

10.0 PROCEDURE FOR REVIEWING STATE REGULATIONS

10.1 Background

There are and will continue to be state regulations affecting groundfish fisheries off the West coast which are in addition to federal regulations. This potential extends to waters off all three West coast states, to all gear types, and to both the commercial and recreational fisheries. In some cases, it may be desirable to ensure consistency between state and federal regulations by implementing federal regulations that complement state regulations. In other cases, the Council may determine that federal regulations are not necessary to complement state regulations, but wish to assure a state that its regulations are consistent with the FMP insofar as they are applied to vessels registered in that state when fishing in the EEZ. Amendment 4 addresses this need by establishing a framework review process by which any state may petition the Council to initiate a review of its regulations, determine consistency with the FMP, and, if appropriate, recommend the implementation of complementary federal regulations.

For example, current regulations implementing the FMP prohibit the use of set nets (gill and trammel nets) to catch groundfish in waters north of 38° N latitude. The purpose of this regulation is to prevent the incidental take of salmon. South of 38° N. latitude, setnet gear is used primarily by small vessel fishermen to catch California halibut, white croaker, and rockfish. Only rockfish are included in the groundfish fishery management unit. Fishing for these species, which mainly are taken inshore, is regulated by the State of California. Thus, some of the setnet fisheries regulated by the state harvest species of groundfish which are also managed under this FMP.

When the FMP was developed and approved by the Secretary, the Council acknowledged that the State of California was regulating the set net fishery off central and southern California. It was the Council's desire that state regulations regarding setnets also be applicable to vessels fishing in the EEZ to the extent that each state regulation was consistent with the goals of the FMP and the national standards of the MFCMA. The Council realized that it would be difficult to apply state regulations to non-California registered vessels in the EEZ. However, this was not considered a significant problem because most vessels in the fishery were registered in the State of California and were subject to its regulations even when fishing in the EEZ. Federal regulations were not considered necessary.

For a variety of reasons, California setnet regulations have changed several times over the years. However none of these changes have been formally reviewed to determine if they remain consistent with the FMP and the national standards of the MFCMA. A system is required to determine consistency of state regulations with the FMP and the national standards to ensure that the regulations continue to be enforceable against vessels fishing in the EEZ.

California is not the only state that has regulations which are applicable to its registered vessels fishing in the EEZ but which are not duplicated by federal regulations. Here again, a system is required to determine consistency of these state regulations with the FMP and the national standards to ensure that the state regulations are enforceable.

Amendment 4 establishes a framework review process by which any state may obtain a determination that its regulations are consistent with the FMP and the national standards. As necessary, the Council may also recommend to the NMFS that duplicate or different federal regulations be implemented in the EEZ. While the Council retains the authority to recommend federal regulations be implemented in the EEZ, the preference is to continue to rely on state regulations in that area as long as they are consistent with the FMP.

While states are not required to submit regulations which they wish to apply in the EEZ to the Council for a consistency determination, regulations which have not received a consistency determination run the risk of being declared inconsistent and invalid if challenged in a state law enforcement proceeding. The Council invites submission of all present and future state fishery regulations relating to the harvest of species managed under this FMP which are to apply in the EEZ.

10.2 Review Procedure

Any state propose that the Council review a particular state regulation for the purpose of determining its consistency with the FMP and the need for complementary federal regulations. Although this procedure is directed at the review of new regulations, review of existing regulations affecting the harvest of groundfish managed by the FMP also will utilize this process. The state making the proposal will include a summary of the regulations in question and concise arguments in support of consistency.

Upon receipt of a state's proposal, the Council may make an initial determination whether or not to proceed with the review. If the Council determines that the proposal has insufficient merit or little likelihood of being found consistent, it may terminate the process immediately and inform the petitioning state in writing of the reasons for its rejection.

If the Council determines sufficient merit exists to proceed with a determination, it will review the state's documentation or prepare an analysis considering, if relevant, the following factors:

- (1) how the proposal furthers or is not otherwise inconsistent with the objectives of the FMP, the MFCMA, and other applicable law;
- (2) the likely effect on or interaction with any other regulations in force for the fisheries in the area concerned;
- (3) the expected impacts on the species or species group taken in the fishery sector being affected by the regulation;
- (4) the economic impacts of the regulation, including changes in catch, effort, revenue, fishing costs, participation, and income to different sectors being regulated as well as to sectors which might be indirectly affected; and,
- (5) any impacts in terms of achievement of quotas or harvest guidelines, maintaining year-round fisheries, maintaining stability in fisheries, prices to consumers, improved product quality, discards, joint venture operations, gear conflicts, enforcement, data collection, or other factors.

The Council will inform the public of the proposal and supporting analysis and invite public comments before and at the next scheduled Council meeting. At its next scheduled meeting, the Council will consider public testimony, public comment, advisory reports, and any further state comments or reports, and determine whether or not the proposal is consistent with the FMP and whether or not to recommend implementation of complementary federal regulations or to endorse state regulations as consistent with the FMP without additional federal regulations.

If the Council recommends the implementation of complementary federal regulations, it will forward its recommendation to the NMFS Regional Director for review and approval.

The NMFS Regional Director will publish the proposed regulation in the Federal Register for public comment, after which, if approved, he will publish final regulations as soon as practicable. If the Regional Director disapproves the proposed regulations, he will inform the Council in writing of the reasons for his disapproval.