

approved FMEPs that specifies the implementation and reporting requirements; evaluate FMEPs every 5 years and identify changes that would improve their effectiveness; and provide a public comment period (≥30 days) before withdrawing approval of an FMEP.

(3) Tribal Exemptions. The prohibitions of paragraph (a) of this section relating to the threatened Southern DPS listed in § 223.102(c)(1) do not apply to fishery harvest or other activities undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent in Willapa Bay, WA, Grays Harbor, WA, Coos Bay, OR, Winchester Bay, OR, Humboldt Bay, CA, and any other area where tribal treaty fishing occurs, if those activities are compliant with a tribal resource management plan (Tribal Plan), provided that the Secretary determines that implementation of such Tribal Plan will not appreciably reduce the likelihood of survival and recovery of the Southern DPS. In making that determination the Secretary shall use the best available biological data (including any tribal data and analysis) to determine the Tribal Plan's impact on the biological requirements of the species, and will assess the effect of the Tribal Plan on survival and recovery, consistent with legally enforceable tribal rights and with the Secretary's trust responsibilities to tribes.

(i) A Tribal Plan may include, but is not limited to, plans that address fishery harvest, artificial production, research, or water or land management, and may be developed by one tribe or jointly with other tribes. The Secretary will consult on a government-to-government basis with any tribe that so requests and will provide, to the maximum extent practicable, technical assistance in examining impacts on the Southern DPS as tribes develop Tribal Plans. A Tribal Plan must specify the procedures by which the tribe will enforce its provisions.

(ii) Where there exists a Federal court proceeding with continuing jurisdiction over the subject matter of a Tribal Plan, the plan may be developed and implemented within the ongoing Federal Court proceeding. In such circumstances, compliance with the Tribal Plan's terms shall be determined within that Federal Court proceeding.

(iii) The Secretary shall seek comment from the public on the Secretary's pending determination whether implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed Southern DPS.

(iv) The Secretary shall publish notification in the **Federal Register** of any determination regarding a Tribal Plan and the basis for that determination.

(d) The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the ESA relating to endangered species, including regulations in part 222 of this chapter II implementing such exceptions, also apply to the threatened Southern DPS of North American green sturgeon listed in § 223.102(c)(1). Federal, state, and private-sponsored research activities for scientific research or enhancement purposes that are not covered under Scientific Research and Monitoring Exceptions as described in paragraph (b)(1) of this section or Scientific Research and Monitoring Exemptions as described in paragraph (c)(1) of this section, may take Southern DPS fish pursuant to the specifications of an ESA section 10 permit. Section 9(a)(1)(B) and (a)(1)(C) take prohibitions would not apply to ongoing research activities if an application for an ESA section 10(a)(1)(A) permit is received by NMFS, preferably through the NMFS online application Web site <https://apps.nmfs.noaa.gov>, no later than November 29, 2010. The take prohibitions would take effect if the permit application is rejected as insufficient or a permit is denied. If the permit application is received by November 29, 2010, ongoing research activities may continue without take prohibitions until NMFS issues or denies a permit.

(e) *Affirmative Defense*. In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened Southern DPS of North American green sturgeon listed in § 223.102(c)(1), any person claiming that his or her take is authorized via methods listed in paragraph (b) of this section shall have a defense where the person can demonstrate that the take authorization is applicable and was in force, and that the person fully complied with the take authorization requirements at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 635

RIN 0648-XW54

#### Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

**ACTION:** Temporary rule; inseason General category retention limit adjustment.

**SUMMARY:** NMFS has determined that the Atlantic tunas General category daily Atlantic bluefin tuna (BFT) retention limit should be adjusted for the June through August 2010 time period, based on consideration of the regulatory determination criteria regarding inseason adjustments. This action applies to Atlantic tunas General category permitted vessels and Highly Migratory Species Charter/Headboat category permitted vessels (when fishing commercially for BFT).

**DATES:** Effective June 1, 2010, through August 31, 2010.

**FOR FURTHER INFORMATION CONTACT:** Sarah McLaughlin or Brad McHale, 978-281-9260.

**SUPPLEMENTARY INFORMATION:** Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006).

The 2010 BFT fishing year, which is managed on a calendar-year basis and subject to an annual calendar year quota, began January 1, 2010. The General category season, which was open for the month of January 2010, resumes on June 1, 2010, and continues through December 31, 2010. Starting on June 1, the General category daily retention limit (§ 635.23(a)(2)), is

scheduled to revert back to the default retention limit of one large medium or giant BFT (measuring 73 inches (185 cm) CFL) or greater per vessel per day/trip. This default retention limit applies to General category permitted vessels and HMS Charter/Headboat category permitted vessels (when fishing commercially for BFT).

Each of the General category time periods (January, June-August, September, October-November, and December) is allocated a portion of the annual General category quota, thereby ensuring extended fishing opportunities in years when catch rates are high and quota is available. For the 2009 fishing year, NMFS adjusted the General category limit from the default level of one large medium or giant BFT as follows: two large medium or giant BFT for January, and three large medium or giant BFT for June through December (73 FR 76972, December 18, 2008; 74 FR 26110, June 1, 2009; and 74 FR 44296, August 28, 2009). NMFS adjusted the January 2010 limit to two large medium or giant BFT (74 FR 68709, December 29, 2009).

The 2008 ICCAT recommendation regarding Western BFT management resulted in a U.S. quota of 1,034.9 mt for 2009, and 977.4 mt for 2010. Consistent with the allocation scheme established in the Consolidated HMS FMP, the baseline General category share was 475.7 mt for 2009, and is 448.6 mt for 2010. The baseline June-August General category subquota was 237.8 mt for 2009, and is 224.3 mt for 2010.

In order to implement the ICCAT recommendation for the 2010 fishing year, NMFS has proposed quota specifications to set BFT quotas for each of the established domestic fishing categories and expects to publish the final specifications by early June 2010. The proposed June-August 2010 subquota is 269.4 mt.

#### **Adjustment of General Category Daily Retention Limits**

Under § 635.23(a)(4), NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range of zero to a maximum of three per vessel based on consideration of the criteria provided under § 635.27(a)(8), which include: the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no adjustment is made; the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT

before the end of the fishing year; the estimated amounts by which quotas for other gear categories of the fishery might be exceeded; effects of the adjustment on BFT rebuilding and overfishing; effects of the adjustment on accomplishing the objectives of the fishery management plan; variations in seasonal distribution, abundance, or migration patterns of BFT; effects of catch rates in one area precluding vessels in another area from having a reasonable opportunity to harvest a portion of the category's quota; and a review of dealer reports, daily landing trends, and the availability of the BFT on the fishing grounds.

NMFS has considered the set of criteria cited above and their applicability to the General category BFT retention limit for the June-August 2010 General category fishery. Based on General category landings rates during the June through August time-period over the last several years, it is highly unlikely that the June through August subquota will be filled with the default daily retention limit of one BFT per vessel. For example, under the three-fish limit that applied in June-August 2009, June-August landings were 54 mt out of an available 311.5 mt. In addition to the adjusted June-August 2010 subquota of 269.4 mt, 25.9 mt of the adjusted January 2010 subquota was unused and automatically rolls forward to the June-August 2010 subquota, per § 635.27(a)(1)(ii), resulting in an available quota of 295.3 mt for the June-August 2010 period. Slow catch rates early in the season could result in unused quota being added to the later portion of the General category season. Increasing the daily retention limit from the default may mitigate rolling an excessive amount of unused quota from one time-period subquota to the next. Excessive rollover is undesirable because it effectively changes the time-period subquota allocation percentages established in the 2006 Consolidated HMS FMP.

Based on considerations of the available quota, fishery performance in recent years, and the availability of BFT on the fishing grounds, NMFS has determined that the General category retention limit should be adjusted to allow for retention of the anticipated 2010 General category quota, and that the same approach used for June-August 2009 is warranted. Therefore, NMFS increases the General category retention limit from the default limit of one large medium or giant BFT to three large medium or giant BFT per vessel per day/trip, effective June 1, 2010, through August 31, 2010. Regardless of the duration of a fishing trip, the daily

retention limit applies upon landing. For example, whether a vessel fishing under the General category limit takes a two-day trip or makes two trips in one day, the daily limit of three fish may not be exceeded upon landing. This General category retention limit is effective in all areas, except for the Gulf of Mexico, and applies to those vessels permitted in the General category as well as to those HMS Charter/Headboat permitted vessels fishing commercially for BFT.

This adjustment is intended to provide a reasonable opportunity to harvest the U.S. quota of BFT without exceeding it, while maintaining an equitable distribution of fishing opportunities; to help achieve optimum yield in the General category BFT fishery; to collect a broad range of data for stock monitoring purposes; and to be consistent with the objectives of the Consolidated HMS FMP.

#### **Monitoring and Reporting**

NMFS selected the daily retention limit for June-August 2010 after examining an array of data as it pertains to the determination criteria. These data included, but were not limited to, current and previous catch and effort rates in the BFT fisheries, quota availability, previous public comments on inseason management measures, stock status, etc. NMFS will continue to monitor the BFT fishery closely through the mandatory dealer landing reports, which NMFS requires to be submitted within 24 hours of a dealer receiving BFT. Depending on the level of fishing effort and catch rates of BFT, NMFS may determine that additional retention limit adjustments are necessary to ensure available quota is not exceeded or to enhance scientific data collection from, and fishing opportunities in, all geographic areas.

Closures or subsequent adjustments to the daily retention limits, if any, will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (888) 872-8862 or (978) 281-9260, or access [www.hmspermits.gov](http://www.hmspermits.gov), for updates on quota monitoring and retention limit adjustments.

#### **Classification**

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the Consolidated HMS FMP provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds,

the migratory nature of this species, and the regional variations in the BFT fishery. Under § 635.23(a)(4), NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range of zero to a maximum of three per vessel based on consideration of the criteria provided under § 635.27(a)(8), which include: the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no adjustment is made; the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT before the end of the fishing year; the estimated amounts by which quotas for other gear categories of the fishery might be exceeded; effects of the adjustment on BFT rebuilding and overfishing; effects of the adjustment on accomplishing the objectives of the fishery management plan; variations in seasonal distribution, abundance, or migration patterns of BFT; effects of catch rates in one area precluding vessels in another area from having a reasonable opportunity to harvest a portion of the category's quota; and a review of dealer reports, daily landing trends, and the availability of the BFT on the fishing grounds.

Affording prior notice and opportunity for public comment to implement these retention limits is impracticable as it would preclude NMFS from acting promptly to allow harvest of BFT that are available on the fishing grounds. Analysis of available data shows that the General category BFT retention limits may be increased with minimal risks of exceeding the ICCAT-allocated quota.

Delays in increasing these retention limits would adversely affect those General and Charter/Headboat category vessels that would otherwise have an opportunity to harvest more than the default retention limit of one BFT per day and may exacerbate the problem of low catch rates and quota rollovers. Limited opportunities to harvest the respective quotas may have negative social and economic impacts for U.S. fishermen who depend upon catching the available quota within the time periods designated in the Consolidated HMS FMP. Adjustment of the retention limit needs to be effective June 1, 2010, to minimize any unnecessary disruption in fishing patterns and for the impacted sectors to benefit from the adjustments so as to not preclude fishing opportunities for fishermen who have

access to the fishery only during this time period.

Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, and because this action relieves a restriction (i.e., the default General category retention limit is one fish per vessel/trip whereas this action increases that limit and allows retention of additional fish), there is also good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under 50 CFR 635.23(a)(4) and (b)(3), and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: May 26, 2010.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 635

[Docket No. 100317152-0176-01]

RIN 0648-AY77

#### Atlantic Highly Migratory Species; 2010 Atlantic Bluefin Tuna Quota Specifications

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is establishing Atlantic bluefin tuna (BFT) quota specifications for 2010. This action is necessary to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as required by the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

**DATES:** Effective July 2, 2010.

**ADDRESSES:** Supporting documents, including the Supplemental Environmental Assessment, Regulatory Impact Review, and Final Regulatory Flexibility Analysis, are available from Sarah McLaughlin, Highly Migratory Species (HMS) Management Division,

Office of Sustainable Fisheries (F/SF1), NMFS, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also available from the HMS Management Division website at <http://www.nmfs.noaa.gov/sfa/hms/> or at the Federal e-Rulemaking Portal: <http://www.regulations.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Sarah McLaughlin, 978-281-9260.

**SUPPLEMENTARY INFORMATION:** Atlantic tunas are managed under the dual authority of the Magnuson-Stevens Act and ATCA. ATCA authorizes the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate, to implement ICCAT recommendations. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA).

#### Background

Background information about the need for the 2010 BFT quota specifications was provided in the preamble to the proposed rule (74 FR 63095, December 2, 2009), and is not repeated here.

#### Changes from the Proposed Rule

Consistent with NMFS' implementation of the 2009 BFT Quota Specifications, NMFS establishes the 2010 U.S. baseline quota at the ICCAT-recommended level and carries over the full amount of available BFT underharvest allowed by ICCAT from 2009 to 2010, and distributes that underharvest to: (1) provide the Longline category sufficient quota to operate during 2010 after the required accounting for BFT dead discards; (2) maintain up to 15 percent of the 2010 U.S. quota in Reserve for potential transfer to other ICCAT contracting parties and other domestic management objectives, if warranted; and (3) provide the non-Longline quota categories a share of the remainder of the underharvest consistent with the allocation scheme established in the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP).

When NMFS prepared the proposed rule, landings information was incomplete, and NMFS anticipated the full amount of 2009 underharvest allowed under the 2008 ICCAT recommendation for the western Atlantic bluefin tuna stock (ICCAT Recommendation 08-04), i.e., 50 percent of the U.S. quota, or 488.7 mt, would be available and carried forward to 2010. NMFS indicated that