

section 7 of the ESA or an incidental take permit issued under section 10 of the ESA. The incidental take of threatened species may be authorized only by an incidental take statement in a biological opinion issued pursuant to section 7 of the ESA, an incidental take permit issued pursuant to section 10 of the ESA, or regulations under section 4(d) of the ESA. Pursuant to section 11(f) of the ESA, the Secretary of Commerce is authorized to promulgate regulations to enforce the requirements of the ESA.

West Coast-Based Pelagic Longline Fishery

Since the early 1990s, a number of longline vessels targeting swordfish and, possibly, tuna, although no sets have been documented, have unloaded their catch and re-provisioned in California ports. Participation has declined from a peak of 43 vessels participating in the fishery in 2001 and 38 vessels in 2000, to approximately 28 vessels in 2002 and an estimated 20–25 vessels in 2003. Almost all of these vessels had some history of fishing in the Hawaii-based longline fishery. Participants in the West Coast-based pelagic longline fishery often fish more than 1,000 nautical miles (1,900 km) offshore and are generally prohibited by state regulations from fishing within 200 nautical miles (370 km) of the West Coast. Longline vessels registered in West Coast states are allowed to land longline caught fish into West Coast ports provided that fishing takes place outside the 200-mile Exclusive Economic Zone. All documented longline fishing by West Coast vessels in recent years has been out of California ports.

NMFS began placing observers aboard West Coast-based pelagic longline fishing vessels on a voluntary basis in October 2001 and began a mandatory observer program in August 2002 under the Marine Mammal Protection Act. From October 2001 through May 2003, 280 sets were observed on 13 trips, documenting a total of 27 sea turtle interactions, consisting of two leatherback sea turtles, 24 loggerhead sea turtles, and one olive ridley sea turtle. All of the observed sea turtles were released alive.

High Seas Fishing Compliance Act

On March 22, 1996, NMFS issued an interim final rule (61 FR 11751) to implement the High Seas Fishing Compliance Act of 1995 (HSFCA). The purpose of the HSFCA is to license U.S. vessels fishing on the high seas and to implement the Agreement to Promote Compliance with International

Conservation and Management Measures by Fishing Vessels on the High Seas. The West Coast-based pelagic longline vessels are permitted under the HSFCA. In May 2001, the Center for Biological Diversity and Turtle Island Restoration Network filed a complaint with the U.S. District Court for the Northern District of California alleging that NMFS unlawfully failed to conduct an ESA section 7 consultation on the West Coast-based pelagic longline fishery when issuing the HSFCA permits for this fishery. On November 27, 2001, the court denied the plaintiffs' motion and ruled in favor of NMFS. In response, the plaintiffs appealed the decision to the Ninth Circuit Court of Appeals in December 2001. On August 21, 2003, the Ninth Circuit Court ruled that NMFS is required to engage in consultation under section 7 of the ESA regarding the effects on sea turtles and other listed species when issuing fishing permits under the HSFCA to West Coast-based pelagic longline fishing vessels. Consequently, the effects of issuing of HSFCA permits that authorize fishing by West Coast-based pelagic longline vessels will be considered during the section 7 consultation that is now being conducted. Furthermore, this proposed rule, if adopted, would be the vehicle by which NMFS imposes conditions and restrictions on the HSFCA permits (16 U.S.C. 5503(d)) held by West Coast-based pelagic longline vessels to ensure the fishery complies with the ESA.

Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species

On October 31, 2003, the Pacific Fishery Management Council (Council) submitted the FMP to NMFS for review. After a public comment process, NMFS will approve, disapprove, or partially approve the FMP, and then implement those portions that were approved (if any). The FMP includes management measures for the West Coast-based pelagic longline fishery that would prohibit shallow longline sets of the type normally used to target swordfish on the high seas in the Pacific Ocean west of 150° W. long. by vessels managed under the new FMP. The FMP would not prohibit West Coast-based pelagic longline vessels from targeting swordfish in waters east of 150° W. long. It should be noted that Hawaii-based longline vessels are currently prohibited from targeting swordfish in this area, pursuant to regulations under the WestPac FMP. Those regulations will be vacated on April 1, 2004, by Court Order. NMFS will propose regulations with any necessary restrictions or

prohibitions for vessels operating under the WestPac FMP. The regulations that will be proposed under the WestPac FMP will be subject to NEPA review and ESA Section 7 consultation.

In addition, to conserve sea turtles, the FMP would require West Coast-based pelagic longline vessels to have on board and to use dip nets, line cutters, and wire or bolt cutters capable of cutting through the vessel's hooks to release sea turtles with the least harm possible to the sea turtles. NMFS issued a proposed rule to implement the FMP on December 10, 2003 (68 FR 68834).

Estimated Sea Turtle Take Levels

There are two sets of data from which rates of sea turtle interactions in the West Coast-based pelagic longline fishery could be derived: (1) Data from observers on Hawaii-based longline vessels operating in the same areas as the West Coast-based pelagic longline vessels; and (2) data from observers on West Coast-based pelagic longline vessels. Vessels in the West Coast-based pelagic longline fishery fish in the same manner, and frequently in the same area, as vessels that had been targeting swordfish in the Hawaii-based longline fishery. Because of the strong similarities between these two fisheries and the limited amount of observer data available for the West Coast-based pelagic longline fleet alone, NMFS concluded that using the combined observer data from the Hawaii-based and West Coast-based longline fleets for fishing east of 150° W. long. is more likely to be representative of the sea turtle interaction rates that can be expected to occur throughout the West Coast-based pelagic longline fishery.

Using the combined observer data, NMFS developed estimates of sea turtle take levels that would result from the West Coast-based pelagic longline fishery under different fishery scenarios. Assuming that the West Coast-based pelagic longline fleet deploys 1.55 million hooks east of 150° W. longitude (the estimated fleet effort in 2002 according to the FMP), NMFS estimates the fishery under the FMP would result in the annual take of 174 loggerhead and 52 leatherback sea turtles. For loggerhead sea turtles, NMFS estimates that 3 may be entangled and no hooking or injury will occur, 74 may be hooked externally or entangled with line left on the animal, 97 may be hooked in the mouth or ingested the hook, and 0 may be released dead. For leatherback sea turtles, NMFS estimates that 0 may be entangled and no hooking or injury will occur, 46 may be hooked externally or entangled with line left on the animal, 6 may be hooked in the mouth or