

(2) NPR 8831.2, Facility Maintenance Management.

[Insert any real property related Center requirements here]

(b) Within 30 calendar days following award, the Contractor shall provide a plan for maintenance of Government real property provided for use under this contract. The Contractor's maintenance program shall enable the identification, disclosure, and performance of normal and routine preventative maintenance and repair. The Contractor shall disclose and report to the Contracting Officer the need for replacement and/or capital rehabilitation. Upon acceptance by the Contracting Officer, the program shall become a requirement under this contract.

(c) Title to parts replaced by the Contractor in carrying out its normal maintenance obligations shall pass to and vest in the Government upon completion of their installation in the facilities. The Contractor shall keep the property free and clear of all liens and encumbrances.

(d) The Contractor shall keep records of all work done to real property, including plans, drawings, charts, warranties, and manuals. Records shall be complete and current. Record of all transactions shall be auditable. The Government shall have access to these records at all reasonable times, for the purposes of reviewing, inspecting, and evaluating the Contractor's real property management effectiveness. When real property is disposed of under this contract, the Contractor shall deliver the related records to the Government.

(e) The Contracting Officer may direct the Contractor in writing to reduce the work required by the maintenance program authorized in paragraph (b) of this clause at any time.

(End of clause)

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 300

[Docket No. 070514119-0452-03]

RIN 0648-AV51

### High Seas Driftnet Fishing Moratorium Protection Act; Identification and Certification Procedures To Address Illegal, Unreported, and Unregulated Fishing Activities and Bycatch of Protected Living Marine Resources

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

**ACTION:** Final rule.

**SUMMARY:** This final action implements identification and certification

procedures to address illegal, unreported, and unregulated (IUU) fishing activities and bycatch of protected living marine resources (PLMRs) pursuant to the High Seas Driftnet Fishing Moratorium Protection Act (Moratorium Protection Act). The objectives of these procedures are to promote the sustainability of transboundary and shared fishery stocks and to enhance the conservation and recovery of PLMRs. The final rule is intended to implement existing U.S. statutory authorities to address noncompliance with international fisheries management and conservation agreements, and encourage the use of bycatch reduction methods in international fisheries that are comparable to methods used in U.S. fisheries. Agency actions and recommendations under this rule will be in accordance with U.S. obligations under applicable international trade law, including the World Trade Organization (WTO) Agreement.

**DATES:** This final rule is effective on January 12, 2011, except for §§ 302.205(b)(2), 300.206, and 300.207, which contain information collection requirements that have not yet been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). A document will be published in the **Federal Register** announcing the effective dates of these provisions after OMB provides its approval.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

##### Background

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA), which was signed into law in January 2007, amends the Moratorium Protection Act to require that actions be taken by the United States to strengthen international fishery management organizations and address IUU fishing and bycatch of PLMRs. IUU fishing has been defined in the Moratorium Protection Act and implemented through regulation at 50 CFR 300.201 as follows:

1. Fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including catch limits or quotas, capacity restrictions, and bycatch reduction requirements;

2. Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; and

3. Fishing activity that has an adverse impact on seamounts, hydrothermal vents, and cold water corals located beyond national jurisdiction, for which there are no applicable conservation or management measures or in areas with no applicable international fishery management organization or agreement. This final action amends the regulatory definition at § 300.201 to make the definition more consistent with the United Nations General Assembly Resolution 65-105.

The Moratorium Protection Act requires the Secretary of Commerce to identify in a biennial report to Congress those foreign nations whose fishing vessels are engaged in IUU fishing or fishing activities or practices that result in bycatch of PLMRs. The Moratorium Protection Act also requires the establishment of procedures to certify whether appropriate corrective actions have been taken to address IUU fishing or bycatch of PLMRs by fishing vessels of those nations. Identified nations that are not positively certified by the Secretary of Commerce could be subject to prohibitions on the importation of certain fisheries products into the United States and other measures, including limitations on port access, under the High Seas Driftnet Fisheries Enforcement Act (Enforcement Act) (16 U.S.C. 1826a). This final rule sets forth procedures to implement the identification and certification requirements of the Moratorium Protection Act.

NMFS published an Advance Notice of Proposed Rulemaking (ANPR) on June 11, 2007 (72 FR 32052), to announce that it was developing certification procedures to address IUU fishing and bycatch of PLMRs pursuant to the Moratorium Protection Act and, based upon comments received, a proposed rule was published on January 14, 2009 (74 FR 1919). Public comments were solicited on the proposed rule for a period of 120 days. In conjunction with publication of the proposed rule, NMFS held public hearings in 2009 in locations where it expected substantial public interest in the proposed procedures. These sessions were held in Boston, MA (March 16, 2009); Silver Spring, MD (April 6, 2009); San Diego, CA (April 13, 2009); Seattle, WA (April 14, 2009); Honolulu, HI (April 27, 2009);

and Miami, FL (May 12, 2009). The public hearings provided valuable opportunities for NMFS to explain the proposed rule, respond to questions, and receive feedback from the public. A summary of the comments received on the proposed rule and how these comments were addressed in the final rule can be found below. Further background is provided in the above-referenced **Federal Register** documents and is not repeated here.

NMFS prepared a final Environmental Assessment (EA) to accompany this final rule. The EA was developed as an integrated document that includes a Regulatory Impact Review (RIR) and a Final Regulatory Flexibility Analysis (FRFA). Copies of the draft EA/RIR/FRFA analysis are available at the following address: Office of International Affairs, F/IA, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. Copies are also available via the Internet at the NMFS Web site at <http://www.nmfs.noaa.gov/msa2007/>.

#### Major Aspects of the Final Action

This final action sets forth procedures for both the identification and certification of foreign nations whose fishing vessels are engaged in IUU fishing or bycatch of PLMRs. As discussed above, the Moratorium Protection Act requires that NMFS identify foreign nations whose fishing vessels are engaged in IUU fishing or bycatch of PLMRs and list these nations in a biennial report to Congress, the first of which was due in January 2009. The Act does not require publication of identification procedures in a rule, but in the interest of transparency and to provide context for subsequent certification determinations, NMFS decided to address identification in this action. NMFS made its first identifications in the January 2009 Biennial Report to Congress based on authority provided in the Moratorium Protection Act only, as these regulations were not yet in place.

#### Procedures To Identify Nations Engaged in IUU Fishing

As required under the Moratorium Protection Act, NMFS will identify, and list in the biennial report to Congress, that those nations whose fishing vessels are engaged, or have been engaged at any point during the preceding 2 years, in IUU fishing.

When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will exercise due diligence in evaluating appropriate information and evidence available to the agency. This

information could include data, gathered by the U.S. Government as well as offered by other nations, international organizations (such as regional fisheries management organizations (RFMOs)), institutions, or arrangements that, if true, could support a determination that a nation's vessels have been engaged in IUU fishing. NMFS will review and verify the pertinent information when determining, for the purposes of identification, whether a nation's fishing vessels are engaged, or have been engaged, during the preceding 2 years in IUU fishing as defined under the Moratorium Protection Act.

Once NMFS has determined that the information received is credible and provides a reasonable basis to believe or suspect that a nation's fishing vessels are engaged in IUU fishing, NMFS, acting through or in consultation with the State Department, will initiate bilateral discussions with the nation to:

- Seek corroboration of the alleged IUU activity or credible information that refutes such allegations;
- Communicate the requirements of the Moratorium Protection Act to the nation; and
- Encourage such nation to take action to address the alleged IUU fishing activity in question.

Prior to making identifications, NMFS will consider measures taken by the nation to address the IUU fishing activity of its vessels, information refuting allegations of IUU fishing activity, and domestic laws or regulatory programs designed to address IUU fishing activity, along with all verified information on alleged IUU fishing activity.

In determining whether to make an IUU fishing identification, NMFS will consider whether a nation has implemented and is enforcing measures that are deemed comparable in effectiveness to measures implemented by the United States to address the pertinent IUU fishing activity. NMFS will also consider if an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes place, whether or not the nation is party to or maintains cooperating status with the organization, and whether or not the relevant RFMO has adopted measures that are deemed by NMFS to be effective at addressing such IUU fishing activity. If the nation is a party or cooperating non-party to the relevant RFMO, NMFS will consider whether the nation has implemented and is enforcing measures of that organization.

Measures by nations to address IUU fishing could include those that reflect

the recommendations of international organizations to prevent, deter and eliminate IUU fishing. Such flag State measures and actions, as relevant, may include, but are not limited to, those that fall into the following categories:

- Data collection and catch reporting programs, including observer programs, catch documentation programs, and trade tracking schemes;
  - Trade-related measures that seek to reduce or eliminate trade in fish, and fish products derived from IUU fishing;
  - At-sea or dockside boarding and inspection schemes;
  - Programs documenting whether fish were caught in a manner consistent with conservation and management measures;
  - IUU vessel lists identifying fishing vessels that violate and/or undermine conservation and management measures;
  - Port State measures to prohibit landings or transshipment of unauthorized or other IUU catch;
  - Catch and effort monitoring, including licensing and permitting schemes, reporting, and vessel monitoring systems (VMS);
  - Bycatch reduction and mitigation strategies and techniques, such as gear restrictions or requirements, if the IUU fishing activity includes a violation of bycatch reduction or mitigation conservation and management measures;
  - Programs or measures to identify and protect vulnerable marine ecosystems (VMEs) in waters beyond any national jurisdiction (including seamounts, hydrothermal vents, and cold water corals) from significant adverse impacts due to bottom fishing activities;
  - Efforts to improve and enhance fisheries enforcement and compliance, including through the development of effective sanctions and monitoring, control and surveillance (MCS) capacity; and
  - Participation in voluntary international efforts to combat IUU fishing (e.g., the International Monitoring, Control, and Surveillance (MCS) Network or other cooperative enforcement and compliance networks).
- NMFS will also examine whether adequate enforcement measures and capacity exist to help promote compliance.

#### Notification of and Consultations With Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

Upon identifying a nation whose vessels have been engaged in IUU fishing activities in the biennial report to Congress, the Secretary of Commerce

will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will notify:

1. Nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding 2 calendar years, in IUU fishing activities;

2. Identified nations of the requirements under the Moratorium Protection Act and this subpart; and

3. Any relevant international fishery management organization of actions taken by the United States to identify nations whose fishing vessels are engaged in IUU fishing.

Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will initiate consultations with nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding 2 calendar years, in IUU fishing activities for the purpose of encouraging such nations to take appropriate corrective action with respect to the IUU fishing activities described in the biennial report.

#### **Procedures To Certify Nations Identified as Having Fishing Vessels Engaged in IUU Fishing**

Subsequent to the identification, notification, and consultation processes outlined above, the Secretary will provide either a positive or negative certification to nations that have been identified in the biennial report as having fishing vessels engaged in IUU fishing. The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that such nation has taken appropriate corrective action to address the activities for which such nation has been identified in the biennial report to Congress. When making such determination, the Secretary shall take into account whether a nation has provided documentary evidence that it has taken appropriate corrective action to address the IUU fishing activity described in the biennial report, or the relevant international fishery management organization has implemented measures that are effective in addressing the IUU fishing activity by vessels of the nation. NMFS will notify nations prior to a formal certification determination, and will provide such nations an opportunity to support and/or refute

preliminary certification determinations, and communicate any corrective actions taken to address the IUU fishing activity described in the biennial report to Congress.

Corrective actions that NMFS will consider include, but are not limited to, a nation's:

- Efforts towards improving data collection, catch monitoring, and reporting programs;

- Record of implementation of or compliance with international measures to address IUU fishing;

- Participation in technical assistance and capacity building programs to address IUU fishing and enhance regulatory efforts, as well as enforcement;

- Adequacy of surveillance, enforcement, and prosecution to promote compliance with conservation and management measures and respond to non-compliance;

- Response to IUU fishing activity;
- Participation in voluntary international efforts to combat IUU fishing (e.g., the International Monitoring, Control, and Surveillance (MCS) network or other cooperative enforcement and compliance networks); and

- Cooperation with other governments in enforcement, apprehension, and prosecution efforts related to those vessels of the identified nation that have engaged in IUU fishing.

To determine whether a positive certification is warranted, NMFS will consider the extent to which the IUU fishing activities described in the biennial report have been effectively addressed, the likely effectiveness of the nation's actions to deter future IUU activity, and whether measures that are comparable in effectiveness to measures implemented by the United States have been implemented and are being effectively enforced. Such flag State measures may include, but are not limited to:

- Catch and effort monitoring, including licensing and permitting schemes, reporting, and vessel monitoring systems (VMS);

- Programs for data collection and sharing, including observer programs;

- Catch documentation and trade tracking schemes that identify the origin and document the legality of fish from the point of harvest through the point of market/import;

- Trade-related measures, such as import and export controls or prohibitions, to reduce or eliminate trade in fish and fish products derived from IUU fishing;

- Programs that document fish were caught in a manner consistent with, or

that does not undermine, conservation and management measures;

- Port State control measures;
- At-sea and dockside inspection schemes;

- Bycatch reduction and mitigation strategies and techniques, such as gear restrictions or requirements, if the IUU fishing activity includes a violation of bycatch reduction and mitigation requirements of an international agreement to which the United States is a party;

- Systems to improve monitoring, control, and surveillance of fishing activities;

- Sufficient sanctions and legal frameworks to support effective enforcement; and

- Measures to protect VMEs from significant adverse impacts from bottom fishing activities in waters beyond any national jurisdiction.

The Secretary of Commerce will make certification determinations pursuant to provisions of the Moratorium Protection Act in accordance with international law, including the WTO Agreement, regarding adoption of trade measures in a fair, transparent, and non-discriminatory manner. When considering whether appropriate corrective action has been taken to warrant a positive certification, NMFS will take into account the outcome of consultations with the identified nation and comments received from such nation. NMFS will also evaluate actions taken by the relevant nation and applicable RFMO to address the IUU fishing activity described in the biennial report, including participation in applicable RFMOs and requests for assistance in building fisheries management and enforcement capacity. NMFS will also consider, as appropriate, whether the affected nation has implemented and is enforcing RFMO conservation and management measures designed to address IUU fishing activities.

The Secretary of Commerce will make the first certification determinations no later than 90 days after promulgation of this rule. Subsequent certification determinations will be published in the biennial report. Identified nations will receive notice of certification determinations.

Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with negatively certified nations and provide them an opportunity to take corrective action with respect to the IUU fishing activities described in the biennial report to Congress.

### Procedures To Identify Nations Engaged in PLMR Bycatch

As required under the Moratorium Protection Act, NMFS will also identify, and list in the biennial report to Congress, nations whose fishing vessels are engaged, or have been engaged during the preceding calendar year in fishing activities either in waters beyond any national jurisdiction that result in PLMR bycatch, or beyond the U.S. exclusive economic zone (EEZ) that result in bycatch of a PLMR shared by the United States.

When determining whether to identify a nation as having fishing vessels engaged in the bycatch of PLMRs, NMFS will evaluate, review, and verify appropriate information and evidence that are available to the agency. During this review, NMFS will take into account the extent of the PLMR bycatch and the impact of bycatch on sustainability of the PLMR. NMFS will also consider any actions taken by the nation to address the bycatch, information refuting the allegations of PLMR bycatch, and participation in cooperative research activities designed to address such bycatch. In addition, NMFS will consider whether adequate enforcement authority and capacity exist to promote compliance.

NMFS will also examine if an international organization for the conservation and protection of such PLMR, or an international or regional fishery management organization with a mandate to regulate the fishery in which the bycatch activity in question occurred, exists; and whether the nation whose fishing vessels are engaged, or have been engaged during the preceding calendar year, in bycatch of PLMRs is party to or maintains cooperating status with the relevant international body. NMFS will examine whether the relevant international body has adopted measures that have been demonstrated to end or reduce bycatch of PLMRs; whether the nation is a party or cooperating non-party to the organization; and whether the nation has implemented, and is enforcing, such measures. If an identified nation is not party to the relevant international or regional body, NMFS will examine whether the nation has implemented measures deemed to be effective at addressing the bycatch of such PLMRs, including any measures that have been recommended by a relevant international body. Such measures, where appropriate, may include, but are not limited to:

- Programs for data collection and sharing, including programs to assess

the abundance and status of PLMRs and observer programs;

- Bycatch reduction and mitigation strategies, techniques, and equipment, such as gear restrictions and gear modifications; and
- Improved monitoring, control, and surveillance of fishing activities.

Once NMFS has determined that information on PLMR bycatch is credible and provides a reasonable basis to believe or suspect that a nation's fishing vessels are engaged in bycatch of PLMRs, NMFS, acting through or in consultation with the State Department, will initiate bilateral discussions with the identified nation. These discussions will, among other things:

- Seek to corroborate the alleged PLMR bycatch or credible information that refutes such allegations;
- Communicate the requirements of the Moratorium Protection Act to the nation; and
- Encourage such nation to take action to address the alleged PLMR bycatch.

Pursuant to the requirements under the Moratorium Protection Act, NMFS will publish a list of nations that have been identified as having fishing vessels engaged in bycatch of PLMRs in the biennial report to Congress.

### Notification and Consultation With Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

After submission of the biennial report to Congress, the Secretary of Commerce, acting through the Secretary of State, will officially notify nations that have been identified in the biennial report as having fishing vessels that are engaged in bycatch of PLMRs. Within 60 days after submission of the biennial report to Congress, NMFS, acting through or in consultation with the State Department, will notify such nations of the requirements of the Moratorium Protection Act and initiate consultations regarding the bycatch of PLMRs.

Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will:

1. Initiate consultations with the governments of identified nations for the purposes of entering into bilateral and multilateral agreements and treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and
2. Seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report that

result in bycatch of PLMRs and, as necessary, request that the Secretary of State initiate the amendment of any existing international treaty to which the United States is a party for the protection and conservation of the PLMRs in question to make such agreements consistent with this subpart.

### International Cooperation and Assistance

To the greatest extent possible consistent with existing authority and the availability of funds, NMFS shall provide assistance to nations identified as having vessels engaged in PLMR bycatch. NMFS will also provide assistance to international organizations of which those nations are members to assist with qualifying for a positive certification. Assistance activities may include, where appropriate, cooperative research activities on species assessments and improved bycatch mitigation techniques, improved governance structures, or improved enforcement capacity. NMFS will also encourage and facilitate the transfer of appropriate technology to identified nations or the organizations of which they are members to assist identified nations in qualifying for a positive certification and to assist those identified nations or organizations in designing and implementing appropriate fish harvesting methods that minimize bycatch of PLMRs.

### Procedures To Certify Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

Based on the identification, notification, and consultation processes outlined above, NMFS will certify nations that have been identified in the biennial report as having fishing vessels engaged in bycatch of PLMRs. NMFS will notify nations prior to a formal certification determination and will provide such nations an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the bycatch of PLMRs described in the biennial report to Congress.

Identified nations will receive either a positive or negative certification from the Secretary of Commerce. A positive certification indicates that a nation has:

1. Provided documentary evidence of the adoption of a regulatory program governing the conservation of the PLMR that is comparable to that of the United States, taking into account different conditions, and which, in the case of pelagic longline fishing, includes mandatory use of circle hooks, careful

handling and release equipment, and training and observer programs; and

2. Established a management plan containing requirements that will assist in gathering species-specific data to support international stock assessments and conservation enforcement efforts for PLMRs. Stock assessments include population assessments.

When determining whether a nation's regulatory program is comparable to measures required in the United States, NMFS will consider whether the program is comparable in effectiveness, taking into account different conditions that could bear on the feasibility and efficacy of comparable measures. If other measures could address bycatch of the PLMRs in question that are comparable in effectiveness, then the implementation of such measures by a nation may be deemed sufficient for purposes of the Moratorium Protection Act. As relevant, NMFS will also consider whether measures have been implemented and effectively enforced including, but not limited to:

- Programs for data collection and sharing, including programs to assess the abundance and status of PLMRs and observer programs;
- Bycatch reduction and mitigation strategies, techniques, and equipment (including training and assistance for bycatch reduction technology and equipment);
- Improved monitoring, control, and surveillance of fishing activities;
- Efforts towards improving data collection, bycatch monitoring, and reporting programs;
- Record of implementation of or compliance with international measures to address bycatch of PLMRs;
- Participation in technical assistance and capacity building programs to reduce bycatch;
- Surveillance, enforcement, and prosecution program and their adequacy for promoting compliance with conservation and management measures and responding to non-compliance;
- Response to PLMR bycatch; and
- Cooperation with other governments in enforcement, apprehension, and prosecution efforts related to those vessels of the identified nation that have engaged in PLMR bycatch.

The Secretary of Commerce will make certification determinations pursuant to provisions of the Moratorium Protection Act in accordance with international law, including the WTO Agreement, regarding adoption of trade measures in a fair, transparent, and non-discriminatory manner. When making certification determinations, the Secretary of Commerce will, in

consultation with the Secretary of State, evaluate the information discussed above, comments received from such nation, the consultations with each identified nation, and subsequent actions taken by the relevant nation to address the bycatch of PLMRs described in the biennial report, including requests for assistance in the implementation of measures comparable to those of the United States and establishment of an appropriate management plan. The Secretary of Commerce will also take into account whether the nation participates in existing certification programs, such as that authorized under section 609 of Public Law 101-162, or the affirmative finding process under the International Dolphin Conservation Program Act (111 Stat. 1122). Nothing in this rulemaking will modify such existing certification procedures.

The Secretary of Commerce will publish certification determinations in the biennial report to the Congress. Identified nations will receive notice of certification determinations.

Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with the negatively-certified nations and provide them an opportunity to take corrective action with respect to the bycatch of PLMRs described in the biennial report to Congress.

#### **Effect of Certification Determinations**

If nations identified as having fishing vessels engaged in IUU fishing and/or bycatch of PLMRs receive a positive certification from the Secretary of Commerce pursuant to the Moratorium Protection Act, no actions will be taken against such nations.

If an identified nation fails to take sufficient action to address IUU fishing and/or bycatch of PLMRs and does not receive a positive certification from the Secretary of Commerce, the nation could face denial of port privileges for its fishing vessels, prohibitions on the import of certain fish and fish products into the United States, and other appropriate measures. In determining the appropriate course of action to recommend to the President, the Secretary of Commerce and other Federal agencies, as appropriate, will take into account the nature, circumstances, extent, duration, and gravity of the fishing activity for which the initial identification was made; the degree of culpability; any history of prior IUU fishing activities or bycatch of PLMRs; and other relevant matters. The Secretary of Commerce, in cooperation

with the Secretary of State, may initiate further consultations with identified nations that fail to receive a positive certification prior to determining an appropriate course of action.

The Secretary of Commerce will recommend to the President appropriate measures, including trade restrictive measures, to be taken against identified nations that have not received a positive certification, to address the relevant IUU fishing activity and/or fishing activities or practices that result in PLMR bycatch for which such nations were identified in the biennial report. The Secretary will make such recommendations on a case by case basis in accordance with international obligations, including the WTO Agreement. Adoption of trade measures will be done in a fair, transparent, and non-discriminatory manner. If certain fish or fish products of a nation are subject to import prohibitions, to facilitate enforcement, NMFS may require that other fish or fish products from that nation that are not subject to the import prohibitions be accompanied by documentation of admissibility to be developed by NMFS. If NMFS decides to require that such fish or fish products be accompanied by documentation of admissibility, it will develop this documentation through a future rulemaking action and give the public an opportunity to review and provide comment.

In implementing the certification procedures under the Moratorium Protection Act, in order to inform U.S. ports that cargo originating from a foreign port may be subject to import restrictions, NMFS intends to collaborate with other Federal agencies and, as appropriate, take advantage of existing prior notification procedures, such as those required under section 343(a) of the Trade Act of 2002, or those proposed for further development under the International Trade Data System (ITDS) established under the Security and Accountability for Every (SAFE) Port Act of 2006 (Pub. L. 109-347). NMFS also intends to utilize existing documentation schemes developed by RFMOs, as appropriate. These efforts will be undertaken to help mitigate the effects of a negative certification determination on U.S. industry.

If certain fish or fish products are prohibited from entering the United States, within six months after the imposition of the prohibition, the Secretary of Commerce shall determine whether the prohibition is insufficient to cause that nation to effectively address the IUU fishing described in the biennial report, or that nation has retaliated against the United States as a result of that prohibition. The Secretary

of Commerce shall certify to the President each affirmative determination that an import prohibition is insufficient to cause a nation to effectively address such IUU fishing activity or that a nation has taken retaliatory action against the United States. This certification is deemed to be a certification under section 1978(a) of Title 22, which provides that the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the WTO.

#### Alternative Procedures

Section 609(d)(2) of the Moratorium Protection Act authorizes the Secretary of Commerce to establish alternative procedures for importing fish or fish products from a vessel of a harvesting nation identified under section 609(a) of the Act in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. The alternative procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this Act. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipment-by-shipment, shipper-by-shipper, or other basis as long as specified conditions are met.

For nations that have been identified as having fishing vessels engaged in IUU fishing and have not received a certification from the Secretary of Commerce, certain fish or fish products of that nation may be eligible for alternative certification procedures. To qualify for the alternative certification procedures, NMFS must determine, based on the best available information, that the relevant vessel has not engaged in IUU fishing, or been identified by an international fishery management organization as participating in IUU fishing activities.

Section 610(c)(4) of the Moratorium Protection Act requires the Secretary of Commerce to establish alternative procedures for importing fish or fish products from a vessel of a harvesting nation identified under section 610(a) of the Act in the event that the Secretary cannot reach a certification determination for such identified nation by the time of the next biennial report. The alternative procedures shall not apply to fish or fish products from identified nations that have received

either a negative or a positive certification under this Act. Under these alternative procedures, the Secretary of Commerce may allow entry of fish or fish products on a shipment-by-shipment, shipper-by-shipper, or other basis as long as specified conditions are met.

To qualify for the alternative certification procedures, NMFS must determine that imports were harvested by practices that do not result in bycatch of a protected living marine resource, or were harvested by practices comparable to those required in the United States, taking into account different conditions that affect the feasibility and efficacy of such practices, and which, in the case of pelagic longline fishing, includes mandatory use of circle hooks, careful handling and release equipment, and training and observer programs. NMFS must also determine that the vessel collects species-specific bycatch data that can be used to support international and regional assessments and efforts to conserve PLMRs. NMFS will make these determinations in accordance with international law, including the WTO Agreement, regarding adoption of trade measures in a fair, transparent, and non-discriminatory manner.

In its implementation of alternative certification procedures, NMFS will seek appropriate documentation to verify that imports were harvested in a manner consistent with the requirements of this subpart, such as chain-of-custody information, VMS reports, or other forms of verification. To the extent practicable, NMFS will rely on existing trade tracking programs to implement alternative procedures.

#### Responses to Comments on the Proposed Rule

NMFS received comments on the proposed rule, including comments from U.S. industry, non-governmental organizations, Marine Mammal Commission, private citizens, and other nations. Several comments received were not germane to this rulemaking and are not addressed in this section. These comments include potential legislative changes and other actions outside the scope of the statutory mandate.

Several commenters provided broad suggestions that pertain to the overall implementation of the rule. Specifically, many commenters expressed their support for the certification process under the Moratorium Protection Act and the application of trade measures, including sanctions.

NMFS received numerous comments asking the agency to adopt the strongest

measures possible to address IUU fishing and the bycatch of PLMRs, as mandated by Congress, in order to conserve these resources and level the playing field for U.S. fisherman. Several commenters recommended that NMFS hold other nations to the same rigorous and strict standards to which U.S. fishermen are subject, especially for Atlantic bluefin tuna fishing, and expressed dissatisfaction that NMFS is not aggressively utilizing trade sanctions as a tool to combat IUU fishing of shared highly migratory fish stocks.

A comment was made that the threat of trade sanctions is often more effective than the actual imposition and that sanctions should only be used as a last resort if at all.

In the following section, NMFS addresses the issues that directly relate to the measures in the rulemaking.

#### General Comments

*Comment 1:* One commenter recommended that NMFS coordinate the proposed rule with the European Union's approach in order to have a unified global process to address IUU fishing.

*Response:* NMFS is obligated to adhere to the Moratorium Protection Act that sets forth identification, consultation, and certification procedures to address IUU fishing and the bycatch of PLMRs. These procedures differ from the regulatory process of the European Union (EU) to address IUU fishing. EU Council Regulation 1005/2008, which was passed in the fall of 2008, requires, among other things, that most exports of seafood to the European market be accompanied by a catch document signed by a flag-state competent authority that the product was caught legally. NMFS is committed to working with our partners in the European Union in order to address the global problem of IUU fishing and the bycatch of PLMRs.

*Comment 2:* A commenter expressed concern that the implementation of the proposed rule will result in increased expenses to U.S. suppliers as well as to the Federal government.

*Response:* The regulations will not directly increase costs to U.S. suppliers. However, it is possible to anticipate increased costs to U.S. suppliers. If a foreign nation's ability to import certain fish or fish products into the United States is limited upon receipt of a negative certification and application of trade restrictive measures, this may impact the ability of U.S. suppliers to access fish or fish products from that nation. Alternative sources of fish and fish products could mitigate the impacts

of restrictions on U.S. suppliers' access to fish and fish products.

*Comment 3:* Several commenters suggested that NMFS should include in the biennial report to Congress information on the status of the RFMOs' compliance committees and the performance reviews as an indicator of the effectiveness of the RFMOs actions related to implementing measures to avoid IUU and bycatch of PLMRs.

*Response:* NMFS will include in the biennial report to Congress relevant information on RFMOs and their measures to address IUU fishing and the bycatch of PLMRs.

*Comment 4:* A suggestion was made that NMFS prioritize situations where IUU is rampant or bycatch of PLMRs is clearly excessive, thus focusing the imposition of trade measures on the most egregious situations.

*Response:* NMFS is required to address IUU fishing activity and the PLMR bycatch. When making identification decisions for both IUU fishing and bycatch, NMFS will consider the history, nature, circumstances, extent, duration, and gravity of the activity in question.

#### *Definition of IUU Fishing*

*Comment 5:* Several commenters suggested that NMFS should expand the definition of IUU fishing. Suggestions included addressing unreported fishing and fishing activities that are misreported to the relevant national or international fishery management authority, as well as violations of agreements to which the United States is not a party. Others suggested broadening the IUU fishing definition to include illegal incursions of a nation's vessels into the waters of other nations (including U.S. waters), flagrant reflagging under flags of convenience, beneficial ownership, and lack of registration.

Commenters also recommended that the definition of IUU fishing be as consistent as possible with the United Nation's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), as well as the UNFAO Agreement on Port State Measures.

*Response:* At this time, NMFS believes it is not appropriate to modify the definition of IUU fishing through this regulatory action. NMFS appreciates the public is interested in having this definition modified, but NMFS has decided not to revise the definition until the agency is able to understand the implications for implementing the United Nations Food and Agriculture Organization's Agreement on Port State Measures to

Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement). Although this agreement has been signed by the United States, it has not been ratified. At present, NOAA plans to revise the definition of IUU fishing in a subsequent rulemaking action to help ensure that the definition complies with our international as well as statutory obligations. In its development of the new definition, NMFS will consider what clarifications may be helpful for the definition, and will seek and take public comments on the definition. NMFS will also take the comments received in response to this rulemaking into account when formulating the new definition of IUU fishing.

*Comment 6:* Several commenters were encouraged that NMFS' definition of fishing vessels relative to its definition of IUU fishing extended to "vessels that are used for fishing or any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing, bunkering or purchasing catch, aiding or assisting one or more vessels at sea in the performance of such activity."

*Response:* NMFS has decided to retain the proposed definition of "fishing vessels" in the final rule without amendment.

*Comment 7:* A nation commented that the failure to meet the commitments of Resolution 61/105 of the United Nations General Assembly and the International Guidelines for the Management of Deep-sea Fisheries in the High Seas should not be defined as IUU fishing, as there are no internationally agreed upon standards that would support such a determination. In addition, the nation suggested that NMFS only consider including flag State responsibilities related to these guidelines for deep seas fisheries in the definition of IUU fishing after the establishment of internationally agreed criteria for assessing flag State performance.

*Response:* The portion of the definition of IUU fishing referenced by the commenter is mandatory under the Moratorium Protection Act. The aspect of the IUU fishing definition the commenter refers to includes fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures, including those in areas with no applicable international fishery management organization or agreement.

This portion of the definition is required under the Moratorium Protection Act.

*Comment 8:* One commenter recommended that NMFS include in its definition of IUU fishing the failure of the flag State to report the catch of its fishing vessels to the RFMO that it is party to, or other applicable authorities in its definition of IUU fishing.

*Response:* Under the Moratorium Protection Act, NMFS is authorized to identify nations based on the IUU fishing activity of their vessels. If the vessels of a flag State fail to report their catch to the relevant RFMO and this action is required under a conservation and management measure of an RFMO to which the United States is a party, then failure to report the catch could be a potential basis for identifying the nation.

#### *Concerns Regarding IUU Fishing*

*Comment 9:* A comment was made in regards to a statement in the biennial report to Congress that "*\* \* \* more than one vessel must be engaged in IUU fishing for purposes of identification.*" The commenter recommended that NMFS reinterpret the statute or attempt to remove legislative language limiting the criterion for identification that a nation must have more than one vessel engaged in IUU fishing. The commenter suggested that nations should be held responsible for any and all IUU fishing activity of their flagged vessels.

*Response:* NMFS' interpretation of the statute that more than one vessel of a nation must be engaged, or have been engaged, in IUU fishing activity to warrant identification under the Moratorium Protection Act is consistent with the statutory language.

*Comment 10:* NMFS received a comment recommending improvements in traceability of catches to prevent IUU fishing. It was suggested that Catch Documentation Schemes (CDS) would help with these improvements.

*Response:* NMFS agrees with the commenter and supports the adoption of tools to address traceability of catch, including catch documentation schemes, to help address IUU fishing, consistent with the purposes of the Moratorium Protection Act.

#### *Definition of Bycatch of PLMRs*

*Comment 11:* One commenter advised NMFS to revise the definition of bycatch of PLMRs to encompass any interaction with a non-target living marine resource that results in the capture, serious injury or mortality of that resource, regardless of whether the resource is discarded or kept for personal or commercial use. The commenter was concerned that the way the current definition is phrased

might suggest that if non-target living marine resources were to be kept on the vessel, they would not be considered bycatch, which would undermine efforts to conserve these species and reduce their bycatch.

Another commenter recommended that NMFS' definition of bycatch of PLMRs be revised to explicitly refer to any encounter of non-target living marine resources with fishing gear, not just encounters that result in mortality or serious injury.

*Response:* NMFS sought to address these comments in the definition of bycatch in the final rule. The revised definition of PLMRs in the final rule is as follows: "Bycatch means the incidental or discarded catch of protected living marine resources or entanglement of such resources with fishing gear."

#### *Concerns Regarding the Bycatch of PLMRs*

*Comment 12:* NMFS received a comment from the Marine Mammal Commission regarding the lack of available information and standards with respect to the bycatch of PLMRs, as well as the incomparable reporting requirement timelines and deadlines between IUU fishing and bycatch of PLMRs. Specifically, under the IUU fishing provisions, the Secretary has 60 days after submission of the biennial report to Congress to notify identified nations and to initiate consultations, whereas the proposed rule only suggests that this occur "as soon as possible" with respect to the bycatch of PLMRs. Therefore, the Marine Mammal Commission recommends that NMFS establish deadlines for notification, consultation, and certification findings with respect to PLMR bycatch.

*Response:* NMFS sought to address these comments by standardizing the timelines and deadlines for information collection, notification, consultation, and certification decisions for IUU fishing and bycatch of PLMRs under the Moratorium Protection Act, in a manner consistent with the statutory text of the Act.

With respect to nations that are identified as having fishing vessels engaged in IUU fishing or bycatch of PLMRs, NMFS, acting through or in cooperation with the State Department, will notify such nations of the requirements of the Moratorium Protection Act and initiate consultations within 60 days of submission of the biennial report to Congress.

Certification determinations will be made for nations that are identified as having vessels engaged in IUU fishing or bycatch of PLMRs on a biennial basis to

coincide with publication of the biennial report to Congress.

*Comment 13:* The Marine Mammal Commission commented that the lack of basic information on pelagic and transboundary PLMRs that are often caught as bycatch is of serious concern, as this will severely hamper NMFS' efforts to identify bycatch problems and evaluate the adequacy of a nation's regulatory program.

*Response:* NMFS shares the concerns raised by the commenter regarding the lack of basic information on PLMR bycatch and, based on the absence of this information, recognizes the challenges associated with identifying nations whose fishing vessels are engaged in bycatch of PLMRs and evaluating other nations' regulatory programs. To address this concern, as explained in the prior response, NMFS plans to examine PLMR bycatch information from as broad a timeframe as possible under the Act.

*Comment 14:* The Marine Mammal Commission recommended that NMFS work with the Department of State to protect PLMRs by promoting protective actions in relevant international fora, and through amendments to treaties to which the United States is party, such as requiring the collection and sharing of data pertaining to fishery interactions, stock status, and bycatch estimates and implementing of bycatch mitigation measures.

*Response:* Consistent with the legislative intent of the Moratorium Protection Act, NMFS will work with the Department of State to protect PLMRs through the adoption of measures in the relevant international fora that require reporting of bycatch data and use of bycatch mitigation gear. NMFS will also continue its efforts to work cooperatively with nations that lack sufficient capacity for fisheries monitoring, control, surveillance, and bycatch mitigation and assist these nations achieve sustainable fisheries.

*Comment 15:* A commenter suggested that NMFS distinguish between a particular instance of fishing activity that results in bycatch of PLMRs, and a consistent disregard of bycatch reduction measures.

*Response:* NMFS has addressed this comment in the final rule by requiring that the agency take into account all relevant matters when determining whether to identify nations whose vessels engaged in PLMR bycatch including, but not limited to, the history, nature, circumstances, extent, duration, and gravity of the bycatch activity in question.

#### *Comparability*

*Comment 16:* NMFS received numerous comments regarding the effectiveness of measures to reduce IUU fishing and bycatch of PLMRs. Specifically, the Marine Mammal Commission suggested that the framework to determine the comparability of effectiveness between countries' measures was too broad, and that NMFS needs to specify what standards will be used to assess comparability in effectiveness by other nations, especially with respect to the bycatch of PLMRs.

*Response:* In order to identify a nation for PLMR bycatch, under this final rule NMFS will also determine that the nation has not implemented measures designed to end or reduce such bycatch that are comparable in effectiveness to U.S. regulatory requirements, and that the relevant international organization has not adopted effective measures to end or reduce bycatch of such species.

In its determination of whether programs to address IUU fishing or PLMR bycatch are comparable in effectiveness to those of the United States, NMFS will examine programs that have been adopted by the United States to address the relevant activity for which a nation has been identified, and compare such programs with those that have been adopted by the nation, taking into account different conditions that could bear on the program's feasibility and efficacy. Given the different IUU fishing and bycatch activities for which a nation could be identified under the Act, it may be difficult and overly prescriptive to establish specific criteria for programs addressing all such activities. NMFS may, however, seek to provide further clarification on its identification and certification procedures, including any standards, through internal guidance.

#### *Data Utilized for Certification*

*Comment 17:* Several comments recommended that in addition to evaluating evidence "available" to NMFS, the proposed rule should clearly state that the NMFS will actively seek out information from industry groups and foundations, international fishery management bodies, and nations wishing to export fish or fish products into the United States. Similarly, a commenter suggested that in addition to using data offered by other international organizations and from among other sources to make an identification determination, as indicated in the proposed rule, NMFS should also seek information from industry groups such as the International Seafood



Sustainability Foundation (ISSF) and individual companies. The Marine Mammal Commission recommended that NMFS establish procedures to allow various U.S. government agencies, foreign governments, international fishery management organizations, NGOs, industry organizations and the public to provide and exchange pertinent information for the identification and certification process.

*Response:* NMFS concurs with the comments provided and will actively seek information from relevant sources with respect to the identification processes under the Moratorium Protection Act. As an illustration, NMFS published and circulated two notices in the **Federal Register** on March 5, 2010 (75 FR 10213), and April 6, 2010 (75 FR 17379), soliciting information on IUU fishing and PLMR bycatch activities prior to the development of the list of nations that were identified in the January 2009 Biennial Report to Congress, and that will be identified in the 2011 report. NMFS will continue to solicit information from the public that could be used for the identification processes under the Moratorium Protection Act, actively seek information from RFMOs and international organizations for the protection of PLMRs, and examine other information deemed relevant for our decision-making processes.

*Comment 19:* A commenter recommended that NMFS give preference to government information, information that has undergone a peer-review process, or information that has been agreed upon through tribunals or some other legal mechanism in making decisions regarding certification.

Several commenters also recommended that NMFS utilize "additional resources" to verify documentation on which a certification will be made; however, none of the commentators identified what those "additional resources" would be.

Further, NMFS received numerous comments with respect to both IUU fishing and the bycatch of PLMRs, regarding the lack of abundance and poor quality of the information that would be available and possibly used to identify and certify nations.

*Response:* When determining whether to identify a nation as having fishing vessels engaged in IUU fishing or bycatch of PLMRs, as well as certifying an identified nation, NMFS will analyze and assess all available information from a variety of sources. NMFS will exercise due diligence in evaluating which information and evidence is most appropriate for use in identifying and certifying nations. This information

could include data actively gathered by the U.S. Government as well as data offered by other nations, or international organizations (such as RFMOs), institutions, or arrangements that provides a reasonable basis to believe or suspect that a nation's vessels have been engaged in IUU fishing or bycatch of PLMRs.

*Comment 20:* A commenter recommended that NMFS establish a process to notify nations and international fishery management bodies of the Moratorium Protection Act requirements.

*Response:* The Moratorium Protection Act requires notification and as such, the final regulations lay out what NMFS will communicate to nations. NMFS has been actively conducting outreach and communicating the requirements of the Moratorium Protection Act to nations and international fishery management organizations over the past 3 years.

*Comment 21:* One commenter requested that NMFS provide information regarding the efforts that the United States has undertaken to eliminate its own IUU fishing and PLMR bycatch. The commenter expressed that this would not only facilitate earlier compliance, but also help in information-gathering and negotiations.

*Response:* NMFS will summarize efforts to address PLMR bycatch and, as appropriate, may provide information on efforts to address IUU fishing in the biennial report to Congress.

*Comment 22:* A comment was made by a nation that NMFS should publish all information sources used in the certification process.

*Response:* NMFS will publish the information sources, as appropriate, that are used in the certification decision-making under the Moratorium Protection Act in the biennial report to Congress.

#### *Identification and Certification*

*Comment 23:* A comment suggested that in order to make the task of identifying and listing a nation easier, the proposed language for section 608(c)(1) of the High Seas Driftnet Fishing Moratorium Protection Act in H.R. 1080 section 2(b), should be clarified so that if vessels and vessel owners are identified as engaging in IUU fishing by an international fishery management organization or through an international agreement, the vessel would automatically be added to the Secretary's list and subject to possible action under the proposed section 608(c)(2).

*Response:* Legislative changes are outside the scope of this action.

However, NMFS notes that, when considering an IUU fishing identification under the Moratorium Protection Act, NMFS will examine information regarding vessels flagged to a nation that is identified by an international fishery management organization to which the United States is a party as having engaged in IUU fishing. The Moratorium Protection Act provides for consideration of vessels' IUU fishing activities during the preceding 2 years.

*Comment 24:* A commenter recommended that, in addition to identifying nations based on vessel-specific activity, NMFS also utilize trade analysis that compares reported catches and trade data for the purposes of identifying IUU fishing occurring in a fishery. The commenter is concerned that in some situations vessel level information will not be sufficient to support identification, but rather trade analysis could be a strong indication that the fishery as a whole is not being adequately monitored and enforced by the particular country or set of countries and therefore the products from that fishery should be considered IUU-derived.

*Response:* Under the Moratorium Protection Act, NMFS is required to identify nations whose vessels engage in IUU fishing activity or bycatch of PLMRs. Therefore, a determination must be made based upon vessel specific information.

*Comment 25:* A comment recommended that the United States pursue schemes requiring all fishing vessels to have International Maritime Organization numbers, or an equivalent system for smaller vessels. It was suggested that in order to encourage vessel owners to register with an International Maritime Organization system, NMFS could automatically list any unregistered vessel.

*Response:* NMFS supports efforts made at the international level to enhance the identification and encourage registration of all fishing vessels, which would improve the tracking of vessel activities and compliance with international registration requirements. To the extent that vessels of a nation are fishing without authorization in violation of a conservation and management measure of an RFMO, NMFS will consider identification of these nations as required under the Moratorium Protection Act.

*Comment 26:* One comment recommended that NMFS not only identify and list nations for having vessels engaged in IUU fishing, but also the specific vessel as well as the

fisheries in which they are engaged. The commenter was concerned that, under the current regulations, all fishing vessels flying the flag of an identified country will be incriminated, as opposed to only those vessels or fisheries actually engaged in IUU fishing.

*Response:* NMFS will, to the extent practicable, identify the specific vessels of a nation that are engaged in IUU fishing activities for purposes of identification under the Moratorium Protection Act in the biennial report to Congress.

*Comment 27:* A nation commented that it was pleased to see that consultation is a key aspect of the identification and certification process. The nation recommended that NMFS consult in a way to ensure the transparency and fairness of these processes.

*Response:* NMFS agrees that consultations are a key aspect of the identification and certification processes under the Moratorium Protection Act. NMFS will seek to implement the Moratorium Protection Act to ensure fairness and transparency.

*Comment 28:* NMFS received a question from a nation requesting clarification of the documentation required with respect to § 300.205(b)(1) (Such finding may include a requirement that fish or fish products from such nations be accompanied by documentation of admissibility.).

*Response:* If an identified nation fails to receive a positive certification from the Secretary of Commerce, and the President determines that certain fish and fish products from that nation are ineligible for entry into the United States and U.S. territories, then NMFS may require that fish or fish products not subject to the import restrictions from the nation be accompanied by admissibility documentation to be developed by NMFS. This requirement would be put into place if deemed necessary to assist with monitoring and compliance with the import prohibitions.

*Comment 29:* A comment from a nation stated that with respect to § 300.205(a)(2) (“\* \* \* If there is no applicable international fishery agreement, the Secretary of Commerce shall not recommend import prohibitions that would apply to fish or fish products caught by vessels not engaged in IUU fishing \* \* \*”), both the intent and the language of this article are unclear. The nation recommended that NMFS clearly explain the effects of negative certification and to whom it applies in relation to bycatch of PLMRs.

*Response:* NMFS has revised the final rule to mirror the text of the Act more closely. In response to the comment provided, NMFS clarifies that, for nations identified under § 300.202(a) that are not positively certified, NMFS believes that import prohibition recommendations should be made with respect to fish or fish products managed under the applicable international fishery agreement. If there is no applicable agreement, import prohibition recommendations should be made with respect to fish or fish products caught by vessels engaged in the IUU fishing activity. For nations identified under § 300.203(a) that are not positively certified, NMFS believes that import prohibition recommendations should be made with respect to fish or fish products caught by the vessels engaged in the relevant activity for which the nation was identified.

*Comment 30:* A nation requested that NMFS clarify § 300.203(d)(2)(ii) (“Such nation has established a management plan that will assist in the collection of species-specific data on PLMR bycatch to support international stock assessments and conservation efforts for PLMRs”). Specifically, the nation wanted to know if PLMRs include species that are managed by an international fishery management organization, and the likelihood of having international stock assessments and conservation efforts for PLMRs. The nation recommended that NMFS delete “international stock assessments” as they are captured under broader “conservation efforts.”

*Response:* The definition of PLMRs set forth in the Moratorium Protection Act exempts those species, with the exception of sharks, that are managed by an RFMO. The statute requires that nations identified as having vessels engaged in PLMR bycatch establish a management plan that will assist in the collection of species-specific data for use in international assessments in order to receive a positive certification.

*Comment 31:* A commenter recommended that the United States place the burden of proof on the nations wishing to export product to the United States that they have not engaged in IUU fishing or PLMR bycatch. The commenter suggested that by placing the burden of proof on the exporting nation, the United States will encourage other nations to enhance their monitoring and enforcement requirements to eliminate IUU fishing and bycatch of PLMRs.

*Response:* NMFS does not have authority under the Moratorium Protection Act to require that nations

bear the burden of proving that their exports to the United States were harvested by vessels that have not engaged in IUU fishing or PLMR bycatch.

*Comment 32:* Several commenters recommended that deadlines for certification findings with respect to bycatch of PLMRs need to be established. Specifically, a timeline should be created by which nations are to meet the applicable comparability requirements or face certification.

*Response:* In this final rule, NMFS clarifies that nations identified for having vessels engaged in PLMR bycatch meet the requirements for a positive certification prior to the subsequent biennial report to Congress. Therefore, each identified nation will have approximately 2 years to take sufficient corrective action before a certification decision is made.

*Comment 33:* A commenter suggested that NMFS should evaluate not only the statutory or regulatory requirements that apply to a fishery but also the effectiveness of a nation’s efforts to achieve compliance with those requirements. Thus, the proposed rule should provide greater detail on the types of data and information that will be required from nations and the standards that will be used to judge the sufficiency of documentary evidence for certification.

*Response:* In its implementation of the Moratorium Protection Act, NMFS will evaluate whether a nation identified as having fishing vessels engaged in IUU fishing or PLMR bycatch has taken appropriate corrective action and is implementing and enforcing such actions. In its evaluation, NMFS will consider several types of documentary evidence and will work with the nation to examine what information is available to determine whether appropriate corrective action is taken. For example, NMFS will examine logbook data, laws and regulations to address IUU fishing activity, and written documentation of permit revocation, among other things.

*Comment 34:* A comment was made regarding revising the timeline for reporting on the identification process. A commenter suggested that stipulating such reports as “biennial” alone is insufficient, as subsequent reports could be provided two years to the calendar year rather than the calendar date. Specifically, a commenter recommended that the language in § 300.202(a)(1) of the proposed regulation be revised to read: “NMFS will identify and list, in a biennial report provided to Congress, no later than 2 years after the date of the prior

biennial report, nations whose fishing vessels are engaged, or have been engaged at any point during the preceding two calendar years, in IUU fishing” (recommended modifications in italics).

*Response:* NMFS is retaining the text as proposed, as it is consistent with section 607 of the Moratorium Protection Act, which requires the biennial report to be produced 2 years after enactment of the MSRA and every 2 years thereafter.

*Comment 35:* Several comments recommended that the time period in which IUU and bycatch activities are considered for identifying countries should be extended to 3 years. Commenters expressed concern that if NMFS reports on a biennial basis and only considers bycatch of PLMRs during the previous calendar year, data from every other year would not be considered in the report. Secondly, several commenters expressed concern that the current two-year time period limits NMFS from effectively collecting sufficient catch data and information on bycatch.

*Response:* As reflected in prior comments and responses above, NMFS recognizes the concerns regarding the availability of data and information for purposes of making identifications under the Moratorium Protection Act. NMFS plans to examine PLMR bycatch information from as broad a timeframe as possible under the Act. For IUU fishing, NMFS will examine information on IUU fishing activities during a 2-year period, consistent with the Act.

*Comment 36:* NMFS received several comments in support of the idea of having alternative certification procedures on a shipper-by-shipper basis. In addition, the Marine Mammal Commission commented that alternative certification procedures should require rigorous chain-of-custody documentation, greater controls on transshipment than currently exist, and real-time monitoring and verification to substantiate that individual vessels, shipments, or shippers fully comply with the bycatch reduction measures. They also recommended that NMFS defer the implementation of alternative certification procedures until nations or RMFOs can adopt monitoring and verification procedures coupled with mandatory real-time tracking and documentation of products obtained in compliance with bycatch reduction procedures.

*Response:* NMFS recognizes the value of establishing alternative certification procedures on a shipper-by-shipper basis for those identified nations that have not received a certification

decision from the Secretary of Commerce. In the implementation of the Moratorium Protection Act, the Secretary of Commerce intends to issue a positive or negative certification decision for each nation that is identified as having vessels engaged in either IUU fishing or PLMR bycatch. However, NMFS will use alternative procedures in the case that a certification decision cannot be reached. For nations that are negatively certified, entry of fish or fish products not subject to the import prohibitions could be facilitated by accompaniment of these products by documentation of admissibility under § 300.205(b)(2).

*Comment 37:* One commenter recommended that NMFS recognize the existing traceability system used for tuna products and its proven track record, and clarify that for tuna products the Secretary intends to use the alternative procedures authority, absent some new information.

*Response:* NMFS recognizes the effective existing systems used for tracking the trade of tuna products. In its implementation of alternative certification procedures for this particular species, NMFS will rely on existing trade tracking programs and seek chain-of-custody documentation, real-time monitoring and verification to substantiate that individual vessels, shipments, or shippers fully comply with requirements of these procedures.

*Comment 38:* A commenter recommended that a strict set of criteria be put in place so that countries know what is expected of them in terms of making adequate reforms, and so that the public can understand the criteria by which decisions are made in terms of certifications.

*Response:* Given the broad scope of IUU fishing and bycatch activities for which a nation could be identified, it is difficult to predict what types of data and information will be required of nations, or what standards would need to be met to receive a positive certification in each specific case. Rather, NMFS will determine the data, information, and standards on a case-by-case basis.

*Comment 39:* A commenter recommended that public consultations be built into the certification process as this will help ensure transparency in decision making about how a positive or negative certification is made.

*Response:* The Moratorium Protection Act requires the Secretary of Commerce to notify nations prior to certification, and provide such nations with an opportunity to comment on the certification determinations. NMFS will provide notice of the official

certifications in the subsequent biennial report to Congress.

#### *Trade Sanctions*

*Comment 40:* A few commenters stated that the Moratorium Protection Act specifies that the negative certification of a nation, or lack of certification with respect to IUU fishing activity or bycatch of PLMRs, triggers mandatory import prohibitions and provides that the President “shall” direct that importation of fish and fish products be prohibited immediately upon being notified that a nation is identified as having engaged in IUU fishing or PLMR bycatch, or if consultations with the government of such a nation have not concluded satisfactorily within 90 days. However, the commenter finds that the rule conflicts with the Act, as it states that such nations “may be subject” to import prohibitions. The commenter recommends that NMFS clarify the rule to reflect the mandatory requirements of the Act, as well as the stated timeline for implementing import prohibitions.

*Response:* The Secretary of Commerce only has the authority to make recommendations to the President on import prohibitions of fish or fish products. Thus, the rule was drafted to focus on the Secretary’s roles and actions.

*Comment 41:* NMFS received a comment recommending that the proposed rule clearly identify which fish products or fishing vessels of negatively certified nations would be subject to the import prohibitions. Similarly, a nation expressed that it is not clear from the proposed rule whether all fish products or all fishing vessels of a negatively certified nation would be subject to import prohibitions. The nation recommended that if import prohibitions are applied only to some fish products or some fishing vessels, NMFS should clarify the criteria that will be used to make that determination.

*Response:* The scope of any trade-related actions would be at the discretion of the President. However, in making recommendations to the President with respect to prohibitions on the importation of fish and fish products from nations identified as having vessels engaged in IUU fishing or PLMR bycatch that did not receive a positive certification from the Secretary of Commerce, NMFS will take into account the fish and fish products affected by the IUU fishing or PLMR bycatch activity in question.

*Comment 42:* One commenter suggested that punitive measures should not be limited solely to nations; penalties or trade restrictions should

also be imposed on vessel operators, fishing masters, senior executives, directors of companies, and traders deemed to be engaged in, involved with, or benefitting from IUU fishing.

*Response:* The Moratorium Protection Act only provides authority for the Secretary of Commerce to identify and certify nations for the activities of its vessels.

### Changes From Proposed Action

In addition to streamlining the final rule to reduce duplication and ease readability, NMFS has made several changes in the final rule to respond to public comments, provide clarification, and revise some text to reflect better text in the Act. The key changes are outlined below.

#### 1. Outreach Prior to Identification

In its implementation of the identification procedures under the Moratorium Protection Act, NMFS will communicate with nations regarding alleged IUU fishing and bycatch activities prior to a formal identification. This outreach process, which was described in the preamble of the proposed rule, will provide NMFS with a means of verifying information and building a more robust record in support of identification decisions. In the preamble of the final rule, NMFS clarified that it will consider action taken by nations in response to IUU fishing, as well as cooperative research conducted by nations to address bycatch activities prior to making formal identification decisions. This will allow NMFS to use the identification and certification procedures effectively to address IUU fishing and bycatch, rather than penalize nations that have already taken corrective action and/or are working cooperatively to reduce their bycatch.

#### 2. Enforcement and Implementation of International Measures

In the proposed rule, NMFS stated that it would consider whether a nation has implemented and is enforcing international measures to address IUU fishing or PLMR bycatch when making identification and certification decisions. In the preamble of the final rule, NMFS clarified that when evaluating whether a nation has implemented and is enforcing measures that will address IUU fishing and PLMR bycatch when making identification decisions, the agency will also examine whether adequate enforcement measures and capacity exist to help promote compliance. In some cases, NMFS may be able to provide international assistance to a nation to

help such nation achieve more sustainable fisheries and obtain a positive certification.

#### 3. Bycatch Definition

In the proposed rule, bycatch was defined as “the discarded catch of any living marine resource and/or mortality or serious injury of such resource due to an encounter with fishing gear that does not result in the capture of such resource.” This definition was revised in response to public comments that bycatch should include resources that are caught incidentally due to an encounter with fishing gear, regardless of whether the resource is retained. The bycatch definition was also revised based on concerns that the terms “mortality and/or serious injury” would establish unintentional standards that could not be applied consistently to all protected living marine resources. The definition of bycatch was revised in the final rule to “the incidental or discarded catch of protected living marine resources or entanglement of such resources with fishing gear.”

#### 4. Definition of International Fishery Management Agreement

In the proposed rule, this term was defined as “any bilateral or multilateral treaty, convention, or agreement that governs direct harvest of fish and/or directly governs bycatch of fish, sea turtles, or marine mammals.” This definition was revised for clarity in the final rule and consistent with the definition of “international fishery management organization” as “any bilateral or multilateral treaty, convention, or agreement for the conservation and management of fish.”

#### 5. Notification and Initiation of Consultations for PLMR Bycatch

As specified in the Moratorium Protection Act, the proposed rule required that NMFS notify nations of their identification for having vessels engaged in IUU fishing, and initiate consultations within 60 days after submission of the biennial report to Congress. The proposed rule did not, however, establish a specific deadline for the notification and initiation of consultations with nations identified for having vessels engaged in PLMR bycatch. In response to public comments, NMFS will require that nations identified for having vessels engaged in PLMR bycatch be notified of their identification and consultations be initiated within 60 days after submission of the biennial report to Congress, consistent with the requirements for nations identified for having vessels engaged in IUU fishing.

#### 6. International Cooperation and Assistance

In the final rule, NMFS specified that the agency is required to work cooperatively with nations that are identified for having vessels engaged in PLMR bycatch to address such bycatch and provide appropriate assistance to help such nations obtain a positive certification. These requirements have been included for transparency in the process by which NMFS plans to work cooperatively with other nations and provide assistance where necessary to help achieve sustainable fisheries globally.

#### 7. Scope of Import Prohibitions

NMFS received several public comments asking for clarification regarding the scope of trade sanctions that would be recommended by the Secretary of Commerce to the President when identified nations fail to receive a positive certification. NMFS has revised the final rule to mirror the text of the Act more closely. In the response to comments in this final rule, NMFS explains that, for nations identified under § 300.202(a) that are not positively certified, NMFS believes that import prohibition recommendations should be made with respect to fish or fish products managed under the applicable international fishery agreement. If there is no applicable agreement, import prohibition recommendations should be made with respect to fish or fish products caught by vessels engaged in the IUU fishing activity. For nations identified under § 300.203(a) that are not positively certified, NMFS believes that import prohibition recommendations should be made with respect to fish or fish products caught by vessels engaging in the relevant activity for which the nation was identified.

#### Classification

This final rule is published under the authority of the Moratorium Protection Act, 16 U.S.C. 1826d–1826k.

This rulemaking has been determined to be significant for the purposes of Executive Order 12866.

A final regulatory flexibility analysis (FRFA) was prepared, as required by section 603 of the RFA. The FRFA describes the economic impact this rule would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

NMFS received public comments on the proposed rule, and made some revisions to the final rule to clarify provisions. A summary of public comments on the proposed rule and agency responses is provided above. NMFS did not receive comments specifically on the IRFA or on issues related to the IRFA.

This final rule does not apply directly to any U.S. small business, as the rulemaking is aimed at foreign nations whose vessels engage in fishing activities. The universe of potentially indirectly affected industries includes the following: U.S. ports and U.S. seafood harvesters, processors, wholesalers, and importers. Ports generate economic activity across many sectors, including surface transportation; maritime services; cargo handling; federal, state, and local governments; port authorities; importers and consignees; and the banking and insurance sectors. Maritime services include pilots, handlers (food and other supplies), towing, bunkering (fuel), marine surveyors, and shipyard and marine construction. Cargo handling services include longshoremen, stevedoring, terminal operators, warehouse operators, and container leasing and repair.

No U.S. industry is directly affected by this rulemaking, although indirect effects may cause short term disruptions in the flow of seafood imports, and thus potentially impact U.S. businesses. NMFS does not anticipate that national net benefits and costs would change significantly in the long term as a result of the implementation of the proposed alternatives.

Although this action will not have significant economic impacts on a substantial number of small U.S. entities, NMFS decided to analyze different alternatives in the FRFA for the certification procedures in this rule. In order to meet the objectives of the Moratorium Protection Act and this final rule, NMFS cannot exempt small entities, change reporting requirements only for small entities, or use performance or design standards in lieu of the regulatory requirements in the rule. Sections 2.2 and 2.3 of the Environmental Assessment describe the alternatives analyzed for certification procedures for IUU fishing and bycatch.

The Alternatives for Certification for nations whose vessels are engaged, or have been engaged in, IUU fishing activities are as follows: Under Alternative I-1, the No Action Alternative, NMFS would not develop any new procedures to address the certification of nations identified in the biennial report to Congress (called for in

section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding 2 calendar years, in IUU fishing activities. Under Alternative I-2, the Secretary would provide a positive certification to a nation identified in the biennial report to Congress (called for in section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding 2 calendar years, in IUU fishing activities, if such nation has taken corrective action against the offending vessels, or the relevant RFMO has implemented measures that are effective in ending the IUU fishing activities by vessels of the identified nation. Under Alternative I-3, the Secretary would provide a positive certification to a nation identified in the biennial report to Congress (called for in section 609(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding 2 calendar years, in IUU fishing activities, if such nation has taken corrective action against the offending vessels, and the relevant RFMO has implemented measures that are effective in ending the IUU fishing activities by vessels of the identified nation.

The Alternatives for Certification for nations whose vessels are engaged, or have been engaged in, bycatch of PLMRs are as follows: Under Alternative B-1, the No action alternative, NMFS would not develop any new procedures to address certification of nations identified in the biennial report to Congress (called for in section 610(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding calendar year in bycatch of PLMRs. Under Alternative B-2, to receive a positive certification from the Secretary of Commerce, nations identified in the biennial report to Congress (called for in section 610(a) of the Moratorium Protection Act) as having vessels that are engaged, or have been engaged during the preceding calendar year in bycatch of PLMRs must provide documentary evidence of their adoption of a regulatory program governing the conservation of the PLMR that is comparable in effectiveness with that of the United States, taking into account different conditions, and establish a management plan that will assist in species-specific data collection to support international stock assessments and conservation enforcement efforts for the PLMR. Under Alternative B-3, identified nations must provide documentary evidence of the adoption

of a regulatory program for PLMR bycatch that is comparable with that of the United States', taking into account different conditions. Identified nations must also show proof of the identified nation's participation with an international organization governing the conservation of the PLMRs, if one exists, and establish a management plan that will assist in species-specific data collection to support international assessments and conservation efforts, including but not limited to enforcement efforts for PLMRs.

As noted above, NMFS does not anticipate significant economic impacts to U.S. businesses from any of the alternatives analyzed. However, certain importers may be affected by import prohibitions that are imposed on fish or fish products coming into the United States from an identified nation that fails to receive a positive certification. IUU Alternative I-3 may produce more socioeconomic benefits than IUU Alternative I-2. Likewise for the bycatch alternatives, Alternative B-3 may produce more benefits than Alternative B-2. Due to the consultative nature of this rulemaking, it may be possible for the costs to U.S. businesses to be ameliorated by new port state controls, substituting different transportation modes, or substituting different products all together. As a result, it is difficult to know if costs will also be higher moving from the less restrictive IUU Alternative I-2 or bycatch Alternative B-2 to IUU Alternative I-3 or bycatch Alternative B-3. Because Alternatives I-2 and B-2 most closely mirror the text of the Moratorium Protection Act, NMFS has decided to implement them in this final rule.

Pursuant to 5 U.S.C 553(d)(3), NOAA finds that there is good cause to waive the 30-day delay in the effective date of this rule. This rule is procedural in nature: It only creates procedures for the agency to follow when determining identification and certification of nations whose fishing vessels are engaged in IUU fishing and/or bycatch of PLMRs. Importantly, the rule does not modify, add, or revoke any existing rights and obligations of the public or any private parties, because the rule only applies to NOAA. Accordingly, NOAA finds that there is good cause, within the meaning of 5 U.S.C. 553(d)(3) and in accordance with the Congressional Review Act, 5 U.S.C. 808(2), to waive the 30-day delay in effectiveness of this rule and to make this rule effective immediately.

This final rule contains collection-of-information requirements for §§ 300.205(b)(2), 300.206(c), and 300.207(c) subject to review and

approval by OMB under the Paperwork Reduction Act (PRA). However, NMFS is delaying the effective date of these sections until NMFS receives OMB approval for these collections. After OMB approval is received, NMFS will publish the effective date for these sections in the **Federal Register**.

#### List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Antarctica, Canada, Exports, Fish, Fisheries, Fishing, Imports, Indians, Labeling, Marine resources, Reporting and recordkeeping requirements, Russian Federation, Transportation, Treaties, Wildlife.

Dated: January 7, 2011.

**Eric C. Schwaab,**

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

■ For the reasons set out in the preamble, NMFS amends 50 CFR part 300 as follows:

### PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. Subpart N is revised to read as follows:

#### Subpart N—Identification and Certification of Nations

Sec.

300.200 Purpose and scope.

300.201 Definitions.

300.202 Identification and certification of nations engaged in illegal, unreported, or unregulated fishing activities.

300.203 Identification and certification of nations engaged in bycatch of protected living marine resources.

300.204 Effect of certification.

300.205 Denial of port privileges and import restrictions on fish or fish products.

300.206 Alternative procedures for IUU fishing activities.

300.207 Alternative procedures for bycatch of PLMRs.

**Authority:** 16 U.S.C. 1826d *et seq.*

#### Subpart N—Identification and Certification of Nations

##### § 300.200 Purpose and scope.

The purpose of this subpart is to implement the requirements in the High Seas Driftnet Fishing Moratorium Protection Act (“Moratorium Protection Act”) to identify and certify nations whose vessels are engaged in illegal, unreported, or unregulated fishing or whose fishing activities result in bycatch of protected living marine resources. This language applies to vessels entitled to fly the flag of the nation in question. Identified nations that do not receive a positive certification may be subject to trade restrictive measures for certain fishery

products. The Moratorium Protection Act also authorizes cooperation and assistance to nations that are taking action to combat illegal, unreported, or unregulated fishing or reduce bycatch of protected living marine resources.

##### § 300.201 Definitions.

For the purposes of the Moratorium Protection Act:

*Bycatch* means: the incidental or discarded catch of protected living marine resources or entanglement of such resources with fishing gear.

*Fishing vessel* means: any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for—

(1) Fishing; or

(2) Any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing, bunkering or purchasing catch, or aiding or assisting one or more vessels at sea in the performance of such activity.

*Illegal, unreported, or unregulated (IUU) fishing* means:

(1) Fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including but not limited to catch limits or quotas, capacity restrictions, and bycatch reduction requirements;

(2) Overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organization or agreement, that has adverse impacts on such stocks; or,

(3) Fishing activity that has a significant adverse impact on seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction, for which there are no applicable conservation or management measures, including those in areas with no applicable international fishery management organization or agreement.

*International agreement* means: an agreement between two or more States, agencies of two or more States, or intergovernmental organizations which is legally binding and governed by international law.

*International fishery management agreement* means: any bilateral or multilateral treaty, convention, or agreement for the conservation and management of fish.

*International fishery management organization* means: an international

organization established by any bilateral or multilateral treaty, convention, or agreement for the conservation and management of fish.

*Protected living marine resources (PLMRs)* means: non-target fish, sea turtles, or marine mammals that are protected under United States law or international agreement, including the Marine Mammal Protection Act, the Endangered Species Act, the Shark Finning Prohibition Act, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna; but they do not include species, except sharks, that are managed under the Magnuson-Stevens Fishery Conservation and Management Act, the Atlantic Tunas Convention Act, or by any international fishery management agreement.

##### § 300.202 Identification and certification of nations engaged in illegal, unreported, or unregulated fishing activities.

(a) *Procedures to identify nations whose fishing vessels are engaged in IUU fishing*—(1) NMFS will identify and list, in a biennial report to Congress, nations whose fishing vessels are engaged, or have been engaged at any point during the preceding two years, in IUU fishing.

(2) When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will take into account all relevant matters, including but not limited to the history, nature, circumstances, extent, duration, and gravity of the IUU fishing activity in question, and any measures that the nation has implemented to address the IUU fishing activity. NMFS will also take into account whether an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes place. If such an organization exists, NMFS will consider whether the relevant international fishery management organization has adopted measures that are effective at addressing the IUU fishing activity in question and, if the nation whose fishing vessels are engaged, or have been engaged, in IUU fishing is a party to, or maintains cooperating status with, the organization.

(b) *Notification of nations identified as having fishing vessels engaged in IUU fishing*. Upon identifying a nation whose vessels have been engaged in IUU fishing activities in the biennial report to Congress, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce,

acting through or in consultation with the Secretary of State, will:

(1) Notify nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding two calendar years, in IUU fishing activities;

(2) Notify identified nations of the requirements under the Moratorium Protection Act and this subpart; and

(3) Notify any relevant international fishery management organization of actions taken by the United States to identify nations whose fishing vessels are engaged in IUU fishing and initiate consultations with such nations.

(c) *Consultation with nations identified as having fishing vessels engaged in IUU fishing.* Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in cooperation with the Secretary of State, will initiate consultations with nations that have been identified in the biennial report for the purpose of encouraging such nations to take appropriate corrective action with respect to the IUU fishing activities described in the biennial report.

(d) *Procedures to certify nations identified as having fishing vessels engaged in IUU fishing.* Each nation that is identified as having fishing vessels engaged in IUU fishing shall receive either a positive or a negative certification from the Secretary of Commerce, and this certification will be published in the biennial report to Congress. A positive certification indicates that a nation has taken appropriate corrective action to address the IUU fishing activity described in the biennial report. A negative certification indicates that a nation has not taken appropriate corrective action.

(1) The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that such nation has taken appropriate corrective action to address the activities for which such nation has been identified in the biennial report to Congress. When making such determination, the Secretary shall take into account the following:

(i) Whether the government of the nation identified pursuant to paragraph (a) of this section has provided evidence documenting that it has taken corrective action to address the IUU fishing activity described in the biennial report; or

(ii) Whether the relevant international fishery management organization has adopted and, if applicable, the identified member nation has implemented and is enforcing, measures

to effectively address the IUU fishing activity of the identified nation's fishing vessels described in the biennial report.

(2) Prior to a formal certification determination, nations will be provided with preliminary certification determinations and an opportunity to support and/or refute the preliminary determinations and communicate any corrective actions taken to address the activities for which such nations were identified. The Secretary of Commerce shall consider any information received during the course of these consultations when making the subsequent certification determinations.

**§ 300.203 Identification and certification of nations engaged in bycatch of protected living marine resources.**

(a) *Procedures to identify nations whose fishing vessels are engaged in PLMR bycatch*—(1) NMFS will identify and list, in the biennial report to Congress, nations whose fishing vessels are engaged, or have been engaged during the preceding calendar year prior to publication of the biennial report to Congress, in fishing activities or practices either in waters beyond any national jurisdiction that result in bycatch of a PLMR, or in waters beyond the U.S. EEZ that result in bycatch of a PLMR that is shared by the United States. When determining whether to identify nations as having fishing vessels engaged in PLMR bycatch, NMFS will take into account all relevant matters including, but not limited to, the history, nature, circumstances, extent, duration, and gravity of the bycatch activity in question.

(2) NMFS will also examine whether there is an international organization with jurisdiction over the conservation and protection of the relevant PLMRs or a relevant international or regional fishery organization. If such organization exists, NMFS will examine whether the organization has adopted measures to effectively end or reduce bycatch of such species; and if the nation whose fishing vessels are engaged, or have been engaged during the preceding calendar year prior to publication of the biennial report to Congress, in bycatch of PLMRs is a party to or maintains cooperating status with the relevant international organization.

(3) NMFS will also examine whether the nation has implemented measures designed to end or reduce such bycatch that are comparable in effectiveness to U.S. regulatory requirements. In considering whether a nation has implemented measures that are comparable in effectiveness to those of the United States, NMFS will evaluate if different conditions exist that could

bear on the feasibility and efficiency of such measures to end or reduce bycatch of the pertinent PLMRs.

(b) *Notification of nations identified as having fishing vessels engaged in PLMR bycatch.* Upon identifying a nation whose vessels have been engaged in bycatch of PLMRs in the biennial report to Congress, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will notify identified nations about the requirements under the Moratorium Protection Act and this subpart.

(c) *Consultations and negotiations.* Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will:

(1) Initiate consultations within 60 days after submission of the biennial report to Congress with the governments of identified nations for the purposes of entering into bilateral and multilateral treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

(2) Seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report that result in bycatch of PLMRs and, as necessary, request the Secretary of State to initiate the amendment of any existing international treaty to which the United States is a party for the protection and conservation of the PLMRs in question to make such agreements consistent with this subpart.

(d) *International Cooperation and Assistance.* To the greatest extent possible, consistent with existing authority and the availability of funds, the Secretary shall:

(1) Provide appropriate assistance to nations identified by the Secretary under paragraph (a) of this section and international organizations of which those nations are members to assist those nations in qualifying for a positive certification under paragraph(e) of this section;

(2) Undertake, where appropriate, cooperative research activities on species assessments and improved bycatch mitigation techniques, with those nations or organizations;

(3) Encourage and facilitate the transfer of appropriate technology to those nations or organizations to assist those nations in qualifying for positive certification under paragraph (e) of this section; and

(4) Provide assistance to those nations or organizations in designing and implementing appropriate fish harvesting plans.

(e) *Procedures to certify nations identified as having fishing vessels engaged in PLMR bycatch*—(1) Each nation that is identified as having fishing vessels engaged in PLMR bycatch shall receive either a positive or a negative certification from the Secretary of Commerce, and this certification will be published in the biennial report to Congress. The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that:

(i) Such nation has provided evidence documenting its adoption of a regulatory program to end or reduce bycatch of such PLMRs that is comparable in effectiveness to regulatory measures required under U.S. law to address bycatch in the relevant fisheries, taking into account different conditions that could bear on the feasibility and efficacy of these measures, and which, in the case of an identified nation with fishing vessels engaged in pelagic longline fishing, includes the mandatory use of circle hooks, careful handling and release equipment, training and observer programs; and

(ii) Such nation has established a management plan that will assist in the collection of species-specific data on PLMR bycatch to support international stock assessments and conservation efforts for PLMRs.

(2) Nations will be notified prior to a formal certification determination and will be provided with an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the activities for which such nations were identified. The Secretary of Commerce shall consider any information received during the course of these consultations when making the subsequent certification determinations.

#### **§ 300.204 Effect of certification.**

(a) If an identified nation does not receive a positive certification under this subpart (*i.e.*, the nation receives a negative certification or no certification is made), the fishing vessels of such nation are, to the extent consistent with international law, subject to the denial of entry into any place in the United States and to the navigable waters of the United States.

(b) At the recommendation of the Secretary of Commerce (*see* § 300.205), certain fish or fish products from such

nation may be subject to import prohibitions.

(c) Any action recommended under this paragraph (c) shall be consistent with international obligations, including the WTO Agreement.

(d) If certain fish or fish products are prohibited from entering the United States, within six months after the imposition of the prohibition, the Secretary of Commerce shall determine whether the prohibition is insufficient to cause that nation to effectively address the IUU fishing described in the biennial report, or that nation has retaliated against the United States as a result of that prohibition. The Secretary of Commerce shall certify to the President each affirmative determination that an import prohibition is insufficient to cause a nation to effectively address such IUU fishing activity or that a nation has taken retaliatory action against the United States. This certification is deemed to be a certification under section 1978(a) of Title 22, which provides that the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization.

(e) *Duration of certification.* Any nation identified in the biennial report to Congress and negatively certified will remain negatively certified until the Secretary of Commerce determines that the nation has taken appropriate corrective action to address the IUU fishing activity and/or bycatch of PLMRs for which it was identified in the biennial report. Receipt of a positive certification determination will demonstrate that appropriate corrective action has been taken by a nation to address the relevant IUU fishing activity and/or bycatch of PLMRs.

(f) *Consultations.* NMFS will, working through or in consultation with the Department of State, continue consultations with nations that receive a negative certification with respect to the IUU fishing activities or bycatch of PLMRs described in the biennial report to Congress. The Secretary of Commerce shall take the results of such consultations into consideration when making a subsequent certification determination for such nation.

#### **§ 300.205 Denial of port privileges and import restrictions on fish or fish products.**

(a) *Scope of Applicability*—(1) If a nation identified in the biennial report under § 300.202(a) or § 300.203(a) is not

positively certified by the Secretary of Commerce, and fishing vessels of the nation are allowed entry to any place in the United States and to the navigable waters of the United States under this subpart, those vessels will be subject to inspection and may be prohibited from landing, processing, or transshipping fish and fish products. Services, including the refueling and re-supplying of such fishing vessels, may be prohibited, with the exception of services essential to the safety, health, and welfare of the crew. Fishing vessels will not be denied port access or services in cases of force majeure or distress.

(2) For nations identified in the biennial report under § 300.202(a) that are not positively certified, the Secretary of Commerce shall recommend import prohibitions with respect to fish or fish products from those nations. Such recommendations on import prohibitions would not apply to fish or fish products not managed under an applicable international fishery agreement, or if there is no applicable international fishery agreement, to the extent that such provisions would apply to fish or fish products caught by vessels not engaged in illegal, unreported, or unregulated fishing. For nations identified under § 300.203(a) that are not positively certified, the Secretary of Commerce shall also recommend import prohibitions; such prohibitions shall not apply to fish or fish products not caught by the vessels engaged in the relevant activity for which the nation was identified.

(3) Any action recommended under this paragraph (a)(3) shall be consistent with international obligations, including the WTO Agreement.

(b) *Imposition of import restrictions*—(1) *Notification.* Where the Secretary of Commerce cannot make positive certifications for identified nations, and the President determines that certain fish and fish products from such nations are ineligible for entry into the United States and U.S. territories, the Secretary of Commerce, with the concurrence of the Secretary of State and in cooperation with the Secretary of Treasury, will file a notice with the Office of the Federal Register.

(2) *Documentation of admissibility.* If certain fish or fish products are subject to import prohibitions, NMFS may publish in the **Federal Register** the requirement that other fish or fish products from the relevant nation that are not subject to the prohibitions be accompanied by documentation of admissibility. The documentation of admissibility must be executed by a duly authorized official of the identified



nation and validated by a responsible official(s) designated by NMFS. The documentation must be executed and submitted in a format (electronic facsimile (fax), the Internet, *etc.*) specified by NMFS.

(3) *Effective date of import restrictions.* Effective upon the date of publication of such finding, shipments of fish or fish products found to be ineligible will be denied entry to the United States. Entry will not be denied for any such shipment that, on the date of publication, was in transit to the United States.

(4) *Removal of negative certifications and import restrictions.* Upon a determination by the Secretary of Commerce that an identified nation that was not certified positively has satisfactorily met the conditions in this subpart and that nation has been positively certified, the provisions of § 300.205 shall no longer apply. The Secretary of Commerce, with the concurrence of the Secretary of State and in cooperation with the Secretary of Treasury, will notify such nations and will file with the Office of the Federal Register for publication notification of the removal of the import restrictions effective on the date of publication.

**§ 300.206 Alternative procedures for IUU fishing activities.**

(a) These certification procedures may be applied to fish or fish products from a vessel of a harvesting nation that has been identified under § 300.202 in the event that the Secretary cannot reach a certification determination for that nation by the time of the next biennial report. These procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this subpart.

(b) Consistent with paragraph (a) of this section, the Secretary of Commerce may allow entry of fish or fish products on a shipment-by-shipment, shipper-by-shipper, or other basis if the Secretary determines that:

(1) The vessel has not engaged in IUU fishing under an international fishery management agreement to which the U.S. is a party; or

(2) The vessel is not identified by an international fishery management organization as participating in IUU fishing activities.

(c) Fish or fish products offered for entry under this paragraph (c) must be accompanied by a completed documentation of admissibility available from NMFS. The documentation of admissibility must be executed by a duly authorized official of the identified nation and must be

validated by a responsible official(s) designated by NMFS. The documentation must be executed and submitted in a format (electronic facsimile (fax), the Internet, *etc.*) specified by NMFS.

**§ 300.207 Alternative procedures for bycatch of PLMRs.**

(a) These certification procedures may be applied to fish or fish products from a vessel of a harvesting nation that has been identified under § 300.203 in the event that the Secretary cannot reach a certification determination for that nation by the time of the next biennial report. These procedures shall not apply to fish or fish products from identified nations that have received either a negative or a positive certification under this subpart.

(b) Consistent with paragraph (a) of this section, the Secretary of Commerce may allow entry of fish or fish products on a shipment-by-shipment, shipper-by-shipper, or other basis if the Secretary determines that imports were harvested by practices that do not result in bycatch of a protected marine species, or were harvested by practices that—

(1) Are comparable to those of the United States, taking into account different conditions, and which, in the case of pelagic longline fisheries, the regulatory program of an identified nation includes mandatory use of circle hooks, careful handling and release equipment, and training and observer programs; and

(2) Include the gathering of species specific data that can be used to support international and regional assessments and conservation efforts for protected living marine resources.

(c) Fish or fish products offered for entry under this section must be accompanied by a completed documentation of admissibility available from NMFS. The documentation of admissibility must be executed by a duly authorized official of the identified nation and validated by a responsible official(s) designated by NMFS. The documentation must be executed and submitted in a format (electronic facsimile (fax), the Internet, *etc.*) specified by NMFS.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

[Docket No. 101006495-0498-01]

RIN 0648-BA31

**Fisheries of the Exclusive Economic Zone Off Alaska; Steller Sea Lion Protection Measures for the Bering Sea and Aleutian Islands Groundfish Fisheries Off Alaska**

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

**ACTION:** Interim final rule, extension of comment period.

**SUMMARY:** NMFS published an interim final rule on December 13, 2010, to implement Steller sea lion protection measures to ensure that the Bering Sea and Aleutian Islands management area groundfish fisheries off Alaska are not likely to jeopardize the continued existence of the western distinct population segment of Steller sea lions or adversely modify its designated critical habitat. A notice correcting errors identified in the preamble to the interim final rule and in the regulatory text was published on December 29, 2010. The public comment period for the interim final rule ends on January 12, 2011. NMFS has decided to extend the public comment period for an additional 45 days, to February 28, 2011, to provide adequate time for various stakeholders and other members of the public to submit comments.

**DATES:** The public comment period for this action has been extended for an additional 45 days, to February 28, 2011. Comments must be received no later than February 28, 2011.

**ADDRESSES:** Send comments to Dr. James W. Balsiger, Administrator, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by RIN 0648-BA31, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at <http://www.regulations.gov>.
- *Mail:* P.O. Box 21668, Juneau, AK 99802.
- *Fax:* (907) 586-7557.
- *Hand delivery to the Federal Building:* 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record. No comments will be posted to <http://www.regulations.gov> for