

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 660**

[Docket No. 000822244-0244-01; I.D. 082100B]

RIN 0648-AO66

**Fisheries off West Coast States and in the Western Pacific; Western Pacific Pelagic Fisheries; Hawaii-based Pelagic Longline Area Closure**

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

**ACTION:** Emergency interim rule; notice of closure; request for comments.

**SUMMARY:** As ordered by the U.S. District Court for the District of Hawaii, NMFS issues an emergency interim rule that closes certain waters in the central and north Pacific Ocean to longline fishing, imposes fishing gear restrictions, effort limits, fish sale restrictions, and catch reporting requirements, and requires increased observer coverage in the Hawaii-based pelagic longline fishery. This rule replaces an emergency interim rule issued by NMFS on December 23, 1999, and subsequently extended on June 26, 2000. Like that rule, the intent of this rule is to reduce adverse impacts to sea turtles by the Hawaii longline fishery while NMFS prepares a comprehensive environmental impact statement (EIS) that analyzes the environmental effects of fishing activities conducted under the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region (FMP).

**DATES:** This emergency interim rule is effective August 25, 2000, through February 21, 2001. Comments must be received no later than 5 p.m., local time, on October 10, 2000.

**ADDRESSES:** Written comments on this action must be mailed to Dr. Charles Karnella, Administrator, NMFS, Pacific Islands Area Office (PIAO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700; or faxed to 808-973-2941. Comments will not be accepted if submitted via e-mail or the Internet. Copies of the environmental assessment (EA) and regulatory impact review (RIR) prepared for this action may be obtained from Dr. Charles Karnella, PIAO.

**FOR FURTHER INFORMATION CONTACT:** Alvin Katekaru at 808-973-2937.

**SUPPLEMENTARY INFORMATION:** On December 23, 1999, to comply with an order dated November 23, 1999, issued

by the U.S. District Court for the District of Hawaii in the case *Center for Marine Conservation v. NMFS*, NMFS issued, under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), an emergency interim rule closing certain waters to fishing by the Hawaii-based pelagic longline fishery (64 FR 72290, December 27, 1999). That rule was extended on June 26, 2000, (65 FR 37917, June 19, 2000) for an additional 180 days, through December 27, 2000. The Court directed NMFS to prohibit all fishing activities of the Hawaii longline fishery in waters north of the Hawaiian Islands above 28° N. lat. (between 168° W. long. and 150° W. long.). That rule, like this emergency interim rule, was intended to reduce adverse impacts to sea turtles resulting from the activities of the Hawaii-based longline fishery while NMFS prepares a comprehensive EIS for the FMP.

In the November 23 Order the Court also directed NMFS to analyze the temporal and spatial distribution of interactions between sea turtles and the Hawaii-based longline fleet, and report its findings to the Court. On May 5, 2000, NMFS presented its analysis to the Court and recommended modifications to the December 1999 time-area closure. The Court also received recommendations from the other parties, including the Defendant-Intervener Hawaii Longline Association (HLA) and plaintiffs in *Center for Marine Conservation v. NMFS*. The objective of these recommendations, as stated in the Court's Order, was to have "appropriate time and area closures based upon the greatest benefit to the sea turtles and considering the costs to the Hawaii-based pelagic longline fishery."

On June 23, 2000, the Court issued an Order (Order Modifying Provisions of Order of Injunction), which was clarified on June 26, 2000, requiring NMFS to establish, within 30 days, a different set of longline area closures, fishing effort restrictions (e.g., a cap of 636 longline sets in "Area A", maximum 4-hour rest time) and 100 percent observer coverage for the entire fishery. However, on July 21, 2000 the Court issued a stay of the June 23 Order (Order Staying Amended Order Modifying Provisions of Order of Injunction) pending further consideration and action.

On August 4, 2000, after hearing motions by NMFS and HLA for reconsideration of the June 23 Order, the Court issued an Order Further Amending Order Modifying Provisions of Order of Injunction. The August 4th Order prohibits all Hawaii-based pelagic

longline fishing activities throughout the year in waters between 28° N. and 44° N. lat., from 150° W. to 168° W. long. ("Area A"); limits longline fishing to a total of 154 sets from August 10 through December 31, 2000, and a total of 77 sets from January 1 through March 14, 2001, and requires 100 percent observer coverage in waters between 28° N. and 44° N. lat., from 137° W. to 150° W. long., and in waters between 28° N. and 44° N. lat., from 168° W. to 173° E. long. (both areas are collectively designated as "Area B"); prohibits Hawaii-based pelagic longline fishing for swordfish in waters between 0° (the equator) and 28° N. lat., from 137° W. to 173° E. long. ("Area C"; limits sales or landings of swordfish such that profits from swordfish that were harvested in Area C and sold by the permit holder, or landed in any port in U.S. territory, must be donated to charity; directs NMFS to provide observer coverage for the longline fishery in Area C at a minimum level of 10 percent by September 21, 2000, and 20 percent by November 7, 2000; requires vessel operators to report their swordfish catch from Area C to NMFS within 5 days following their return to port; and prohibits all longline fishing activities in Area B and Area C from March 15 through May 31. This emergency interim rule, issued under authority of section 305(c) of the Magnuson-Stevens Act, implements the Court's August 4th Order and replaces the emergency interim rule issued on December 23, 1999.

Until NMFS has access to additional trained observers, NMFS expects the number of available observers to be insufficient to cover all the fishermen who will want to longline in Area B. Initially, observers will be assigned to vessels fishing in Area B, or any portion thereof, on a first-come-first-served basis relying on current regulations requiring permit holders or vessel operators to notify NMFS at least 72 hours before their vessel leaves port on a fishing trip. Observers will be assigned according to the order that fishermen provide notice to NMFS via telephone. This assignment procedure will be employed as long as sufficient numbers of observers are available. However, in the event of an observer shortage, observers for Area B will be apportioned through a random selection process. Vessel owners or operators of vessels intending to fish in Area B will have the names of their vessels entered into an observer placement pool from which vessel names will be randomly drawn by computer to generate an observer placement list. The first vessel on the

list will be given the first opportunity to carry a NMFS observer, the second vessel on the list will be given the second opportunity, etc. After a vessel completes a fishing trip with an observer, that vessel will be moved to the end of the list. Any vessel owner may request the vessel be removed from the list altogether, or moved to the bottom of the list. The purpose of this limitation is to preserve opportunities for other vessels to take observers and fish in Area B.

NMFS is required to increase observer coverage in Area C under a schedule prescribed by the Court. No later than 45 days following the date of entry of the Order (September 21, 2000), NMFS must have a minimum of 10 percent observer coverage in Area C, and no later than 90 days from the date of the Order (November 7, 2000), the fishery must have at least a 20 percent observer coverage rate. Since NMFS is allowed some time to ramp up the observer coverage in Area C, the process for assigning observers to vessels fishing in Area C differs slightly from the process employed for Area B. Vessel owners or operators intending to fish in Area C after September 21, 2000, will have their vessels assigned observers on a random, sequential basis, e.g., one observer for every 8 vessels embarking on fishing trips to Area C. This process relies on the current pre-trip notification requirement under which permit holders or vessel operators must call NMFS regarding observer assignment at least 72 hours prior to leaving port for a fishing trip. The Regional Administrator will assign observers or provide written exemptions (waivers) for observer placement on a per trip basis consistent with the level of observer coverage required by the Court. A vessel may not fish in Area C unless there is an observer on board or the vessel has been issued a waiver. If a vessel that is assigned an observer fails to depart on its fishing trip within 72 hours of notification, the next vessel listed in accordance to the pre-trip notification list will be assigned the observer. A vessel that has been assigned an observer but failed to depart as intended will not be allowed to leave port on a fishing trip without an observer. Any vessel owner may request the vessel be removed from the list altogether, or moved to the bottom of the list. If at any time there is a shortage of available observers, the Regional Administrator will allow vessels to fish in Area C via a random selection process, similar to the one used for Area B, using a computer to randomly select

vessels to generate a list of vessels that may go fishing.

The Court Order contains a reporting requirement specific to swordfish caught by Hawaii-based longliners in Area C. A longline vessel operator must submit swordfish catch information to NMFS within 5 days following the vessel's return to port. Under the FMP and its implementing regulations, operators of all vessels registered for use under the Hawaii longline limited access permit are currently required to complete daily longline logbooks. Catch and effort information on all longline-caught Pacific pelagic management unit species, including swordfish, is recorded on logbooks that must be submitted to NMFS within 72 hours from the vessel's return to port following each fishing trip (50 CFR 660.14). Therefore, no additional reporting requirement for the Hawaii longline fishery is established under this emergency interim rule.

This rule bans the use of lightsticks by Hawaii-based longliners fishing in Area C to facilitate compliance with the Court's order prohibiting longliners from targeting swordfish. It is anticipated that a prohibition on lightsticks would reduce swordfish catch by as much as 90 percent. This is based on the aggregated average catch rate for swordfish in Area C for all trip types (tuna, mixed, swordfish) during 1998-99. The catch rate during this period was 7.4 swordfish per 1,000 hooks when lightsticks were employed by longliners and 0.7 swordfish per 1,000 hooks without lightsticks. NMFS considered other approaches for prohibiting vessels from targeting swordfish in Area C, such as banning night setting of longline gear, banning the use of squid bait, or establishing a trip limit on swordfish. However, at this time, it appears that banning lightsticks in this fishery should facilitate compliance with the Court Order. NMFS will be monitoring the swordfish catch in Area C based on observer coverage and daily logbook reports of turtle takes and, if necessary, NMFS will impose additional measures to prohibit longline vessels from targeting swordfish in Area C.

To comply with the Court's Order requiring that profits from the sale of swordfish caught incidentally in Area C be donated to an IRS-approved charitable organization, this rule requires that 20 percent of the gross revenue (total sales price) of all such swordfish be donated to one or more organizations holding charitable status with the Internal Revenue Service. This 20 percent requirement is based on

targeted longline fishing trips in 1999. NMFS estimated from survey and logbook data that 20 percent of the ex-vessel value of swordfish landed in Honolulu by Hawaii longline vessels targeting tuna can be considered profit (revenue less operating costs, including repairs). This profit amounts to roughly \$55 per swordfish (\$0.41 per pound) or \$2,800 per vessel annually. For the purpose of ensuring compliance with the Court Order, as authorized under Federal regulations implementing the FMP, NMFS will monitor the amount of swordfish landed through daily logbooks and fish dealer records on the sale or other transactions involving swordfish incidentally harvested from Area C.

#### **Criteria for Issuing an Emergency Interim Rule**

This emergency interim rule meets NMFS policy guidelines for the use of emergency interim rules (62 FR 44421, August 21, 1997). Also, it realizes benefits that outweigh the value of prior notice, opportunity for public comment, and deliberative consideration expected under the normal rulemaking process.

#### *Recent, Unforeseen Events or Recently Discovered Circumstances*

The Court's Order Further Amending Order Modifying Provisions of Order of Injunction was issued August 4, 2000; it requires NMFS to implement various restrictions on the Hawaii-based longline fishery within 3 days from the date of entry of the Order (August 7, 2000). Emergency action is necessary for NMFS to comply with the Order.

#### *Immediate Benefits*

Although there are many variables that make it difficult to predict the effects of this fishery upon different sea turtle populations, NMFS anticipates the closure will have a positive benefit on sea turtles by reducing overall fishing effort and thereby reducing the number of turtles that might otherwise be taken by Hawaii-based longline vessels.

#### **Classification**

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this emergency interim rule is necessary to comply with a valid order of the U.S. District Court for the District of Hawaii. The AA has also determined that this emergency interim rule is consistent with the Magnuson-Stevens Act and other applicable laws.

NMFS prepared an EA for this emergency interim rule that describes the impact on the human environment caused by this rule and found that no

significant impact would result. NMFS also prepared an RIR for this action which assesses the economic costs and benefits of the action. This emergency interim rule is of limited duration and is expected to result in a reduction of overall sea turtle interactions with longline fisheries. The Hawaii longline fishery was valued at \$46.7 million in a 1998 baseline. Under the assumption that displaced fishing effort that results from the Area A closure and Area B fishing restrictions is transferred into Area C tuna effort, the estimated loss of ex-vessel gross fishery revenues is 32 percent (\$14.9 million) annually. At the other end of the extreme is a scenario in which all the displaced effort is totally removed from the fishery, which would result in an estimated decline in fishery revenues of 53 percent (\$24.8 million) annually. The economic effect for the limited duration of these measures would be less, but due to a lack of data the actual economic impact cannot be calculated. Copies of the EA and RIR are available (see **ADDRESSES**).

The AA finds that this emergency interim rule, which is being implemented under section 305(c) of the Magnuson-Stevens Act, must become effective immediately to comply with the August 4, 2000, amended Order issued by the U.S. District Court for the District of Hawaii. The Order requires that the various fishing restrictions and area closures in the Hawaii-based longline fishery be implemented within 3 days from the date of entry of the Order. Under section 305(c) of the Magnuson-Stevens Act, this emergency interim rule may remain in effect for not more than 180 days after the date this notification is published, and may be extended for one additional period of not more than 180 days.

The AA finds for good cause that providing prior notice and opportunity for public comment for this rule is unnecessary given that the Court ordered the specific actions contained in this rule, thus precluding implementation of any alternative, and is impracticable given the Court's deadline. Similarly, the AA finds, for good cause, under 5 U.S.C. 553(d)(3), that delaying the effectiveness of this rule for 30 days is impracticable given the Court's deadline. Accordingly, the AA is making this rule effective upon publication in the Federal Register.

Because this emergency interim rule is not required to be published with notice and opportunity for public comment under 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act do not apply.

This rule restates a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by the Office of Management and Budget (OMB) under control number 0648-0214. Public reporting burden for a pre-trip notification is estimated to average 5 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES** above) and OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC, 20503 (Attention: NOAA Desk Officer).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### List of Subjects in 50 CFR Part 660

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaiian Natives, Indians, Northern Mariana Islands, Reporting and recordkeeping requirements.

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

Dated: August 23, 2000.

**William T. Hogarth,**

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

For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

#### **PART 660—FISHERIES OFF WEST COAST STATES AND IN THE WESTERN PACIFIC**

1. The authority citation for part 660 continues to read as follows:

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

2. In § 660.22, paragraphs (z), (aa), and (bb) are suspended, and new paragraphs (ee) through (jj) are added to read as follows:

#### **§ 660.22 Prohibitions.**

\* \* \* \* \*

(ee) Fish for Pacific pelagic management unit species with a vessel registered for use under a Hawaii longline limited access permit using longline gear within the Hawaii emergency closed areas in violation of

§ 660.33(b)(1), (c)(1), (c)(4), (c)(5), or (d)(1).

(ff) Use a receiving vessel registered for use under a receiving vessel permit to receive from another vessel Pacific pelagic management unit species harvested with longline gear, if the fish were harvested or the transfer occurs within the Hawaii emergency closed areas in violation of § 660.33(b)(2), (c)(2), or (d)(2).

(gg) Land or transship shoreward of the outer boundary of the EEZ around Hawaii Pacific pelagic management species that were harvested with longline gear within the Hawaii emergency closed areas in violation of § 660.33(b)(3), (c)(3), or (d)(3).

(hh) Use light sticks within the Hawaii emergency longline closed Area C in violation of § 660.33(d)(4).

(ii) Land or sell swordfish (*Xiphias gladius*) caught by longline gear within the Hawaii emergency longline closed Area C in violation of § 660.33(d)(5).

(jj) Use longline gear to fish for Pacific pelagic management unit species in Hawaii emergency longline closed Area B or Area C without a NMFS-approved observer aboard the vessel in violation of § 660.33(e)(1) or (e)(2).

3. In § 660.23, paragraph (a) is suspended and new paragraph (c) is added to read as follows:

#### **§ 660.23 Notifications.**

\* \* \* \* \*

(c) The permit holder of a vessel registered for use with a Hawaii longline limited access permit or with an agent designated by the permit holder shall provide notice to the Regional Administrator at least 72 hours (not including weekends and holidays) before the vessel leaves port on a fishing trip, any part of which occurs in Area B or Area C, as described in § 660.33(a)(2) or (a)(3). The vessel operator will be presumed to be an agent designated by the permit holder unless the Regional Administrator is otherwise notified by the permit holder. The notice must be provided to the telephone number designated by the Regional Administrator. The notice must provide the official number of the vessel, the name of the vessel, the intended departure date, time, and location, the name of and telephone number of the agent designated by the permit holder to be available between 8:00 a.m. to 5 p.m. (Hawaii time) on weekdays for NMFS to contact in order to arrange observer placement.

4. In § 660.28, paragraph (c) is suspended.

5. New § 660.33 is added to subpart C to read as follows:

**§ 660.33 Hawaii emergency closure.**

(a) *Longline fishing restricted areas.*

(1) Area "A" as used in this section, is defined as all waters bounded on the south by 28° N. lat., on the north by 44° N. lat., on the east by 150° W. long., and on the west by 168° W. long. (see Figure 2 to this section).

(2) "Area B" as used in this section, is defined as all waters bounded on the south by 28° N. lat., on the north by 44° N. lat., on the east by 137° W. long., and on the west by 150° W. long; and all waters bounded on the south by 28° N. lat., on the north by 44° N. lat., on the east by 168° W. long., and on the west by 173° E. long. (see Figure 2 to this section).

(3) "Area C", as used in this section, is defined as all waters bounded on the south by 0° latitude, on the north by 28° N. lat., on the east by 137° W. long., and on the west by 173° E. long. (see Figure 2 to this section to this section).

(b) *Longline fishing restrictions in Area A.* (1) A vessel registered for use under a Hawaii longline limited access permit may not use longline gear to fish for Pacific pelagic management unit species in Area A.

(2) A vessel registered for use under a receiving vessel permit may not receive from another vessel Pacific pelagic management unit species in Area A.

(3) A vessel registered for use under a Hawaii longline limited access permit or receiving vessel permit may not land or transship Pacific pelagic management unit species that were harvested with longline gear in Area A shoreward of the outer boundary of the EEZ surrounding Hawaii.

(c) *Longline fishing restrictions in Area B.* (1) A vessel registered for use under a Hawaii longline limited access permit may not use longline gear to fish for Pacific pelagic management unit species in Area B from March 15 through May 31.

(2) A vessel registered for use under a receiving vessel permit may not receive from another vessel Pacific pelagic management unit species in Area B from March 15 through May 31.

(3) A vessel registered for use under a Hawaii longline limited access permit or receiving vessel permit may not land or transship Pacific pelagic management unit species that were harvested with longline gear in Area B shoreward of the outer boundary of the EEZ surrounding Hawaii.

(4) From August 7 through December 31, 2000, the number of longline sets allowed in Area B is limited to a total of 154 sets.

(5) From January 1 through March 14, 2001, the number of longline sets allowed in Area B is limited to 77 sets.

(6) Between August 7 through December 31, 2000, the Regional Administrator shall prohibit the use of longline gear to fish for Pacific pelagic management unit species on the date and time that an estimated 154 longline sets will have been made in Area B.

(7) Between January 1 through March 14, 2001, the Regional Administrator shall prohibit the use of longline gear to fish for Pacific pelagic management unit species on the date and time that an estimated 77 longline sets will have been made in Area B.

(8) The Regional Administrator shall determine on the basis of available data when the maximum number of sets will be reached in Area B.

(9) The Regional Administrator will notify each permit holder and each operator of vessels fishing in Area B when further use of longline gear to fish for Pacific pelagic management unit species in Area B is prohibited.

(10) At least 24 hours advance notice will be given of the effective date and time after which the use of longline gear to fish for Pacific pelagic management unit species in Area B is prohibited, as prescribed in paragraph (c)(9) of this section.

(d) *Longline fishing restrictions in Area C.* (1) A vessel registered for use under a Hawaii longline limited access permit may not use longline gear to fish for Pacific pelagic management unit species in Area C from March 15 through May 31.

(2) A vessel registered for use under a receiving vessel permit may not receive from another vessel Pacific pelagic management unit species in Area C from March 15 through May 31.

(3) Landing or transshipping Pacific pelagic management unit species, that were harvested with longline gear in Area C from March 15 through May 31, shoreward of the outer boundary of the EEZ surrounding Hawaii is prohibited.

(4) A vessel registered for use under a Hawaii longline limited access permit may not use lightsticks in Area C.

(5) Within 30 days of each landing of swordfish caught by longline gear in Area C, the permit holder or operator of a vessel registered for use under a Hawaii longline limited access permit

must donate to charity at least 20 percent of the total proceeds from the sale of such swordfish.

(6) For the purpose of this section, "charity" means an entity to which a taxpayer can contribute and deduct the value of any such contribution from taxable income as a "charitable contribution" as defined by the Internal Revenue Code at 26 U.S.C. 170(c).

(e) *Emergency closure at-sea observer coverage.* (1) A vessel registered for use under a Hawaii longline limited access permit may not use longline gear to fish for Pacific pelagic management unit species in Area B without a NMFS-approved observer aboard the vessel.

(2) A vessel registered for use under a Hawaii longline limited access permit may not use longline gear in Area C without a NMFS-approved observer aboard the vessel, unless it is issued a written exemption on a per trip basis by the Regional Administrator.

(3) The Regional Administrator may assign NMFS-approved observers to vessels registered for use under Hawaii longline permits:

(i) Based on notice provided by the permit holder or by an agent designated by the permit holder to the Regional Administrator according under §660.23(c); or

(ii) According to a list containing vessel names randomly ordered by the Regional Administrator.

(4) When NMFS notifies the permit holder or the designated agent of the obligation to carry an observer as required under this section, the vessel may not engage in the fishery without taking the observer.

(5) An operator of a vessel registered for use under a Hawaii longline limited access permit must immediately terminate longline fishing in Area C while at sea upon notification by the Regional Administrator that the level of observer coverage is below the 10 percent or 20 percent level of observer coverage established by NMFS.

(6) An operator of a vessel registered for use under a Hawaii longline limited access permit that has been notified by the Regional Administrator as described in paragraph (e)(5) of this section is prohibited from using longline gear in Area C for the remainder of the trip, unless notified by the Regional Administrator that the prohibition has been removed for the vessel.

Billing Code: 3510-22-S

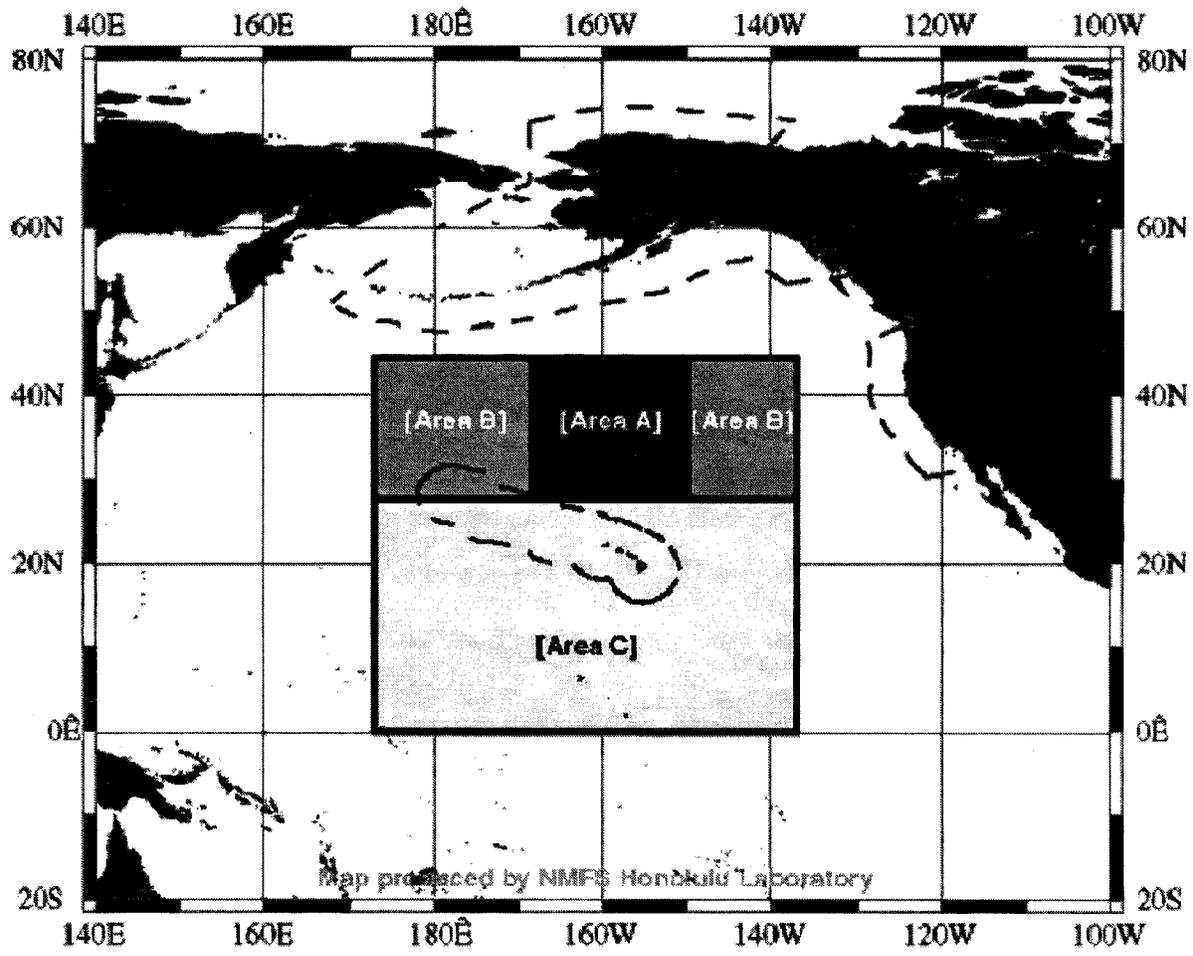


Figure 2 to § 660.33—Longline Fishing Restricted Areas

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