

**ACTION:** Notice of decision on petition for rulemaking on bycatch.

**SUMMARY:** NOAA announces its decision on a petition for rulemaking under the Administrative Procedure Act. Oceana, a non-governmental organization, petitioned the U.S. Department of Commerce to promulgate immediately a rule to establish a program to count, cap, and control bycatch in U.S. fisheries. The Oceana petition asserted that NMFS is not complying with its statutory obligations to monitor and minimize bycatch under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act (ESA), the Marine Mammal Protection Act of 1972 (MMPA), and the Migratory Bird Treaty Act (MBTA). The petition sought a regulatory program that includes a workplan for observer coverage sufficient to provide statistically reliable bycatch estimates in all fisheries, the incorporation of bycatch estimates into restrictions on fishing, the placing of limits on directed catch and bycatch in each fishery with provision for closure upon attainment of either limit, and bycatch assessment and reduction plans as a requirement for all commercial and recreational fisheries. NMFS has decided not to initiate rulemaking immediately, but instead to update and renew its commitment to a National Bycatch Strategy, which may eventually result in rulemaking for some fisheries.

**ADDRESSES:** Copies of the petition are available from John H. Dunnigan, Director, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301-713-2334. The text of Oceana's petition is available via internet at the following NMFS web address: <http://www.nmfs.noaa.gov/bycatch.htm>.

**FOR FURTHER INFORMATION CONTACT:** John H. Dunnigan, telephone (301)713-2334.

**SUPPLEMENTARY INFORMATION:** NMFS published a notice of receipt of petition for rulemaking in the April 18, 2002, *Federal Register* (67 FR 19154) and invited public comments for 30 days ending June 17, 2002. In response, NMFS received 31 letters from different interest groups including Regional Fishery Management Councils (RFMCs), the Commonwealth of the Northern Mariana Islands, various commercial fishermen and fisheries organizations, environmental groups, and other interested individuals. Also, NMFS received tens of thousands of letters of similar content and petitions from interested members of the general public. Summaries of and responses to

comments are provided under Public Comments below.

### The Petition

The petition sought rulemaking on "bycatch," which it refers to as "the incidental catch of birds, mammals, turtles, and fish." The petition cited specific legal responsibilities of NMFS for bycatch under the MSA, ESA, MMPA and MBTA, and concluded that NMFS must count, cap, and control bycatch. The petition stated that NMFS must monitor and report bycatch of seabirds that occurs in fishing operations and take steps to reduce seabird bycatch.

For the MSA and related regulations and Federal Court interpretations, the petition cited national standard 9 and other requirements for minimizing bycatch and related mortality, including the requirement to establish a standardized reporting methodology to assess the amount and type of bycatch occurring in a fishery. The petition concluded that any Federal Fishery Management Plan (FMP) or regulation prepared to implement an FMP must contain measures to minimize bycatch in fisheries to the extent practicable and argued that greater observer coverage is required.

For the ESA, the petition cited the prohibition on taking endangered species and protection of threatened species, including recovery plans to guide regulatory efforts, as well as consultation requirements and incidental take statements.

For the MMPA, the petition cited requirements for a regulatory system to avoid and minimize takes of marine mammals reducing mortality or serious injury to insignificant levels, as well as take reduction plans and monitoring of marine mammal takes.

For the MBTA, the petition cited the prohibition on taking any migratory bird, including seabirds, except as permitted by regulations issued by the Department of the Interior, and cited Federal case law and Executive Order 13186 as requirements that NMFS ensure that fishery management plans (FMPs) comply with the MBTA. The petition also referred to the NMFS-issued National Plan of Action for reducing seabird bycatch and the need to prepare a national seabird bycatch assessment.

The exact and complete assertions of nonconformance with Federal law are contained in the text of Oceana's petition which is available via internet at the following NMFS web address: <http://www.nmfs.noaa.gov/bycatch.htm>. Also, a copy of the petition may be

obtained by contacting NMFS at the above address.

The petition specifically requested that NMFS immediately undertake a rulemaking to meet its obligations under the above statutory authorities and that such rulemaking include the following four actions:

"1. Develop and implement a workplan for placing observers on enough fishing trips to provide statistically reliable bycatch estimates in all fisheries. This task involves several steps (taking into account the diversity of vessel category, gears used, and fishing region): (a) determining how many fishing trips must be observed, where observers should be stationed, and other details; (b) identifying funding sources to support such observer coverage, including taxpayer subsidies, taxing landings or user fees; and (c) hiring, training, and deploying the necessary observers.

"2. Incorporate reasonable estimates of bycatch into all total allowable catch levels and other restrictions on fishing.

"3. Set absolute limits on the amount of directed catch and bycatch (including non-fish bycatch) that can occur in each fishery, and close the fishery when the applicable catch or bycatch limit (whichever is reached first) is met.

"4. Within 12 months of initiating rulemaking, develop, approve, and implement bycatch assessment and reduction plans for commercial and recreational fisheries. Such plans should include, at minimum, (a) an assessment of the fishery according to its bycatch, including its types, levels, and rates of bycatch on a per-gear basis and the impact of that bycatch on bycaught species and the surrounding environment; (b) a description of the level and type of observer coverage necessary accurately to characterize total mortality (including bycatch) in the fishery; (c) bycatch reduction targets and the amount of directed and bycatch mortality allowed in each fishery to meet the target; and (d) types of bycatch reduction measures (such as closed areas, gear modifications, or effort reduction) that will be employed in the fishery, including incentives for those who use gears that produce less bycatch. Beginning 12 months after rulemaking commences, NMFS should not permit fishing in any fishery that lacks a functioning bycatch plan."

### *Public Comments on the Need for Such a Regulation, Its Objectives, and Alternative Approaches*

Thousands of letters of similar content and petitions from interested members of the general public expressed concern about "the senseless