

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 635

[Docket No. 990528152-9152-01; I.D. 051199A]

RIN 0648-AM27

**Atlantic Highly Migratory Species Fisheries; Atlantic Bluefin Tuna Fishery; Regulatory Adjustment**

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

**ACTION:** Proposed rule; public hearings; request for comments.

**SUMMARY:** NMFS proposes to amend the regulations governing the Atlantic highly migratory species (HMS) fisheries to prohibit fishing vessel operators from using spotter aircraft to assist in the location and capture of Atlantic bluefin tuna (BFT) for all vessels other than Purse Seine category vessels. The proposed regulatory amendments are necessary to achieve domestic management objectives for HMS fisheries. NMFS has received extensive comment on this issue during the comment period for the rule to implement the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP) and during previous related comment periods. However, NMFS will hold two public hearings to receive additional comments from fishery participants and other members of the public regarding these proposed amendments.

**DATES:** Comments are invited and must be received on or before June 22, 1999. The public hearings dates are:

1. Monday, June 14, 1999, 2–5 p.m. in Silver Spring, MD.
2. Tuesday, June 15, 1999, 7–10 p.m. in Gloucester, MA.

**ADDRESSES:** Comments on the proposed rule should be sent to, Rebecca Lent, Chief, Highly Migratory Species Management Division (F/SF1), NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3282. Copies of supporting documents, including a Draft Environmental Assessment (EA), which includes a Draft Regulatory Impact Review and an Initial Regulatory Flexibility Analysis (IRFA), are available from Brad McHale, Highly Migratory Species Management Division, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930.

The public hearing locations are:

1. Silver Spring (Monday June 14, 1999), NMFS, 1315 East-West Highway, Room 4527, Silver Spring, MD 20910.

2. Gloucester, MA (Tuesday June 15, 1999), Milton Fuller School, 4 School House Road, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Mark Murray-Brown, 978–281–9260.

**SUPPLEMENTARY INFORMATION:** Atlantic tunas are managed under the dual authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act (ATCA). ATCA authorizes the Secretary of Commerce to implement binding recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT). 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). Within NMFS, daily responsibility for management of Atlantic HMS fisheries rests with the Office of Sustainable Fisheries, and is carried out by the HMS Management Division.

NMFS proposes this action under the framework provisions described in the HMS FMP. NMFS believes that the prohibition on the use of spotter aircraft assistance by fishing vessel operators (other than those in the Purse Seine category) in the location and capture of Atlantic BFT is a necessary regulatory action in order to meet the goals and objectives of the FMP.

After reviewing public comments and additional information or data that may be available, NMFS will, if appropriate, make final determinations regarding the consistency of this proposed measure with the objectives of the FMP, the national standards of the Magnuson-Stevens Act, and other applicable law. Within 30 days of the close of the public comment period, NMFS will take final action.

**Background**

Background information on the use of spotter aircraft in the BFT fishery was provided in the HMS FMP, released in April 1999, and is provided in greater detail in the Draft EA.

**Relation to Previous Rulemaking**

NMFS has, on four prior occasions (in 1988, 1989, 1996, and 1997), requested specific comments on the impacts of spotter aircraft use in the BFT fishery. NMFS has proposed prohibiting the use of spotter aircraft by all but Purse Seine category vessels twice, and, in 1997, published a final rule to prohibit the use of spotter aircraft by all but Purse Seine

and Harpoon category vessels. Prior to 1997, NMFS did not take final action due to concerns about the enforceability of spotter aircraft regulations. Additionally, in 1996, the majority of active tuna spotters signed a voluntary agreement limiting their activity to assisting vessels using harpoon gear. NMFS recognized that the voluntary agreement warranted a trial period, but also indicated that the agency would continue to monitor the situation and would take appropriate action if necessary. Public comment indicated that some rod-and-reel vessels in the General category were using spotter aircraft contrary to the terms of the agreement.

On March 4, 1997 (62 FR 9726), NMFS proposed to prohibit the use of spotter aircraft except in the Purse Seine category fishery. NMFS indicated that it had considered combining the Harpoon and General categories as a means of resolving catch rate and safety issues (since a daily catch limit of one BFT per vessel for all handgear fishermen would decrease the incentive for spotter aircraft use), but was concerned that the harpoon fishery, as it had traditionally existed, might not be able to continue under such restriction. NMFS requested comment on suggestions from constituents that self-policing would assist with enforcement of a spotter aircraft prohibition, and on alternative measures to address the fishery management and safety issues raised by use of spotter aircraft in the BFT fishery. In response, NMFS received nearly 2,000 comments on the proposed prohibition on the use of spotter aircraft. On July 18, 1997 (62 FR 38487), NMFS published a final rule prohibiting the use of spotter aircraft to assist vessels in all but the Purse Seine and Harpoon categories.

In response to a lawsuit filed by the Atlantic Fish Spotters Association, the United States District Court for Massachusetts, on June 10, 1998, overturned the prohibition on the use of spotter aircraft in assisting BFT vessels in other than the Harpoon and Purse Seine categories, as codified in 50 CFR 285.31(a)(40); the prohibition is now void. NMFS decided not to appeal the Court's decision, but rather, to gather more facts and relevant data in order to reach a satisfactory resolution.

At the August 1998 meeting of the HMS Advisory Panel (AP) in Warwick, Rhode Island, apart from three abstentions, all members of the AP requested and advised that NMFS prohibit the use of spotter aircraft in the BFT fishery. In the draft HMS FMP published in October 1998, NMFS once again presented alternatives on

regulating the use of spotter aircraft in the BFT fishery. NMFS did not propose any changes at that time, pending further deliberation and analysis, but the agency did indicate that it would address the issue in a separate rulemaking before the start of the 1999 General and Harpoon category seasons (June 1, 1999).

In April 1999, NMFS adopted the final HMS FMP. This FMP establishes a rebuilding program for west Atlantic BFT and brings the management of Atlantic tuna under the dual authority of the Magnuson-Stevens Act and ATCA. The Magnuson-Stevens Act and the FMP bring new considerations to regulating the use of spotter aircraft. In the time since the prohibition on the use of spotter aircraft in assisting BFT vessels in other than the Harpoon and Purse Seine categories was overturned (July 1998), NMFS has obtained further information, conducted additional analyses, and contracted for an independent study regarding the use of spotter aircraft in the BFT fishery.

NMFS remains concerned that the use of spotter aircraft to locate BFT accelerates the catch rates and closures in the General and Harpoon categories. This undermines NMFS' regulations designed to control effort in the General category, alters the distribution of optimum yield, and impedes the collection of important scientific information in the fishery. In addition, the use of spotter aircraft is inconsistent with the reasoning behind the initial establishment of the Harpoon category (in which multiple daily landings are allowed) and the Harpoon category quota in 1980, i.e., dependency on optimal weather and sea conditions, negatively impacts traditional fisheries and has adverse impacts on communities. The issue of spotter aircraft use in the BFT fishery is a source of great conflict in the fishery. Conflicts in the fishery are exacerbated by the fact that the BFT fishery is a derby fishery (with the exception of the Purse Seine category), in which vessels are concentrated on the fishing grounds over short periods of time. Some commenters have indicated that potential for accidents at sea is increased by the use, whether direct or indirect, of spotter aircraft as vessels may congregate under the aircraft. NMFS has received extensive comment from the public and guidance from the HMS AP urging NMFS to prohibit the use of spotter aircraft by all vessels in the BFT fishery other than those in the Purse Seine category.

After a review of all the information on record regarding this issue, NMFS has determined that the status quo is

unacceptable and that the proposed action would best address the management concerns regarding spotter aircraft use in the BFT fishery, while ensuring that the objectives of the FMP are met, consistent with the Magnuson-Stevens Act and that Act's national standards.

#### **Spotter Aircraft**

This proposed rule would prohibit the use of spotter aircraft to assist fishing vessels in the location and capture of BFT, with the exception of Purse Seine category vessels.

#### **Permit Category Deadline Change**

Within 1 week, NMFS will announce, in the **Federal Register**, the deadline to change Atlantic tuna permit categories for calendar year 1999. Previously, NMFS suspended this deadline to allow vessel owners to weigh the impacts of various rulemakings on each permit category (64 FR 27207, May 19, 1999).

#### **Public Hearings and Special Accommodations**

The public hearing sites are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mark Murray-Brown (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days prior to the hearing.

The public is reminded that NMFS expects participants at the public hearings to conduct themselves appropriately. At the beginning of each public hearing, a NMFS representative will explain the ground rules (e.g., alcohol in the hearing room is prohibited, attendees will be called to give their comments in the order in which they registered to speak, each attendee will have an equal amount of time to speak, and attendees should not interrupt one another). The NMFS representative will attempt to structure the hearing so that all attending members of the public are able to comment, if they so choose, regardless of the controversiality of the subject(s). Attendees are expected to respect the ground rules, and if they do not, they will be asked to leave the hearing.

#### **Classification**

This proposed rule is published under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*, and the Atlantic Tunas Convention Act, 16 U.S.C. 971 *et seq.* Preliminarily, the AA has determined that the regulations contained in this proposed rule are consistent with the FMP, the Magnuson-Stevens Act, and the 1998 ICCAT

recommendation (ICCAT Rebuilding Program).

NMFS has prepared a draft EA for this proposed rule and has concluded that, depending on the universe of potentially impacted small business entities involved in the BFT fishery chosen for analysis, this action may or may not result in a significant impact on small entities in the fishery as a whole. Therefore, NMFS has prepared an IRFA to accompany the proposed rule. The reasons this action is being considered and the objectives of, and legal basis for, the proposed rule are as stated in the preamble above. The IRFA indicates that if the proposed regulations are implemented, there may be a negative impact on a significant number of small business entities, including fishing vessels and spotter aircraft, involved in the BFT fishery. NMFS estimates that less than 70 small entities, including fishing vessels and spotter aircraft, would be significantly affected by the proposed rule. This is less than 1 percent of the small entities participating in the bluefin tuna fishery in terms of the total number of spotter aircraft/pilots and commercially-permitted vessels. The impact is significant for a greater percentage of small entities in the fishery if one considers only those vessels which land fish as those which are potentially affected. In addition, these regulations may also impact related parties and communities such as marinas, gear suppliers, and aviation-related businesses. There are no relevant Federal rules which duplicate, overlap, or conflict with the proposed rule. There are no proposed reporting, recordkeeping or compliance requirements in the proposed rule. Although the preferred alternative may have a significant impact on small business entities, NMFS believes that these impacts are unavoidable if the management concerns regarding spotter aircraft are to be addressed. NMFS considered several alternatives to the preferred alternative, including: No action, prohibition of the use of spotter aircraft for vessels in the General category only, and requiring registration and reporting for fishing vessels or spotter aircraft. NMFS has preliminarily determined that none of these alternatives meet the objectives of, and basis for, this proposed action.

This proposed rule has been determined to be not significant for purposes of E.O. 12866.

NMFS initiated formal consultation on the HMS and billfish fisheries on May 12, 1998. The consultation request concerned the possible effects of management measures in the HMS FMP

and Billfish Amendment. On April 23, 1999, NMFS issued a Biological Opinion (BO) under section 7 of the Endangered Species Act. The BO applies to the Atlantic pelagic fisheries for tunas, sharks, swordfish, and billfish.

The harpoon/handline/rod-and-reel gear fisheries are listed as category III fisheries under the Marine Mammal Authorization Program due to their remote likelihood of interaction with marine mammals. Although a few reports of entanglement in handline and harpoon gear exist, these were likely non-injurious entanglements from which the whales could easily disentangle themselves or be disentangled. Increased development of the Disentanglement Network under the Atlantic Large Whale Take Reduction Plan should provide adequate mitigation for these infrequent (and thus far, non-lethal) entanglements.

The B.O. states that after reviewing the current status of the subject species, the environmental baseline for the action area, the cumulative effects of the continued operation of the Atlantic HMS fisheries and associated management actions, it is NMFS' biological opinion that the continued operation of the harpoon/handline/rod-and-reel gear fisheries is not likely to adversely affect the continued existence of any endangered or threatened species under NMFS jurisdiction.

Because the proposed action addresses only the Atlantic BFT harpoon/handline/rod-and-reel gear fisheries, NMFS has determined that proceeding with this proposed rule

would not result in any irreversible and irretrievable commitment of resources that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. This proposed rule would prohibit of fishing vessel operators from using spotter aircraft to assist in the location and capture of BFT for all vessels other than Purse Seine category vessels. Therefore, the proposed rule is not expected to increase endangered species or marine mammal interaction rates.

The area in which this proposed action is planned has been identified as essential fish habitat (EFH) for species managed by the New England Fishery Management Council, the Mid-Atlantic Fishery Management Council and the Highly Migratory Species Division of NMFS. It is not anticipated that this action will have any adverse impacts to EFH and therefore no consultation is required.

#### List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Reporting and recordkeeping requirements, Treaties.

Dated: May 28, 1999.

**Andrew A. Rosenberg**

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

For the reasons set out in the preamble, 50 CFR part 635 is proposed to be amended as follows:

#### PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

1. The authority citation for part 635 continues to read as follows:

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

2. In § 635.2, the definition for "aircraft" is added to read as follows:

#### § 635.2 Definitions.

\* \* \* \* \*

*Aircraft* means any contrivance used for flight in air.

\* \* \* \* \*

3. In § 635.21, paragraph (e) is added to read as follows:

#### § 635.21 Gear operation and deployment restrictions.

\* \* \* \* \*

(e) *Aircraft.* Other than for a vessel holding a valid permit in the Purse Seine category under § 635.4, locating, fishing for, catching, taking, retaining or possessing, or attempting to locate, fish for, catch, retain, or possess, bluefin tuna by means, aid, or use of any aircraft is prohibited.

4. In § 635.71, paragraph (b)(28) is added to read as follows:

#### § 635.71 Prohibitions.

\* \* \* \* \*

(b) \* \* \*

(28) Locate, fish for, catch, possess or retain, or attempt to locate fish for, catch, possess or retain any bluefin tuna by means, aid, or use of any aircraft, unless holding a valid permit in the Purse Seine category under § 635.4.

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