NMFS approach to its jeopardy analysis improperly compared the effects of a proposed action to the baseline condition for the species and the commenter cited *National Wildlife Federation* v. *NMFS*, (*NWF* v. *NMFS*, 481 F.3d 1224, 9th Cir. 2007) where ''baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm'' and ''that the agency must consider not only the likelihood of extinction in its jeopardy analysis, but also prospects for recovery.''

Response: There are no current or proposed Federal actions that jeopardize ESA-listed species within the action area, so the court ruling for *NWF* v. *NMFS* is not applicable to this action. The environmental baseline for a biological opinion includes the past and present impacts of all state, Federal, or private actions and other human activities in the action area. The anticipated impacts of all proposed Federal projects in the action area that have already undergone section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process are also included (50 CFR 402.02). The ESA Consultation Handbook further clarifies that the environmental baseline is ''an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat), and ecosystem, within the action area.'' The purpose of describing the environmental baseline in this manner in a biological opinion is to provide the context for the effects of the proposed action on the listed species. The past and present impacts of human and natural factors leading to the status of the six species addressed by the 2008 BiOp within the action area include fishing interactions, vessel strikes, climate change, pollution, marine debris, and entanglement.

In some cases, such as when an ESA-listed species consists of a single, small, declining population, and environmental baseline conditions are continuing to deteriorate, any additional harm could constitute jeopardy. For example, due to concerns about the likely decline of the Western Pacific leatherback population, and due to the uncertainty of information about leatherback populations, the annual interaction limit for leatherback sea turtles was retained at the current level of 16. Such is not the case with the North Pacific loggerhead population. Some 10,847 loggerhead nests were counted in Japan in 2008, more than any year since comprehensive records were started in 1990, and up from 2,000 nests in 1999. The 2008 nests represent several thousand adult females. Not all adult females nest every year, and loggerheads mature at approximately 30 years of age; thus, the total North Pacific loggerhead population is neither small nor declining. In addition, as described in the 2008 BiOp, numerous conservation efforts are being implemented throughout the range of the population to attempt to reduce mortality during all life stages. The potential mortality of a maximum of 10 loggerhead male and female adults and juveniles annually will not appreciably reduce the likelihood of survival and recovery of the North Pacific loggerhead population.

Comment 62: The Hawaii shallow-set fishery is the most rigorously and successfully regulated commercial fishery in the world.

Response: NMFS agrees that the Hawaii-based shallow-set fishery is well-managed to sustainably harvest swordfish with conservative measures and regulations to reduce impacts to sea turtles, seabirds, and other marine wildlife. In light of the severe contraction of domestic economic activity, the fishery should be allowed to operate under the optimal yield mandate of the Magnuson-Stevens Act. This final rule is consistent with that mandate.

Comment 63: Amendment 18 is based on sound data and science, scrutinized and accepted as the best available data and information.

Response: NMFS agrees that Amendment 18 and its implementing regulations are based on the best scientific information available. Amendment 18 adheres to published standards for preparing a final rule to an FMP or amendment. NMFS must comply with the requirements of the Magnuson-Stevens Act, National Environmental Policy Act, Administrative Procedure Act, Paperwork Reduction Act, Coastal Zone Management Act, ESA, MMPA, and Executive Orders 13132 (Federalism) and 12866 (Regulatory Planning). NMFS has determined that Amendment 18 is consistent with the National Standards of the Magnuson-Stevens Act, and all other applicable laws.

National Standard 2 of the Magnuson-Stevens Act requires conservation and management measures to be based upon the best scientific information available. In accordance with this national standard, the information product incorporates the best biological, social, and economic information available to date, including the most recent biological information on, and assessment of, the pelagic fishery resources and protected resources, and

the most recent information available on fishing communities, including their dependence on pelagic longline fisheries, and up-to-date economic information (landings, revenues, etc.).

Amendment 18 was prepared by the Council and NMFS based on information provided by NMFS Pacific Islands Fisheries Science Center (PIFSC) and NMFS PIRO. The information product was reviewed by PIRO and PIFSC staff, and NMFS Headquarters.

Comment 64: The fish species and stocks targeted by the shallow-set fishery are abundant and healthy at levels that can sustainably support the projected growth in the shallow-set fishery under Amendment 18.

Response: NMFS agrees. As noted in the 2008 stock status report to Congress and current stock assessments, no species caught by the shallow-set fishery is overfished or approaching an overfished condition. The North Pacific swordfish stock is currently fished at about 65 percent of the MSY, with the Hawaii-based shallow-set longline fishery harvesting 6 - 12 percent since the fishery was reopened in 2004, allowing for increased harvest.

Comment 65: Restrictions in the shallow-set longline fishery results in more sea turtle interactions, not less. See Rausser, G., M. Kovach, and R. Sifter. 2008. Unintended Consequences: The spillover effects of common property regulations. Marine Policy 33(1), January 2009, pp. 24–39.

Response: ''Market transfer effects'' generally refer to the transfer of catch from one region to other regions as a result of a regulation; the referenced paper examines a particular case of the market transfer effect of endangered sea turtle bycatch resulting from the 2001–04 closure of the Hawaiian longline swordfish fishery. There are two steps to the analysis. First, a model of swordfish demand and supply is estimated by a system of simultaneous equations to identify the magnitude of the market transfer effect of swordfish catch from U.S. fishery to non-U.S. fishery. Then, an analysis measures the effects of the swordfish market transfer on sea turtles. The analysis found that the closure of the Hawaiian longline swordfish fishery during 2001–04, which was motivated by the protection of endangered sea turtles, resulted in an estimated transfer of 1,602 mt of swordfish catch to non-U.S. fisheries, leading to an estimated additional 2,882 sea turtle interactions.

Comment 66: Amendment 18's preferred alternatives of lifting the annual shallow-set effort limit and eliminating the set certificate program will allow the shallow-set fishery to return to historical levels of fishing, which has the potential to reduce pressure on Pacific bigeye and yellowfin tuna stocks by promoting a shift in fishing effort to swordfish-targeted shallow-set longlining.

Response: NMFS expects that removal of the set certificate program will allow vessels to shift effort from targeting tuna in the deep-set fishery to targeting swordfish in the shallow-set fishery. Effort in the shallow-set fishery may gradually increase to historical levels. Some 10–30 vessels are projected to eventually join the existing 30 vessels in the fishery. The maximum number of Hawaii longline limited entry permits is 164 for the deep- and shallow-set fisheries, combined.

Comment 67: Increased shallow-set fishing effort under Amendment 18 will not have an appreciable adverse impact on affected Pacific populations of sea turtle species.

Response: NMFS agrees that the affected populations of Pacific sea turtles will not be jeopardized under this action. The 2008 BiOp analyzed the effects of the continued operation of the Hawaii-based shallow-set longline fishery based at an effort level of 5,550 sets annually, or over 4.6 million hooks. The opinion concluded that the action is not likely to jeopardize the continued existence of any ESA-listed species. Although the annual sea turtle interaction limits are 46 and 16, for loggerhead and leatherback turtles, respectively, the predicted mortalities (based on 100 percent observer data) at the interaction limits would be three adult female loggerhead and two adult female leatherback sea turtles, the effects of which would be indistinguishable from natural mortality. Further, the ITS is conservative and the fishery will continue to be monitored by 100 percent observer coverage.

Comment 68: Pacific loggerhead and leatherback nesting beach conservation measures were undertaken and continue as a result of the Hawaii-based commercial longline fisheries.

Response: NMFS continues to support conservation and recovery of ESA-listed species. See response to Comment 1 with respect to NMFS responsibilities to conserve and protect living marine resources and the survival and recovery of ESA-listed species.

The Council and NMFS have been supporting sea turtle conservation projects at key loggerhead and leatherback nesting beaches from which individuals interacting in the Hawaii-based longline fisheries originate. Preliminary results from an analysis conducted by PIFSC (Kobayashi, NMFS, unpublished data) suggest that approximately 3 to 75 additional loggerhead hatchlings would equal 1 loggerhead juvenile taken in the fishery, and that approximately 55–550 additional leatherback hatchlings would equal 1 leatherback juvenile taken in the fishery. The model used to estimate the number of hatchlings required to offset fishery impacts takes into consideration simultaneous impacts from other sources (such as harvest and other fisheries), and thus provides a realistic estimate of the current state of sea turtle populations. If the allowed maximum number of interactions were to occur in the shallow-set fishery final rule, the model projects that 138 to 3,450 loggerhead hatchlings and 935 to 9,350 leatherback hatchlings would be needed to offset the impacts of fishery interactions. The Council-supported nesting beach projects could offset the impacts.

All North Pacific loggerhead turtles are known to originate from nesting beaches in Japan. The Council has supported nesting beach monitoring and conservation activities at four locations in Japan since 2003. One of the important activities undertaken is the relocation of nests from erosion-prone and inundation areas to improve hatchling production. In 2008 alone, the Council project relocated 80,955 loggerhead eggs, with an estimated 48,573 loggerhead hatchlings produced from those relocated nests. These numbers exceed the estimated 138 to 3,450 loggerhead hatchlings needed to offset impacts from the Hawaii longline fishery.

The Council also supports two nesting beach projects to protect Western Pacific leatherback turtles in Wermon Beach, Indonesia, and Huon Coast, Papua New Guinea. Both project areas had very low hatchling production prior to project inception due to egg harvests, nest predation, and inundation. The use of monitoring staff on nesting beaches to prevent egg harvest from occurring and deployment of simple bamboo grids over nests to prevent dog, pig, and lizard depredation of eggs have been effective in increasing hatchling production in these areas. Based on the most recent nesting data available, the Wermon Beach project produces approximately 40,000 leatherback hatchlings, and the Huon Coast project produces approximately 12,000 leatherback hatchlings each year, most of which would not survive without the conservation project in place. The over 50,000 leatherback hatchlings produced annually in Council projects exceed the estimated 935 to 9,350 hatchlings needed to offset impacts from the Hawaii longline fishery.

Comment 69: With increased shallow-set effort, more non-target species, such as sharks, will be caught in the fishery.

Response: Blue sharks are the most often-caught sharks in the shallow-set longline fishery. Approximately 94 percent of those caught are returned alive to the sea and are believed to survive. Fish bycatch in the Hawaii shallow-set longline fishery is estimated to be limited to 6–7 percent of the annual catch. Since no other significant changes are occurring in the fishery, it is unlikely that removing the annual set limit would increase the annual percentage of any bycatch species. As described in Amendment 18, other bycatch species are caught in insignificant numbers in relation to their maximum sustainable yields, and most of these species are kept, or returned to sea alive. In addition, based on a 2009 stock assessment, blue sharks in the Pacific are not overfished or subject to overfishing.

Comment 70: In light of the many stressors facing leatherbacks in the western and central Pacific, Amendment 18 should reduce the annual interaction limit rather than maintain the current level.

Response: The purpose of Amendment 18 and its implementing regulations is to optimize the yield of the North Pacific swordfish stock and supply a sustainable source of domestic seafood. To do this, the fishery impacts were analyzed for an appropriate number of interactions that will not jeopardize the continued existence of ESA listed species. While the 2008 BiOp determined that incidentally taking 19 leatherback turtles annually will not jeopardize the continued existence of this species, NMFS took a precautionary approach in regards to acknowledged declines of monitored portions of the Western Pacific leatherback population. Therefore, the 2008 BiOp authorized the interaction limit equal to the current limit of 16 leatherbacks. See also the responses to Comments 67 and 68.

Comment 71: NMFS should retain the existing leatherback and loggerhead sea turtles regulations, because they are critical to the species viability.

Response: All measures currently applicable to the fishery will remain in place, including limited access. The Hawaii longline fishery is limited to 164 permits. In any given year about 120–130 vessels are actively fishing, with about 30 of those in the shallow-set fishery. The limit on the number of vessels remains unchanged with the removal of the effort limitations. Other requirements that remain in place include vessel and gear marking requirements, vessel length restrictions, Federal catch and effort logbooks, large longline restricted areas around Hawaii, vessel monitoring system (VMS), annual protected species workshops, and the use of sea turtle, seabird, and marine mammal handling and mitigation gear and techniques. NMFS will also maintain 100–percent observer coverage.

Under this final rule, the interaction limit for leatherback turtles remains unchanged at 16. The Hawaii shallow-set longline fishery will be allowed to interact with (hook or entangle) no more than 46 loggerhead sea turtles, an increase from the current limit of 17. The interaction limit does not represent the upper limit of interactions that would avoid jeopardizing the continued existence of loggerhead sea turtles, but instead is the annual number of interactions anticipated to occur in the fishery.

Comment 72: Time-area closures and closures in areas with higher-risk temperature bands should be considered to reduce sea turtle bycatch.

Response: Implementation of time-area closures was thoroughly discussed and analyzed as a way to reduce the number of sea turtle interactions that may occur in the first quarter of each year while increasing annual fishery harvests. The Council recommended not implementing time-area closures because it was unknown whether the displaced fishing effort would be relocated to other areas or to other months, and what impacts this displacement would have on turtles and other protected species, and on catch rates of target fish. Although the loggerhead hard cap was reached in the first quarter of 2006, the 2008 data indicated that no loggerhead turtle interactions and one leatherback interaction occurred during the same time period. The difficulty in managing time-area closures based on largely transient ocean temperature bands, as well as the inherent uncertainty in predicting with reasonable confidence whether turtle interactions will occur at higher rates within these bands, make the benefits of time-area closures speculative in relation to the impacts on fishery yields. Moreover, the implementation of time-area closures deprives the agency of observational data that are helpful to understanding sea turtle distribution and behavior. The use of proven turtle mitigation measures and hard caps contained in the preferred alternative will provide appropriate protection to sea turtles.

Comment 73: The increase in fishing effort should be limited to relatively small increments to ensure that the fishery does not exceed the take of turtles and does not become overcapitalized.

Response: In the FSEIS, Alternatives 1B -1D were thoroughly discussed and analyzed as increases of allowable sets per year (Alt 1B- Allow up to 3,000 sets per year; Alt - 1C Allow up to 4,240 sets per year; Alt 1D - Allow up to 5,500 sets per year; Alt - 1E Set effort to be commensurate with North Pacific swordfish stock at approximately 9,925 sets per year). The final rule implements Alternative 1F, which will remove the set limit and allow optimum yield to be achieved from the shallow-set fishery. Fishing effort may increase gradually to historical levels.

Because the Hawaii-based longline fisheries (shallow-set and deep-set) are regulated under a limited entry program (maximum 164 permits combined), it is likely the fishery will not be overcapitalized in the future. The Hawaii shallow-set fishery has 100 percent observer coverage, so NMFS is able to monitor the precise number of individual turtles that interact with the fishery. If or when an annual interaction limit is reached, the shallow-set longline fishery will be closed north of the Equator beginning on a specified date until the end of the calendar year. Further, in the event that either annual interaction limit is exceeded, NMFS will lower the following year's interaction limit by the amount it was exceeded.

Comment 74: The EPA's review recommended time-area closures and chastised the agency for not doing so as part of a preferred option in the DSEIS.

Response: The EPA comment letter consisted of a recommendation to investigate time-area closures as a research component of the proposed action: ''EPA recommends the issue of time-area closures be explored as a research component of the proposed action, and that this possibility be discussed in the FSEIS.'' See Comment 72 for time-area closure response.

Comment 75: Until estimates of stock status are more certain, the Scientific Committee (SC) of the WCPFC recommended no increase in fishing effort on swordfish.

Response: The North Pacific stock of swordfish is healthy and currently fished below MSY. The final rule allows an increased sustainable harvest of swordfish, while minimizing bycatch, including protected species from reaching an overfished or jeopardy state. Perhaps of more relevance than the recommendations of the WCPFC's SC are the decisions of the WCPFC itself, some of which are binding on its members, including the United States. The WCPFC has not adopted any

conservation and management measures specifically for swordfish in the North Pacific. However, WCPFC Conservation and Management Measure 2008–05, which focuses on and establishes measures for swordfish in the southwestern Pacific Ocean, is binding on WCPFC members and states that [WCPFC members] ''shall not shift their fishing effort for swordfish to the area north of 20° N, as a result of this measure.'' The phrase ''as a result of this measure'' refers to limits on the number of fishing vessels that are used to fish for swordfish and on swordfish catches in the WCPFC Convention Area south of 20° S. In other words, it calls for WCPFC members to ensure that fishing effort for swordfish by their vessels in the WCPFC Convention Area south of 20° S. not shift to the area north of 20 N.

In 2009, after adoption of WCPFC Conservation and Management Measure 2008–05, the International Scientific Committee for Tunas and Tuna-Like Species in the North Pacific Ocean (SSC), which provides scientific advice to the WCPFC for stocks in the North Pacific Ocean, completed a stock assessment for swordfish in the North Pacific Ocean. The SSC concluded that the North Pacific WCPO and EPO stocks of swordfish are healthy and well above the level required to sustain current catches.

Comment 76: Expansion of Hawaii shallow-set fishery uses unsustainable fishing practices and should be scaled back to preserve and protect sea turtles.

Response: NMFS and the Council are responsible for managing the living marine resources of the U.S.A. The best available scientific information indicates that this action (which continues proven sea turtle and seabird mitigation measures and 100 percent observer coverage) will not jeopardize the continued existence and recovery of any ESA-listed species, will not impact the conservation of marine mammal or seabird species, and will not result in overfishing or overfished conditions for any target or non-target stocks. Since the shallow-set longline fishery reopened in 2004, the fishery has reduced its bycatch of protected species from historical levels, and continues to be subject to a suite of bycatch mitigation measures and gear restrictions. All fish stocks will continue to be monitored according to their MSY, and the sea turtle interaction limits will help ensure that the survival and recovery of sea turtles will continue. This final rule allows the Hawaii shallow-set fishery to sustainably harvest the North Pacific swordfish stock, while minimizing bycatch and associated mortality. See also the response to Comment 70.

Comment 77: Another way must be available to catch the swordfish, and only the swordfish.

Response: Swordfish are managed under the Pelagics FMP, which authorizes the following gear types: bandit gear, buoy gear, handline, hook-and-line, rod-and-reel, spear, purse seine, lampara net, and longline (50 CFR 600.725). While some of these gear types can be highly selective, none have been identified as being able to single out swordfish from other fish and bycatch species. NMFS continues to research fishing methods that reduce bycatch and improve catch rates of target species.

Comment 78: The proposed expansion would allow 4 million or more deadly hooks to be set in the ocean that are certain to accidentally catch and harm leatherbacks, loggerheads, humpback whales, false killer whales, seabirds, and several types of fish.

Response: See the responses to Comments 1 and 2 for why the final rule would not jeopardize sea turtles, and Comments 7 and 8 for the conditions of fish stocks. The responses to Comments 16 and 49 address marine mammal interactions, and the response to Comment 26 and 58 for continuing seabird protections.

Comment 79: This action is in direct violation of the very principles that NOAA has been given the duty to uphold.

Response: This final rule is consistent with the Magnuson-Stevens Act, under which the Secretary of Commerce approved Amendment 18. NMFS is responsible for enabling domestic fisheries to attain optimal yield for the benefit of the Nation, while ensuring that living marine resources are conserved and managed in a way that ensures their continuation as functioning components of marine ecosystems.

Comment 80: Consideration was inadequate of cumulative impacts (e.g., climate change, collisions with vessels, entanglement in other fisheries, non-target species, habitat loss, beach erosion, animal and human predation, pollution, plastics, disease, and others) that pose jeopardy to ESA listed species in both the EEZ and other portion of the species' range.

Response: Both the FSEIS and the 2008 BiOp considered a wide array of cumulative effects on sea turtles, marine mammals, seabirds, and target and non-target fish stocks. The action area subject to the cumulative effects analysis of this Federal action is a section of the North Pacific Ocean, and does not include the continuation of activities described under the Environmental Baseline outside the action area (see response to Comment 30 for more on effects analysis). The 2008 BiOp includes cumulative effects in the analysis of the 2008 ITS for the Hawaii shallow-set fishery, future actions, and a list of U.S. Pacific Fisheries with sea turtle ITS.

Cumulative effects on the ESA-listed humpback whales, loggerhead, leatherback, olive ridley, green, and hawksbill sea turtles are likely to occur as a result of worsening climate change, and any increase in the fishing, ship traffic, and other actions. However, since the extent of climate change, and increases in fishing, ship traffic, and marine debris, are unquantifiable, the corresponding effects are also unquantifiable. Cumulative effects have been considered and will continue to be part of the environment affecting sea turtles and the longline fishery that must be addressed through adaptive management regardless of which alternative is selected for implementation.

Comment 81: Due to the lack of monitoring across fishing fleets, longline bycatch in other fisheries, juvenile loggerhead impacts, injuries, and other stressors, it would seem difficult for NMFS to ensure that the direct and indirect effects of this proposed action, in addition to activities outside the action area, will not pose jeopardy to the loggerhead.

Response: See the response to Comment 46 for how cumulative impacts were considered in the 2008 BiOp.

Comment 82: The scope of injury assessed to these ESA-listed animals in the BiOp should be broadened beyond the action area.

Response: See the response to Comment 46 for components of the 2008 BiOp. The environmental baseline for a biological opinion includes the past and present impacts of all state, Federal or private actions and other human activities in the action area, and for further clarity the environmental baseline is ''an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat), and ecosystem, within the action area.'' (USFWS & NMFS 1998). The purpose of describing the environmental baseline in this manner in a biological opinion is to provide the context for the effects of the action on the listed species.

Comment 83: NMFS acknowledges that take of albatross species occurs in this fishery, but continues to deny that this take occurs outside the jurisdiction of the MBTA.

Response: See response to Comment 57 for MBTA applicability to this final rule.

Changes From the Proposed Rule

No changes were made from the proposed rule.

Classification

The Administrator, Pacific Islands Region, NMFS, determined that this final rule is necessary for the conservation and management of the pelagic shallow-set longline fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

An FSEIS for this action was filed with the Environmental Protection Agency. A notice of availability of the FSEIS was published on April 10, 2009 (74 FR 16388). In approving the Amendment 18 on June 17, 2009, NMFS issued a record of decision (ROD) identifying the selected alternative. A copy of the ROD is available from William L. Robinson, NMFS, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814. The action provides additional opportunities for Hawaii-based shallow-set longline fishermen to fish for swordfish while continuing to conserve protected species. Removing the effort limitations, and set certificate program, would increase fishing effort, but would not exceed MSY or contribute to overfishing of swordfish and other fish species. The action would not have adverse conservation and recovery impacts on loggerhead or leatherback sea turtles. The action is not likely to cause significant adverse effects to marine mammals, migratory birds, essential fish habitat, or habitat areas of particular concern. The complete analysis of the alternatives is contained in Amendment 18 and final SEIS, and is not repeated here. The environmental analytical documents are available from *www.regulations.gov* and the Council (see **ADDRESSES**).

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

A final regulatory flexibility analysis (FRFA) was prepared. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA and NMFS responses to those comments, and a summary of the analyses completed to support the action. The FRFA follows:

A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this rule. There are no disproportionate economic impacts from this rule based on home port, gear type, or relative vessel size. There are no recordkeeping, reporting, or other compliance costs associated with this rulemaking. In the absence of relevant cost data, gross revenue is used as proxy for profitability. There were no comments received on the IRFA during the comment period.

Description and estimate of the number of small entities to which the rule applies

About 30 active Hawaii-based swordfish longline vessels and an indeterminate number of non-active permit holders may be affected by this rulemaking. Between 2005 and 2007, 29 to 37 vessels participated in the shallow-set longline fishery for swordfish. The average revenue earned by vessels from participating in the shallow-set swordfish fishery in 2005 through 2007 was $225,227. In addition it is believed that the majority of participants are also active in the deep-set longline fishery during the course of a year; thus, their shallow-set revenues represent one portion of their total revenue. In 2007, the overall average (combined deep-set and shallow-set longline fisheries) ex-vessel revenue was $62.6 million realized by a total of 129 active vessels. On a per-vessel basis, this yields an average ex-vessel revenue of $486,039 per vessel, still far below the $4.0 million threshold. Therefore, all vessels are considered to be small entities under the definition provided by the Small Business Administration (SBA) as follows: any fish-harvesting business is a small business if it is independently owned and operated and not dominant in its field of operation and has annual receipts not in excess of $4.0 million.

Economic Impacts

Alternative 1–F will have no adverse economic impact on the 30 individual vessels comprising the fishery. In 2007, 29 vessels made 1,497 sets, and the 27 vessels fishing in 2008 made 1,587 sets. Since the fishery had reopened in 2004, it has never approached the current cap of 2,120 sets. Therefore, this rule would lift a constraint that has not been historically tested by the present participants in the fishery. The elimination of the cap, accordingly, would be expected to have no economic impact on the 30 participants in the fishery. In the long term, removal of the set limit is expected to allow for the entry of new vessels into the fishery thus increasing available rents to the fishery as a whole. This is discussed in length in the Regulatory Impact Review (see **ADDRESSES**).

Since the fishery has been closed as a result of reaching the current loggerhead cap, the increase in allowable turtle interactions for loggerheads would theoretically translate to a potential increase in gross revenues and vessel profitability that could be measured by comparing the total revenues associated with the old interaction cap and the total revenues associated with the new interaction cap. The reduction in allowable leatherback interactions, however, would theoretically have no economic impact to the fishery in the short run since historically the leatherback cap of 16 has not been reached. However, data on the relationship between turtle interactions and catch is not reliable because of the newness of the managed fish and the lack of data points. Therefore, those economic impacts would be indeterminate in the short term.

Alternative 2–B, the removal of the requirement for set certificates, will have a minimal yet positive impact on individual vessel owners that would have needed additional certificates to prosecute the fishery. The gross revenue derived from a set averages approximately $5,000, and the sale of set certificates by those owning a limited access permit has been reported by industry to be between $50 and $100, or 2 to 3 percent of gross revenue per set. This would reflect a cost savings to the vessel and an enhancement of profitability. Alternatively, those that have historically sold their certificates in lieu of fishing could lose $50 to $100 dollars per set per year. The private sale of certificates has not been tracked by NMFS due to privacy considerations and the lack of any legal requirements to do so. However, if we assume that opportunities outside of shallow-set longline fishing equal or exceed profits that could be obtained by using their certificates to fish, the adverse impact to these permit holders would be 3 percent or less. Alternative 3–A will have no impact on the fishery.

Steps Taken by the Agency to Minimize Economic Impact

There are no significant alternatives to this rulemaking that would have a less adverse or more beneficial economic impact than the preferred. All other alternatives considered regarding number of sets allowed, including the no-action alternative, are expected to have no adverse economic impact to the present participants in the fishery. The no-action alternative for elimination of set certificates would have no economic impact vis-a-vis the present fishery and permit holders selling certificates. Since there are no adverse impacts to small entities resulting from this rule, NMFS did not take steps to minimize economic impact.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency must explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared, and will be sent to all Hawaii-based pelagic longline vessels. In addition, copies of this final rule and guide at *www.fpir.noaa.gov/SFD/SFD_regs_2.html*

A formal section 7 consultation under the ESA was conducted for Amendment 18 on the effects of the action on ESA-listed marine species. In a Biological Opinion dated October 15, 2008, NMFS determined that fishing activities under Amendment 18 and its implementing regulations may affect, but are not likely to adversely affect, seven ESA-listed

species (Hawaiian monk seal, and blue, fin, sei, sperm, and North Pacific Right whales). NMFS also determined that the action may affect, and is likely to adversely affect, six other ESA-listed marine species that occur in the action area (humpback whale, and loggerhead, leatherback, olive ridley, green, and hawksbill sea turtles). This final rule is consistent with the October 2008 Biological Opinion's Reasonable and Prudent Measures and Terms and Conditions.

Additionally, an informal consultation was conducted under section 7 of the ESA with the U.S. Fish and Wildlife Service (USFWS) on the effects of the final rule on the endangered short-tailed albatross. The USFWS concurred with the NMFS determination that the action is not expected to result in a significant impact on short-tailed albatross during the first year after the rule is implemented.

List of Subjects

50 CFR Part 300

Administrative practice and procedure, International fishing and related activities.

50 CFR Part 665

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaii, Hawaiian Natives, Northern Mariana Islands, Pacific remote island areas, Reporting and recordkeeping requirements.

Dated: December 04, 2009.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR chapters III and VI are amended as follows:

CHAPTER III

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. The authority citation for 50 CFR part 300, subpart B, continues to read as follows:

Authority: 16 U.S.C. 5501 *et seq.*

■ 2. In § 300.17, revise paragraph (b)(1)(v) to read as follows:

§ 300.17 Reporting.

* * * * *

(b) * * *

(1) * * *

(v) Pacific Pelagic Longline Longline Logbook (§ 665.14(a) of this title);

* * * * *

CHAPTER VI

PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 3. The authority citation for 50 CFR part 665 continues to read as follows:

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

§ 665.12 [Amended].

■ 4. In § 665.12, remove the definition of ''Shallow-set certificate.''

■ 5. In § 665.22, remove and reserve paragraphs (bb), (gg), and (hh), and revise paragraph (jj) to read as follows:

§ 665.22 Prohibitions.

* * * * *

(jj) Engage in shallow-setting from a vessel registered for use under any longline permit issued under § 665.21 north of the Equator (0° lat.) with hooks other than circle hooks sized 18/0 or larger, with an offset not to exceed 10 degrees, in violation of § 665.33(f).

* * * * *

■ 6. In § 665.32,

■ a. Revise paragraphs (a)(1) and (a)(2);

■ b. Redesignate paragraphs (a)(5) and (a)(6) as paragraphs (a)(6) and (a)(7), respectively;

■ c. Add new paragraph (a)(5);

■ d. Revise introductory text to newly-redesignated paragraphs (a)(7)(ii) and (a)(7)(iii);

■ e. Add new paragraph (a)(7)(iii)(C);

■ f. In newly-redesignated paragraph (a)(7), redesignate (a)(7)(iv), (a)(7)(vii), (a)(7)(viii), (a)(7)(ix), and (a)(7)(x) as new paragraphs (a)(8), (a)(9), (a)(10), (a)(11), and (a)(12), respectively; and

■ g. In newly-redesignated paragraph (a)(7), redesignate paragraph (a)(7)(v) as paragraph (a)(7)(iv), and redesignate paragraph (a)(7)(vi) as paragraph(a)(7)(v).

The revisions and additions read as follows:

§ 665.32 Sea turtle take mitigation measures.

(a) * * *

(1) *Hawaii longline limited access permits.* Any owner or operator of a vessel registered for use under a Hawaii longline limited access permit must carry aboard the vessel line clippers meeting the minimum design standards specified in paragraph (a)(5) of this section, dip nets meeting the minimum design standards specified in paragraph (a)(6) of this section, and dehookers meeting minimum design and performance standards specified in paragraph (a)(7) of this section.

(2) *Other longline vessels with freeboards of more than 3 ft (0.91 m).* Any owner or operator of a longline vessel with a permit issued under § 665.21 other than a Hawaii limited access longline permit and that has a freeboard of more than 3 ft (0.91 m) must carry aboard the vessel line clippers meeting the minimum design standards specified in paragraph (a)(5) of this section, dip nets meeting the minimum design standards specified in paragraph (a)(6) of this section, and dehookers meeting the minimum design and performance standards specified in paragraph (a)(7) of this section.

* * * * *

(5) *Line clippers.* Line clippers are intended to cut fishing line as close as possible to hooked or entangled sea turtles. NMFS has established minimum design standards for line clippers. The Arceneaux line clipper (ALC) is a model line clipper that meets these minimum design standards and may be fabricated from readily available and low-cost materials (see Figure 1 to this section). The minimum design standards are as follows:

(i) *A protected cutting blade.* The cutting blade must be curved, recessed, contained in a holder, or otherwise afforded some protection to minimize direct contact of the cutting surface with sea turtles or users of the cutting blade.

(ii) *Cutting blade edge.* The blade must be capable of cutting 2.0–2.1 mm monofilament line and nylon or polypropylene multistrand material commonly known as braided mainline or tarred mainline.

(iii) *An extended reach handle for the cutting blade.* The line clipper must have an extended reach handle or pole of at least 6 ft (1.82 m).

(iv) *Secure fastener.* The cutting blade must be securely fastened to the extended reach handle or pole to ensure effective deployment and use.

* * * * *

(7) * * *

(ii) *Long-handled dehooker for external hooks.* This item is intended to be used to remove externally-hooked hooks from sea turtles that cannot be brought aboard. The long-handled dehooker for ingested hooks described in paragraph (a)(7)(i) of this section meets this requirement. The minimum design and performance standards are as follows: * * *

* * * * *

(iii) *Long-handled device to pull an ''inverted V''.* This item is intended to be used to pull an ''inverted V'' in the fishing line when disentangling and dehooking entangled sea turtles. One long handled device to pull an ''inverted V'' is required on the vessel. The minimum design and performance standards are as follows: * * *

* * * * *

(C) The long-handled dehookers described in paragraphs (a)(7)(i) and (ii) of this section meet this requirement.

* * * * *

■ 7. In § 665.33, remove and reserve paragraphs (a), (c), and (e), and revise paragraphs (b) and (f) to read as follows:

§ 665.33 Western Pacific longline fishing restrictions.

* * * * *

(b) *Limits on sea turtle interactions.* (1) Maximum annual limits are established on the number of physical interactions that occur each calendar year between leatherback and loggerhead sea turtles and vessels registered for use under Hawaii longline limited access permits while shallow-setting.

(i) The annual limit for leatherback sea turtles (*Dermochelys coriacea*) is 16, and the annual limit for loggerhead sea turtles (*Caretta caretta*) is 46.

(ii) If any annual sea turtle interaction limit in paragraph (b)(i) of this section is exceeded in a calendar year, the annual limit for that sea turtle species will be adjusted downward the following year by the number of interactions by which the limit was exceeded.

(iii) No later than January 31 of each year the Regional Administrator will publish a notice in the **Federal Register** of the applicable annual sea turtle interaction limits established pursuant to paragraphs (b)(i) and (b)(ii) of this section.

* * * * *

(f) Any owner or operator of a vessel registered for use under any longline permit issued under § 665.21 must use only circle hooks sized 18/0 or larger, with an offset not to exceed 10 degrees, when shallow-setting north of the Equator (0° lat.). As used in this paragraph, an offset circle hook sized 18/0 or larger is one with an outer diameter at its widest point no smaller than 1.97 inches (50 mm) when measured with the eye of the hook on the vertical axis (y-axis) and perpendicular to the horizontal axis (x-axis). As used in this paragraph, the allowable offset is measured from the barbed end of the hook, and is relative to the parallel plane of the eyed-end, or shank, of the hook when laid on its side.

* * * * *

[FR Doc. E9–29444 Filed 12–9–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 0907301200–91412–03]

RIN 0648–AY07

Magnuson-Stevens Act Provisions; Fisheries off West Coast States; Pacific Coast Groundfish Fishery; 2010 Harvest Specifications and Management Measures for Petrale Sole

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

ACTION: Final rule.

SUMMARY: This final rule revises the 2010 Optimum Yield and the January-December 2010 management measures for petrale sole taken in the U.S. exclusive economic zone (EEZ) off the coasts of Washington, Oregon, and California.

DATES: Effective January 1, 2010.

FOR FURTHER INFORMATION CONTACT: Gretchen Arentzen (Northwest Region, NMFS), phone: 206–526–6147, fax: 206–526–6736 and e-mail *gretchen.arentzen@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is accessible via the Internet at the Office of the **Federal Register**'s Website at http://www.gpoaccess.gov/fr/index.html. Background information and documents are available at the Pacific Fishery Management Council's (the Council or PFMC) website at *http://www.pcouncil.org/*. An Environmental Assessment (EA) was prepared for the proposals to revise the 2009–2010 harvest specifications and management measures for petrale sole and canary rockfish. A copy of the EA is available online at *http://www.nwr.noaa.gov/*.

Background

The 2009 and 2010 Acceptable Biological Catches (ABCs), Optimum Yields (OYs) and Harvest Guidelines (HGs) for Pacific coast groundfish species were established in the final rule for the 2009–2010 groundfish harvest specifications and management measures (74 FR 9874, March 6, 2009). On September 11, 2009, NMFS proposed taking interim measures for two species of groundfish petrale sole and canary rockfish - during 2009 and 2010 (74 FR 46714). Those changes were proposed because the PFMC received new stock assessments of those species in June 2009 that indicated the stocks are in worse shape than had been thought at the beginning of 2009. On November 4, 2009, NMFS published the first of two final rules to implement a portion of the action described in the proposed rule; specifically, more restrictive management measures to reduce petrale sole catches in 2009 (74 FR 57117). This final rule implements another portion of the September 2009 proposed action for the year 2010 regarding petrale sole. These changes were considered and recommended by the Council at its November 2009 meeting in Costa Mesa, California. This final rule does not implement any changes to 2010 harvest specifications or management measures for canary rockfish (see Changes From the Proposed Rule).

This final action is taken to respond to the most recently available stock status information regarding petrale sole. The interim measures being implemented in this rule, in combination with the existing regulations, are designed to speed the rebuilding of petrale sole while NMFS and the Council complete the stock assessments, revised rebuilding plans, Environmental Impact Statement (EIS), and full rulemaking for the 2011 and 2012 specifications and management measures for the entire groundfish fishery.

The Council's policies on setting ABCs, OYs, other harvest specifications, and management measures are discussed in the preamble to the December 31, 2008, proposed rule (73 FR 80516) for 2009–2010 harvest specifications and management measures. The routine management measures, as described in the 2009–2010 proposed rule, will continue to be adjusted as necessary to modify fishing behavior during the fishing year to allow a harvest specification to be achieved, or to prevent a harvest specification from being exceeded.

Additional information regarding considerations for interim changes to 2010 harvest specifications and management measures for petrale sole can be found in the preamble to the September 2009 proposed rule (74 FR 46714).

Comments and Responses

NMFS received two letters of comment during the comment period for the proposed rule. The first was from the Department of the Interior, stating that it had no comment. The second was from Oceana, an environmental advocacy group, concerning the most