

ENFORCEMENT CONSULTANTS REPORT ON UNMANAGED FORAGE FISH
PROTECTION FINAL ACTION

The Enforcement Consultants (EC) have reviewed the documents associated with agenda item E.4 Ecosystem Management: Unmanaged Forage Fish Protection Final Action and have the following comments.

The Risa Lynn case and the recent review and revision of the Highly Migratory Species (HMS) Prohibited Species regulations regarding what constitutes a targeted versus incidentally harvested species have reminded us of a legal premise where regulated persons or entities must be given fair notice of conduct that is forbidden or required. Regulated parties should know what is required of them so they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.

The Pacific Council is considering adding the below listed species to all four fishery management plans (FMPs), as "shared ecosystem component species."

- Round herring, *Etrumeus teres*
- Thread herring, *Opisthonema libertate*, *O. medirastre*
- Mesopelagic fishes of the families Myctophidae, Bathylagidae, Paralepididae, and Gonostomatidae
- Pacific sand lance, *Ammodytes hexapterus*
- Pacific saury, *Cololabis saira*
- Silversides, Atherinopsidae
- Smelts of the family Osmeridae
- Pelagic squids (families: Cranchiidae, Gonatidae, Histioteuthidae, Octopoteuthidae, Ommastrephidae, except Humboldt squid, Onychoteuthidae, and Thysanoteuthidae)

Targeting these species would be prohibited, but incidental catch and retention would be allowed.

The current draft FMP language under consideration by the Ecosystem Working Group is listed as:

5.1.7 Incidental Catch Allowance for Shared EC Species

Shared EC Species could continue to be taken incidentally without violating Federal regulations, unless regulated or restricted for other purposes, such as with bycatch minimization regulations for eulachon recovery. The targeting of Shared EC Species is prohibited.

Similar language is found in the West Coast Groundfish regulations;

West Coast Groundfish definitions at 50 CFR § 660.11 include: “Target fishing means fishing for the primary purpose of catching a particular species or species group (the target species).”

And, “Incidental catch or incidental species means groundfish species caught while fishing for the primary purpose of catching a different species.”

These regulations on their own are not adequate to provide fair notice to the industry, or to enforcement personnel, of what conduct will be prohibited. Without any further explanation, it simply leads to further questions about the meaning of the phrase, “fishing for the primary purpose of catching a particular species or species group (the target species).” A clearer, objective standard is needed.

Recognizing this, within the groundfish regulation there is additional guidance offered, i.e. trip limits, catch ratios and specific species prohibitions. The same needs to occur in considering regulatory elements for unmanaged forage fish.

Suggested options for a regulation prohibiting “targeting” to set an understandable and enforceable standard, in keeping with the FMP goals. We understand these options only apply to Federal waters.

1. Specify a maximum permissible ratio of EC species to other species taken and retained on board the vessel either by trip, cumulative period, or annually. A ratio option would reduce discards over trip limits and lessen the need for intense dock side enforcement. The emphasis at the dock would be to assure the delivery is properly recorded.
2. Set limits, either by trip, cumulative period or annually for shared EC species. Trip limits would potentially increase discards and require more intense dockside monitoring. Historically, trip limits often times morph into targeting which would defeat the goal and intent of the FMP.
3. Some combination of the two. Example: Allow for one trip annually or biannually to exceed 50% allowing for a lightning strike type event, but cap the annual ratio for all trip at some nominal percentage, i.e. 5%. A fish ticket run by vessel could be conducted at the end of each year to determine the ratio of the annual harvest of all species for that vessel. Dockside enforcement would be more in line with Option 1 emphasizing all deliveries are properly reported.

Our preference is Option 1, a ratio approach or Option 3 which also uses a ratio approach with a slight increase in regulatory complexity, but offset by some accommodation for lightning strike type events. Both options reduce discards at sea, define and discourage targeting, and would require less intensive dock side monitoring over a trip limit approach.

There may be other options or variations available. The EC’s primary concern remains ensuring the regulations are clear to the industry and enforcement personnel alike, as well as optimizing effectiveness of dockside enforcement to the maximum extent practicable.

We look forward to engaging in those discussions as supporting regulations are developed.

PFMC
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